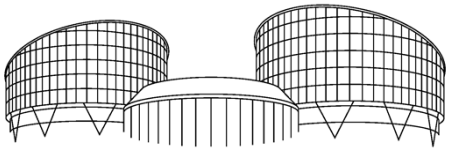

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 4188/21
A.M. against Poland
and 7 other applications
(see list appended)

The European Court of Human Rights (First Section), sitting on 16 May 2023 as a Chamber composed of:

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

Having regard to the above applications lodged on the various dates indicated in the appended table,

Having regard to the decision to give priority to the applications under Rule 41 of the Rules of Court,

Having regard to the decision to grant the applicants anonymity under Rule 47 § 4 and confidentiality of the case file under Rule 33,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the comments submitted by the Council of Europe Commissioner for Human Rights, who exercised her right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2 of the Rules of Court),

Having regard to the comments submitted by the third-party interveners, who were granted leave to intervene by the President of the Section (Article 36 § 2 of the Convention and Rule 44 § 3),

Having deliberated on 15 November 2022 and 16 May 2023, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix.

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

The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background to the case

(a) Constitutional Court case no. K 13/17

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

5. Among the signatories of the application was K.P., a member of parliament who was subsequently elected to the office of judge of the Constitutional Court on 5 December 2019.

6. In October 2019 parliamentary elections were held.

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

(b) Constitutional Court case no. K 1/20

8. 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) (first sentence) of the 1993 Act declared incompatible with the Constitution (case no. K 1/20).

9. On 22 October 2020 the Constitutional Court, sitting in plenary (thirteen judges), held by a majority of eleven votes to two that sections 4a (1) 2 and 4a (2) (1st sentence) of the 1993 Act were incompatible with the Constitution. The bench included Judge K.P. and Judges M.M., J.W. and J.A.P. and was presided over by Judge J.P., the President of the Constitutional Court. Publication of the judgment in the Journal of Laws was postponed (see also paragraph 31 below).

10. 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 entered into force on the date of its publication.

(c) Street protests

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

(d) Federation for Women and Family Planning

12. In January 2021 the Federation for Women and Family Planning ("FEDERA"), a Polish non-governmental organisation (NGO) campaigning on sexual and reproductive rights, posted online a pre-filled form for applications to the Court, together with attachments. FEDERA further encouraged women of child-bearing age living in Poland to lodge applications with the Court.

13. Potential applicants were invited to print out the pre-filled application form, add information about their personal circumstances, sign it and send it to the Court.

2. The present case

14. The applicants in the present case lodged their applications using the pre-filled application forms and attached copies of documents prepared by FEDERA (namely copies of the Constitutional Court's judgment, legal opinions prepared by the Commissioner for Human Rights of the Republic of Poland, the Helsinki Foundation for Human Rights and the Polish Bar Council, and press articles). At the beginning of the application form each applicant also added a few phrases describing her personal circumstances. None of the applicants attached any documents or medical certificates relating to their individual circumstances.

(a) Application no. 4957/21

15. The applicant submitted that she was thirty-five years old and suffered from chronic leukopenia, a severe allergy and severe myopia. She had experienced several anaphylactic shocks over the previous few years. Because of her illnesses she had been taking contraceptives and was not planning a pregnancy. However, no contraceptive method was completely effective. The applicant submitted that she was very worried about the effect that the Constitutional Court's judgment would have on her situation.

(b) Application no. 6217/21

16. The applicant submitted that she was forty years old and had been undergoing fertility treatment for the previous ten years. She had had three unsuccessful cycles of *in vitro* fertilisation (IVF) treatment. During the first pregnancy the embryo had not developed, and she had spent several days in hospital for a pharmacological termination.

17. Despite the fact that her age did not preclude pregnancy and her financial situation allowed her to continue IVF treatment, given the situation in Poland she would stop trying for a baby. Given her medical history, she was worried that if she became pregnant and the foetus was found to have a serious abnormality, she would not be able to terminate the pregnancy.

