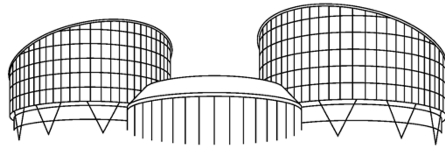

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.L. v. POLAND

(Application no. 40119/21)

JUDGMENT

Art 8 • Private life • Prohibition of abortion on grounds of foetal abnormality following amendments introduced by the Constitutional Court, resulting in the applicant travelling abroad for termination • Art 8 applicable • Impugned proceedings directly decisive for applicant's Art 8 rights • Grave irregularities vitiating election of Constitutional Court judges sitting on the panel which issued relevant ruling and compromising its legitimacy as a "tribunal established by law" • Findings in *Xero Flor w Polsce sp. z o.o. v. Poland* regarding the election of Constitutional judges applicable • Impugned restriction not issued by a body compatible with the rule of law requirements • Lack of required foreseeability depriving applicant of the proper safeguards against arbitrariness • Interference not " in accordance with the law"

Prepared by the Registry. Does not bind the Court.

STRASBOURG

14 December 2023

FINAL

14/03/2024

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of M.L. v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Alena Poláčková*, President*,
Krzysztof Wojtyczek,
Péter Paczolay,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 40119/21) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms M.L. ("the applicant"), on 26 July 2021;

the decision to give notice to the Polish Government ("the Government") of the complaints under Articles 3 and 8 of the Convention;

the decision not to have the applicant's name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the third-party interveners, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 21 November 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns restrictions on abortion on the grounds of foetal abnormalities which were introduced by the Constitutional Court's judgment of 22 October 2020. It raises issues under Articles 3 and 8 of the Convention.

THE FACTS

2. The applicant was born in 1985 and lives in Warsaw. She was represented by Ms A. Bzdyń and Ms K. Ferenc, lawyers practising in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

A. Election of judges in 2015

5. The chronology of events relating to the election of the Constitutional Court judges in 2015 is set out in detail in the Court's judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, §§ 4-63, 7 May 2021).

6. On 1 December 2015 a group of members of parliament from the majority submitted a list of five candidates for judicial posts at the Constitutional Court. On 2 December 2015 the eighth-term *Sejm* adopted resolutions on the election of H. Cioch, L. Morawski, M. Muszyński, P. Pszczółkowski and J. Przyłębska as judges of the Constitutional Court. The resolutions on the appointment of those judges were published in the Official Gazette of the Republic of Poland on 2 December 2015.

7. The President of the Republic received the oath from four of the judges on the night of 2-3 December, and from the fifth judge (J. Przyłębska) on 9 December 2015.

8. Judge L. Morawski passed away in July 2017. On 15 September 2017 the *Sejm* elected J. Piskorski as a judge of Constitutional Court. Judge J. Piskorski was sworn in on 18 September 2017.

9. Judge H. Cioch passed away in December 2017. On 26 January 2018 the *Sejm* adopted a resolution, electing J. Wyrembak as a judge of the Constitutional Court. Judge J. Wyrembak took an oath before the President of the Republic on 30 January 2018.

B. Constitutional Court case no. K 13/17

10. On 22 June 2017 a group of 104 members of parliament lodged an application with the Constitutional Court to have the following provisions declared incompatible with the Constitution (case no. K 13/17) – sections 4a(1)(2) and 4a(2) of the Law on family planning, protection of the human foetus and conditions permitting the termination of pregnancy (*Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży* – "the 1993 Act"; see also paragraph 26 below), which related to legal abortion on the grounds of foetal abnormalities.

11. Among the signatories of the application was Ms K. Pawłowicz, a member of parliament at that time, who was subsequently elected to the office of judge of the Constitutional Court on 5 December 2019.

12. In October 2019 parliamentary elections were held.

13. On 21 July 2020 the Constitutional Court discontinued the proceedings on the grounds that the application had been lodged during the previous term of the *Sejm*.

C. Constitutional Court case no. K 1/20

14. On 19 November 2019 a group of 118 members of parliament lodged a new application with the Constitutional Court to have sections 4a(1)(2) and 4a(2) (the first sentence of that provision) of the 1993 Act declared incompatible with the Constitution (case no. K 1/20).

15. On 22 October 2020 the Constitutional Court, sitting in a plenary formation (thirteen judges), held by a majority of eleven votes to two that sections 4a(1)(2) and 4a(2) (the first sentence of that provision) of the 1993 Act were incompatible with the Constitution. The bench included Judge K. Pawłowicz (see paragraph 11 above) and Judges M. Muszyński, J. Wyrembak and J. Piskorski, and was presided over by Judge J. Przyłębska, the President of the Constitutional Court. Publication of the judgment in the Journal of Laws was postponed (see also paragraphs 30 and 39 below).

16. On 27 January 2021 the Constitutional Court published the reasoning of its judgment of 22 October 2020. On the same date, the judgment was published in the Journal of Laws. The judgment took effect on the date of its publication.

D. Street protests

17. The Constitutional Court's ruling prompted large mass street protests and demonstrations involving thousands of participants. The protests were organised by All-Poland Women's Strike, a women's social rights movement in Poland.

II. THE CIRCUMSTANCES OF THE PRESENT CASE

18. The applicant became pregnant in 2020. On 12 January and 20 January 2021, when she was fourteen and fifteen weeks pregnant respectively, the applicant underwent medical tests which determined that the child she was carrying had a genetic disorder, trisomy 21.

19. On 25 January 2021 Dr L.K., a professor in medical genetics, gave an opinion and confirmed that the foetus had trisomy 21.

20. On 26 January 2021 the applicant was examined by three medical practitioners from Bielański Hospital in Warsaw who stated that the foetus's condition meant that the applicant qualified for an abortion under section 4a(1)(2) of the 1993 Act. The procedure was to be carried out in the same hospital, and the applicant obtained a referral for an appointment on 28 January 2021.

21. However, on 27 January 2021 the Constitutional Court's judgment of 22 October 2020 took effect (see paragraph 39 below), finding section 4a(1)(2) of the 1993 Act unconstitutional and repealing it.

22. According to the applicant, on 28 January 2021, shortly after midnight, she sent a text message to her doctor, A.P., asking whether she should still come for her appointment on that day. The doctor replied that the applicant should wait until she had consulted the hospital management. Subsequently, the doctor informed the applicant that, given the amendments to the domestic law, she could not have an abortion in Bielański Hospital or in any other medical institution in Poland. In support of her submissions, the applicant provided copies of her telephone records, screen shots of text messages and a written statement from Dr A.P.

23. Immediately afterwards, the applicant travelled to the Netherlands, where the pregnancy was terminated in a private clinic on 29 January 2021. The applicant was seventeen weeks pregnant on that date.

24. The applicant submitted that her travel costs and medical fees relating to the treatment in the private clinic had amounted to 1,220 euros (EUR).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Constitutional provisions

25. The relevant provisions of the Constitution read as follows:

Chapter II
THE FREEDOMS, RIGHTS AND OBLIGATIONS OF PERSONS AND CITIZENS
GENERAL PRINCIPLES
Article 30

"The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

Article 31

"...

3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

Chapter VIII. Courts and tribunals
Article 173

"The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."

Article 175 § 1

"The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the ordinary courts, administrative courts and military courts."

Article 188

"The Constitutional Court shall adjudicate on the following matters:

(1) the conformity of statutes and international agreements with the Constitution;

(2) the conformity of a statute with ratified international agreements whose ratification required prior consent granted by statute;

(3) the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes;

(4) the conformity of the purposes or activities of political parties with the Constitution;

(5) a constitutional complaint, as specified in Article 79 § 1."

Article 190

"1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court regarding matters specified in Article 188 shall immediately be published in the official publication in which the original normative act was promulgated. ...

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for when the binding force of a normative act will end. Such a time-limit may not exceed eighteen months in relation to a statute, or twelve months in relation to any other normative act. ...

4. A judgment of the Constitutional Court on a normative act's non-conformity with the Constitution, an international agreement or a statute [a normative act], on the basis of which a final and enforceable judicial decision or a final administrative decision ... [has been] given, shall be a basis for reopening the proceedings or for quashing the decision ... in a manner specified in provisions applicable to the given proceedings, and on the basis of principles [specified in such provisions].

5. ..."

Article 191

"1. The following may make an application to the Constitutional Court regarding matters specified in Article 188:

(1) the President of the Republic, the Speaker of the *Sejm*, the Speaker of the Senate, the Prime Minister, fifty members of parliament, thirty senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the President of the Supreme Audit Office and the Commissioner for Human Rights,

(2) the National Council of the Judiciary, to the extent specified in Article 186 § 2;

(3) the constitutive organs of units of local government;

(4) the national organs of trade unions, as well as the national authorities of employers' organisations and occupational organisations;

(5) churches and religious organisations;

(6) the entities referred to in Article 79, to the extent specified therein.

2. The [entities] referred to in points 3-5 of paragraph 1 above may make such an application if the normative act relates to matters relevant to the scope of their activity."

Article 193

"Any court may refer to the Constitutional Court a question of law as to whether a normative act is in conformity with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue [pending] before such a court."

Article 194

"1. The Constitutional Court shall be composed of fifteen judges chosen individually by the *Sejm* for a term of office of nine years from amongst persons distinguished by their knowledge of the law. ..."

Article 195 § 1

"1. Judges of the Constitutional Court, in the exercise of their office, shall be independent and subject only to the Constitution."

B. Access to legal abortion

1. The 1993 Act

26. The Law of 7 January 1993 on family planning, protection of the human foetus and conditions permitting the termination of pregnancy (*Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży* – "the 1993 Act"), sets out the conditions for access to legal abortion.

27. Initially, the 1993 Act provided that legal abortion was possible until the twelfth week of pregnancy where the pregnancy endangered the mother's life or health; prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable life-threatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

28. On 4 January 1997 the 1993 Act was amended – in particular, section 4a was added, which provided, in so far as relevant, as follows:

"(1) Abortion may be carried out only by a physician where

1. pregnancy endangers the mother's life or health;

2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;

3. there are strong grounds for believing that the pregnancy is a result of a criminal act; [or]

4. the pregnant woman is suffering material hardship or is in a difficult personal situation."

29. However, in December 1997 further amendments were made to the text of the 1993 Act, following a judgment of the Constitutional Court given on 28 May 1997 (case no. K 26/96). In that judgment, the Constitutional Court held that section 4a(1)(4) of the 1993 Act, legalising abortion on the grounds of material or personal hardship, was incompatible with the Constitution as it stood at that time. The court held, in particular, that this provision legalised termination of pregnancy without providing sufficient justification for the need to protect another value, right or constitutional freedom and used unspecified criteria, thus violating the constitutional guarantees for [the protection of] human life.

30. On 22 October 2020 the Constitutional Court declared that section 4a(1)(2), allowing for legal abortion in the event of foetal abnormalities, was also incompatible with the Constitution (case no. K1/20). The judgment took effect on 27 January 2021 (see paragraph 39 below).

31. Section 4a of the 1993 Act, as it stands at present, reads as follows, in so far as relevant:

"(1) Abortion may be carried out only by a physician where

1. pregnancy endangers the mother's life or health;

2. (ceased to have effect);

3. there are strong grounds for believing that the pregnancy is a result of a criminal act;

4. (ceased to have effect).

(2) In situations listed above under point 2 of subsection 1, abortion may be performed until such time as the foetus is capable of surviving outside the mother's body; in situations listed under points 3 or 4 above, [abortion may be performed] until the end of the twelfth week of pregnancy.

(3) In situations listed under points 1 and 2 of subsection 1 above, abortion shall be carried out by a physician working in a hospital.

..."

2. Legislative initiatives in 2015-2022

32. On 11 September 2015 a draft bill proposing to introduce a complete ban on abortion was rejected by the *Sejm*.

33. On 3 October 2016 another bill proposing a ban on abortion in all situations except for when the mother's life was threatened was rejected by

the *Sejm*. The proposed law included prison terms for women who underwent an abortion and doctors who carried out the procedure.

34. In 2017 a draft bill proposing amendments to the 1993 Act, signed by more than 100,000 people and prepared by a legislative committee called Stop Abortion (*Zatrzymaj aborcje*), was introduced in the *Sejm*. The amendment was to remove section 4a(1)(2) from the 1993 Act and effectively ban legal abortion in the event of foetal abnormalities. On 16 April 2020 the bill was referred to the Parliamentary Commission for Health and the Commission for Justice and Human Rights.

35. On 23 October 2017 a draft bill signed by more than 100,000 people and prepared by a legislative committee called Save Women 2017 (*Ratujmy kobiety 2017*) was introduced in the *Sejm*. The bill, which proposed the liberalisation of abortion law, was rejected by the *Sejm* on 10 January 2018.

36. On 30 October 2020 the President submitted to the *Sejm* a bill amending the 1993 Act. The amendment reintroduced the option to terminate a pregnancy owing to foetal abnormalities, although only in the case of "lethal" defects. On 3 November 2020 the bill was referred to the Parliamentary Commission for Health and the Commission for Justice and Human Rights.

37. On 2 May 2022 a draft bill on the safe termination of pregnancy and other reproductive rights, signed by more than 100,000 people, was introduced in the *Sejm*. The bill, which proposed termination at a person's request up to twelve weeks of pregnancy, was rejected by the *Sejm* on 23 June 2022.

