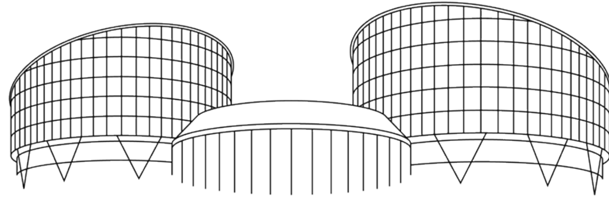

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF P. AND S. v. POLAND

(Application no. 57375/08)

JUDGMENT

STRASBOURG

30 October 2012

FINAL

30/01/2013

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 P. and S. v. Poland,

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

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 9 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 57375/08) 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 Polish nationals, Ms P. ("the first applicant") and Ms S. ("the second applicant"), on 18 November 2008. The Vice-President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms M. Gąsiorowska and Ms I. Kotiuk, lawyers practising in Warszawa. They were assisted by Ms Christina Zampas who was later replaced by Ms J. Westeson, both of the Center for Reproductive Rights. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the circumstances of their case had given rise to violations of Articles 8, 3 and 5 of the Convention.

4. On 29 September 2011 the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1993 and 1974 respectively and live in Lublin.

6. On 9 April 2008 the first applicant went with a friend to the Public University Health Care Unit in Lublin. She said that she had been raped on 8 April 2008 by a boy of her own age. The medical staff told her that they could neither examine her nor provide medical assistance because she was a minor and the consent of her legal guardian was necessary. Dr E.D. reported the case to the police and notified the first applicant's parents.

7. Later that day, after reporting that an offence of rape had been committed, the applicants attended at Public University Hospital no. 4 in Lublin, accompanied by a female police officer. The second applicant gave her consent for an examination of her daughter to be carried out. The first applicant was in a state of emotional shock. At the hospital, psychological help was offered to her. Bruises on her body were confirmed by a family doctor several days after the alleged event took place, between 9 and 14 April 2008.

8. The rape resulted in pregnancy. The applicants decided together that an abortion would be the best option, considering that the first applicant was a very young minor, that the pregnancy was the result of forced intercourse, and that she wanted to pursue her education.

9. On 19 May 2008 the first applicant was questioned by the police. Her mother and the alleged perpetrator's defence lawyer were present during the questioning. The first applicant stated that the perpetrator had used force to hold her down and to overcome her resistance.

10. On 20 May 2008 the District Prosecutor, referring to section 4 (a) item 5 *in fine* of the Law on Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) ("the 1993 Act") (see paragraph 54 below) issued a certificate stating that the first applicant's pregnancy had resulted from unlawful sexual intercourse with a minor under 15 years of age.

A. Attempts to obtain an abortion in Lublin hospitals

11. The second applicant went to the Ministry of Internal Affairs and Administration Hospital in Lublin to ask for a referral for an abortion. She was advised there to contact Dr O., the regional consultant for gynecology and obstetrics. Other doctors whom the second applicant contacted privately were also of the view that a referral from the regional consultant was necessary.

12. The second applicant also went to another public hospital in Lublin (the Jan Boży hospital) and contacted a chief physician there, Dr W.S., who suggested that the applicants meet with a Catholic priest. The second applicant refused.

13. The second applicant then contacted Dr O. He told her that he was not obliged to issue a referral and advised the second applicant to "get her daughter married". She left his office, but returned shortly afterwards as she was afraid that without the doctor's referral it would not be possible to obtain an abortion. He told her to report to the Jan Boży hospital.

14. On 26 May 2008 the applicants reported to that hospital. They were received by the acting chief physician. They clearly stated their intention to have the pregnancy terminated. They were told that they would have to wait until the head of the gynecological ward, Dr W.S., returned from holiday. They were told that it would be best for the first applicant to be hospitalised, with a view to blood and urine tests and an ultrasound scan being carried out. On the same day the first applicant was admitted to that hospital.

15. On 30 May 2008 Dr W.S. returned from holiday and told the applicants that she needed time to make a decision. She asked them to return on 2 June. She then called the second applicant separately to her office and asked her to sign the following statement: "*I am agreeing to the procedure of abortion and I understand that this procedure could lead to my daughter's death*." On the same day the first applicant was discharged from the hospital for the weekend.

16. On the morning of 2 June 2008 the first applicant returned to the hospital alone as her mother was working.

17. The applicants submitted that Dr W.S. took the first applicant for a talk with a Catholic priest, K.P. The first applicant was not asked what her faith was or whether she wished to see a priest. During the conversation it transpired that the priest had already been informed about the pregnancy and about the circumstances surrounding it.

18. The Government disagreed with the above account by the applicants. They stated that the girl had wished to see the priest.

19. During the conversation the priest tried to convince the first applicant that she should carry the pregnancy to term. The first applicant told him that she could not make the decision herself and that she relied on her parents in the matter. The priest asked her to give him her mobile phone number, which she did. She was given a statement written by Dr W.S. to the effect that she wanted to continue with the pregnancy and she signed it. The applicants submitted that she had signed it as she had not wanted to be impolite to the doctor and priest.

20. When the second applicant arrived later, the priest spoke to her. She told him that it was the family's decision to terminate the pregnancy. Dr W.S. told the second applicant that she was a bad mother. She presented her with the document signed by the first applicant and told her that the first

applicant had decided to continue with the pregnancy. An argument took place between the doctor and the second applicant. The first applicant, who was present in the room, started to cry. The doctor said that she would adopt both the first applicant and the baby.

21. Subsequently, Dr W.S. told the applicants that she would not perform the abortion, that under communism when abortion had been freely available no one had made her perform abortions, and that no doctor would have given permission for an abortion to be performed. According to the applicants, she also implied that none of the other doctors in the hospital would perform an abortion.

22. The applicants left the hospital. The second applicant contacted the Federation for Women and Family Planning (*Federacja na rzecz Kobiet i Planowania Rodziny* - hereinafter, "the Federation") in Warsaw for help, as after their experience in Lublin she was afraid that no one in that town would perform an abortion.

23. On an unspecified date the Jan Boży hospital issued a press release to the effect that it would not perform an abortion in the applicants' case. Journalists who contacted the hospital were informed of the circumstances of the case.

24. The case became national news. A number of articles were published by various local and national newspapers. It was also the subject of various publications and discussions on the internet.

B. Attempts to obtain an abortion in Warsaw

25. On 3 June 2008 the applicants went to Warsaw and contacted a doctor recommended by the Federation. They were informed about the procedure and about the available options. In the afternoon the first applicant was admitted to a hospital in Warsaw. She submitted to the hospital the certificate issued by the prosecutor (see paragraph 10 above), and a medical certificate issued by the national consultant in gynecology to the effect that she had a right to a lawful abortion. She signed a consent form to undergo an abortion and her parents also gave their written consent. Shortly afterwards the deputy head of the gynecological ward informed the applicants that he had received information from the Lublin hospital that the first applicant did not wish to have an abortion.

26. On 4 June 2004 the applicants were told that the first applicant was obliged by law to wait another three days before having an abortion. On the same day the first applicant received a text message from Catholic priest K.P. that he was working on her case and that people from all over the country were praying for her. She also received numerous text messages along the same lines from a number of unknown third parties. The priest came to the Warsaw hospital later in the day together with Ms H.W., an anti-abortion activist. They were allowed to see the first applicant. They

talked to her in her mother's absence and tried to persuade her to change her mind. In the evening an unidentified woman came to her room and tried to convince her to continue with the pregnancy. The first applicant was upset about this and about the fact that the hospital apparently had no control over who could approach her.

27. On the same day the first applicant's father came to the hospital, apparently as he had been informed that his consent to the abortion was also necessary. A psychologist spoke with the first applicant's parents and then with the applicant. She apparently prepared an opinion on the case. The first applicant's parents were not given access to it. The doctor who had admitted the first applicant to the hospital told her that a lot of pressure had been put on the hospital with a view to discouraging it from performing the abortion, and that the hospital was receiving numerous e-mails from persons criticising the applicants for having decided to allow the first applicant to have an abortion.