(c) Application no. 4188/21

18. The applicant submitted that she was thirty years old and twelve weeks pregnant. She stated that she was very worried about the possibility that the foetus might have genetic defects. She was afraid that she would not receive the requisite care from the State. She submitted that it would amount to torture if she was required to carry the child to term even in a situation when the foetus was found to have an abnormality.

(d) Application no. 5876/21

19. The applicant submitted that she was twenty-seven years old and ten weeks pregnant. However, instead of happiness she felt anxiety. She was afraid that in the event of complications she would be deprived of the requisite medical care. She was also worried that this situation would negatively affect her pregnancy.

(e) Application no. 5014/21

20. The applicant submitted that she was thirty-four years old and planning a pregnancy. She submitted that the Constitutional Court's judgment had caused her stress and anguish. She felt that her life could be endangered if she suffered health problems and was afraid that she would not receive adequate medical care from the State.

(f) Application no. 5523/21

21. The applicant stated that she was thirty-six years old and planning a pregnancy. She submitted that the Constitutional Court's judgment had caused her stress and made her afraid of becoming pregnant. She felt that her life could be endangered should there be any health complications and she was afraid that she would not receive adequate medical care from the State.

(g) Application no. 6114/21

22. The applicant submitted that she was thirty-seven years old. On 22 October 2020, when the Constitutional Court's judgment was delivered, she had stopped trying to become pregnant. She submitted that she lived in fear and humiliation. She was anxious that she would not receive help should she become pregnant and the foetus be found to have a serious abnormality.

(h) Application 8857/21

23. The applicant, who has not specifically indicated her age, submitted that she had two daughters. She and her husband would have liked to have more children, but the Constitutional Court's judgment meant that her rights as a mother and patient might not be respected. She did not wish to risk her life and health in the event of possible complications during subsequent pregnancies.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Domestic law and practice

1. The 1993 Law on family planning, protection of the human foetus and conditions permitting pregnancy termination and related statutes

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

25. 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; or 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.

26. On 4 January 1997 the 1993 Act was amended. In particular, the amendment allowed legal abortion during the first twelve weeks where the mother either suffered from material hardship or was in a difficult personal situation.

27. However, in December 1997, further amendments were made to the text of the 1993 Act, following a judgment of the Constitutional Court given in May 1997. In that judgment the court held that the provision legalising abortion on grounds of material or personal hardship was incompatible with the Constitution as it stood at that time.

28. Subsequently, on 22 October 2020, the Constitutional Court declared that the provision allowing for legal abortion in the event of foetal

abnormalities was also incompatible with the Constitution. The judgment entered into force on 27 January 2021 (see paragraph 32 below).

29. Section 4a of the 1993 Act, as it stands at present, reads, 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 cases listed above under subsection (1), sub-paragraph 2, abortion may be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under sub-paragraph 3 above, [abortion may be performed] until the end of the twelfth week of pregnancy.
>
> (3) In cases listed under subsection (1), sub-paragraphs 1 and 2 above, abortion shall be carried out by a physician working in a hospital.
>
> ..."

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

30. 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.

3. Constitutional Court

(a) Election of judges in 2015

31. 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).

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

32. 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 that section 4a (1) 2 of the 1993 Act was incompatible with Article 38 (right to life) in conjunction with Article 30 (right to dignity) in conjunction with Article 31 § 3 (limitations on constitutional rights) of the Constitution (see also paragraph 9 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 entered into force on the day of its publication, 27 January 2021.

33. 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 subject with a right to life, and the legal system had to guarantee due protection to this central interest, without which this subjectivity would be erased. The constitutional and legal subjectivity of the child in the period before birth did not mean, however, 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.

34. The Constitutional Court further noted that the assessment of the permissibility of termination of pregnancy, 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 possibility of sacrificing the child's interests, required an indication of an analogous interest on the part of other persons.