C. Criminal offence of abortion performed in contravention of the 1993 Act

38. The termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 of the Criminal Code. Anyone who terminates a pregnancy in violation of the 1993 Act or assists in such a termination may be sentenced to up to three years' imprisonment. However, the pregnant woman herself does not incur any criminal liability for an abortion performed in contravention of the 1993 Act.

D. The Constitutional Court

Judgment of the Constitutional Court of 22 October 2020 in case no. K 1/20

39. In a judgment of 22 October 2020 (case no. K 1/20), the Constitutional Court, sitting as a full bench composed of thirteen judges, held by a majority that section 4a(1)(2) of the 1993 Act was incompatible with Article 38 of the Constitution (the right to life) in conjunction with Article 30 (the right to

dignity) and Article 31 § 3 (limitations on constitutional rights) (see paragraph 25 above). Two judges appended their dissenting opinions to the judgment, and three judges appended concurring opinions as to the reasoning of the judgment. The judgment took effect on the day of its publication, 27 January 2021.

40. In its judgment, the Constitutional Court held in particular that human life had value at every stage of development, and as that value derived from provisions of the Constitution, it should be protected by legislation. The Court also stated that an unborn child, as a human being – a person with inherent and inalienable dignity – was a legal subject with a right to life, and the legal system had to guarantee this central interest (the right to life) proper protection, without which this legal personality would be erased. However, the constitutional and legal personality of the child in the period before birth did not mean that the child was fully entitled to the protection of all rights and freedoms guaranteed by the Constitution, since they were contingent on a specific level of psychophysical and social maturity.

41. The Constitutional Court further noted that in a case where prenatal tests or other medical indications pointed to a high likelihood of severe and irreversible foetal impairment or an incurable life-threatening illness, and thus of the child's interests possibly being sacrificed, the assessment of whether it was permissible to terminate a pregnancy required an indication of a corresponding interest on the part of other persons.

42. The Constitutional Court concluded that section 4a(1)(2) of the 1993 Act did not support the assumption that a high probability of severe and irreversible foetal impairment or an incurable life-threatening disease constituted a basis for automatically presuming that a pregnant woman's interests would be infringed, while solely indicating that a potential risk of such defects in a child was eugenic in nature. There was no reference in the provision to any measurable conditions relating to damage to the mother's interests justifying termination of the pregnancy.

43. Two of the dissenting judges, Judge L. Kieres and Judge P. Pszczółkowski, noted in particular that the Constitutional Court had taken over the role of a legislator. Judge L. Kieres argued that the proceedings before the Constitutional Court should have been discontinued owing to ongoing discussions in Parliament on the proposal by citizens to change abortion laws (see also paragraph 34 above). He also raised the question of the impartiality of two members of the bench (Judge K. Pawłowicz and Judge S. Piotrowicz, as regards their previous involvement as members of parliament). In his dissenting opinion, Judge P. Pszczółkowski pointed out in particular that the Constitutional Court had acknowledged only one side of the conflict, accepting only "the prospect of preserving life in the prenatal phase. At the same time, it [had] ignored the perspective of women whose dignity, life and health [were] undoubtedly values under constitutional protection. In the name of protecting life in the prenatal phase ..., the

Constitutional Court [had] imposed on them an obligation [to adopt] a heroic attitude, that is, an obligation to assume responsibility in all circumstances for ... sacrifices and hardships far exceeding the usual measure of limitations related to pregnancy, childbirth and raising a child".

E. The Law on patients' rights

44. Section 31 of the Law of 6 November 2008 on patients' rights and the Patients' Rights Ombudsman (*ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta* – "the 2008 Act") provides, in so far as relevant, as follows:

> "1. The patient or his or her statutory representative may raise an objection to an opinion or decision (*orzeczenie*) referred to in section 2(1) of the Law of 5 December 1996 on physicians and dentists, if the opinion or decision affects the patient's rights or obligations under the law.
>
> 2. The objection shall be submitted to the Medical Commission attached to the Patients' Rights Ombudsman, through the Patients' Rights Ombudsman, within thirty days from the date of issuance of the opinion or decision by the doctor who [has] evaluate[d] the patient's condition.
>
> 3. The objection shall require a justification, including an indication of the provision of law from which the rights or obligations referred to in subsection 1 derive.
>
> 4. If the requirements set out in subsection 3 are not met, the objection shall be returned to the person who submitted it.
>
> 5. The Medical Commission shall, on the basis of medical records and, where necessary, after examining the patient, issue a ruling without delay, but no later than within thirty days from the date on which the objection was lodged.
>
> 6. The Medical Commission shall issue a ruling by an absolute majority of votes, in the presence of all its members.
>
> 7. There shall be no appeal against the decision of the Medical Commission.
>
> 8. The provisions of the Code of Administrative Procedure shall not apply to proceedings before the Medical Commission.
>
> ..."

F. The Civil Code

45. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*dobra osobiste*) and states:

> "The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements shall be protected under civil law, regardless of the protection laid down in other legal provisions."

46. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. In accordance with that provision, a person whose rights are at risk of infringement by a third party may seek an

injunction, unless the activity complained of is not unlawful. In the event of an infringement, the person concerned may, *inter alia*, require the party responsible for the infringement to take the necessary steps to eliminate the consequences of the infringement, for example, by making a relevant statement in an appropriate form, or ask the court to award an appropriate sum for the benefit of a specific public interest. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

II. RELEVANT INTERNATIONAL DOCUMENTS

A. The United Nations

1. The Human Rights Committee

(a) Periodic report of Poland

47. In its concluding observations on the seventh periodic report of Poland, adopted on 31 October 2016, the Human Rights Committee ("the Committee") stated as follows:

> "Constitutional and legal framework within which the Covenant is implemented.
>
> 7. The Committee is concerned about the negative impact of legislative reforms, including the amendments of November and December 2015 and July 2016 to the law on the Constitutional Tribunal, and the fact that some judgments of the Constitutional Tribunal have been disregarded, on the functioning and independence of the Tribunal and on the implementation of the Covenant. The Committee is also concerned about the Prime Minister's refusal to publish the Tribunal's judgments of March and August 2016 in the Journal of Laws, about the efforts of the Government to change the composition of the Tribunal in ways that the Tribunal regards as unconstitutional, ...
>
> 8. The State party should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges, and ensure the implementation of all its judgments. The Committee urges the State party to officially publish all the judgments of the Tribunal immediately, to refrain from introducing measures that obstruct its effective functioning, and to ensure a transparent and impartial process for the appointment of its members and security of tenure that meets all the requirements of legality under domestic and international law."

(b) General Comment No. 36

48. In its General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018 (UN Doc. CCPR/C/GC/36), the Committee noted the following:

> "8. ... [R]estrictions on the ability of women or girls to seek abortion must not, *inter alia*, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a

manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly ...”

(c) *Mellet v. Ireland* and *Whelan v. Ireland*

49. In two cases examined by the Committee (*Mellet v. Ireland*, Communication no. CCPR/C/116/D/2324/2013, and *Whelan v. Ireland*, Communication no. CCPR/C/119/D/2425/2014), the Committee found that denying access to abortion care could constitute cruel, inhuman or degrading treatment.

50. In its decision in *Mellet v. Ireland*, which concerned a woman who received a diagnosis that her foetus had congenital defects and would die *in utero* or shortly after birth, the Committee stated as follows (footnotes omitted):

“7.4. The Committee considers that the fact that a particular conduct or action is legal under domestic law does not mean that it cannot infringe article 7 of the Covenant. By virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering. The author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable, and as documented, *inter alia*, in the psychological reports submitted to the Committee, had her physical and mental anguish exacerbated by not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health-care system; the need to choose between continuing her non-viable pregnancy or travelling to another country while carrying a dying foetus, at her personal expense and separated from the support of her family, and returning while not fully recovered; the shame and stigma associated with the criminalization of abortion of a fatally ill foetus; the fact of having to leave the baby’s remains behind and later having them unexpectedly delivered to her by courier; and the State party’s refusal to provide her with the necessary and appropriate post-abortion and bereavement care. Many of the negative experiences described that she went through could have been avoided if the author had not been prohibited from terminating her pregnancy in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted, and if she had been afforded the health benefits she needed that were available in Ireland, were enjoyed by others, and could have been enjoyed by her, had she continued her non-viable pregnancy to deliver a stillborn child in Ireland.

...

7.7. The author claims that by denying her the only option that would have respected her physical and psychological integrity and reproductive autonomy under the circumstances of the case (allowing her to terminate her pregnancy in Ireland), the State interfered arbitrarily in her right to privacy under article 17 of the Covenant. The Committee recalls its jurisprudence to the effect that a woman’s decision to request termination of pregnancy is an issue which falls under the scope of this provision. In the present case, the State party interfered with the author’s decision not to continue her non-viable pregnancy. The interference in this case was provided for under article 40.3.3 of the Constitution and therefore was not unlawful under the State party’s domestic law. However, the question before the Committee is whether such interference was unlawful or arbitrary under the Covenant. The State party argues that there was no arbitrariness, since the interference was proportionate to the legitimate aims of the Covenant, taking into account a carefully considered balance between protection of the foetus and the rights of the woman.

7.8. The Committee considers that the balance that the State party has chosen to strike between protection of the foetus and the rights of the woman in the present case cannot be justified... The Committee notes that the author's much-wanted pregnancy was not viable, that the options open to her were inevitably a source of intense suffering and that her travel abroad to terminate her pregnancy had significant negative consequences for her, as described above, that could have been avoided if she had been allowed to terminate her pregnancy in Ireland, resulting in harm contrary to article 7. On that basis, the Committee considers that the interference in the author's decision as to how best cope with her non-viable pregnancy was unreasonable and arbitrary in violation of article 17 of the Covenant."

51. In its subsequent decision in *Whelan v. Ireland*, which concerned a woman who received a diagnosis that her foetus had a fatal condition and would in all likelihood die *in utero* or shortly after birth, the Committee stated as follows (footnotes omitted):

"7.3 The author claims that the legal prohibition of abortion caused her to suffer cruel, inhuman and degrading treatment, in that she was denied the health care and bereavement support she needed in Ireland; felt pressurized to carry to term a dying foetus; had to terminate her pregnancy abroad without emotional support from her family; and was subjected to intense stigma and loss of dignity. The State party contests the author's claims by arguing, *inter alia*, that the prohibition on abortion seeks to balance the competing rights between the fetus and the woman; and that there were no arbitrary decision-making processes or acts of 'infliction' by any person or State agent that caused or contributed to cruel, inhuman or degrading treatment. The State party also maintains that its laws guarantee access to information about abortion services provided abroad and constitute part of the balance it struck between the competing rights.

7.4 The Committee recalls that the legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant. The Committee notes that in the present case, the author's claims appertain to her treatment in State health facilities, which was the direct result of the legislation in place in Ireland. The existence of such legislation engages the responsibility of the State party for the treatment of the author, and cannot be invoked to justify a failure to meet the requirements of article 7.

7.5 The Committee considers it well-established that the author was in a highly vulnerable position after learning that her much-wanted pregnancy was not viable. As documented in the psychological reports submitted to the Committee, her physical and mental situation was exacerbated by the following circumstances arising from the prevailing legislative framework in Ireland and by the author's treatment by some of her health care providers in Ireland: being unable to continue receiving medical care and health insurance coverage for her treatment from the Irish health care system; feeling abandoned by the Irish health care system and having to gather information on her medical options alone; being forced to choose between continuing her non-viable pregnancy or traveling to another country while carrying a dying fetus, at personal expense and separated from the support of her family; suffering the shame and stigma associated with the criminalization of abortion of a fatally-ill fetus; having to leave the baby's remains in a foreign country; and failing to receive necessary and appropriate bereavement counselling in Ireland. Much of the suffering the author endured could have been mitigated if she had been allowed to terminate her pregnancy in the familiar environment of her own country and under the care of health professionals whom she knew and trusted; and if she had received necessary health benefits that were available

in Ireland, which she would have enjoyed had she continued her nonviable pregnancy to deliver a stillborn child in Ireland.”

2. The Committee on Economic, Social and Cultural Rights

52. In its General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/22 (2 May 2016), the Committee on Economic, Social and Cultural Rights noted the following:

> “5. The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant.
>
> ...
>
> 10. The right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.
>
> ...
>
> 34. States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health. There exists a wide range of laws, policies and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws ...
>
> ...
>
> 38. Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity. This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include the removal of sexual and reproductive health medications from national drug registries; laws or policies revoking public health funding for sexual and reproductive health services; imposition of barriers to information, goods and services relating to sexual and reproductive health; enacting laws criminalizing certain sexual and reproductive health conduct and decisions ...”

B. The Council of Europe

1. The Committee of Ministers

53. The Recommendation adopted by the Committee of Ministers on 17 November 2010 (CM/Rec(2010)12) entitled “Judges: independence, efficiency and responsibilities” provides, in so far as relevant:

> “Chapter I – General aspects
>
> Scope of the recommendation
>
> 1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters.
>
> ...
>
> Judicial independence and the level at which it should be safeguarded
>
> 3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.
>
> 4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.
>
> ...
>
> Chapter VI - Status of the judge
>
> Selection and career
>
> 44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.
>
> ...
>
> 46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.
>
> 47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.”

2. The Venice Commission

54. The relevant documents issued by the Venice Commission relating to the election of the Constitutional Court judges are described in detail in the Court’s judgment in *Xero Flor w Polsce sp. z o.o.* (cited above §§ 123-24).