28. On 5 June 2008, feeling manipulated and helpless, the applicants decided to leave the hospital. As they were leaving, they were harassed by Ms H.W. and Mr M.N.-K., anti-choice activists waiting at the hospital entrance. The mother stopped a taxi but the activists told the driver that her parental rights had been taken away and that she was trying to kidnap the first applicant. The driver refused to take them. Ms H.W. called the police. The police arrived promptly and took both applicants to the police station.

C. The first applicant's placement in a juvenile shelter

29. At the police station the applicants were questioned on the same day, from approximately 4 p.m. until 10 p.m. No food was offered to them. The officers showed the applicants the family court decision which the police had received by fax at about 7 p.m. from the Warsaw hospital. That decision, given by the Lublin Family Court, restricted the second applicant's parental rights and ordered the first applicant to be placed in a juvenile shelter immediately (see paragraph 34 below).

30. Subsequently the police took the first applicant to a car. She was driven around Warsaw in search of a juvenile shelter that would accept her. The second applicant was not permitted to accompany her daughter. As no place was found in Warsaw, the police drove the girl to Lublin, where she was placed in a shelter at approximately 4 a.m. on 6 June 2008. She was put in a locked room and her mobile phone was taken from her. On 6 June 2008 priest K.P. visited her there and told her that he would lodge an application with the court requesting it to transfer her to a single mother's home run by the Catholic church.

31. A psychologist and an education specialist talked to her. She summarised the conversation thus:

> “They wanted to know the entire story and the Assistant Principal was present. I told them again about the entire affair with the hospitals and the abortion. They said that it would be better for me to give birth. They did not ask me about my view. I stayed locked in the room all day. I felt as though I was in a correctional facility, I had bars on the window and a locked door, it was not very pleasant.”

32. Later in the morning of that day the first applicant felt pain and experienced bleeding. In the late afternoon she was taken to the Jan Boży hospital in Lublin. She was admitted to the maternity ward. A number of journalists came to see her and tried to talk to her.

D. Proceedings before the Family and Custody Court

33. On 3 June 2008, acting upon a letter from the Lublin III Police Station and two letters from the headmaster of the school attended by the first applicant dated 26 and 27 May, and a note drawn up by a non-identified authority, apparently a court supervisor (*kurator*), also on 3 June 2008, the Lublin Family and Custody Court instituted proceedings to divest the second applicant of her parental rights.

In these letters the headmaster referred to a text message sent to a friend of the first applicant in which the first applicant had expressed serious distress and said that she could not count on her mother’s assistance as she saw abortion as the only solution, and to a conversation between the first applicant and one of her teachers in which she had said that she wished to carry the pregnancy to term. She had also been concerned about the consequences, including psychological ones, that an abortion might have. The headmaster was of the view, relying on a conversation he had had with the class teacher and with the school social pedagogue, that the first applicant might be under pressure from her family. He was concerned that the second applicant had not sought psychological assistance for her daughter, who, it had been suggested by the school, might have suicidal tendencies. The second applicant had been requested to attend at the school; she had been shown the text message and told to make an appointment with a psychologist immediately and given all the necessary information for contacting a therapist.

Enclosed with the letter was a print-out of a chat between the first applicant and her friend dated 7 May 2008. It transpired therefrom that in reaction to the news about the minor’s pregnancy her father had become violent and had told her that if she wanted to keep her baby she would have to move out of the house; she also said that she did not know what to do and wanted her friend to help and the school to intervene.

34. On the same date that court, sitting *in camera,* ordered the first applicant’s placement in a juvenile shelter as an *interim* measure. In its decision the court stated that the documents referred to above demonstrated that the first applicant’s parents did not take appropriate care of their

daughter. She was pregnant; she had been admitted to the Lublin Jan Boży hospital, which had refused to carry out an abortion having regard to the first applicant's statement that she did not wish to have recourse to it. The court had regard to text messages she had sent to her friend. Doctor W.S. had informed her about the consequences of an abortion. It was reported that the first applicant had travelled to Warsaw with her mother in order to have an abortion performed there. The first applicant was under pressure from her mother and was unable to take a decision independently. Her hospital stays and the atmosphere in the family were harmful to her. She had to be separated from her family in her own interest. The court relied on Article 109 para 1 (5) of the Family Code.

35. On 6 June 2008 the second applicant appealed against that decision. On 9 June 2008 she filed with the court a written consent to her daughter's abortion, which she also submitted to the Lublin hospital. On 10 June 2008 she submitted a declaration by the first applicant stating that she wanted to have an abortion and that she was not being coerced into it.

36. On 13 June 2008 the first applicant was questioned at the hospital by a criminal judge in the presence of a prosecutor and a psychologist, in the context of proceedings concerning allegations of coercion with a view to making her terminate her pregnancy. The first applicant testified that she had been forced into a sexual act which had resulted in pregnancy and that her mother had not forced her to make the decision to have a termination. The questioning started at 7.30 p.m. and lasted for three hours. The first applicant's parents were not permitted to be present. The first applicant did not have legal assistance or any other adult present to represent her as a minor. Later the same day the court allowed the second applicant to take her home. On 14 June 2008 she was discharged from the hospital.

37. On 18 June 2008 the Lublin Family Court quashed its decision concerning the first applicant's placement in the shelter.

38. On 18 February 2009 the Lublin Family and Custody Court, relying mainly on an expert opinion prepared by the Family Diagnostic and Consultation Centre, held that there were no grounds on which to divest the first applicant's parents of their parental rights. It discontinued the proceedings.

E. The applicants' contact with the Ministry of Health

39. Between 9 and 13 June 2008 the second applicant filed a complaint with the Office for Patients' Rights of the Ministry of Health asking them to help her daughter obtain a lawful abortion, and submitted relevant documents, in particular the prosecutor's certificate. An official of the Ministry, K.U., informed the second applicant that her daughter's statement consenting to an abortion would have to be witnessed by three persons. When the second applicant informed him that the statement had in fact been

signed in the presence of three witnesses, he told her that the witnesses' identification numbers were required and that the faxed copy had to be notarised.

40. On 16 June 2008 the second applicant was informed by telephone by a Ministry official that the issue had been resolved and that her daughter could undergo an abortion. She was notified that she would have to go to Gdańsk, in northern Poland, approximately 500 kilometers from their home in Lublin.

41. On 17 June 2008 the Ministry of Health sent a car for the applicants and they were driven to Gdańsk. The first applicant had an abortion in a public hospital there. The applicants submitted that the trip to Gdansk and the abortion were carried out in a clandestine manner, despite the termination being lawful. When the applicants came back home, they realised that information about their journey to Gdańsk had been put on the Internet by the Catholic Information Agency that day at 9 a.m.

F. Various sets of criminal proceedings

1. Against the first applicant

42. On 1 July 2008 the Lublin District Court instituted proceedings against the first applicant on suspicion that she had committed a criminal offence punishable under Article 200 § 1 of the Criminal Code (sexual intercourse with a minor under 15 years of age). The first applicant was summoned to appear in court for questioning on 25 September 2008.

43. On 20 November 2008 the proceedings were discontinued. The court held that the first applicant could only be considered the victim of a criminal offence, not the perpetrator.

2. Against the perpetrator of the alleged rape

44. On 28 August 2008 the second applicant informed the prosecutor that her daughter had been raped. According to her submissions, she was not aware that reporting the rape to the prosecuting authorities in May was not sufficient for an investigation to be instituted. The investigation against the perpetrator of the alleged rape was ultimately discontinued on 10 June 2011.

3. Against the second applicant, the first applicant's father and two other persons

45. On 14 July 2008 the Warsaw-Śródmieście District Prosecutor discontinued proceedings against the second applicant, the first applicant's father, Mrs W. N., and K.K., who worked for the Federation for Women and Family Planning, concerning a suspicion that the first applicant had been

coerced into having an abortion against her will. The prosecutor found that they had no case to answer and observed that it was not open to doubt, in the light of the documents submitted by the applicants to the Warsaw hospital, that she had a right to a lawful abortion.

4. Against other persons

46. A second set of proceedings, discontinued on the same date, concerned a suspicion that unknown persons, including doctors from Lublin and Warsaw, Catholic priests and members of anti-abortion organisations, had exerted pressure on the first applicant to dissuade her from having an abortion. The prosecutor found that there was no case to answer, because the criminal law did not penalise attempts to persuade a pregnant woman to carry the pregnancy to term as long as no physical violence was used.