35. 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 an automatic presumption of infringement of a pregnant woman's interests, whereas the sole indication of a potential risk of such defects in the child was of a eugenic nature. There was no reference in the analysed provision to any measurable conditions of damage to the mother's interests justifying termination of the pregnancy, meaning a situation in which she could not legally be required to sacrifice the legal interest in question.

B. Relevant international documents

1. United Nations Human Rights Committee

36. 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 United Nations (UN) Human Rights 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 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 ..."

37. In two cases examined by the Human Rights 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.

2. The Council of Europe Commissioner for Human Rights

38. The Commissioner for Human Rights, Ms Dunja Mijatović, carried out a visit to Poland from 11 to 15 March 2019. In her report following the visit, published on 28 June 2019, she stated as follows:

"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."

COMPLAINTS

39. The applicants complained that they were potential victims of a breach of Article 8 of the Convention. While they had not been refused an abortion on the ground of foetal defects, the 1993 Act still breached their rights as they had been forced to adapt their conduct.

40. The applicants also complained under Article 8 of the Convention that the restriction had not been "prescribed by law" as (i) the composition of the Constitutional Court had been incorrect and in breach of the Constitution, since Judges J.A.P., M.M. and J.W., assigned to the bench, had been elected by the Sejm to judicial posts that were already occupied; (ii) the appointment of Judge J.P., the President of the Constitutional Court, who had presided in the present case, was also open to challenge; and (iii) Judge K.P., 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.

41. Lastly, the applicants claimed to be potential victims of a breach of Article 3 of the Convention. The prospect of being forced to give birth to an ill or dead child caused them anguish and distress.

THE LAW

A. Joinder of the applications

42. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly.

B. Alleged violation of Article 3 and 8 of the Convention

43. The applicants complained that they were potential victims of a breach of Article 8 of the Convention on account of the Constitutional Court's judgment of 22 October 2020. Under the same provision, they also complained that the restriction had not been "prescribed by law" given the incorrect composition of the Constitutional Court. Lastly, they claimed that they were potential victims of a breach of Article 3 of the Convention. These provisions of the Convention read, in so far as relevant, as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his private and family life ...

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."

1. The parties' submissions

(a) The Government

44. The Government submitted at the outset that none of the applicants could be regarded as a victim of a violation of Articles 3 or 8. In particular, the Government referred to the Court's position on "potential victims" as set out in *Dudgeon v. the United Kingdom* (22 October 1981, Series A no. 45), *Norris v. Ireland* (26 October 1988, Series A no. 142) and *S.A.S. v. France* ([GC], no. 43835/11, ECHR 2014 (extracts)).

45. The Government noted that, in order to claim to be a "potential victim", an applicant had to produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally would occur; mere suspicion or conjecture was insufficient. In that regard they submitted that the present applications had been lodged before the publication of the Constitutional Court's judgment on 27 January 2021. None of the applicants who had been pregnant at the time of lodging their applications with the Court (applications nos. 4188/21 and 5876/21) had submitted that the foetus had been diagnosed with severe and irreversible abnormalities or an incurable life-threatening disease. Furthermore, in their submissions the applicants had focused rather on a detailed composition of the Constitutional Court rather than a description of the facts of their individual situations. None of the applicants had provided any documentary evidence relating to their individual circumstances and medical condition. They had submitted only extremely limited information that did not permit to determine their medical situation. In addition, the majority of the applicants (applications nos. 4957/21, 5014/21, 5523/21, 6114/21, 6217/21 and 8857/21) had not been pregnant and one applicant (application no. 4957/21) had not even wished to start a family.

46. In the Government's view, the present case should be clearly distinguished from cases in which the Court had accepted that the applicants were "potential victims" on the ground that they belonged to a category of persons who had been at risk of being directly affected by the legislation in question. In those cases, no additional conditions had had to be met to fall within the scope of the contested regulations and the applicants had been forced to modify their conduct or else risk being prosecuted.