55. The relevant extracts from the Rule of Law Checklist (CDL-AD(2016)007), adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016)[1], read as follows:

> "44. State action must be in accordance with and authorised by law. ... [footnote omitted].
>
> 45. A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law [footnote omitted].
>
> ...
>
> 74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.
>
> ...
>
> 107. Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.
>
> ...
>
> 110. The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.
>
> 111. This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body [footnote omitted] ..."

3. *The Council of Europe Commissioner for Human Rights*

56. The Council of Europe Commissioner for Human Rights, Mr Nils Muižnieks, carried out a visit to Poland from 9 to 12 February 2016. The report from his visit, published on 15 June 2016, reads as follows, in so far as relevant:

> "43. The Commissioner is seriously concerned at the current paralysis of the Constitutional Tribunal which bears heavy consequences for the human rights of all Polish citizens. He calls on the Polish authorities to urgently find a way out of the current deadlock following the Opinion of the Venice Commission. As already stated by the latter institution, the rule of law requires that any such solution be based on respect and full implementation of the judgments of the Tribunal. As the Commissioner

[1] Endorsed by the Ministers' Deputies at the 1263rd Meeting (6-7 September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) and by the Parliamentary Assembly of the Council of Europe at the fourth part-session (11 October 2017).

stated at the end of his visit, there can be no real human rights protection without mechanisms guaranteeing the rule of law, in particular by ensuring checks and balances among the different state powers. The Commissioner is particularly concerned that proceedings regarding the compliance of statutes and decisions with human rights obligations and standards in Poland might be left in limbo for an undetermined period."

57. The Council of Europe Commissioner for Human Rights, Ms Dunja Mijatović, carried out a subsequent visit to Poland from 11 to 15 March 2019. In her report following the visit, published on 28 June 2019, as regards the Constitutional Court, she stated as follows:

"10. The Constitutional Tribunal has a fundamental role as the main control mechanism allowing for a review of the compliance of legislation with the Polish Constitution and Poland's international human rights obligations. The Commissioner deeply regrets that despite the recommendations by her predecessor, the Venice Commission, and other international and domestic actors mandated to foster the observance of international standards in the area of judicial independence, the Polish authorities have not yet found a solution to the prolonged deadlock affecting the functioning of this essential institution. In the Commissioner's view, the independence and credibility of the Constitutional Tribunal have been seriously compromised. In particular, the Commissioner regrets the persisting controversy surrounding the election and the status of the Tribunal's new President and several of its new judges. She urges the Polish authorities to take urgent steps to resolve the deadlock regarding the composition and functioning of the Constitutional Tribunal, in line with the recommendations of the Venice Commission's opinions adopted in March and October 2016. This should include recognition of the legitimacy of the election of the three judges in October 2015 by the previous *Sejm* and their swearing into office, and re-establishing dialogue and cooperation between the Constitutional Tribunal and other constitutional bodies, including the Supreme Court and the Ombudsman."

58. The report includes also the following observations relating to women's sexual and reproductive rights and access to abortion:

"84. Inaction or delay in accessing abortion care may in some cases create a very real and grave risk to women's life and health. The Commissioner was concerned to learn that so many Polish women, whose number may reach tens of thousands per year according to some estimates, resort to clandestine abortions or travel abroad to obtain assistance in pregnancy termination and related care, or to access modern contraceptives. She was also concerned that there are areas in Poland where abortion care is either completely unavailable or very seriously limited due to refusals of care by health care professionals on the grounds of conscience. The Commissioner considers that women and girls who have the legal right to abortion should not be hindered in any way in obtaining such services and care in their own country.

85. The Commissioner therefore encourages the authorities to urgently adopt the necessary legislation to ensure the accessibility and availability of legal abortion services in practice. The exercise of freedom of conscience by health professionals must not jeopardise women's timely access to sexual and reproductive health care to which they are entitled, as required by the case-law of the European Court of Human Rights ...

86. The Commissioner was concerned by the repeated and ongoing attempts to further restrict Poland's already very restrictive legislation governing access to abortion. ...

> 87. The Commissioner takes note of the shifting general attitudes to the question of abortion and the increasing public support for a woman's right to terminate pregnancy for up to 12 weeks, as evidenced be recent opinion polls. Drawing on the recommendations of the 2017 'Issue Paper on women's sexual and reproductive health and rights in Europe', she invites Poland to consider guaranteeing access to safe and legal abortion care by ensuring that abortion is legal on a woman's request in early pregnancy, and thereafter throughout pregnancy to protect women's health and lives and ensure freedom from ill-treatment."

4. The Parliamentary Assembly of the Council of Europe

59. The Parliamentary Assembly, in its resolution of 11 October 2017 on new threats to the rule of law in Council of Europe member States (Resolution 2188 (2017)), expressed concerns about developments in Poland which put respect for the rule of law at risk, and in particular the independence of the judiciary and the principle of the separation of powers. It called on the Polish authorities to, *inter alia*, fully cooperate with the Venice Commission and implement its recommendations, especially those with respect to the composition and functioning of the Constitutional Court.

60. On 28 January 2020 the Parliamentary Assembly decided to open its monitoring procedure in respect of Poland. Out of those States belonging to the European Union, Poland is the only member State of the Council of Europe which is currently undergoing that procedure. In its resolution of the same date entitled "The functioning of democratic institutions in Poland", the Assembly stated:

> "6. The constitutional crisis that ensued over the composition of the Constitutional Court remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court. The full and unconditional implementation of all Constitutional Court decisions by the authorities, including with regard to the composition of the Constitutional Court itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the Constitutional Court, in line with European standards, is essential and should be a priority. The Assembly is especially concerned about the potential impact of the Constitutional Court's apparently illegal composition on Poland's obligations under the European Convention on Human Rights."

61. On 26 January 2021 the Parliamentary Assembly adopted a resolution entitled "Judges in Poland and in the Republic of Moldova must remain independent" (2359 (2021)). The Assembly, referring to the concerns expressed in Resolution 2316 (2020), noted "the 'constitutional crisis' has not been resolved and the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law". The Assembly further called on the Polish authorities to, *inter alia*, "review the changes made to the functioning of the Constitutional Tribunal and the ordinary justice system in the light of Council of Europe standards relating to the rule of law, democracy and human rights".

C. European Union law

1. Treaty on European Union

62. Article 2 of the Treaty on European Union (TEU) provides:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are ordinary to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

63. Article 19 § 1 of the TEU reads as follows:

> "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

2. The European Commission

(a) Initiation of the rule of law framework

64. On 13 January 2016 the European Commission ("the Commission") decided to examine the situation in Poland under the rule of law framework. The exchanges between the Commission and the Polish Government were unable to resolve the concerns of the Commission. The rule of law framework provided guidance for a dialogue between the Commission and the member State concerned to prevent the escalation of systemic threats to the rule of law.

65. On 27 July and 21 December 2016 the Commission adopted two recommendations regarding the rule of law in Poland, concentrating on issues pertaining to the Constitutional Court. In particular, the Commission found that there was a systemic threat to the rule of law in Poland, and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency. The Commission recommended, *inter alia*, that the Polish authorities: (a) implement fully the judgments of the Constitutional Court of 3 and 9 December 2015 which required that the three judges who had been lawfully nominated in October 2015 by the previous legislature be permitted to take up their judicial duties as judges of the Constitutional Court, and that the three judges nominated by the new legislature in the absence of a valid legal basis not be permitted to take up their judicial duties without being validly elected; and (b) publish and implement fully the judgments of the Constitutional Court of 9 March 2016, and ensure that the publication of future judgments was automatic and did not depend on any decision of the executive or legislative powers.

(b) Rule of Law Recommendation (EU) 2017/1520 (third recommendation)

66. On 26 July 2017 the Commission adopted a third *Recommendation regarding the Rule of Law in Poland*, which complemented two earlier recommendations it had made. The concerns of the Commission related to the lack of an independent and legitimate constitutional review, and the new legislation relating to the Polish judiciary, which would structurally undermine the independence of the judiciary in Poland and have an immediate and concrete impact on the independent functioning of the judiciary as a whole. In its third recommendation, the Commission considered that the situation whereby there was a systemic threat to the rule of law in Poland, as presented in its two earlier recommendations, had seriously deteriorated. The Commission reiterated that, notwithstanding the fact that there was a diversity of justice systems in Europe, ordinary European standards had been established on safeguarding judicial independence. The Commission observed – with great concern – that following the entry into force of the new laws referred to above, the Polish judicial system would no longer be compatible with European standards in this regard.

(c) Rule of Law Recommendation (EU) 2018/103 (fourth recommendation)

67. On 20 December 2017 the Commission adopted a fourth *Recommendation regarding the Rule of Law in Poland*, finding that the concerns raised in earlier recommendations had not been addressed and the situation of systemic threat to the rule of law had seriously deteriorated further. In particular, it stated that "the new laws raised serious concerns as regards their compatibility with the Polish Constitution as underlined by a number of opinions, in particular from the Supreme Court, the National Council of the Judiciary and the Polish Commissioner for Human Rights". However, as explained in the third recommendation adopted on 26 July 2017, an effective constitutional review of these laws was no longer possible.

(d) European Commission v. Republic of Poland (Case C-448/23)

68. On 17 July 2023 the Commission brought proceedings before the Court of Justice of the European Union (CJEU) against Poland for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU on account of the Constitutional Court's interpretation in its judgments of 14 July 2021 (case P 7/20) and of 7 October 2021 (case K 3/21), seeking a declaration that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) and the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the CJEU. Its action was formulated as follows:

> "**Form of order sought**
>
> The applicant claims that the Court should:

declare that, in the light of the interpretation of the Constitution of the Republic of Poland made by the Trybunał Konstytucyjny (Constitutional Court, Poland) in its judgments of 14 July (Case P 7/20) and of 7 October 2021 (Case K 3/21), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) of the Treaty on European Union;

declare that, in the light of the interpretation of the Constitution of the Republic of Poland made by the Trybunał Konstytucyjny (Constitutional Court) in its judgments of 14 July (Case P 7/20) and of 7 October 2021 (Case K 3/21), the Republic of Poland has failed to fulfil its obligations under the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the Court of Justice;

declare that, since the Trybunał Konstytucyjny (Constitutional Court) does not satisfy the requirements of an independent and impartial tribunal previously established by law as a result of irregularities in the procedures for the appointment of three judges to that court in December 2015 and in the procedure for the appointment of its President in December 2016, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

order the Republic of Poland to pay the costs.

Pleas in law and main arguments

By the first and second pleas in law, the Commission challenges two judgments of the Trybunał Konstytucyjny (Constitutional Court) of the Republic of Poland (‘the Constitutional Court’) of 7 October 2021 (Case K 3/21) and of 14 July 2021 (Case P 7/20). Those judicial decisions result in an infringement of different, but not unrelated obligations imposed on Poland by the EU treaties. The first plea concerns the infringement by the aforementioned judgments of the Constitutional Court of the second subparagraph of Article 19(1) TEU, as interpreted by the Court of Justice of the European Union, in particular in the judgments of 2 March 2021, A.B. and Others (Appointment of Judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, and of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, because the Constitutional Court interpreted the Constitution of the Republic of Poland in relation to the EU law requirements of effective judicial protection by an independent and impartial tribunal previously established by law too narrowly, incorrectly, and in a manner that manifestly disregards the case-law of the Court of Justice of the European Union. The second plea concerns the infringement by those judgments of the Constitutional Court of the principles of primacy, autonomy, effectiveness and uniform application of EU law and the binding effect of judicial decisions of the Court of Justice of the European Union, as the Constitutional Court, in those judgments, unilaterally disregarded the principles of primacy and effectiveness of Articles 2, 4(3) and 19(1) TEU and Article 279 TFEU, as consistently interpreted and applied by the Court of Justice of the European Union, and ordered all Polish authorities to disapply those Treaty provisions.

By the third plea, the Commission argues that the Constitutional Court no longer offers the guarantees of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, (i) as a result of manifest irregularities in the appointments to judicial positions at the Constitutional Court in December 2015 in flagrant breach of Polish constitutional law and (ii) as a result of irregularities in the procedure for the election of the President of the Constitutional Court in December 2016. Each of those irregularities gives rise, in

the light of the activities of the Constitutional Court composed of persons appointed in this way, to reasonable doubts in the minds of individuals as to the impartiality of the Constitutional Court and its imperviousness to external factors.”

3. *The European Parliament*

(a) The 2017 Resolution

69. On 15 November 2017 the European Parliament adopted a resolution on the situation of the rule of law and democracy in Poland (2017/2931(RSP)). The resolution reiterated that the independence of the judiciary was enshrined in Article 47 of the Charter and Article 6 of the Convention, and was an essential requirement of the democratic principle of the separation of powers, which was also reflected in Article 10 of the Polish Constitution. It expressed deep concern at the redrafted legislation relating to the Polish judiciary, in particular its potential to structurally undermine judicial independence and weaken the rule of law in Poland. The Polish Parliament and the Government were urged to implement fully all recommendations of the Commission and the Venice Commission, and to refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary. In this regard, the European Parliament called for the enactment of any laws to be postponed until a proper assessment had been made by the Commission and the Venice Commission.

(b) The 2020 Resolution

70. On 26 November 2020, the European Parliament adopted a resolution on the *de facto* ban on the right to abortion in Poland (2020/2876(RSP)). In particular, the resolution condemned the Constitutional Court’s ruling and the setback to women’s sexual and reproductive rights in Poland, and affirmed that the ruling put women’s health and lives at risk. It noted that restricting or banning the right to abortion by no means eliminated abortion, but merely pushed it underground. It further strongly urged the Polish Parliament and authorities to refrain from any further attempts to restrict women’s sexual and reproductive rights, and affirmed that the denial of such rights was a form of gender-based violence. Lastly, it was deeply concerned that thousands of women had to travel to access a health service as essential as abortion, and emphasised that cross-border abortion services were not a viable option for the most vulnerable and marginalised people.