47. The second applicant appealed against that decision.

5. Against Ms H.W. and Mr M.N.-K.

48. On 21 November 2008 the Warsaw-Śródmieście District Prosecutor discontinued proceedings that had been instituted against Ms H.W. and Mr M.N.-K., finding that they had accosted the applicants when they were leaving the hospital in Warsaw on 4 June 2008, but that they had no case to answer because no physical violence had been involved. On 19 September 2009 the Warsaw-Śródmieście District Court dismissed the applicants' appeal.

6. Against the police officers

49. On 17 September 2009 the Warsaw-Śródmieście District Court dismissed the first applicant's appeal against a decision given on 26 May 2009 by the Warsaw-Sródmieście District Prosecutor to discontinue criminal proceedings against the police officers who had detained her at the police station on the basis of the placement order. The prosecutor and the court found that the police officers had no case to answer.

7. Against various persons on charges of disclosure of confidential information

50. On 31 October 2008 the Lublin-Północ District Prosecutor upheld a decision given on an unspecified date by the police to discontinue an investigation into charges of unlawful disclosure of the applicants' personal data, finding that no criminal offence against the protection of personal data had been committed. No written grounds were prepared for these decisions as the law did not make it mandatory. The applicants appealed, submitting that when the first applicant had been in the Warsaw hospital, information about her real name, condition and predicament was available and discussed on many internet fora. This caused considerable stress to the applicants. The

medical data were particularly sensitive and their disclosure to the general public was unlawful. It was therefore necessary to establish the identity of the persons who had leaked the information to the public. On 31 March 2009 the Lublin Regional Court dismissed the appeal, finding that the prosecutor's decision was lawful and correct.

51. On 12 November 2008 the Lublin-Północ District Prosecutor upheld a decision given on an unspecified date by the police to discontinue an investigation into charges of disclosure of information protected by law, an punishable under Article 266 of the Criminal Code committed by Dr W.S., possibly also by other doctors working at that hospital, [2]by the director of the hospital who had spoken to the press about the applicants' case and by priest K.P. The applicants appealed submitting that information about the applicants' situation had been disclosed to the general public.

On 5 February 2009 the Lublin District Court dismissed the complaint, holding that the first applicant had not objected to the proposal to speak to the priest; that prior to her admission to the hospital information about her pregnancy was known in her school and to her friends and that the first applicant had not obliged the priest not to disclose information about her predicament to third parties. The court was of the view that it was well known that cases of teenage pregnancy gave rise to controversy and were normally widely discussed by third parties, social and church organisations engaged in the debate about such cases.

II. RELEVANT DOMESTIC LAW AND PRACTICE

52. The applicable provisions of domestic law are extensively summarised in the judgments of *Tysiąc v. Poland*, no. 5410/03, 20 March 2007, and *R.R. v. Poland*, no. 27617/04, 26 May 2011.

53. In particular, the Law on Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination), which is still in force, was passed by Parliament in 1993. Section 1 provided at that time: "every human being shall have an inherent right to life from the moment of conception".

54. Section 4(a) of the 1993 Act reads, in its relevant part:

> "1. An abortion can be carried out only by a physician and 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 suffer from an incurable life-threatening ailment;
>
> 3) there are strong grounds for believing that the pregnancy is the result of a criminal act.

2. In the cases listed above under 2), an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; and in cases listed under 3) above, until the end of the twelfth week of pregnancy.

3. In the cases listed under 1) and 2) above, the abortion shall be carried out by a physician working in a hospital.

...

5. The circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life. The circumstances specified in paragraph 1, subparagraph 3) above shall be certified by a prosecutor. ."

THE LAW

I. THIRD PARTIES' SUBMISSIONS

55. The Court will first set out the submissions received from the third parties who were granted leave to intervene in the case. It will then examine the admissibility and merits of the applicants' complaints under Articles 3 and 8 of the Convention.

A. The Polish Helsinki Foundation for Human Rights

56. In cases of sexual violence against women and girls, distress suffered by the victims is exacerbated by the risk of unwanted pregnancy or by actual pregnancy resulting from rape. A denial of timely access to necessary medical treatment for female victims of sexual assault, including legal abortion, exposes them to additional suffering and may constitute an act of inhuman or degrading treatment. The distress of a female victim of rape may also be amplified by the unauthorised release of confidential information concerning a rape-induced pregnancy.

57. In the intervenor's view, it is the State's obligation, stemming from Article 3 of the Convention, to adopt detailed guidelines for the criminal justice system and health-care practitioners in order to prevent additional suffering for the victim. Therefore, developing a specialised procedure regulating conduct towards victims of sexual abuse would not only assist in collecting the necessary evidence but also, more importantly, validate and address sexual assault patients' concerns, minimise the trauma they may experience and promote their healing.

58. In theory, the 1993 Act grants women a broad array of reproductive health services, for instance, medical, social and legal assistance, easy access to information and pre-natal testing, methods of family planning and oral contraceptives, and the possibility to terminate a pregnancy. However, despite the statutory wording, Polish women and girls face significant barriers when seeking these medical services in practice. Problems with effective access to legal abortion are reflected in governmental statistics on the execution of the Act: the official number of legal abortions carried out in Poland is very low. In 2009 there were only 538 procedures of legal abortion nationwide. In 510 of those cases the termination was caused by embryopathological factors; 27 procedures were conducted in order to protect the life and health of the pregnant woman, and only 1 abortion was carried out on grounds of the registered pregnancy having been caused by a criminal act. No comprehensive analysis has been presented to explain such a small number of abortions. The third party considers the data collected by the Government highly unreliable and doubts whether they reflect the real situation. The data should be seen against the background of police statistics to the effect that 1,816 cases of rape were reported in 2009. The low figures for lawful abortions in connection with the enforcement of the 1993 Act prove only that women find it less complicated to terminate pregnancies illegally than under the provisions of that statute.

59. Furthermore, in practice the "conscience" clause is often misused. Apart from being used by individual doctors, who fail to refer the patient to another hospital, it is also invoked by entire healthcare facilities, including public ones. Although the problem of such abuse is widely recognised, no effective monitoring mechanism has been put in place to ensure that women's right to abortion is respected.

B. The Rule of Law Institute, Lublin, Poland

60. Issues involving the legal definition of and protection of human life, the determination of the conditions for its acceptable termination, and the understanding of privacy and freedom of conscience are issues of fundamental importance deeply rooted in the culture of each society. The definition of the temporal limits of human life falls within the margin of appreciation of the States Parties. It is not the Court's task to question the doctors' and State authorities' decisions on the acceptability of abortion. It has been acknowledged in the Court's case-law that the acceptance of termination of pregnancy should be left to decisions given by the democratically elected national authorities. This approach is based on the values underpinning the Convention, such as respect for individual freedom and dignity. Understanding of notions of life and parenthood is so strongly linked to personal freedom and dignity and also to the spiritual values common to the nation that their protection cannot be taken out of the

national sphere. In the examination of any case the Court should also have regard to the social and cultural specificity of Poland.

61. The notion of private life within the meaning of Article 8 of the Convention is not unlimited. Termination of pregnancy cannot be said to belong exclusively to the sphere of the mother's private life. When a woman becomes pregnant her life becomes closely bound up with the developing child. It is not open to doubt that each decision on abortion is seriously harmful to the mother. It has long-lasting effects on her body and psyche. A woman who has decided to have an abortion for whatever dramatic reason must be treated with the utmost care and protection so as to avoid her dignity being threatened any further. This obligation of assistance rests in particular on the State officials responsible for handling such cases.

C. The Coram Children's Legal Centre, London

62. The unique, special position of children has been expressly recognised in many international human rights instruments. The best interests of the child shall be a primary consideration in proceedings touching on its situation. The best interests of the child can only be assessed properly by reference to the views, wishes and feelings of the child. Failure to establish the child's views may render any decision as to what those best interests are, and how they are best met, unsafe and unlawful. This principle applies irrespective of the type of decision or subject matter of the decision to be taken and is applicable to judicial decision-making and to administrative proceedings. The United Nations Committee on the Rights of the Child (CRC) has emphasised the need to provide appropriate child-sensitive procedural accommodation to enable children to take part in decision-making and legal proceedings.