47. Conversely, in the case at hand the Constitutional Court's judgment of 22 October 2020 not only had not affected the applicants but could affect them only in very specific circumstances involving future and uncertain events. Firstly, the applicants would have had to become pregnant and secondly the foetus would have had to be diagnosed with severe and irreversible abnormalities or an incurable life-threatening disease. The Government concluded that the application forms contained very little information concerning the individual applicants and had been introduced following a national campaign organised by a pro-choice NGO which had

posted a template application form online. In their view the applicants had aimed to request the Court to review, *in abstracto*, the relevant law and practice concerning termination of pregnancy and to contribute to the political debate relating to reproductive rights and access to termination of pregnancy in Poland. Such complaints should have been considered as bringing of an *actio popularis* which the Convention did not envisage.

48. The Government also argued that the applications were incompatible *ratione materiae* with the provisions of the Convention as Article 8 of the Convention could not be interpreted as conferring a right to abortion.

49. Lastly, the Government submitted that the applications 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 present applications 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 in which it had stated that over 1,000 similar applications had been lodged with it.

(b) The applicants

50. The applicants disagreed with the Government's submissions that they could not claim to be victims of a breach of the Convention. They submitted, referring to the Court's case-law (*Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Norris*, cited above; *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008; *Michaud v. France*, no. 12323/11, ECHR 2012; and *S.A.S. v. France*, cited above), that they were "potential victims" within the meaning of Article 34 of the Convention. Although they had not been denied access to legal abortion on the grounds of foetal malformation, they asserted that the 1993 Act, as amended on 22 October 2020, infringed their rights. This was because the national law obliged them to adjust their conduct to its requirements, which in practice meant that they were confronted with a legal obligation to carry pregnancies to term even where the foetus was damaged or sick and potentially to give birth to a seriously ill child.

51. They maintained that all women of child-bearing age were subject to universally applicable national regulations concerning the availability of abortion. Accordingly, they had to adjust their conduct to the conditions created by law and to take them into account when making choices in reproductive matters. The need to adjust one's conduct in the most intimate sphere of personal life clearly made women potential victims in situations where the law had set strict conditions on access to lawful abortion or when it was *de facto* impossible in practice to convince the medical world that these conditions had been met.

52. The applicants in applications nos. 4188/21 and 5876/21 (who were pregnant at time of lodging their applications with the Court) and applications nos. 4957/21 and 6217/21 (who ran a higher risk of foetal malformation)

submitted that they had suffered uncertainty and fear on account of the unclear status of the Constitutional Court's judgment under domestic law prior to its official publication.

53. In addition, the applicants submitted that the legal restrictions on abortion in Poland, taken together with the risk of incurring criminal responsibility under Article 156 § 1 of the Criminal Code, could have a chilling effect on doctors when deciding whether the requirements of legal abortion were met in an individual case.

54. With regard to the Government's objection of incompatibility *ratione materiae*, the applicants maintained that they had not claimed "a right to abortion" but merely submitted that the legislation concerning the availability of legal abortion touched on the most intimate sphere of their life: the decision whether to have a child and in what circumstances.

55. Furthermore, they disagreed with the Government's submissions that the applications constituted an abuse of the right of individual application.

2. The third-party interveners in applications nos. 4188/21, 4957/21, 5876/21 and 6217/21

(a) Council of Europe Commissioner for Human Rights

56. The Commissioner, referring in particular to her 2019 country visit to Poland (see paragraph 38 above), provided information on the legal framework and practical situation relating to access to abortion in Poland. She also provided a comparative overview showing an established European consensus in favour of access to safe and legal abortion care. The Commissioner elaborated on the harmful impact of restrictive legal and policy frameworks regarding access to abortion on women's human rights. She concluded that in order to ensure the effective protection of women's human rights, Poland should urgently guarantee to all women and girls full and adequate access to safe and legal abortion care by bringing its law and practice into line with international human rights standards, including the Convention, and regional best practices.