(c) The 2021 Resolution

71. On 11 November 2021 the European Parliament adopted a resolution on the first anniversary of the *de facto* abortion ban in Poland (2021/2925(RSP)). In particular, it reiterated its strong condemnation of the Constitutional Court’s ruling of 22 October 2020 and called on the Polish

Government to swiftly and fully guarantee access to and the provision of abortion services. It further reiterated that women's rights were fundamental human rights, and that the EU institutions and the member States were legally obliged to uphold and protect them in accordance with the EU treaties and the Charter of Fundamental Rights of the European Union, as well as international law. Lastly, it called on the Council to address this matter and other allegations of violations of fundamental rights in Poland by expanding the scope of its hearings on the situation in Poland, in accordance with Article 7(1) of the TEU.

4. *Case-law of the Court of Justice of the European Union*

72. The High Court of Cassation and Justice in Romania made five requests for a preliminary ruling under Article 267 of the TEU. On 21 December 2021 the CJEU gave the following ruling (in Joined Cases C-357/19, C379/19, C-547/19, C-811/19 and C-840/19 NC), the relevant parts of which read:

> "229. Although neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences, Member States must nonetheless comply, *inter alia*, with the requirements of judicial independence stemming from those provisions of EU law (see, by reference to the case-law of the European Court of Human Rights on Article 6 ECHR, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 130).
>
> 230. In those circumstances, Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 do not preclude national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, if the national law does not guarantee such independence, those provisions of EU law preclude such national rules or such a national practice since such a constitutional court is not in a position to ensure the effective judicial protection required by the second subparagraph of Article 19(1) TEU."

THE LAW

I. SCOPE OF THE CASE AND COMPLAINTS

73. The Court finds it necessary to clarify the scope of the case, together with the provisions under which the complaints are to be examined. The applicant firstly claimed that she had been a victim of a breach of Article 3 of the Convention, as the Constitutional Court's judgment had deprived her of the opportunity to terminate her pregnancy on the grounds of foetal defects. Secondly, she alleged that there had been a breach of Article 8 of the

Convention. She submitted that as a direct consequence of the Constitutional Court's judgment, she had been under an obligation to maintain her pregnancy and give birth to a seriously ill child. She had not been able to have an abortion on the grounds of foetal defects, and had had to travel abroad to have a termination. Thirdly, invoking Articles 6 and 8 of the Convention, the applicant specifically alleged that the restriction had not been "prescribed by law": (i) the composition of the Constitutional Court had been incorrect and in breach of the Constitution, since Judges J. Piskorski, M. Muszyński and J. Wyrembak, assigned to the bench, had been elected by the *Sejm* to judicial posts which had already been filled; (ii) the appointment of Judge J. Przyłębska, the President of Constitutional Court, who had presided over the present case, was also open to challenge; and (iii) Judge K. Pawłowicz, who had sat in the case, had not been impartial, since she had previously been a member of parliament in favour of restricting abortion laws in Poland.

74. In the Court's view, the applicant's complaints must be examined solely under Articles 3 and 8 of the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018).

II. ADMISSIBILITY

75. The Government made several preliminary objections as to the admissibility of the application. They argued that it was incompatible *ratione materiae* and *ratione personae* with the provisions of the Convention. They further submitted that the applicant had not complied with the rule of exhaustion of domestic remedies. Lastly, they stressed that the applicant had abused the right of petition.

A. Applicability of Articles 3 and 8

76. The Court finds that the Government's objection relating to incompatibility *ratione materiae* should be examined separately as regards the complaints under Articles 3 and 8.

1. Article 3

(a) The parties

(i) The Government

77. The Government maintained that the facts of the present case did not disclose a level of severity sufficient to fall within the scope of Article 3 of the Convention. In their view, the case should be distinguished from *R.R. v. Poland* (no. 27617/04, §§ 159-160, ECHR 2011 (extracts)), in which the Court found that the applicant's suffering, caused by the doctors' intentional failure to provide timely prenatal examination that would have allowed her to take a decision as to whether to continue or terminate her

pregnancy, had reached the minimum threshold of severity under Article 3 of the Convention. They noted that in the present case there had been no procrastination, undue delay or confusion in the applicant's diagnosis and treatment, and she had not been treated in a humiliating manner.

78. The Government admitted that a situation where a woman discovered that her unborn child had severe defects was extremely difficult. A diagnosis confirming foetal abnormalities must have a significant emotional effect on any woman and her family. However, while such a critical diagnosis caused distress, subsequent events, including a woman's inability to terminate the pregnancy, should not be analysed in isolation. It was thus impossible to separate different facts which affected a woman's emotional state in such a complex and distressing situation.

79. For the above reasons, the Government submitted that the applicant had not been subjected to inhuman and degrading treatment in breach of Article 3 of the Convention.

(ii) The applicant

80. The applicant argued that the restrictions introduced by the Constitutional Court had caused her direct harm. She referred to the fact that her hospital appointment had been cancelled at the last minute and that she had been forced to travel abroad for an abortion. This had caused her serious and real emotional suffering. She stressed that the fear and anguish she had felt at that time had been unimaginable.

81. The applicant referred to the Human Rights Committee's decisions in *Mellet v. Ireland* and *Whelan v. Ireland* (see paragraphs 49-51 above), in which the Committee had stated that by prohibiting and criminalising abortion, the State in question had subjected the applicants to severe emotional and mental pain and suffering. She submitted that her situation was similar to that of the applicants in those cases, and that there had been a breach of Article 3 of the Convention.

(b) The Court's assessment

82. The Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015).

83. The Court takes note of the views expressed by the Human Rights Committee in two decisions concerning fatal foetal abnormalities (see paragraphs 49-51 above), in which the Committee found that criminalising access to abortion in situations of fatal foetal abnormality constituted a breach of Article 7 of the International Covenant on Civil and Political Rights (the

right to be free from torture and cruel, inhuman or degrading treatment or punishment). It further notes that the Committee recognised the financial, social and health-related burdens and hardships that were placed on women when laws forced them to choose between continuing a non-viable pregnancy and travelling to another country to access abortion care.

84. The Court accepts that in the present case, travelling abroad for an abortion was psychologically arduous. However, notwithstanding the fact that the applicant suffered emotional and mental pain, in the particular circumstances of the case, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of Article 3 of the Convention (compare *Tysiąc v. Poland*, no. 5410/03, § 66, ECHR 2007 I, and *A, B and C v. Ireland* [GC], no. 25579/05, § 164, ECHR 2010).

85. The Court therefore has no sufficient basis to conclude that the applicant's treatment was such as to reach the threshold of Article 3 of the Convention, and accordingly it upholds the Government's objection.

2. *Article 8*

(a) The parties

(i) The Government

86. The Government submitted that the applicant's complaint under Article 8 was incompatible *ratione materiae* with the provisions of the Convention. In that regard, they referred to the Court's case-law on the question of the beginning of life and protection of a foetus (see *X. v. the United Kingdom*, no. 8416/79, Commission decision of 13 May 1980, DR 19, p. 244; *H. v. Norway* no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 155; *Boso v. Italy*, no. 50490/99, ECHR 2002-VII; *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII; and *A, B and C v. Ireland*, cited above, § 222).

87. They stated that the Court had already made it clear that Article 8 could not be interpreted as conferring a right to abortion, and the Convention did not guarantee a right to specific medical services as such. In their view, the gist of the present case was not a breach of existing provisions of the Convention, but the applicant's request to be granted a right to terminate a pregnancy. They also noted that no instrument of international law to which Poland was party explicitly provided for a right to abortion. Furthermore, States might limit the right to terminate a pregnancy to exceptional cases, in view of the profound moral views of a given society and its wish to accord protection to the right to life of an unborn child. For all the above reasons, the decision to protect the right to life of unborn children under Polish law and the decision to determine the scope of exceptions to this principle were sovereign decisions within the remit of the Polish lawmaker.

88. Since the Convention did not grant a right to terminate a pregnancy or a right to specific medical services, and since none of its provisions could be

interpreted as conferring such rights, a State could not be precluded from shaping its domestic regulations on reproductive healthcare services and access to abortion in line with its moral view enshrining the need to protect the life of an unborn child, also taking into account the broad margin of appreciation which States had in this area. Consequently, the Government were of the view that Article 8 of the Convention was not applicable.

(ii) The applicant

89. The applicant argued that the crux of the case was not the right to terminate a pregnancy as such, since under the 1993 Act, this right existed in Poland, but the fact that as a direct consequence of the Constitutional Court's judgment, she could not access an abortion on the grounds of foetal abnormalities.

90. She further stated, referring to the Court's case-law, that the prohibition of abortion, when abortion was sought for reasons of health and/or well-being, fell within the scope of the right to respect for one's private life under Article 8 of the Convention. She argued that she had initially been allowed to terminate the pregnancy, in accordance with the exception provided by section 4a(1)(2) of the 1993 Act. However, after the Constitutional Court's judgment had taken effect, that exception had been removed from the 1993 Act, and no doctor could perform an abortion without risking criminal charges. In her view, as the panel of the Constitutional Court had been composed in breach of the Constitution, its decision could not legally change the 1993 Act. Nevertheless, she had been deprived of her right to respect for her private life and the right to decide about her pregnancy.

(b) The Court's assessment

91. The Court notes that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). It concerns subjects such as gender identification, sexual orientation and sexual life (see, for example, *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45, and *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, § 36, Reports 1997-I), a person's physical and psychological integrity (see *Tysiąc*, cited above, § 107), as well as decisions to have or not have a child or to become genetic parents (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I).

92. The Court observes that the applicant was informed that the child she was carrying had a genetic disorder - trisomy 21. Up until 27 January 2021 she could have had a legal abortion on those grounds. However, after the Constitutional Court's judgment took effect, this was no longer possible.

Since the applicant did not wish to give birth to a child with genetic disorder, she was forced to travel abroad to terminate the pregnancy.

93. The Court notes that it has previously found that legislation regulating the termination of pregnancy touches upon the sphere of a woman's private life, since whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. A woman's right to respect for her private life should be weighed against other competing rights and freedoms invoked, including those of the unborn child (see *Tysiąc*, § 106; *Vo*, §§ 76, 80 and 82; and *A, B and C v. Ireland*, § 213, all cited above).

94. In view of the above, while Article 8 cannot be interpreted as conferring a right to abortion, the Court finds that the prohibition of abortion in Poland on the grounds of foetal malformation, where abortion is sought for reasons of health and well-being (the prohibition about which the applicant complained, see paragraphs 90 above and 100 below), comes within the scope of the applicant's right to respect for her private life, and accordingly Article 8 applies in the present case (see *A, B and C v. Ireland*, cited above, § 214).

95. Accordingly, the Government's objection, in so far as it concerns the applicability of Article 8, must be dismissed.

B. Alleged lack of victim status

1. *The parties*

(a) The Government

96. The Government argued that the applicant could not be considered a "victim" for the purposes of Article 34 of the Convention. They stated that she had failed to provide evidence that she had been refused medical care in relation to her pregnancy in Poland. Instead, the applicant's complaints should be seen as a request for permission to undergo a specific medical procedure and have it financed from public funds. Moreover, in her application, the applicant had focused on the composition of the Constitutional Court rather than the description of her medical case. In the Government's view, the applicant had aimed to ask the Court to review, *in abstracto*, the relevant law and practice concerning the termination of pregnancy, and to contribute to the political debate relating to reproductive rights and access to abortion.

(b) The applicant

97. The applicant submitted that there was no doubt that her situation, namely the fact that she had had to travel to the Netherlands to have an abortion on the grounds of foetal malformation, had been caused by the delivery of the Constitutional Court's judgment and its taking effect. She referred to her pain and suffering, and relied on the diagnosis of foetal

malformation, the doctors' decision that she qualified for a legal abortion, and documents confirming that she had travelled abroad in order to legally have an abortion as she could not do this in Poland. She further stressed that she had had to modify her conduct, change her plans and travel outside of Poland in order to avoid any medical practitioners, who might have decided to terminate the pregnancy in Poland, possibly being prosecuted. She submitted that she had been directly affected by the restrictions in question.

2. The Court's assessment

98. The Court reiterates that Article 34 of the Convention does not allow complaints *in abstracto* alleging a violation of the Convention. The Convention does not provide for the institution of an *actio popularis* (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014), meaning that applicants may not complain about a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention. However, an individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a "victim", within the meaning of Article 34, if he or she is required either to modify his or her conduct or risk being prosecuted, or if he or she is a member of a category of persons who risk being directly affected by the legislation (see, in particular, *S.A.S. v. France* [GC], no. 43835/11, §§ 57 and 110, ECHR 2014 (extracts), and the references cited therein, and *A.M. and Others v. Poland* (dec.), no. 4188/21, § 72, 16 May 2023).

99. The Court observes that the applicant in the instant case, like the applicants in *A.M. and Others* (cited above), complained about the interference with her private life caused by the Constitutional Court's judgment of 22 October 2020. However, the applicants in *A.M. and Others* complained of a risk of a future violation, and the Court concluded that they had failed to put forward any convincing evidence that they were at real risk of being directly affected by the amendments introduced by the Constitutional Court's judgment (ibid., § 86). Conversely, in the present case, the applicant maintained that she had been directly affected by the changes to the legislative framework, since she had had to modify her conduct in the most intimate sphere of her personal life (see paragraph 97 above).