63. The rights protected by Article 8 of the Convention encompass protection of health and other personal information. Children are entitled to the same, if not higher, protection against non-consensual disclosure of their health and other personal information to third parties, in view of their vulnerability. The CRC observed that confidential medical information concerning adolescents may only be disclosed with the consent of the person concerned or in the same situation applied to adults. Confidentiality is essential to promote the use of health services by adolescents. Other international bodies have consistently recognised the need to respect children's privacy in matters of health as well as when they are victims of crime.

64. Separation by public authorities amounts to an interference with the family's rights. While authorities enjoy a wide margin of appreciation in assessing the need to take a child into care, the court must still be satisfied that genuine emergency circumstances existed justifying a child's abrupt removal from her parents' care without consultation. The State has the

burden of demonstrating that it has engaged in a careful assessment of the impact of the separation on the family and of the available alternatives.

65. In the context of a child's placement in a juvenile centre there must be a relationship between the ground of permitted deprivation of liberty relied on and the conditions of detention. A care order resulting in placing a child in a locked room in a juvenile shelter can only be made when the child is in such danger that it is impossible for him or her to remain in the family environment. Care orders do not fall into the exhaustive list of permitted deprivations of liberty set out in Article 5 § 1 of the Convention.

D. European Centre for Law and Justice, Strasbourg

66. The principle of the sanctity of life has been recognised by the Court. The right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights. Life is not merely a private good and right; it is also a public good, which explains why it should by protected by criminal law. Moreover, pregnancy does not concern merely the mother's private life.

67. The Convention does not formulate any limitations as to the temporal scope of the protection of the right to life; it protects "everyone". Every human life forms a continuum which begins at conception and advances towards death. Developments in *in vitro* fertilisation, abortion and euthanasia give rise to situations where the legal protection of life does not coincide with the natural temporal limits of life. The Court has accepted, referring to their margin of appreciation, that States are entitled to determine the moment from which that protection is accorded to a foetus. The Court has also accepted that a foetus belongs to the human race and should be protected as such.

68. Abortion amounts to an exception or derogation from the principle that human life should be protected. There is no right to abortion as such; it must be regarded only as an exception to the rule. The Convention itself does not guarantee a right to abortion. Its Article 8 does not confer such a right on women. The Convention and its Protocols must be interpreted in the light of present-day conditions; however, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.

69. Where a State allows for legal abortion, it remains under a positive obligation to protect life and to strike a balance between competing interests. Such legitimate interests must be taken into account adequately and in accordance with the obligations deriving from the Convention. Making abortion lawful does not exempt the State from its responsibility to limit recourse to it and to restrict its consequences for the exercise of fundamental rights. The fundamental rights to life and to health cannot be

put on the same footing as the alleged right to abortion. These rights cannot be balanced against each other. The obligation of the State is even stronger where vulnerable persons are concerned who need to be protected against pressure exerted on them, including by their own family environment. The State should be obliged to help pregnant women respect and nurture life. When a pregnant woman envisages abortion, it is the responsibility of the State to ensure that such a decision has not been taken as a result of external pressure.

70. Medical professionals are entitled to refuse to provide medical services. This entitlement originates in their moral obligation to refuse to carry out immoral orders. The Court in its case-law has confirmed the supremacy of moral sense over positive law. Respect for the life of a human being underpins the right to conscientious objection in the medical sphere. Medical practitioners should not be obliged to perform abortion, euthanasia or *in vitro* fertilisation against their will and against their principles. A possible solution for this dilemma would be to establish a register of physicians qualified and willing to perform lawful abortions.

E. Amnesty International

71. The United Nations Committee on the Rights of the Child has emphasised most strongly that the term "violence" must not be interpreted in such a way as to minimise the impact of, and the need to address, non-physical and/or non-intentional forms of harm, such as, *inter alia*, neglect and psychological maltreatment. That Committee defined inhuman or degrading treatment as "violence in all its forms against children in order to extract a confession, [or] to extrajudicially punish children for unlawful or unwanted behaviours". Unwanted behaviour in this regard may be understood broadly to include a child's desire to terminate an unwanted pregnancy and to exercise the right to freedom of conscience.

72. The Inter-American Commission on Human Rights has remarked that victims of sexual violence cannot fully exercise their human rights unless they have access to comprehensive health-care services and information. Providing such care to victims of sexual violence should be treated as a policy priority.

73. The United Nations Special Rapporteur on Violence against Women has noted that certain violations entail different harms for men and women and therefore require different reparation regimes to remedy the wrongdoing. Unwanted pregnancies are part of this gender-specific harm. Where States fail to take a comprehensive and gender-based approach to remedying sexual violence, this may cause additional suffering.

74. The United Nations Committee on the Elimination of Discrimination against Women has recommended that States take measures to prevent coercion in regard to fertility and reproduction and to ensure that women are

not forced to seek unsafe medical procedures such as illegal abortion because of a lack of appropriate services in regard to fertility control. Denial of available and legal means to prevent or terminate an unwanted pregnancy would constitute coercion.

75. The Human Rights Committee has pointed out that the extent to which a State provides rape victims with access to safe abortion is of particular relevance to an assessment of that State's compliance with the prohibition of cruel, inhuman and degrading treatment. Given the fact that the mental distress caused by unwanted pregnancy is likely to grow over time, substantial delay in the provision of voluntary abortion services after rape may cause severe suffering. It is not enough for the State to decriminalise abortion on paper; adequate procedures must be put in place to ensure the provision of legal medical services so that both law and practice are in conformity with the international legal obligations of the State under the UN Convention against Torture.

76. Unauthorised release of confidential information about patient care and health violates the patient's right to privacy. It may, in addition, deter women from seeking advice and treatment they need, thereby adversely affecting their health and well-being. The United Nations Committee on the Elimination of Discrimination against Women has held that breaches of confidentiality are particularly likely to render women "less willing to seek medical care ... for incomplete abortion and in cases where they have suffered sexual or physical violence". Indeed, the general stigma attached to abortion and to sexual violence has been shown to deter women from seeking medical care, causing much distress and suffering, both physically and mentally.

77. States have an obligation to ensure that their policies favour the best interests of the child, and to give due weight to the views of the child in all matters affecting him or her, in accordance with the age and maturity of the child. The United Nations Committee on the Rights of the Child has clarified that children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child care-giving and protection.

When medical personnel subjects a child to sustained and aggravated harassment with a view to getting her to continue an unwanted pregnancy she has already and repeatedly asked to terminate, this constitutes mental violence, applied by persons who have power over the child, for the purposes of forcing her to engage in an activity against her will and, potentially, punishing her for unwanted behaviour.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE DETERMINATION OF ACCESS TO LAWFUL ABORTION

78. The applicants complained that the facts of the case gave rise to a breach of Article 8 of the Convention. They submitted that their right to due respect for their private and family life and for the first applicant's physical and moral integrity had been violated by the absence of a comprehensive legal framework guaranteeing her timely and unhindered access to abortion under the conditions set out by the applicable laws.

Article 8 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... 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."

A. Admissibility

1. The first applicant's status as a victim

79. The Government submitted that the first applicant could not claim to be the victim of a breach of the Convention. The national authorities had fulfilled their positive obligation of not only ensuring a legal framework for carrying out an abortion, but, first and foremost, of guaranteeing effective measures leading to the implementation of that right. Therefore, the procedures applied by the national authorities had to be recognised as guaranteeing rights which were not only theoretical or illusory, but also practical and effective, and thus met the standards laid down in the Convention and the Court's case-law.

80. The applicants submitted that the first applicant remained a victim of a breach of Article 8 of the Convention, despite ultimately, after long and protracted efforts, having undergone an abortion. The applicants had never claimed that the first applicant's rights had been violated because she had not been allowed access to an abortion. The core of her complaint was that the State's actions and systemic failures in connection with the circumstances concerning the determination of her access to abortion, seen as a whole, as well as the clandestine nature of the abortion, had resulted in a violation of Article 8.

81. The unwillingness of numerous doctors to provide a referral for abortion or to carry out the lawful abortion as such constituted evidence of the State's failure to enforce its own laws and to regulate the practice of

conscientious objection. Both applicants had been misled by the doctors and the authorities as to the applicable procedure and requirements for lawful abortion. The first applicant had been given unwanted counselling by a priest, harassed by doctors and bullied by persons informed of her situation by the doctors and the priest. She had also been unlawfully torn from her mother's custody and put into detention. When she had finally been allowed to obtain the abortion that she lawfully sought, that abortion had been performed in a clandestine manner, in a hospital five hundred kilometres from her home town.