(b) European Centre for Law and Justice

57. The European Centre for Law and Justice (ECLJ) submitted that eugenic abortion was contrary to human rights. On account of its very nature, abortion could never be a right or a freedom. Moreover, Poland had chosen to recognise unborn children as legal subjects and granted them legal protection from the moment of conception. By granting a child the right to non-discrimination on the grounds of disability, Poland was bringing itself into line with the most recent developments in international law, which prohibited mentioning disability as a specific ground for abortion.

(c) Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women's Link Worldwide, and World Organisation Against Torture (OMTC)

58. In their joint submissions, the interveners stated that women of reproductive age belonged to a class of people who were at risk of being directly and seriously prejudiced by legal prohibitions on abortion, whether or not they were currently pregnant or seeking an abortion. Abortion care was an essential element of healthcare which only women of reproductive age might require. Prohibitions on abortion compelled women of reproductive age to seek clandestine and often unsafe abortions, carry a pregnancy to term against their will, or, where this was possible, travel abroad to obtain abortion care, all of which exposed them to risks to their health, exacerbated social inequities and violated their human rights.

59. Lastly, the interveners submitted that prohibitions on abortion that were introduced as retrogressive measures removing existing legal grounds for access to abortion care could exacerbate harmful stigma and deepen existing uncertainties and anxieties for women of reproductive age, and further compounded the chilling effects on healthcare providers.

(d) Ordo Iuris – Institute for Legal Culture

60. 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* to the Convention. The organisation further stated that given the wide margin of appreciation afforded to member States, they were allowed to decide whether or not to make abortion legal.

(e) The UN Working Group on discrimination against women and girls (WGDAWG), the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the UN Special Rapporteur on torture and other cruel, inhuman or degrading or punishment and the UN Special Rapporteur on violence against women, its causes and consequences – "the UN experts"

61. In their joint submissions the UN experts noted that there was a clear international consensus that States must provide for abortion on broad grounds, including in cases of severe foetal impairment, and must decriminalise abortion in all circumstances, as otherwise they breached not only the right to privacy but also the right to be free from inhuman and degrading treatment as well as the right to equality and non-discrimination. In particular, the UN experts referred to two rulings of the UN Human Rights Committee (*Mellet v. Ireland* and *Whelan v. Ireland* – see paragraph 37 above) in which it had established that denying access to abortion care could constitute cruel, inhuman or degrading treatment.

(f) Clinique doctorale Aix Global Justice (Aix-Marseille Université)

62. The intervening organisation maintained that there existed a European consensus as regards the right to abortion, and an international consensus on the primacy of the life and health of pregnant women, which had to be taken into account in assessing the extent of the national margin of appreciation. The right to safe, legal and effective abortion included therapeutic abortion and abortion in cases of rape or incest. Therapeutic abortion was different from voluntary termination of pregnancy, as it could be performed only when there was a danger to the health or life of the mother or when the foetus suffered from a malformation.

(g) The Ombudsman for Children ("the Ombudsman")

63. The Ombudsman stated that legislation permitting termination of pregnancy in cases of foetal abnormality in Poland 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.

(h) International Federation of Gynecology and Obstetrics (FIGO)

64. FIGO submitted that unsafe abortion was a preventable cause of maternal mortality and morbidity. One of the most significant methods of reducing unsafe abortions was to provide broad legal access to abortion care. Restrictive abortion laws exerted a negative impact on comprehensive healthcare and the fundamental rights of women and girls.

(i) Professor Fiona de Londras on behalf of eight legal scholars

65. Professor de Londras submitted her comments on behalf of Dr Silvia de Zordo, Professor Sandra Fredman, Dr Atina Krajewska, Dr Natasa Mavronicola, Professor Sheelagh McGuinness, Professor Joanna Mishtal, Professor Ruth Rubio Marín and Professor Rosamund Scott.