100. Despite arguing that the applicant could not be considered a "victim" for the purposes of Article 34, the Government did not dispute the core factual submission that she had travelled abroad for an abortion. Regarding her reasons for doing so, the Court observes that the applicant underwent the relevant clinical tests which determined that the foetus she was carrying had trisomy 21. She qualified for a legal abortion and a hospital appointment was scheduled. However, just before her appointment, the Constitutional Court's judgment took effect, making it impossible to have an abortion on the grounds of foetal abnormalities (see paragraphs 20 and 21 above). It can be thus

concluded that the applicant travelled abroad for an abortion for reasons of health and well-being (compare *A, B and C v. Ireland*, cited above § 125).

101. The Court accepts the applicant's argument that this caused her pain and suffering and had a significant psychological impact on her. Undoubtedly, obtaining an abortion abroad, away from the support of her family, rather than undergoing the procedure in the security of her home country, constituted a significant source of added anxiety (compare *A, B and C v. Ireland*, cited above § 126).

102. As regards the financial burden of travelling abroad, the applicant, who travelled at her own expense, submitted that her transport costs and medical fees had amounted to EUR 1,220 (see paragraph 24 above). The Court observes that these costs could have constituted a considerable expense for the applicant.

103. On the whole, the Court is of the view that many of the negative experiences described by the applicant could have been avoided if she had been allowed to terminate her pregnancy in the security of her home country.

104. Given the above considerations, the Court finds that the applicant was not a potential victim but was "directly affected" by the legislative change in question (see *A, B and C v. Ireland*, cited above, §§123-24).

105. The Government's objection must therefore be dismissed.

C. Non-exhaustion of domestic remedies

1. *The parties*

(a) The Government

106. The Government argued that the applicant had failed to exhaust domestic remedies. In particular, they pointed out that a complaint under section 31 of the 2008 Act (see paragraph 44 above) might be used by women who had been refused lawful terminations of pregnancy and those who had been refused prenatal examinations.

107. They further noted, in general terms, that the domestic law provided for various types of civil, criminal and disciplinary proceedings against medical practitioners. Moreover, the right to family planning and the right to lawful termination of pregnancy were considered personal rights within the meaning of Articles 23 and 24 of the Civil Code (see paragraphs 45, 46 above). Consequently, the applicant could have had recourse to civil compensatory remedies under Articles 23 and 24, in connection with Article 448 of the Civil Code.

(b) The applicant

108. The applicant disagreed with the Government's submissions. She submitted firstly that proceedings under the 2008 Act were not effective in the case of women seeking a legal abortion. In that regard, she referred to the

findings made by the Committee of Ministers in the process of executing the judgment in *Tysiąc*. In particular, it was noted during that process that the appeal mechanism created by the 2008 Act had a number of apparent deficiencies, such as excessive formal requirements and delays. It was further stressed that a guarantee that such appeals would be examined urgently was of essence for effective access to lawful abortion. The applicant argued that the Government had failed to indicate any example of an effective use of the appeal mechanism under the 2008 Act.

109. Secondly, with respect to civil remedies, the applicant submitted that they were solely of a retroactive and compensatory character, and therefore would not have been effective in her case, where speediness had been an important factor.

110. Thirdly, as regards the possibility of instituting disciplinary and criminal proceedings against medical practitioners who refused to perform an abortion, that remedy could not have provided any redress in her case, and did not offer any prospects of success.

111. In the applicant's view, none of the remedies advanced by the Government would have guaranteed her right to legal and timely access to an abortion.

2. The Court's assessment

112. The Court reiterates that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies that are available and sufficient in respect of his or her Convention grievances (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014).

113. The Government pleaded, in general terms, that a complaint under section 31 of the 2008 Act was an effective remedy that could have put right the alleged violation. However, they failed to explain how it could have specifically remedied the applicant's grievances under Article 8 of the Convention, in the sense of remedying the impugned state of affairs directly and providing her with the requisite redress for the purposes of Article 35 § 1 of the Convention (see *Vučković and Others*, cited above, §77, and *Juszczyszyn v. Poland*, no. 35599/20, §241, 6 October 2022).

114. As regards civil remedies, the Court has already held that the very nature of the issues involved in decisions to terminate a pregnancy is such that time factors are of critical importance (see *Tysiąc*, cited above, §118). The procedures in place should therefore ensure that such decisions are timely, and procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function. In that connection, the Court has also found that civil law remedies do not afford a procedural instrument by which the right to respect for private life can be vindicated. They are solely of a retroactive and compensatory character, and can only result in the courts granting damages (ibid., §125). Having regard to

its findings in *Tysiąc*, the Court fails to see how the civil remedies mentioned by the Government could have proved effective in the present case.

115. As regards the other remedies suggested by the Government, criminal and disciplinary proceedings against the medical practitioners in question, the Court finds that they also could not have proved effective with regard to the applicant's complaints. Such retrospective measures are not sufficient to provide appropriate protection for a person whose situation calls for legal means to address the immediacy of an issue, where time is of critical importance, like the applicant in the present case.

116. The Government's objection must therefore be dismissed.

D. Abuse of the right of petition

1. The parties

(a) The Government

117. The Government submitted that the application should be declared inadmissible as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention. They stressed that the application had been lodged in the context of a political debate concerning reproductive health. In that regard, they referred to the Court's press release of 8 July 2021 giving notice of twelve applications concerning restrictions on abortion rights in Poland, in which the Court had stated that over 1,000 similar applications had been lodged with it.

118. They maintained that the applicant's arguments in relation to the Constitutional Court were of a political nature and aimed to discredit that court. The applicant had exercised her right of application to describe the functioning of the Constitutional Court in a negative manner, rather than to protect her rights under the Convention. Furthermore, the perception of the applicant that she could not have legally terminated her pregnancy in Poland was unsubstantiated and unverified, as she had not had any recourse to domestic remedies.

(b) The applicant

119. The applicant referred to the Court's case-law concerning abuse of the right of petition and maintained that the Government had interpreted Article 35 § 3 (a) of the Convention incorrectly. She submitted that they had failed to prove that she had knowingly intended to conceal any information or had changed the facts of the case in order to mislead the Court.

2. The Court's assessment

120. The Court reiterates that the concept of "abuse" within the meaning of Article 35 § 3 (a) of the Convention must be understood in its ordinary sense according to general legal theory – namely, the harmful exercise of

a right for purposes other than those for which it is designed (see *Zhdanov and Others v. Russia*, nos. 12200/08 and 2 others, § 79, 16 July 2019).

121. The Court further reiterates that it has applied that provision, *inter alia*, in two types of situations. Firstly, an application may be rejected as an abuse of the right of petition within the meaning of Article 35 § 3 (a) if it was knowingly based on untrue facts (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014, with further references). Secondly, it may also be rejected in cases where an applicant used particularly vexatious, contemptuous, threatening or provocative language in his communication with the Court (see, for example, *Rehak v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004).

122. In the present case, the gist of the Government's arguments does not concern "untrue facts" allegedly adduced by the applicant before the Court. Nor did the Government submit that she had used vexatious, contemptuous, threatening or provocative language in her communications. Rather, their objection is based on their own perception of the applicant's possible intentions behind her decision to lodge an application with the Court. Consequently, having regard to its case-law on the issue, the Court finds that the arguments raised by the Government with regard to the applicant's conduct and the context of the application cannot be regarded as an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention. It accordingly dismisses the Government's preliminary objection.

E. Overall conclusion on admissibility

123. The Court finds that the applicant's complaint under Article 8 of the Convention is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible, and the remainder of the application inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

124. The applicant complained under Article 8 of the Convention that as a direct consequence of the restrictions introduced by the Constitutional Court, she could not have an abortion in Poland on the grounds of foetal defects, and had had to travel abroad to terminate her pregnancy. She complained that the restriction had not been "prescribed by law", given the composition of the Constitutional Court, which included judges appointed by means of a procedure which the Court had found to be in breach of Article 6 of the Convention. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties

1. The applicant

125. The applicant submitted that there had been an interference with her right to respect for her private life under Article 8 of the Convention on account of the restrictions imposed by the Constitutional Court's judgment of 22 October 2020. She had been informed by her doctor that the appointment for an abortion scheduled to take place at Bielański Hospital had been cancelled, and there had been nothing that the doctors could do to help her.

126. The applicant noted that following the delivery of the Constitutional Court's judgment, all hospitals in Poland refused to perform abortions in the event of foetal defects. She referred to the statistical data provided by the non-governmental organisation FEDERA, according to which the FEDERA's helpline, in the period between 22 October 2020 and September 2021, had received 8,142 calls and over 5,000 emails on how to legally obtain an abortion. She also stated that in some cases, women who received a diagnosis of lethal foetal abnormalities obtained certificates from psychiatrists confirming that abortion should be allowed under section 4a(1)(1) of the 1993 Act (that is, when a pregnancy endangered the mother's life or health – see paragraph 31 above). However, not all hospitals respected such certificates. The applicant submitted that in her situation, she could not wait to obtain such a certificate and then attempt to convince a hospital in Poland that she qualified for a legal abortion. In any event, just after the Constitutional Court's judgment had taken effect, it had not been clear that psychiatrists could issue such certificates.

127. The applicant stressed that the Constitutional Court's judgment of 22 October 2020 had reopened the political debate on legal abortion in Poland. In that context she referred to the dissenting opinion of judge L. Garlicki concerning the previous ruling of the Constitutional Court (see paragraph 29 above), in which it was stated: "it is not the role or task of [the] Constitutional Court to resolve general issues of a philosophical, religious or medical nature, as these are issues beyond the knowledge of the judges and the competence of the courts. Regardless of the moral assessment of abortion, the Constitutional Court can only rule on the legal aspects of this issue ... The Constitutional Court is only called upon to assess the constitutionality of the laws it examines, [and] it cannot replace Parliament in making assessments, establishing the hierarchy of objectives and selecting the means to achieve them. The principle of separation of powers prohibits the [Constitutional Court] from entering into the role of legislator."

128. The applicant maintained that the interference with her rights under Article 8 had not been in accordance with the law, as the composition of the bench of the Constitutional Court had included judges appointed in an unlawful manner. She referred to the fact that Judges J. Piskorski, M. Muszyński and J. Wyrembak, who had been assigned to the bench, had been elected by the *Sejm* to judicial posts which had already been filled. She also questioned the appointment of Judge J. Przyłębska to the post of President of the Constitutional Court, and the impartiality of Judge K. Pawłowicz.

129. With respect to Judge M. Muszyński, she pointed out that the circumstances of his election had already been examined by the Court (see *Xero Flor w Polsce sp. z o.o.*, cited above). As regards Judge J. Wyrembak and Judge J. Piskorski, they had replaced two other deceased judges who had been elected by the eighth-term *Sejm* to judicial posts which had already been filled and, consequently, their election was adversely affected by the same fundamental defects as the election of Judge M. Muszyński. The applicant submitted that the Constitutional Court's judgment of 22 October 2020 had been delivered by a panel which had included three judges who had been improperly appointed and thus had not been authorised to sit in the Constitutional Court.

130. As regards Judge J. Przyłębska, who had presided over the panel, the applicant submitted that her election to the post of President of the Constitutional Court had been tainted with numerous irregularities: the General Assembly of Judges of the Constitutional Court, which normally elected two candidates for the post of President of the Constitutional Court, had not been properly convened; the three judges elected to judicial posts which had already been filled had participated in the assembly; not all judges could participate in the meeting; and lastly, there had been a number of irregularities as regards the voting process.

131. In addition, the applicant noted that Judge K. Pawłowicz, who had previously been a member of parliament, had signed the 2017 application to have certain provisions of the 1993 Act declared incompatible with the Constitution (see paragraphs 101 and 11 above). The judge had also participated in many public debates relating to abortion and expressed her views on this issue.

132. In view of all these procedural shortcomings, the judgment of 22 October 2020 could not be regarded as having been delivered by a lawful body, and thus the interference with the applicant's rights under Article 8 had not been in accordance with the law.

133. Furthermore, the applicant submitted that the restrictions imposed by the Constitutional Court's judgment were not justified as being "necessary in a democratic society". She maintained that no such value existed in society which needed protection by way of a ban on abortion. A decision on abortion was of a very sensitive, intimate and private nature, and each time such a

decision was made it was made for different, complicated, personal and particular reasons, and could not be subject to a uniform official judgment delivered by the courts.

134. Additionally, the European consensus on reproductive health services allowed individuals to make their own decisions and guaranteed them effective, liberal access to such services in the public healthcare system, abortion included. The applicant stated that interference with private matters such as decisions to continue with a pregnancy should never exist in plural and democratic societies. A State ban on abortions in the public healthcare system meant that women tended to seek abortion services outside the system. They travelled abroad or used abortion pills. According to data provided by NGOs, 1,080 women based in Poland had gone to foreign abortion clinics between 22 October 2020 and the end of September 2021. At the same time, according to official data, about 1,000 legal abortions per year were carried out in Polish hospitals.

135. In conclusion, the applicant maintained that there had been a breach of her rights under Article 8 of the Convention.

2. The Government

136. The Government submitted that there had been no interference with the applicant's rights under Article 8 on account of the restrictions imposed by the Constitutional Court's judgment. They noted, referring to the Court's case-law (see *Vo*, § 76, and *A, B and C v. Ireland*, § 216, both cited above), that not every regulation of the termination of pregnancy constituted an interference with the right to respect for private life of the mother.