82. The State had failed to take appropriate measures to address the systemic and deliberate violations which had breached the applicants' right to respect for their private life. The set of circumstances surrounding the applicants' efforts to secure a lawful abortion for the first applicant had not been remedied by the fact that she had ultimately obtained it. The first applicant had not lost her victim status because the State had not acknowledged any of the alleged violations, nor had it provided redress.

83. The Court observes that the scope of the present complaint is not limited to the mere question of access to abortion: the applicants neither challenged the Polish abortion legislation as such nor complained that the first applicant had been denied access to an abortion. Rather, the Court's task is to examine the issues arising in connection with the procedural and practical modalities for the determination of the lawfulness of such access and, in particular, whether due regard for the applicants' right to respect for their private and family life was had by the authorities throughout the events concerned. The fact that the first applicant ultimately obtained access to an abortion does not, by itself, deprive the applicants of their status of victims of the alleged breach of the Convention. To that extent the Government's preliminary objection must therefore be dismissed.

84. The Court considers that the issue of the applicants' status as victims of the alleged violation of the Convention is closely linked to the substance of their complaint under Article 8 of the Convention, and should be joined to the merits of the case.

2. Exhaustion of domestic remedies

85. The Government submitted that the applicants had failed to exhaust relevant domestic remedies. The Polish legal system provided for legal avenues which made it possible by means of civil compensation claims under Articles 417, 444 and 448 of the Civil Code, or Articles 23 and 24 of that Code, to establish liability on the part of the doctors concerned for any damage caused by medical malpractice. The Government referred to judgments given by the Supreme Court in the cases of V CK 167/03 and V CJ 161/05, given on 21 November 2003 and 13 October 2005 respectively.

86. The applicants submitted that they had had no legal means at their disposal in order to challenge the individual doctors or the decisions made by the hospital. Likewise, no remedy had been available to them in order to contest the failure to provide them with appropriate information in respect of the determination of access to abortion. The applicants had exhausted all possible effective domestic criminal-law remedies. Given the intentional nature of the acts and omissions by the State in this case, and the resulting serious impact on the applicants' personal integrity and fundamental values, the remedy most appropriate in the circumstances of this case was a criminal-law remedy (see *M.C. v. Bulgaria*, no. 39272/98, §§ 148-53, ECHR 2003-XII, and *X and Y v. the Netherlands*, cited above, §§ 23-24).

87. The first applicant submitted that civil proceedings in this case would not have provided her with sufficient and effective remedies to vindicate her right to respect for her private life. She was a young and vulnerable rape victim, whose identity would have been disclosed to the public during civil proceedings. This would have resulted in double victimisation. She had been in a weak position and completely dependent on the doctors. The Court in *M.C. v. Bulgaria* stressed that "[children and other vulnerable individuals, in particular, are entitled to effective [criminal-law] protection." (*M.C. v. Bulgaria*, cited above, § 150). Applicants should therefore not be required, in the absence of a successful criminal prosecution, to obtain redress by bringing a civil action for damages.

88. The Court considers that the Government's objection concerning the alleged failure to exhaust domestic remedies by way of pursuing a compensation claim before the civil courts in respect of this part of the application is closely linked to the substance of the applicants' complaints under Article 8 of the Convention, and should therefore be joined to the merits of the case.

89. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

90. The Government submitted that decisions concerning the carrying out of abortions belonged to the sphere of private, not family, life. Hence, solely women were able to make the relevant decisions, within the limits set by the national legal framework. They referred to the case of *Boso v. Italy*, where the Court had held that Article 8 of the Convention did not give a potential father any right to participate in the decision-making as to whether or not to carry out an abortion (see *Boso v. Italy* (dec.), no. 50490/99,

5 September 2002). Therefore this provision could not be regarded as conferring such a right on the mother of the woman seeking an abortion.

91. The fact that at the material time the first applicant was a minor did not confer on her mother, the second applicant, any rights under Article 8 of the Convention. While parental authority was a necessary element of family life, the scope and imperative nature of parental authority changed as the child developed and the functioning of the family had to be subordinated to the child's interests. Therefore, there had been no violation of the second applicant's rights guaranteed by Article 8 of the Convention.

92. As regards the second applicant, the Government argued that the instant case differed fundamentally from the case of *Tysiąc v. Poland*, because ultimately the applicant had had access to an abortion within the time-limit provided for by the statute. The legal conditions for a lawful abortion had existed in the present case and there had never been any dispute between the first applicant and the doctors whether the conditions for a legal abortion obtained. The refusal to perform an abortion at the Lublin hospital had resulted from the statutory right of a doctor to refrain from performing medical services contrary to his or her conscience, the so-called "conscience clause" provided for under Article 39 of the Doctor and Dentist Professions Act. That Act obliged a doctor to refer the patient to another physician. The doctors in that hospital had failed to refer the applicants to another medical practitioner, but that had not been to the first applicant's detriment because she had ultimately obtained access to an abortion in a public hospital within the time limit provided for by law. Hence, it could not be said that in the circumstances of the present case there had been no procedural mechanism available with a view to determining access to a lawful abortion.

93. The applicants submitted that the absence of a comprehensive legal framework governing the practice of conscientious objection and ensuring access to lawful termination of pregnancy in medical facilities had allowed the doctors to deny the first applicant her right to terminate her pregnancy in a respectful, dignified and timely manner. The applicants had been given contradictory and inaccurate information about the legal conditions that had to be met to obtain a lawful abortion (the waiting time, the necessary documents, the formal requirements which such documents had to meet, the necessity for parental consent by both parents). They had thus been hindered in taking a free decision on the matter of an abortion.

2. *The Court's assessment*

(a) General principles

94. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph as

being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to the Court's settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities (see, among other authorities, *Olsson v. Sweden (No. 1)*, 24 March 1988, § 67, Series A no. 130).

95. In addition, there may also be positive obligations inherent in effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91).

96. The Court has previously found States to be under a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity (see, among many other authorities, *Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-...; *Carlo Dossi and others v. Italy, (dec.), no.* 26053/07, 12 October 2010; *Yardımcı v. Turkey, no.* 25266/05, 5 January 2010 ; §§ 55-56; *Gecekuşu v. Turkey* (dec.), no. 28870/05, 25 May 2010). These obligations may involve the adoption of measures including the provision of an effective and accessible means of protecting the right to respect for private life (see, among other authorities, *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X).

While the Court has held that Article 8 cannot be interpreted as conferring a right to abortion, it has found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8 (see *A, B and C v. Ireland* [GC], no. 25579/05, § 245, 16 December 2010, § 214). In particular, the Court held in this context that the State's obligations include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures (*Tysiąc v. Poland*, cited above, § 110; *A, B and C v. Ireland* [GC], cited above, § 245; and *R.R. v. Poland*, cited above, § 184).

97. The Court has already found that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother

in favour of greater access to abortion (see (*A, B and C v. Ireland* [GC], cited above, §§ 235 and 237). In the absence of such a common approach regarding the beginning of life, the examination of national legal solutions as applied to the circumstances of individual cases is of particular importance for the assessment of whether a fair balance between individual rights and the public interest has been maintained (see also, for such an approach, *A, B and C v. Ireland*, cited above, § 229-241).

98. Since the nature of the right to decide on the termination of a pregnancy is not absolute, the Court is of the view that the circumstances of the present case are more appropriately examined from the standpoint of the respondent State's positive obligations arising under Article 8 of the Convention (see, *mutatis mutandis*, *Tysiąc v. Poland*, cited above, § 108).

99. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32). The Court has already found in the context of similar cases against Poland that once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion (*Tysiąc v. Poland*, cited above, § 116-124, *R.R. v. Poland*, cited above, § 200). The legal framework devised for the purposes of the determination of the conditions for lawful abortion should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (*A, B and C v. Ireland* [GC], cited above, § 249). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by that provision that the relevant decision-making process is fair and such as to afford due respect for the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case, and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *W. v. the United Kingdom*, 8 July 1987, §§ 62 and 64, Series A no. 121). The Court has already held that in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision (see *Tysiąc v. Poland*, cited above, § 117).