66. The interveners argued that all persons who could become pregnant, all persons who were pregnant and all persons who received a diagnosis of foetal impairment were "victims" within the meaning of Article 34 of the Convention in respect of measures prohibiting abortion, including in cases of foetal impairment. They further submitted, referring to the findings made by various human rights bodies and in particular the UN Human Rights Committee, that the prohibition and criminalisation of abortion was incompatible with international human rights law.

(j) ADF International (Alliance Defending Freedom)

67. ADF International argued that States could choose through their domestic legal framework whether to protect unborn children from discriminatory abortion targeted against an unborn child with a life-limiting condition or disability (or a "foetal abnormality"). Moreover, where the State could show that it had taken into account extensive human rights protection for the unborn child and the scientific evidence demonstrating that abortion on grounds of "foetal abnormality" was not physiologically therapeutic or helpful for a pregnant woman, that State could not be held to have overstepped the margin of appreciation.

(k) Helsinki Foundation for Human Rights ("the HFHR")

68. The HFHR presented the results of a survey concerning access to abortion in Poland which had been conducted from November 2020 to January 2021. In particular, the organisation 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 further pointed to a number of practical and procedural obstacles to accessing legal abortion in Poland.

(l) Polish Bar Association

69. The Polish Bar Association was granted permission to intervene but did not submit third-party comments.

3. The third-party interveners in applications 5014/21, 5523/21, 6114/21 and 8857/21

70. Ordo Iuris Institute for Legal Culture, the HFHR and Amnesty International together with eight other organisations essentially repeated the comments they had already submitted in applications nos. 4188/21, 4957/21, 5876/21 and 6217/21 (see paragraphs 59-61 and 69 above).

4. The Court's assessment

71. The Court will first consider the objection of lack of jurisdiction *ratione personae* and examine whether the applicants may claim to be victims of a breach of Articles 3 and 8 of the Convention.

(a) General principles

72. 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 against 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*, cited above §§ 57 and 110, ECHR 2014 (extracts) and the references cited therein).

73. The Court has accepted that an applicant may be a potential victim in a number of cases. For example, it has accepted that an applicant enjoyed victim status under Article 34 of the Convention where he was not able to establish that the legislation he complained of had actually been applied to him, on account of the secret nature of the measures it authorised (see *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28); where a law against homosexual acts was capable of being applied to a certain category of the people, which included the applicant (see *Norris*, cited above §§ 31-33); where an alien's deportation had been ordered but not yet enforced and where enforcement of the order would have exposed him, in the receiving country, to treatment contrary to Article 3 (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90,91, Series A no. 161); and lastly where a court order restraining the corporate applicants, and their agents, from providing certain information to pregnant women was likely to indirectly affect applicants not belonging to the companies in question (see *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A). In the last-mentioned judgment, the Court recognised the victim status of Mrs X and Mrs Geraghty – two applicants whose beliefs had encouraged them to join the application lodged by the corporate applicants – on the grounds that "it [was] not disputed that they belong[ed] to a class of women of child-bearing age which may be adversely affected by the restrictions imposed" and that they "[were] not seeking to challenge *in abstracto* the compatibility of Irish law with the Convention". In contrast, in *Willis v. the United Kingdom* (no. 36042/97, ECHR 2002-IV), the risk to the applicant of being refused a widow's pension on grounds of sex at a future date was found to be hypothetical, since it was not certain that the applicant would otherwise fulfil the statutory conditions for the payment of the benefit at the date when a woman in his position would become entitled.

74. Thus, in order for an applicant to be able to claim to be a victim, he or she must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Tauira and 18 Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports 83-B, p. 112 at p. 131, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 101). In this regard the Court held, for

example, that to claim to be a victim of a statutory restriction on prison visits, the applicant prisoner had to demonstrate that he had potential visitors and had optimised his visiting rights to date (see *Chernenko and Others v. Russia* (dec.), no. 4246/14, § 45, 5 February 2019).