137. The applicant had not been refused any treatment relating to her pregnancy and financed by public funds. She had undergone standard medical examinations in public and private medical facilities. On 26 January 2021 she had qualified for admission to hospital for an abortion on the grounds of foetal abnormalities (trisomy 21). She had not attempted to obtain a legal abortion on the basis of any other exceptions provided for by the 1993 Act, and had instead decided to travel to the Netherlands to undergo a termination.

138. The Government submitted that the amendments to the 1993 Act introduced by the Constitutional Court's judgment could not be regarded as an interference with the applicant's rights. The Constitutional Court's judgment was in compliance with the relevant provisions of the Polish Constitution and international law. Since there was no right to abortion under the Convention, it could not be said that the introduction of more restrictive domestic regulations had breached its provisions.

139. The Government also argued that the applicant had not submitted any evidence to the Court relating to her text message exchange with the doctor on 27 January 2021, and therefore it had not been proved that she had been refused a legal abortion.

140. The Government further stated that even if the Court found that the restrictions imposed by the Constitutional Court's judgment had amounted to an interference with the applicant's rights, that interference had been in accordance with the law and had pursued legitimate aims within the meaning of Article 8 § 2 of the Convention.

141. As regards the lawfulness of the interference, the Government objected against automatic implementation of the Court's findings made in *Xero Flor* (see *Xero Flor w Polsce sp. z o.o.*, cited above) due to significant difference between the facts of these cases and the scope of complaints. They stated that, given the role played by the Constitutional Court, the present case differed significantly from *Xero Flor*. In the present case, the Constitutional Court had acted in its role as a "negative legislator", not a court within the meaning of Article 6 of the Convention. In contrast with the applicant company in *Xero Flor*, the applicant in the present case had not applied for any remedy or recourse available under the domestic law. The Government stressed that the determination of circumstances in which the termination of pregnancy was possible was within the sovereign competence of the national legislature.

142. Furthermore, the 1993 Act had previously been amended by the Constitutional Court. In its judgment of 28 May 1997, the Constitutional Court had declared that section 4a (1) (4), which had allowed abortion for so-called "social reasons" (material or personal hardship), was incompatible with the Constitution (see paragraph 29 above).

143. The Government noted that the State authorities which could create the legal order of Poland were the *Sejm* and the Senate. The Constitutional Court could not interfere with the assessments, forecasts and choices made by the legislature unless there was a breach of constitutional norms, principles or values, or the relevant level of protection was set below the constitutionally required minimum.

B. The third-party interveners

1. European Centre for Law and Justice (ECLJ)

144. The ECLJ submitted that the Convention did not include a right to abortion. It also noted that when States decided to legalise abortion, this should be done with respect to the rights and freedoms guaranteed by the Convention, including protection against discrimination. Moreover, abortion on the basis of disability breached the principle of non-discrimination and violated the dignity of people with disabilities. In Poland, legal abortion was still allowed if the continuation of pregnancy would endanger the mother's life or health, including her mental health. Lastly, the intervener noted that the suffering inflicted on a foetus by a late-term abortion might constitute torture.

2. Ordo Iuris – Institute for Legal Culture

145. The Ordo Iuris Institute made detailed submissions with regard to the beginning of human life and the legal status of *nasciturus* as defined in international documents, the Court's case-law and the *travaux préparatoires* of the Convention. The organisation further stated that, given the wide margin of appreciation afforded to member States in relation to sensitive moral and ethical issues, they were allowed to decide whether or not to make abortion legal. When a State decided to legalise abortion, this resulted in a right to abortion at national level. In such situations, a positive obligation arose at Convention level to establish a procedure ensuring that the right would not be theoretical or illusory. Lastly, the intervener submitted that under Polish law, abortion constituted an act punishable by law, and there was provision for certain justifications (*kontratypy*) only when the unlawfulness of that act was excluded. Consequently, Polish law did not grant the right to abortion, but only chose not to prosecute abortion in exceptional, dramatic situations.

3. The Polish Ombudsman for Children

146. The Polish Ombudsman for Children stated that legislation in Poland permitting the termination of pregnancy in cases of foetal abnormality was incompatible with the constitutional principle of the protection of life as the highest value. Referring to the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities, the intervener argued that it was the duty of States to protect the life of a child both during the prenatal period and after birth. Trisomy 21 was not a disease, but a syndrome involving congenital anomalies.

4. Helsinki Foundation for Human Rights (HFHR)

147. The HFHR submitted that the issuing of the Constitutional Court's judgment of 22 October 2020 had involved a serious breach of the law. It referred to the irregular composition of the court's panel and noted that according to many lawyers, such a ruling could be considered a "non-existent judgment" which was devoid of any legal effect.

148. The intervener also presented the results of a survey concerning access to abortion in Poland which had been conducted between November 2020 and January 2021. In particular, it submitted that the Constitutional Court's judgment of 22 October 2020 had affected the availability of legal abortion in Poland even before its publication in the Journal of Laws. It also pointed to a number of practical and procedural obstacles to accessing legal abortion in Poland. In particular, the procedure provided for under the 2008 Act (see paragraph 44 above), whereby a patient could lodge an objection against a doctor's medical opinion or certificate with the Medical Commission within thirty days from the date if its issuance, was

excessively formalistic and did not guarantee that a pregnancy could be terminated within the legal time-limit.

5. European Network of National Human Rights Institutions (ENNHRI)

149. The ENNHRI submitted that the assessment of whether the interference in the present case had been justified required consideration of whether the imposed restrictions had been introduced in compliance with the rule of law principles and, as a result, by a tribunal "established by law". In the light of the case-law of the Court and the CJEU, objectively justified, legitimate reasons to fear that a particular court lacked independence or impartiality precluded such an authority being considered to meet the Convention standards. The interveners referred to the CJEU's judgment of 21 December 2021 (see paragraph 72 above), in which that court had held that although Article 19 of the TEU might not fully apply to organs of constitutional review, as there was a large disparity between models of constitutional review in member States and such organs were not always to be considered "tribunals" in the strict sense of this term, if the national law provided for the universal application of their decisions and the legal force of those decisions was binding upon judges in national cases, such organs had to meet minimum standards linked to the right to a fair trial, in particular the principle of independence.

150. As regards the issues under Articles 3 and 8 of the Convention, in the context of limiting access to abortion, the ENNHRI maintained that a pregnant woman's decision as to whether or not to continue with a pregnancy belonged to the sphere of private life and autonomy. While member States were allowed a wide margin of appreciation with regard to abortion law, that margin was not unlimited and did not allow for the introduction of arbitrary and disproportionate measures.

151. Lastly, the ENNHRI provided the results of a survey conducted in 2022, regarding access to abortion in twenty-six member institutions (Albania, Belgium, Bosnia and Hercegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Netherlands, Northern Ireland, Norway, Portugal, Romania, Scotland, Serbia, Slovakia, Slovenia and Spain) which indicated that the majority of European countries guaranteed relatively broad access to abortion.

C. The Court's assessment.

1. Whether the case concerns positive or negative obligations

152. The Court observes that the applicant's grievances essentially concerned the argument that the prohibition in Poland of abortion on the grounds of foetal defects, where an abortion was sought for health and/or

well-being reasons, had disproportionately restricted her right to respect for her private life. Thus, the Court considers it appropriate to analyse this complaint as one concerning negative obligations (see *A, B and C v. Ireland*, cited above, § 216).

2. Whether there was an interference

153. The Court has previously held that not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother (see *Brüggemann and Scheuten v. Germany,* no. 6959/75, Commission decision of 19 May 1976, Decisions and Reports 5, p. 103; *Vo*, cited above, § 76; and *A, B and C v. Ireland*, cited above, § 216).

154. In the present case, the Government argued that as there was no right to abortion under the Convention, the introduction of more restrictive domestic regulations could not be regarded as an interference with the applicant's rights (see paragraph 138 above). The Court is unable to accept this view. Having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity (see paragraph 91 above), the Court finds that the applicant's being prohibited from terminating her pregnancy on the grounds of foetal abnormality, where the termination was sought for reasons of health and well-being (see paragraphs 100 above), amounted to an interference with her right to respect for her private life.

155. To determine whether this interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article, namely, whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention (see *A, B and C v. Ireland*, cited above, § 218).

3. Whether the interference was "in accordance with the law"

(a) General principles

156. The expression "in accordance with the law" requires, firstly, that the impugned measure must have a basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in the subject matter and aim of Article 8. It states the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82, and *Juszczyszyn*, cited above, § 261).

157. Secondly, the expression refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and be compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, *Reports of Judgments and Decisions*

1998 II). The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts), with further references, and *De Tommaso v. Italy* [GC], no. 43395/09, §§ 106-09, 23 February 2017). In particular, as regards the requirement of foreseeability, the Court held that a rule was "foreseeable" if it was formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct (see, among many other authorities, *Malone,* cited above § 67 and *Rotaru v. Romania* [GC], no. 28341/95, § 55., ECHR 2000-V).

158. The interference with the right to respect for one's private and family life must therefore be based on a "law" that guarantees proper safeguards against arbitrariness. There must be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse of powers. The requirements of Article 8 with regard to safeguards will depend, to some degree at least, on the nature and extent of the interference in question (see *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 113, 20 September 2018, with further references).

159. The Court reiterates that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see, among many other authorities, *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018).

(b) Application of the general principles to the present case

160. The Court notes at the outset that the conditions for legal abortion in Poland are set out in the 1993 Act. The passing of the 1993 Act involved a lengthy political debate which reflected profoundly differing views and demonstrated the sensitivity and complexity of the issues at stake. Initially, the 1993 Act provided for three situations where legal abortion was possible: where the pregnancy endangered the mother's life or health; where there was a high risk of foetal malformation; or where there were grounds to believe that the pregnancy was a result of rape or incest. In 1997 it was amended to allow abortion for reasons of difficult living conditions or difficult personal situations. However, shortly afterwards, the Constitutional Court gave a judgment finding that amendment incompatible with the Constitution (see paragraphs 26-29 above). Despite several legislative initiatives from those in favour of greater legal access to abortion on one hand, and those advocating for the restriction of existing grounds for lawful abortion on the other hand (see paragraphs 32-34 above), this so-called "abortion compromise"

remained unchanged for the next twenty years, until the Constitutional Court's judgment of 22 October 2020.

161. Turning to the circumstances of the present case, the Court observes that the restriction was based on the Constitutional Court's judgment of 22 October 2020 which declared section 4a(1)(2) of the 1993 Act incompatible with the Constitution (see paragraphs 39 above). However, the parties' opinions diverge considerably on whether the interference was lawful for the purpose of the Convention, notably whether the relevant legal framework was compatible with the rule of law.

162. The applicant contended that there had been a number of fundamental shortcomings in the adoption of the judgment forming the legal basis for the interference, and given those shortcomings, the judgment of 22 October 2020 could not be regarded as having been delivered in accordance with the law (see paragraphs 128-132 above). The Government retorted that the Constitutional Court had acted in its role as a "negative legislator", and not as a court within the meaning of Article 6 of the Convention, and in any event the composition of the panel in case no. K1/20 had been lawful and regular.

163. The Court has already held that it is fully aware of the special role and status of a constitutional court, whose task is to ensure that the legislative, executive and judicial authorities comply with the Constitution, and which, in those States that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed in the Constitution (see *Süßmann v. Germany*, 16 September 1996, § 37, *Reports* 1996-IV, and *Xero Flor w Polsce sp. z o.o.*, cited above, § 193). At the same time it has no doubt that the Constitutional Court should be regarded as a "tribunal" within the meaning of Article 6 § 1 (see *Xero Flor w Polsce sp. z o.o.*, cited above, § 194).

164. The Court further notes that the Constitutional Court's judgment of 22 October 2020 was adopted in the process of a constitutional review of the domestic legislation. The procedure was initiated pursuant to Article 191 § 1 (1) of the Polish Constitution, by a group of members of parliament who contested the constitutionality of section 4a(1)(2) of the 1993 Act (see paragraph 14 above). While it is true that the applicant was not a party to those proceedings (compare *Xero Flor w Polsce sp. z o.o.*, cited above), they were of key importance to her rights and to those of many other persons in similar situations. In that regard, the Court points out that however proceedings are initiated before the Constitutional Court, the effects of its judgments are the same and affect the rights of all persons in comparable situations (see paragraph 25 above). In the present case, as a direct consequence of the Constitutional Court's ruling, which abrogated the provisions relating to abortion on the grounds of foetal defects, the applicant's hospital appointment was cancelled and she was almost instantly left with no

other option but to travel abroad to have a termination. Thus, in the Court's view, the proceedings before the Constitutional Court were directly decisive for the applicant's rights, in particular her right to respect for her private life.

165. The Court would also note in passing that while the proceedings before the Constitutional Court were taking place, a draft bill proposing an amendment to the 1993 Act to remove the option to terminate a pregnancy on the grounds of foetal abnormalities was being discussed in the *Sejm* (see paragraphs 34 and 43 above).

166. The Court has previously largely disregarded the kind of procedure leading to the enactment of a specific law relied on in support of an interference with a right secured under the Convention, the only limit being arbitrariness (see *G. S. B. v. Switzerland*, no. 28601/11, § 72, 22 December 2015). Nevertheless, in the specific circumstances of the present case, the Court finds it necessary to reiterate that, as the Convention is a constitutional instrument of European public order, the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 145, ECHR 2016). This is all the more so since the Statute of the Council of Europe refers to the rule of law in two places: firstly in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3, which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..." (see *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18, and *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 225, 20 September 2018).