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

100. The Court first notes that the 1993 Act provides for the possibility of lawful abortion in certain narrowly defined situations. In its judgments referred to above the Court has already highlighted the importance of procedural safeguards in the context of the implementation of the 1993 Act when it comes to determining whether the conditions for lawful abortion provided for by that Act obtain. It held that Polish law did not contain any effective procedural mechanisms capable of determining whether these conditions were fulfilled in an individual case, either in the context of a dispute between a pregnant woman and doctors as to whether the conditions for lawful abortion on grounds of a threat to the woman's health were met (see *Tysiąc v. Poland*, cited above, §§ 119–124), or in the context of possible foetal malformation confirmed by an initial diagnosis (see *R.R. v. Poland*, cited above, § 200 and 207).

The present case differs from those two cases in that it concerns an unwanted pregnancy resulting from rape. Under Article 4 (a) 1 (5) of the 1993 Act abortion can lawfully be carried out where there are strong grounds for believing that the pregnancy was the result of a criminal act, certified by a prosecutor.

101. The Court now has to examine how the legal framework was applied to the applicants' case.

102. In this connection, the Court observes that the first applicant received from the public prosecutor the certificate referred to above (see paragraph 10 above). However, the applicants contacted public hospitals in Lublin considerable difficulties arose in obtaining access to an abortion. They received contradictory information as to whether they needed a referral in addition to the certificate from the prosecutor, as to who could perform the abortion, who could make a decision, whether there was any waiting time prescribed by law, and what other conditions, if any, had to be complied with. Ultimately, after an argument with the second applicant, a head of the gynaecological ward at the Lublin Jan Boży hospital refused to allow the abortion to be performed in her ward, relying on her personal views. The Court notes that the second applicant was requested to sign a consent form to the first applicant's abortion which warned that the abortion could lead to her daughter's death (see paragraph 15 above). No cogent reasons have been advanced to show that there were special grounds on which in the circumstances of the case an abortion could entail such danger.

103. The applicants subsequently travelled to Warsaw, where the first applicant was admitted to another hospital. She was told there that she could have an abortion on the basis of the certificate issued by the prosecutor (see paragraph 10 above) and a medical certificate issued by the national consultant in gynaecology to the effect that she had a right to an abortion. However, the applicants were told that the first applicant was obliged by law to wait another three days before having an abortion. A psychologist

spoke with the first applicant's parents and with the first applicant. She apparently prepared an opinion on the case, to which the second applicant was not allowed access. The doctor who had admitted the first applicant to the hospital told her that a lot of pressure had been put on the hospital with a view to discouraging it from performing the abortion, and that the hospital had received numerous e-mails from persons criticising the applicants for the decision to have an abortion.

104. Further, when the second applicant filed a complaint with the Office for Patients' Rights of the Ministry of Health asking them to help her daughter obtain a lawful abortion, a Ministry official told her that the daughter's statement consenting to an abortion would have to be witnessed by three persons. When the second applicant told him that that statement had in fact been signed in the presence of three witnesses, he informed her that the witnesses' identification numbers were required and that the faxed copy had to be notarised.

105. Ultimately, the applicants were notified by the Ministry of Health that to have an abortion the first applicant would have to go to a public hospital in Gdansk. The Court notes that that hospital was approximately 500 kilometres from the applicant's home. The Court fails to see any justification for such an arrangement in respect of the provision of a lawful medical service. It has not been argued, let alone shown, that such a service was not available in a medical establishment closer to the applicants' normal address.

106. In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience, relying on Article 9 of the Convention, the Court reiterates that the word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief (see, among many other authorities, *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X). For the Court, States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation (see *R.R. v. Poland*, cited above, no. 27617/04, § 206).

107. In this connection, the Court notes that Polish law has acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. This mechanism also includes elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service. However, it has not been shown that these

procedural requirements were complied with in the present case or that the applicable laws governing the exercise of medical professions were duly respected.

108. On the whole, the Court finds that the staff involved in the applicants' case did not consider themselves obliged to carry out the abortion expressly requested by the applicants on the strength of the certificate issued by the prosecutor. The events surrounding the determination of the first applicant's access to legal abortion were marred by procrastination and confusion. The applicants were given misleading and contradictory information. They did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes. No set procedure was available to them under which they could have their views heard and properly taken into consideration with a modicum of procedural fairness.

109. As to the second applicant, the Court is fully aware that the issues involved for her in the case were different from those of the first applicant. The Court acknowledges that in a situation of unwanted pregnancy the mother of a minor girl is not affected in the same way. It is of the view that legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor's reproductive choices, because proper regard must be had to the minor's personal autonomy in this sphere. This consideration applies also in a situation where abortion is envisaged as a possible option. However, it cannot be overlooked that the interests and life prospects of the mother of a pregnant minor girl are also involved in the decision whether to carry the pregnancy to term or not. Likewise, it can be reasonably expected that the emotional family bond makes it natural for the mother to feel deeply concerned by issues arising out of reproductive dilemmas and choices to be made by the daughter. Hence, the difference in the situation of a pregnant minor and that of her parents does not obviate the need for a procedure for the determination of access to a lawful abortion whereby both parties can be heard and their views fully and objectively considered, including, if necessary, the provision of a mechanism for counselling and reconciling conflicting views in favour of the best interest of the minor. It has not been shown that the legal setting in Poland allowed for the second applicant's concerns to be properly addressed in a way that would respect her views and attitudes and to balance them in a fair and respectful manner against the interests of her pregnant daughter in the determination of such access.

110. In so far as the Government relied on the instruments of civil law as capable of addressing the applicants' situation, the Court has already held, in the context of the case of *Tysiąc v. Poland*, cited above, that the provisions of the civil law as applied by the Polish courts did not make available a procedural instrument by which a pregnant woman seeking an abortion could fully vindicate her right to respect for her private life. The

civil-law remedy was solely of a retroactive and compensatory character. The Court was of the view that such retrospective measures alone were not sufficient to provide appropriate protection of the personal rights of a pregnant woman in the context of a controversy concerning the determination of access to lawful abortion, and emphasised the vulnerability of the woman's position in such circumstances (see *Tysiąc v. Poland*, no. 5410/03, § 125, ECHR 2007-IV, and *R.R. v. Poland*, cited above, § 209, ECHR 2011 (extracts)). Given the retrospective nature of compensatory civil law, the Court fails to see any grounds on which to reach a different conclusion in the present case.

The Court is fully aware of examples from the case-law of the Polish civil courts where damages in tort were awarded to women complaining of a breach of their personal rights in various situations connected with unwanted pregnancies and access to abortion (see *R.R. v. Poland*, cited above, § 79-80, see also paragraph 52 above). However, in those cases the damage had arisen out of facts posterior to the refusal of abortion. No examples of case-law have been adduced before the Court whereby the civil courts acknowledged and redressed damage caused to a pregnant woman by the anguish, anxiety and suffering entailed by her efforts to obtain access to abortion.

The Court finds that in the present case civil litigation did not constitute an effective and accessible procedure allowing the applicants to vindicate their rights in the context of the determination of access to a lawful abortion. The Court therefore dismisses the Government's preliminary objection concerning civil litigation as an effective remedy.

111. The Court is of the view that effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I; *R.R. v. Poland*, cited above, § 180). The nature of the issues involved in a woman's decision to terminate a pregnancy or not is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time. The uncertainty which arose in the present case despite a background of circumstances in which under Article 4 (a) 1.5 of the 1993 Family Planning Act there was a right to lawful abortion resulted in a striking discordance between the theoretical right to such an abortion on the grounds referred to in that provision and the reality of its practical implementation (*Christine Goodwin v. the United Kingdom* [GC], cited above, §§ 77-78; *S.H. and Others v. Austria*, cited above, § 74, *mutatis mutandis*; and *A, B and C v. Ireland* [GC], cited above).

112. Having regard to the circumstances of the case, the Court concludes that the authorities failed to comply with their positive obligation to secure to the applicants effective respect for their private life. There has therefore been a breach of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE DISCLOSURE OF THE APPLICANTS' PERSONAL AND MEDICAL DATA

113. The applicants complained that there had been a breach of Article 8 of the Convention as a result of the disclosure of information concerning their case to the general public.