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

75. The Court notes that the applicants in the instant case complained about the Constitutional Court's judgment of 22 October 2020 (see paragraph 32 above) and submitted that, as women of child-bearing age, they had been affected by the changes to the legislative framework as they had had to adjust their conduct in the most intimate sphere of personal life.

76. The judgment in question removed one of the provisions legalising abortion from the 1993 Act and thus effectively banned access to legal abortion on the grounds of foetal malformation (see paragraphs 28 and 29 above). The applicants argued that they belonged to a group of people, namely "women of child-bearing age", who risked being directly affected by that measure (see paragraph 51 above). They did not claim that they had been denied access to legal abortion, but argued that the 1993 Act, as amended on 22 October 2020, infringed their rights nonetheless since the national law had obliged them to adjust their conduct and because they were confronted with a concrete legal obligation to carry pregnancies to term, even if the foetus was damaged or sick, and potentially give birth to a seriously ill child (see paragraph 50 above). At the same time the Government called into question the applicants' status as "victims", noting that the applicants' aim had been to request the Court to review, *in abstracto*, the law and practice concerning termination of pregnancy and that the applications amounted to *actio popularis* (see paragraph 47 above).

77. In this connection the Court reiterates that it is only in highly exceptional circumstances that an applicant may claim to be a victim of a violation of the Convention owing to the risk of a future violation (see *Tauira and 18 Others*, cited above).

78. It is true that in *Open Door and Dublin Well Woman* (cited above, § 44) the class of persons at real risk of being directly affected by an impugned measure was defined very broadly. However, that case concerned complaints under Article 10 of the Convention and the restriction imposed on the applicants on receiving information relating to abortion clinics operating lawfully in Britain. In that case it was clear that the two applicants as "women of child-bearing age" might have been adversely affected by the restrictions imposed by the relevant injunction. However, in the present case the applicants complained generally about the removal of one specific ground for legal abortion from the 1993 Act. In the Court's view the class of persons who can claim to be "victims" of such a violation must necessarily be much narrower. While a woman of child-bearing age in Poland, being exposed to the risk of pregnancy with foetal abnormalities, may be affected by the

impugned restrictions on access to therapeutic abortion, in order for an applicant to be able to claim to be a victim in such a situation, she must produce reasonable and convincing evidence of the likelihood that a violation affecting her personally will occur. Mere suspicion or conjecture is insufficient in this respect (see the general principles cited in paragraph 74 above).

79. The Court will thus examine whether the applicants in the present case produced reasonable and convincing evidence to be able to claim to be victims of a violation of the Convention.

80. In that regard the Court observes that the two applicants who claimed to have medical conditions which allegedly caused a higher risk of foetal malformation (see paragraphs 15 and 16 above) did not provide any medical evidence substantiating their claims in their original applications (see paragraph 14 above). Nor did they submit any such evidence even in response to the Government's reasoned objections (see paragraph 45 above).

81. The Court further notes that the two applicants who were pregnant at the time of lodging their applications (applications nos. 4188/21 and 5876/21) did not allege that their foetuses had been diagnosed with any abnormalities (see paragraphs 18 and 19 above). They also did not adduce any evidence as to their state of health or their potentially running a higher risk of foetal malformation. No documents relating to their individual circumstances were provided, for instance medical reports or any other relevant documents.

82. As for the remaining applicants, they described their personal situations in very general terms. The applicants in applications nos. 5014/21 and 5523/21 merely stated that they were planning pregnancy and the Constitutional Court's judgment caused them stress and anguish. They were also afraid that they would not receive adequate medical care from the State (see paragraphs 20 and 21 above). Nonetheless, those applicants also failed to provide any further details and/or any documents in support of their claims.