167. The Court reiterates in that regard that the rule of law is inherent in all the Articles of the Convention (see *Golder*, cited above, § 34) and the whole Convention draws its inspiration from that principle (see *Engel and Others v. the Netherlands*, 8 June 1976, § 69, Series A no. 22). Accordingly, the guarantees of the right to respect for private life under Article 8 must also be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. In the context of Article 6 § 1, the Court has already held that the right to a "tribunal established by law" is a reflection of the principle of the rule of law. It has further discerned a common thread running through the institutional requirements of this provision, that is, "independence", "impartiality" and "tribunal established by law", in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 233 and 237, 1 December 2020, and *Reczkowicz v. Poland*, no. 43447/19, § 260, 22 July 2021). It is thus implied, in the light of the rule of law principle, that any interference with Article 8

rights must emanate from a body which is itself "lawful", without that it will lack the legitimacy required in the democratic society.

168. It is true that the judgment of the Constitutional Court was adopted in the process of constitutional review of the domestic legislation and, in contrast to *Xero Flor w Polsce sp. z o.o.*, did not concern an individual decision issued in breach of the right to a "tribunal established by law" under Article 6 § 1 of the Convention (compare *Juszczyszyn*, cited above, §§ 216 and 265, and *Tuleya v. Poland*, nos. 21181/19 and 51751/20, §§ 348 and 439, 6 July 2023). However, where, as in the present case, an interference with the right to respect for private life arises from the ruling of a national judicial body directly decisive for the applicant's rights, an assessment of its compliance with the rule of law test in Article 8 may also require an examination of that judicial body's attributes as a "tribunal" which is "lawful" for the purposes of the Convention, including in respect of its composition and the appointment procedure of its members (see, *mutatis mutandis*, *Juszczyszyn*, §§ 265-270, and *Tuleya* §§ 439-443, both cited above).

169. Turning to the examination of the specific shortcomings of the proceedings before the Constitutional Court when – as emphasised by the Government (see paragraph 141 above) – it was acting in its role as a "negative legislator", proceedings which allegedly rendered the interference "not in accordance with the law", the Court notes that the judgment in question was delivered by a bench composed of thirteen judges, including Judge M. Muszyński, Judge J. Piskorski, Judge J. Wyrembak, Judge K. Pawłowicz and the President of the Constitutional Court, Judge J. Przyłębska (see paragraph 39 above). The applicant questioned the appointment and/or impartiality of all those judges (see paragraphs 128-131 above).

170. In this context, the Court observes that Judge M. Muszyński was elected on 2 December 2015 together with four other judges: Judge H. Cioch, Judge L. Morawski, Judge P. Pszczółkowski and Judge J. Przyłębska (see *Xero Flor w Polsce sp. z o.o.*, cited above, §§ 19-20). In 2017 Judge L. Morawski passed away and was replaced by Judge J. Piskorski later that year. Subsequently, following the death of Judge H. Cioch, Judge J. Wyrembak was elected and took the oath of office in 2018 (see paragraphs 8, 9 above).

171. In that regard, the Court notes that in *Xero Flor* (see *Xero Flor w Polsce sp. z o.o.*, cited above, §§ 289-90), in the context of a complaint under Article 6 § 1 of the Convention, it found that the fundamental rule applicable to the election of Constitutional Court judges had been breached by the eighth-term *Sejm* and the President of the Republic. The eighth-term *Sejm* had elected three Constitutional Court judges on 2 December 2015 (M. Muszyński, H. Cioch and L. Morawski), even though the respective seats had already been filled by three judges elected by the previous *Sejm*. The President of the Republic had refused to swear in the three judges elected by

the previous *Sejm*, and had received the oath of office from the three judges elected on 2 December 2015 (ibid., § 289). The Court further held that the breaches in the procedure for electing those three judges had been of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a “tribunal established by law”. Having regard to the three-step test set out in *Guðmundur Andri Ástráðsson* (cited above, § 243), the Court concluded that the applicant company in that case had been denied its right to a “tribunal established by law” on account of Judge M. Muszyński’s participation in the proceedings before the Constitutional Court; that judge’s election had been vitiated by grave irregularities that had impaired the very essence of the right at issue (see *Xero Flor w Polsce sp. z o.o.*, cited above, § 290).

172. In the present case, the fact that the bench of the Constitutional Court which issued the ruling of 22 October 2020 included Judge M. Muszyński, when seen in the light of the Court’s judgment in *Xero Flor w Polsce sp. z o.o* and its conclusion under Article 6 § 1, is by itself capable of vitiating the legal force to be attached to that judgment (ibid., § 290, and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, § 319, 8 November 2021).

173. Moreover, the Court points out that Judges J. Piskorski and J. Wyrembak, who likewise sat on the bench, were elected in 2017 and 2018 respectively in order to replace two other judges who had been elected together with Judge M. Muszyński by the eighth-term *Sejm* in a procedure which the Court has already found to be in breach of Article 6 (see *Xero Flor w Polsce sp. z o.o* , cited above, and paragraphs 8 and 9 above).

174. Consequently, given that the irregularities in the election procedure of the above-mentioned judges compromised the legitimacy of the Constitutional Court’s bench which introduced the impugned restriction as a “tribunal established by law”, its ruling fell short of what the rule of law required (see *Guðmundur Andri Ástráðsson*, cited above, § 226; in that context see also the European Commission’s action seeking a declaration by the CJEU that the Constitutional Court does not satisfy the requirements of an independent and impartial tribunal previously established by law as a result of irregularities in the procedures for the appointment of three judges to that court in December 2015, cited in paragraph 68 above). In view of this conclusion, the Court does not see a need to examine in detail the remaining shortcomings alleged by the applicant, in particular the allegations that the appointment of Judge J. Przyłębska, the President of Constitutional Court, was open to challenge, and the issue of the impartiality of Judge K. Pawłowicz, who had previously been a member of parliament in favour of restricting abortion laws in Poland.

175. In view of the foregoing, the Court finds that the interference with the applicant’s rights cannot be regarded as lawful in terms of Article 8 of the Convention because it was not issued by a body compatible with the rule of law requirements (see paragraph 156 above). Furthermore, the circumstances

of the present case disclose the lack of foreseeability required under Article 8 of the Convention, given that the Constitutional Court's ruling interfered with the medical procedure for which the applicant had qualified and which had already been put in motion, thus creating a situation where she was deprived of the proper safeguards against arbitrariness (see the relevant general principles cited in paragraph 158 above and *Juszczyszyn*, cited above, § 265). In view of the foregoing, the Court finds that the interference with the applicant's rights "was not in accordance with the law" within the meaning of Article 8 of the Convention.

176. There has accordingly been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

177. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

178. The applicant claimed 1,220 euros (EUR) in respect of pecuniary damage. This amount corresponded to the costs associated with her abortion in the Netherlands: the cost of the medical treatment in a private clinic, and the transport and accommodation costs incurred by her and the person who supported her abroad. In that connection, she submitted an invoice from the clinic for 830 EUR and a receipt for EUR 174 for a stay in a hotel. She further claimed EUR 50,000 in respect of non-pecuniary damage, in relation to the damage that she had suffered on account of being pregnant at the time the Constitutional Court had delivered its judgment and discovering that the foetus had trisomy 21.

179. The Government submitted that these claims were unfounded. They stressed that the sum requested by the applicant in respect of non-pecuniary damage was exorbitant. They further noted that the applicant had submitted only two invoices in relation to her pecuniary claim. They argued that this claim had no connection with the alleged violation of the Convention. In addition, they maintained that the costs of any medical services abroad were generally not reimbursed by the National Health Fund, unless reimbursement was otherwise provided for by a specific legal provision

180. The Court observes that in *A, B and C v. Ireland* (cited above, §§ 277-278) it rejected the applicant's claims in respect of pecuniary and non-pecuniary damage which were linked to her travelling abroad for an abortion, as there was no established causal link between the violation found

and the applicant's claims. However, the applicant's situation in the present case is significantly different. She initially qualified for an abortion on the grounds of foetal abnormality, in accordance with the relevant legal provisions. However, just before the procedure was carried out, the Constitutional Court repealed the relevant legal provisions and she could no longer have an abortion in Poland. As she did not wish to continue with the pregnancy, travelling abroad to access abortion services was her only option (compare and contrast *A, B and C v. Ireland*, cited above, § 277). Consequently, in the Court's view, in the present case, there is a clear link between the violation found and the pecuniary damage alleged by the applicant.

181. In relation to the applicant's claim in respect of pecuniary damage, the Court observes that the applicant did provide some evidence in support of her claims, that is, two invoices for medical and accommodation costs amounting to EUR 1,004 in total. Having regard to the violation found (see paragraphs 174 and 175 above), it considers that this amount should be reimbursed by the respondent State. It therefore awards the applicant EUR 1,004 in respect of pecuniary damage and rejects the remainder of the claim as unsubstantiated.

182. The Court further finds that the restriction imposed by the Constitutional Court's judgment caused the applicant considerable anxiety and suffering, in circumstances where she was confronted with the fear that her foetus had been diagnosed with a genetic abnormality and faced uncertainty as regards the availability of a legal abortion in such a situation. Ruling on an equitable basis, it therefore awards the applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable, and rejects the remainder of the claim.

B. Costs and expenses

183. The applicant also claimed EUR 5,025 for the legal costs incurred before the Court. She stated that her lawyers had provided their services *pro bono*, but nevertheless asked the Court to award that sum, as she believed that those costs should be covered by the State as part of the financial compensation due.

184. The Government submitted that the applicant had not actually incurred any legal costs and had not submitted any bills in support of her claim, consequently her claim for costs and expenses was unjustified.

185. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant did not pay any fees to her representatives, who worked *pro bono*, nor is there any evidence that the applicant is under an obligation to pay any sum of money

to the lawyers. In such circumstances, these costs cannot be claimed since they have not actually been incurred. The Court therefore rejects the claim for costs and expenses.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the complaint concerning Article 3 inadmissible;

2. *Declares*, by a majority, the complaint concerning Article 8 admissible;

3. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

4. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,004 (one thousand four euros) plus any tax that may be chargeable, in respect of pecuniary damage;
   that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 December 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Alena Poláčková
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judges Jelić, Felici and Wennerström;
(b) dissenting opinion of Judges Wojtyczek and Paczolay.

R.D.
A.P.L.

CONCURRING OPINION BY JUDGES JELIĆ, FELICI AND WENNERSTRÖM

1. While we concur with the majority's finding of a violation of Article 8 of the Convention, we respectfully disagree with the majority's decision to declare the complaint under Article 3 of the Convention inadmissible on the grounds that the applicant's treatment was not such as to reach the threshold of severity required by that provision. We believe that the part of the judgment relating to that provision is illustrative of shortcomings in Polish legislation and practice regarding abortion which raise serious issues of personal insecurity and legal uncertainty for vulnerable women and concerns as to the protection of their dignity when claiming the right to abortion under Polish law.

2. The applicant's treatment was severe – a fact which was not sufficiently taken into account by the majority of the Chamber. An atmosphere of heightened tension and emotions has already been assessed as a relevant contextual factor in the Court's case-law (see *Khlaifia and Others v. Italy*, no. 16483/12, § 160, 15 December 2016), but that aspect of the context was disregarded in this judgment. In addition, we believe that there should have been an assessment of whether the victim was in a vulnerable situation and what impact this may have had on the applicant's level of suffering and her feeling of insecurity. By ignoring these criteria, the majority failed to address crucial aspects of the present case, which diminishes, we believe, their overall assessment of the level of severity of the treatment inflicted on the applicant.

3. The applicant, who was seventeen weeks pregnant when she was abruptly denied the previously authorised termination of her pregnancy, which she had requested owing to a malformation of the foetus (trisomy 21), was indeed vulnerable. She complained that the "restrictions introduced by the Constitutional Court had caused her direct harm" since her medical appointment had been cancelled at the last minute and she had been forced to travel abroad to undergo an abortion, causing her "serious and real emotional suffering" and unimaginable "fear and anguish" (see paragraph 80 of the judgment).

4. As a victim, the applicant found herself in a very delicate, painful and vulnerable situation, which the judgment failed to take adequately into account. Indeed, as evidenced by many studies, any pregnancy termination procedure is a delicate and psychologically challenging experience for a woman, which should be handled with caution and requires appropriate psychological support, especially when it is to be carried out as a result of foetal malformation. In that regard, the UN Human Rights Committee's finding in the *Whelan v. Ireland* case is instructive, according to which a woman is "in a highly vulnerable position after learning that her much-wanted pregnancy [is] not viable" (UN Human Rights Committee, 17 March 2017, communication no. 2425/2014, § 7.5). The respondent

Government also admitted that “a situation where a woman discovered that her unborn child had severe defects was extremely difficult”, and that a “diagnosis confirming foetal abnormalities must have a significant emotional effect on any woman and her family” (see paragraph 78 of the judgment). The Court’s case-law expressly acknowledges the vulnerable situation in which a woman is placed when learning that the foetus is affected by a malformation (see *R.R. v. Poland*, no. 27617/04, § 159, 26 May 2011).