A. Admissibility

114. The Government submitted that the applicants should have had recourse to civil litigation against the persons involved in their case, claiming a breach of their personal rights within the meaning of Articles 23 and 24 of the Civil Code.

115. The applicants argued that there were no effective remedies in Poland for the violations complained of. Where criminal law could be used, such measures had been resorted to in the present case, but to no avail. Civil litigation would have led to the subsequent disclosure of the applicants' identities and to further victimisation. It should not be overlooked that all the criminal proceedings instituted at the applicants' request against various persons had eventually been discontinued. In any event, the applicants had not known the identity and addresses of the perpetrators of certain of the offences concerned. As under the Polish law names and addresses of defendants were necessary in order to bring a civil case before the civil court, the applicants had not been in a position to pursue civil litigation. As a result, the applicants' rights could not be vindicated under the civil law. It was the responsibility of the State to establish the identity of the perpetrators of any criminal offences.

116. The aim of the rule of exhaustion of domestic remedies referred to in Article 35 § 1 is to afford Contracting States an opportunity to put matters right through their own legal system before having to answer before an international body for their acts (see, among many other authorities, *Egmez v. Cyprus*, no. 30873/96, § 64, ECHR 2000-XII). Where there is a choice of remedies, the exhaustion requirement must be applied to reflect the practical realities of the applicant's position so as to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see, among many other authorities, *Wiktorko v. Poland*, no. 14612/02, § 36, 31 March 2009, and *Krumpel and Krumpelová v. Slovakia*, no. 56195/00, § 43, 5 July 2005). Moreover, an applicant who has used a remedy which is

apparently effective and sufficient cannot be required also to have tried others that were also available but probably no more likely to be successful (see, among many other authorities, *Assenov and Others v. Bulgaria*, 28 October 1998, § 86, *Reports* 1998-VIII; *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; and *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002).

117. The Court notes that the applicants complained to the prosecution authorities, which opened criminal investigations into a number of alleged offences, including two sets of investigations concerning specifically the allegations of disclosure of information about the case to the general public (see paragraphs 50-51 above). The Court does not find the applicants' choice of procedure unreasonable. The applicants tried to have the persons they believed to be guilty of criminal conduct towards them identified and punished. The authorities found that the persons concerned had no case to answer. In particular, the Lublin District Court considered it normal that cases of teenage pregnancy gave rise to controversy and were normally widely discussed by third parties, social and church organisations (see paragraph 51 above). Having regard to the fact that the applicants' efforts to have the disclosure of their personal information examined in criminal proceedings were unsuccessful, the Court considers that the applicants could not be required to embark on civil proceedings which, in the light of the findings made by the authorities, did not offer good prospects of the authorities finding that the conduct complained of was unlawful within the civil sense of that term.

118. Accordingly, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies.

119. The Court also considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

120. The Government were of the view that the applicants' complaint about the disclosure of information concerning their situation, their personal data and their whereabouts had been examined in a number of domestic investigations, including the investigations initiated by the second applicant. However, the authorities had ultimately found that no criminal offence had been committed (see paragraphs 50-51 above).

121. The Government further submitted that the information concerning the case had been made public by the first applicant. She had informed her friend of her predicament by way of a text message sent to her friend during

the night of 25 May 2008 and by instant messaging, asking for assistance and also thanking her for informing the school. Later on, the Family Court, when deciding on the first applicant's deprivation of liberty, had had regard to correspondence from the first applicant's school referring to this evidence (see paragraph 34 above). In the Government's submission, this correspondence confirmed that she had taken the initiative and voluntarily provided information about her private life and her intention to have an abortion. Information made available voluntarily by the persons concerned was not subject to protection under Article 8 of the Convention (see *N.F. v. Italy*, no. 37119/97, § 39, 2 August 2001).

122. The Government argued that actions taken by the medical staff of the Jan Boży hospital in Lublin had constituted a part of their routine functions. The first applicant had requested to see a priest and he had talked to her in the exercise of his ministry. The medical staff had not initiated any action with a view to making her change her mind as to the abortion. The hospital had not disclosed information about the first applicant's stay, her family situation, her health, or about her personal details. That information had not been provided to the hospital in Warsaw.

123. The Government further argued that the press release issued by the director of the Jan Boży Hospital in Lublin had never been published or announced to the public. No press conference had been organised to disseminate information about the case. Because of the media attention surrounding the case and pressure exerted by journalists, the media which had contacted the hospital's management had received a comment that the doctors had invoked the "conscience clause". The hospital managers had been obliged to comply with their duty of cooperating with the press in their capacity as persons exercising public function. The hospital had therefore not breached medical secrecy.

124. To sum up, the Government were of the view that the applicants' right to respect for their private life had not been violated.

125. The applicants submitted that there had been a breach of Article 8 of the Convention as a result of the disclosure of information concerning the first applicant's pregnancy and their situation to priest K.P. and to the general public. They complained about the press release about the case issued by the management of the Lublin hospital, communication of information to the hospital in Warsaw concerning the first applicant's identity, her situation and her and her mother's wish to have the pregnancy terminated, and the disclosure of the applicants' identity and whereabouts to the general public and the ensuing harassment by various third parties.

126. The applicants complained that the medical staff of the Jan Boży hospital in Lublin had informed priest K.P. about their predicament without asking for their permission. As a result, he had been allowed to approach the first applicant without her or her family having asked to see him and without any thought having been given to the applicants' wishes.

Inappropriate and manipulative pressure had been exerted on the family by Dr. W.S. No proper respect had been shown for their own decisions and views. Information about the applicants' case had been leaked to the public, including by way of a press release issued by that hospital. As a result, the applicants had found themselves in the midst of a public controversy and the subject of a heated media debate. A hospital in Warsaw where they had subsequently sought assistance had received information about the case from the Lublin hospital without requesting it. When the first applicant was in the hospital in Warsaw she had been harassed by anti-choice activists. The case had become national news and developments in it had been closely followed by many newspapers.

127. The respondent State was liable for the above-mentioned violations of the applicants' private and family life. Medical staff working for the public hospital and therefore considered to be agents of the State under Polish law had released sensitive information covered by the doctor-patient privilege guaranteed under Polish law. The State was therefore responsible for the actions taken by medical personnel, individual doctors, and civil servants from the Ministry of Health.

2. The Court's assessment

128. The Court has previously held that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for their private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. The disclosure of such data may dramatically affect an individual's private and family life, as well as his or her social and employment situation, by exposing that person to opprobrium and the risk of ostracism (see *Z v. Finland*, 25 February 1997, §§ 95-96, *Reports* 1997-I). Respecting the confidentiality of health data is crucial not only for the protection of a patient's privacy but also for the maintenance of that person's confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health (see *Z v. Finland*, cited above, § 95, and *Biriuk v. Lithuania*, no. 23373/03, § 43, 25 November 2008).

129. The Court notes at the outset that it is not in dispute that the management of the Jan Boży hospital in Lublin issued a press release for the purposes of informing the press about the first applicant's case, her pregnancy and the hospital's refusal to carry out an abortion. The Government have also acknowledged that the journalists who contacted that hospital were given information about the circumstances of case. Nor is it in dispute that following the press release and information received by journalists from the hospital the case became the subject of a number of articles in the national

press. The hospital was a public hospital for whose acts the State is responsible for the purposes of the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 71, ECHR 2004-II, and *I. v. Finland*, no. 20511/03, § 35, 17 July 2008).

130. The Court has noted the Government's argument that the press release did not contain the applicants' names or other details making it possible to establish their identity. However, the Court observes that after that communiqué the first applicant was contacted by various third parties who sent numerous text messages to her urging her to abandon her intention to have an abortion. The doctors at the Warsaw hospital informed the applicants that a lot of pressure had been put on the hospital with a view to discouraging it from carrying out the abortion. That hospital had received numerous e-mails from persons criticising the applicants for their intention to have recourse to an abortion. In the evening of 4 June 2008 an unidentified woman went to the first applicant's room and tried to convince her to continue with the pregnancy. When the applicants were leaving that hospital on 5 June 2008 they were accosted by anti-abortion activists. Hence, the Court has no choice but to conclude that the information made available to the public must have been detailed enough to make it possible for third parties to establish the applicants' whereabouts and to contact them, either by mobile phone or personally.