83. Lastly, the Court observes that the applicant in application no. 6114/21 stated that following the delivery of the Constitutional Court's judgment she had stopped trying to become pregnant. She had become anxious that if she became pregnant and the foetus was found to have a serious abnormality, she would not receive help (see paragraph 22 above). In similar terms, the applicant in application no. 8857/21 merely noted that she did not wish to risk her life and health in the event of possible complications during a pregnancy (see paragraph 23 above). However, those applicants likewise failed to provide any documents relating to their individual circumstances and have not put forward any further detailed arguments. Furthermore, with regard to the applicants' arguments that their life or health might be endangered in case of health problems during a future pregnancy or that they would not be able to receive adequate medical care (see paragraphs 19, 20, 21 and 23 above), the Court observes that section 4a (1) 1 of the 1993 Act still remains in force (see paragraph 29 above). Pursuant to

this provision if the pregnancy endangers the mother's life or health, medical abortion is authorised by law.

84. The Court also notes that while in the opening lines of their applications nearly all the applicants mentioned their age, none of them argued, either explicitly or in substance, that because of their age they were at a higher risk of having a child with chromosomal abnormalities.

85. The Court considers all the above-mentioned factors to be relevant and finds that the applicants' situation must be clearly contrasted with that of the applicants in, for example, *Dudgeon* (cited above § 41), *Michaud* (cited above, § 52) and *S.A.S. v. France* (cited above, § 57), who faced the dilemma of either complying with the contested regulations or refusing to do so and facing prosecution. The present case must also be distinguished from that of *Parrillo v. Italy* ([GC], no. 46470/11, §§ 117-19, ECHR 2015), where the very existence of the contested legislation continuously and directly affected the applicant's private life as she had been unable to donate her embryos to research since that legislation had come into force.

86. In the light of the foregoing, the Court cannot but conclude that the applicants failed to advance any convincing evidence that they were at real risk of being directly affected by the amendments introduced by the Constitutional Court's judgment. It would thus appear that the restrictions resulting from those amendments could only have hypothetical consequences for the applicants' personal situations, and such consequences seem too remote and abstract for the applicants to arguably claim to be "victims" within the meaning of Article 34 of the Convention. The Court further notes the complete absence of detailed individual particulars or any documentary evidence relating to the applicants' personal circumstances, making it impossible to conduct an assessment of their situation (see, *mutatis mutandis*, *Zambrano v. France* (dec.), no. 41994/21, §§ 43 and 44, 21 September 2021).

87. It follows that the applicants cannot claim to be victims within the meaning of Article 34 of the Convention and that the applications must be declared inadmissible in their entirety, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

88. In view of this finding, the Court considers that it is not necessary to examine the other preliminary objections advanced by the Government.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 8 June 2023.

Renata Degener Registrar	Marko Bošnjak President

Appendix

List of applications:

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence Nationality	Represented by
1.	4188/21	A.M. v. Poland	08/01/2021	**A.M.** 1990 Bydgoszcz Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
2.	4957/21	E.P. v. Poland	08/01/2021	**E.P.** 1985 Orzesze Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
3.	5014/21	M.B. v. Poland	11/01/2021	**M.B.** 1986 Warsaw Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
4.	5523/21	M.G. v. Poland	13/01/2021	**M.G.** 1984 Cracow Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
5.	5876/21	A.F. v. Poland	14/01/2021	**A.F.** 1993 Kraków Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
6.	6114/21	K.N. v. Poland	09/01/2021	**K.N-S.** 1984 Kościelisko Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
7.	6217/21	M.O.-M. v. Poland	08/01/2021	**M. O.-M.** 1980 Podkowa Leśna Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC
8.	8857/21	A.C. v. Poland	26/01/2021	**A.C.** 1992 Warsaw Polish	Monika GĄSIOROWSKA Agata BZDYŃ Kamila FERENC