5. An additional burden on the applicant, as a vulnerable woman carrying a foetus with a malformation, was the insecurity in which she was thrown as a result of being denied her previously authorised termination of pregnancy only a day before it was scheduled to be performed. She found herself having to travel overnight to another country, from one day to the next, without being provided with any psychological or financial assistance from the State that had suddenly denied her the medical appointment. The psychological suffering experienced by the applicant is therefore evident and goes beyond a violation of Article 8.

6. Another aspect here is that the applicant had to undergo the termination of her pregnancy in a foreign setting, with medical personnel who were completely unfamiliar to her, were unaware of her particular situation and had not provided her with any prior support or guidance, the whole process taking place in a language different from her own. In that regard, in the *Mellet v. Ireland* case, the UN Human Rights Committee highlighted the importance, for a pregnant woman seeking an abortion, of terminating her pregnancy “in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted” (UN Human Rights Committee, 31 March 2016, communication no. 2324/2013, § 7.4). By contrast, in the present case, the applicant was placed in an extremely vulnerable and insecure position that inevitably triggered feelings of fear and anguish. Intense physical or mental suffering, diminishing the applicant’s human dignity and arousing feelings of fear, anguish or inferiority could be found to fall under other provisions in addition to Article 8 (see *Bouyid v. Belgium*, no. 23380/09, § 87, ECHR 2015).

7. Taking into account the circumstances of the present case, emphasis should be put not only on the “emotional and mental pain” (see paragraph 84 of the judgment) suffered by the applicant, but also on the humiliation she endured, along with feelings of fear and anguish. In that regard, in its General Comment no. 36 on the right to life, the UN Human Rights Committee stressed the need to prevent the stigmatisation of women and girls who seek abortion (UN Human Rights Committee, General Comment no. 36 on Article 6: right to life, 2019, CCPR/C/GC/36, § 8).

8. Finally, there are several uncertainties that speak in favour of the applicant’s claims, under and beyond Article 8 of the Convention, and illustrate the State’s failure to provide legal certainty and personal security to the applicant. It remains unclear why the medical staff failed to inform the

applicant that the Constitutional Court's ruling was about to take effect; instead she had been prepared for the abortion in the days preceding its sudden denial. Additionally, there is a lack of clarity as to why the medical appointment was scheduled if it was indeed clear at the time of the prenatal screenings (performed on 12 and 20 January 2021) that the Constitutional Court's ruling would take effect on 27 January and that the abortion would therefore no longer be possible. Lastly, the reason for deferring the appointment to 28 January – after the ruling was to have taken effect – is unclear, considering that on 26 January three medical practitioners from Bielański Hospital had already declared that, in accordance with the law in force at that time, the foetus's condition was such that the applicant qualified for an abortion in the same hospital (see paragraph 20 of the judgment).

9. In conclusion, it is for the above reasons that we take the view that the psychological stress to which the applicant was subjected, considered in the light of her vulnerability and the context of uncertainty and personal insecurity, reached the threshold of severity for consideration beyond the scope of Article 8 alone.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND PACZOLAY

We respectfully disagree with the view that the instant application is admissible, and that there has been a violation of Article 8 in the present case.

1. REMARKS ABOUT THE DOMESTIC LAW

1. The Polish legislation in force before the delivery of the Constitutional Court's judgment of 22 October 2020 permitted abortion provided that, in particular, "prenatal examinations or other medical factors indicate a high probability of a grave and irreversible impairment of the foetus or an incurable disease threatening his [or her] life". We note in this connection that the precise scope of these grounds was and remains a matter of public and scholarly dispute in Poland. We also note that abortion in cases of trisomy 21 was not prosecuted prior to 22 October 2020 and that the Polish press has reported abortions in cases of trisomy 21 performed in Poland after 27 January 2021.

However, in our view, it would be difficult to consider that trisomy 21 *per se* attains the threshold of severity envisaged in the provision in question. Therefore, the practice of performing an abortion in cases of trisomy 21 does not appear to be sufficiently grounded in the letter of Polish law. There were grounds to consider – even before the judgment of 22 October 2020 – that abortion could be refused in cases of trisomy 21 as not reaching the threshold of severity required by the provision in question. Such situations most probably arose prior to the judgment of 22 October 2020 and refusals in such cases would have had a further legal basis in Article 38 of the Constitution. Moreover, in Poland, medical practitioners may in any event refuse to perform abortions on grounds of conscientious objection.

In this context, the question whether the impugned judgment of the Constitutional Court was the actual basis for an interference that was directly decisive for the applicant's situation would have required a much more thorough analysis.

2. THE MARGIN OF APPRECIATION

2. The Court has always emphasised that a very wide margin of appreciation is left to the States with regard to access to abortion. In the case of *A, B and C v. Ireland* ([GC], no. 25579/05, §§ 233 and 237, ECHR 2010) the Court set forth the following principles in that regard:

> "There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of

> that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention. ...
>
> Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case-law at paragraphs 75-80 in [*Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII]), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (see [*Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26], and *Vo*, § 82, ... cited above)."

This very wide margin of appreciation also has a bearing on the criteria for the review of lawfulness under the Convention.

It is also important in this context to keep in mind the following views expressed by the Court (see *Palfreeman v. Bulgaria*, 59779/14 (dec.), § 34, 6 May 2017):

> "The Court has consistently held, moreover, that it is not for Article 8, however broad its scope, to fill an alleged gap in fundamental rights protection which results from the decision of the respondent State to exercise the possibility, in accordance with international law, not to provide a particular substantive right (see, *mutatis mutandis*, *Misick v. the United Kingdom* (dec.), no. 10781/10, 16 October 2012)."

3. ABSENCE OF ANY RIGHT TO ABORTION UNDER THE CONVENTION

3. The majority state – in our view correctly – that there is no right to abortion under Article 8 (see paragraph 94 of the judgment). This statement entails as a logical consequence that a restriction on abortion is not a restriction on an Article 8 right and therefore cannot be seen as interfering with the rights secured by Article 8.

However, the majority in the same sentence express the view that, in at least in some circumstances, access to abortion is protected by Article 8. This view is further confirmed in paragraph 154 of the judgment. This means that, in the majority's view, Article 8 confers a right to abortion, at least in some circumstances. The reasoning therefore contains a logical contradiction.

4. CRITERIA FOR THE REVIEW OF LAWFULNESS UNDER ARTICLE 8

4. For decades the Court has developed the practice of conducting a very limited review of the lawfulness of interference with Article 8. The approach adopted in this regard is well summarised in the following passage from *Paradiso and Campanelli v. Italy* ([GC], no. 25358/12, § 169, 24 January 2017, emphasis added):

> "The Court reiterates that, according to its settled case-law, the expression 'in accordance with the law' not only requires that the impugned measure should have **some basis in domestic law,** but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012). However, it is for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176 A; *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998-II; and [Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], no. 38433/09, § 140, ECHR 2012]; see also *Delfi AS v. Estonia* [GC], no. 64569/09, § 127, ECHR 2015)."

The Court's approach was also explained in *G.S.B. v. Switzerland* (no. 28601/11, § 72, 22 December 2015) in the following terms:

> "... as it transpires from its case-law reiterated above, [the Court] largely disregards the kind of procedure leading to the enactment of a specific law relied on in support of an interference with a right secured under the Convention, the only limit being arbitrariness."

In its review of lawfulness, the Court has so far limited itself in practice to issues of substantive law. It has hitherto never reviewed the lawfulness of a procedure for enacting or abrogating general rules regulating the exercise of Convention rights. The assessment as to whether or not such measures are compatible with domestic law and the consequences of any non-compliance with domestic law has thus far always been left to the domestic authorities. In our view, in the instant case, the alleged interference satisfies the criterion of having "some basis in domestic law", as formulated in the Court's well-established case law.

The approach adopted in the instant case in respect of a general measure abrogating a legislative provision previously in force represents a major change in the application of the Convention. It overrules the Court's well-established case law and the issue should therefore have been addressed by the Grand Chamber. We note that under the new approach, it should be possible to assess whether legislation interfering with Convention rights has been adopted by a legislature elected in compliance with the standards of the rule of law.

We further note, in this context, that there are no similarities between the instant case and the cases of *Juszczyszyn v. Poland* (no. 35599/20, 6 October 2022) and *Tuleya v. Poland* (nos. 21181/19 and 51751/20,

6 July 2023), mentioned in the reasoning (see paragraph 167 of the judgment). In those cases, which concerned purely individual measures, the Court derived a violation of Article 8 from a violation of Article 6 in the adoption of individual measures.

5. THE ABSTRACT CONSTITUTIONAL REVIEW OF PRIMARY LEGISLATION

5.1. The majority state the following: "[the Court] has no doubt that the Constitutional Court should be regarded as a 'tribunal' within the meaning of Article 6 § 1 (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 194, 7 May 2021)" (see paragraph 163 of the judgment). We respectfully disagree with this statement for the following reasons.

Firstly, the judgment in the case of *Xero Flor* (cited above) pertained to a case involving civil rights in which a party to a civil-law dispute had lodged a constitutional complaint with the Constitutional Court to contest the constitutionality of legislation applied in that case. In the *Xero Flor* case Article 6 was applicable.

Secondly, the Court found in that case that the Constitutional Court, when adjudicating on civil rights in that case, had failed to satisfy the criteria of a "tribunal" within the meaning of Article 6. Therefore, the Polish Constitutional Court could not be regarded as a "tribunal" within the meaning of Article 6.

Thirdly, the relevant question is not whether the Constitutional Court should be regarded as a "tribunal" within the meaning of Article 6 but whether in a specific case it has to comply with the criteria set forth in Article 6. The Constitutional Court has to comply with the criteria of a "tribunal" within the meaning of Article 6 when two conditions are met: (i) it performs a concrete constitutional review of legislation and (ii) its ruling determines civil rights or a criminal charge. It cannot be required to satisfy the criteria of a tribunal within the meaning of Article 6 when it performs a purely abstract constitutional review of primary legislation or decides about rights not covered by Article 6. Under the Court's case-law, abstract constitutional review of primary legislation is not encompassed by Article 6. In particular, the Court's case-law has thus far never excluded abstract constitutional review of primary legislation performed by quasi-judicial, non-judicial or even political bodies.

We note in this context that the applicant complained separately of a violation of Article 6 in her application, but her complaints were communicated and addressed only under Articles 3 and 8, thereby confirming that Article 6 was implicitly considered not to apply.

In any event, the question whether the Constitutional Court "should be regarded" as a "tribunal" within the meaning of Article 6 while performing

an abstract constitutional review of primary legislation would have required a separate, thorough analysis.

5.2. The majority further state the following (see paragraph 168 *in fine* of the judgment, emphasis added):

> "However, where, as in the present case, an interference with the right to respect for private life arises from the ruling of a **national judicial body** directly decisive for the applicant's rights, an assessment of its compliance with the rule of law test in Article 8 **may also require** an examination of that judicial body's attributes as a 'tribunal' which is 'lawful' for the purposes of the Convention, including in respect of its composition and the appointment procedure of its members (see, *mutatis mutandis*, *Juszczyszyn*, §§ 265-270, and *Tuleya*, §§ 439-443, both cited above)."

This statement elicits the following remarks. Firstly, the question arises as to the meaning of the term "national judicial body". Under the Convention, a specific public body is either a tribunal within the meaning of Article 6 or is not a tribunal within the meaning of Article 6. What, then, is a "national judicial body" which is not a tribunal within the meaning of Article 6 but which should be a tribunal within the meaning of Article 6? There seems to be a serious logical flaw in the reasoning.

Secondly, what happens if an interference with the right to respect for private life arises from the ruling of a **non-judicial** body that is directly decisive for the applicant's rights? Should the Court also examine whether such a body has the attributes of a "tribunal" which is "lawful" for the purposes of the Convention, including in respect of its composition and the procedure for appointment of its members?

Thirdly, under the clear letter of the Convention as confirmed by the Court's well-established case-law, Article 6 is applicable "in the determination of ... civil rights and obligations or of any criminal charge". Such a determination has to be made – at least at last instance – by a body meeting all the criteria of a "tribunal" within the meaning of Article 6. Article 6 is not applicable if a ruling is directly decisive for the applicant's rights that do not belong to the category of "civil rights" within the meaning of Article 6. However, the majority have not even tried to assess whether there are any subjective rights at stake and whether they are "civil rights" within the meaning of Article 6.

Fourthly, the majority use the wording "**may require**". The question arises as to when exactly – and under what circumstances – the type of examination mentioned by the majority is required, and when it is not.

6. THE NEED FOR A MORE INCLUSIVE APPROACH IN RESPECT OF AN EXTREMELY VULNERABLE GROUP

6. We would like to note that the specificities of trisomy 21 do not appear to be sufficiently known to the broader public, such that persons with trisomy 21 are often negatively stereotyped. Against this backdrop, it should

be stressed that trisomy 21 does not prevent the persons affected by it from leading a happy and fulfilling life.

The majority underscore the fact that trisomy 21 is an "abnormality" (see paragraphs 154, 180 and 182 of the judgment) and a source of anxiety for the parents (see in particular paragraphs 84, 103 and 182 of the judgment). In our view, the instant judgment will contribute to enhancing prejudice against the extremely vulnerable class of persons with trisomy 21 and negatively stereotyping them as a burden on their families. In a democratic society, a more inclusive approach should be preferred, and this genetic diversity should be perceived not as threat but as a possible source of enrichment.

7. CONCLUSION

7. The majority have opted for a major change of paradigm, both in the review of lawfulness under the Convention and in the approach to the abstract constitutional review of primary legislation. Such an approach is difficult to reconcile with the principle of subsidiarity of the Convention system, as developed in the Court's case-law.