131. In so far as the Government appear to argue that the first applicant, by contacting a friend via text messages and disclosing her predicament to her, had wished to make her case public, the Court notes that this can reasonably be regarded as a call for assistance, addressed to that friend and possibly also to her close environment, such as the school, by a vulnerable and distraught teenager in a difficult life situation. By no means can it be equated with an intention to disclose information about her pregnancy, her own views and feelings about it and about her family's attitude towards it to the general public and to the press.

132. The Court finds that there was thus an interference with the applicants' right to respect for their private life. Such interference gives rise to a breach of Article 8 unless it can be shown that it was "in accordance with the law", pursued one or more legitimate aim or aims as defined in paragraph 2, and was "necessary in a democratic society" to attain them.

133. It is true that a State enjoys a certain margin of appreciation in deciding what "respect" for private life requires in particular circumstances (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 62-63, *Reports* 1996-IV, and *X and Y v. the Netherlands*, 26 March 1985, § 24, Series A no. 91). However, the fact that the issue of the availability of legal abortion in Poland is a subject of heated debate does not confer on the State a margin of appreciation so wide as to absolve the medical staff from their uncontested professional obligations regarding medical secrecy. It has not been argued, let alone shown, that in the present case there were any

exceptional circumstances of such a character as to justify public interest in the first applicant's health (compare and contrast, *Editions Plon v. France*, no. 58148/00, ECHR 2004-IV, *mutatis mutandis*, where the Court held that a permanent ban on distribution of a book disclosing health information about a public person was not necessary in a democratic society). The Court fails to see how the disclosure of information about the first applicant's unwanted pregnancy and about the refusal to carry out an abortion could be justified by media interest in the case. In the Court's view it cannot be regarded as compatible either with the Convention standards as to the State's obligation to secure respect for one's private or family life, or with the obligations of the medical staff to respect patients' rights laid down by Polish law. It did not therefore pursue a legitimate aim. That of itself is sufficient to ground a breach of Article 8 of the Convention.

134. However, the Court considers that it is also appropriate to address the lawfulness requirement. The Government referred in this connection to the general obligation of the hospital managers to co-operate with the press in their capacity as persons exercising a public function. However, no provision of domestic law has been cited on the basis of which information about individual patients' health issues, even non-nominate information, could be disclosed to the general public by way of a press release. It further observes that the first applicant was entitled to respect for her privacy regarding her sexual life, whatever concerns or interest her predicament generated in the local community. The national law expressly recognised the rights of patients to have their medical data protected, and imposed on health professionals an obligation to abstain from disclosing information about their patients' conditions. Likewise, the second applicant was entitled to the protection of information concerning her family life. Yet, despite this obligation, the Lublin hospital made information concerning the present case available to the press.

135. In the light of the foregoing considerations, the Court considers that the disclosure of information about the applicants' case was neither lawful nor served a legitimate interest.

136. In the absence of a legitimate aim or legal basis for the interference complained of, it is not necessary to ascertain whether it was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

137. There has therefore been a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

138. The applicants complained of the unlawful removal of the first applicant from the custody of her mother, and her placement in a juvenile shelter and later in a hospital. They referred to Article 5 of the Convention, which, in so far as relevant, provides as follows:

> "1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> ..."

A. The parties' observations

139. The Government submitted that deprivation of liberty pursuant to Article 5 § 1 (d) of the Convention was allowed in most of the States Parties for the purpose of supervision of a minor's education or to bring him or her before a relevant authority, in the minor's interest, and also where the minor was not charged with a punishable act, but his or her development was endangered.

140. The provision of Polish law applied in the present case empowered a family court to place a minor with a foster family or in an educational care centre. A court could interfere with parental authority as soon as a potential threat to the interests of the child came to light in order to prevent its negative consequences. Such an interference was not conditional on the inadequate performance of the parents, because a restriction of parental authority was not a measure of repression against parents, but a measure for the protection of the child which at the same time provided assistance to parents who were not coping adequately with their educational responsibilities.

141. In the present case the domestic court had had evidence at its disposal that had led it to reasonably believe that the second applicant's interests – not only her development, but also her health and life – were seriously threatened. She had been deprived of her liberty on the basis of a lawful decision designed to guarantee her interests.

142. In the Government's view, the procedure under which the first applicant had been deprived of her liberty had been fair. The decision had been taken promptly after the court learned about the first applicant's situation. Likewise, the decision had been lifted as soon as the grounds on

which she had been deprived of her liberty had ceased to exist. The authorities could not be accused of having acted arbitrarily.

143. The applicants submitted that, considering the first applicant's age, her distress and her unwanted pregnancy, the decision to deprive her of her liberty had been manifestly unjustified, excessive and extremely stressful for both applicants.

B. The Court's assessment

144. It is not in dispute between the parties that the first applicant was "deprived of [her] liberty" within the meaning of Article 5 § 1. The Court reiterates that the exhaustive list of permitted deprivations of liberty set out in Article 5 § 1 must be interpreted strictly (see *Guzzardi v. Italy*, 6 November 1980, §§ 96, 98 and 100, Series A no. 39).

145. It is further noted that detention must be lawful both in domestic and Convention terms: the Convention lays down an obligation to comply with the substantive and procedural rules of national law and requires that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect an individual from arbitrariness (see *Winterwerp v. the Netherlands*, 24 October 1979, §§ 39 and 45, Series A no. 33; *Bozano v. France*, 18 December 1986, § 54, Series A no. 111; and *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114). In this regard, there must be a relationship between the ground of permitted deprivation of liberty relied on and the conditions of detention (see *Aerts v. Belgium*, 30 July 1998, § 46, *Reports* 1998-V, with further references).

146. The Court observes that the first applicant was placed in the juvenile shelter pursuant to Article 109 of the Family and Custody Code. It can therefore accept that the decision of the Family Court was lawful in terms of domestic law.

147. As to Convention lawfulness, the Government justify her detention on the grounds of "educational supervision" within the meaning of Article 5 § 1 (d). The Court has therefore considered whether the detention complied with the conditions imposed by that subsection. The Court has accepted that, in the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned (see *Koniarska v. the United Kingdom*, (dec.), no. 33670/96, 12 October 2000).

148. The Court observes that the Family Court imposed detention on the first applicant, having regard to her pregnancy and referring to the doubts as to whether she was under pressure to have an abortion. The Court has

already acknowledged, in the context of Article 8 of the Convention, that there was a difference in the way in which the pregnancy affected the situation and life prospects of the first and second applicants (see paragraph 110 above). It was therefore legitimate to try to establish with certainty whether the first applicant had had an opportunity to reach a free and well-informed decision about having recourse to abortion. However, the essential purpose of the decision on the first applicant's placement was to separate her from her parents, in particular from the second applicant, and to prevent the abortion. The Court is of the view that by no stretch of the imagination can the detention be considered to have been ordered for educational supervision within the meaning of Article 5 § 1 (d) of the Convention if its essential purpose was to prevent a minor from having recourse to abortion. Furthermore, the Court is of the opinion that if the authorities were concerned that an abortion would be carried out against the first applicant's will, less drastic measures than locking up a 14-year old girl in a situation of considerable vulnerability should have at least been considered by the courts. It has not been shown that this was indeed the case.

149. Accordingly, the Court concludes that the first applicant's detention between 4 and 14 June 2008, when the order of 3 June 2008 was lifted, was not compatible with Article 5 § 1 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

150. The applicants further complained that the facts of the case had given rise to a breach of Article 3 of the Convention in respect of the first applicant. This provision, in so far as relevant, reads as follows:

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

151. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

A. The parties' submissions

152. In the Government's view, the first applicant had not been subjected to treatment constituting a breach of Article 3 of the Convention. The applicant may have experienced stress or felt uncomfortable, but the treatment she complained about had not attained the minimum level of severity to consider it a breach of the said article of the Convention. On 9 April 2008 the second applicant had been offered psychological support for the first applicant, who had been given contraception counselling (the offer of post-coital contraception). When the first applicant experienced

pain and vaginal bleeding at the juvenile shelter on 6 June 2008, she had been given medical assistance.

153. The purpose of the first applicant's trip to the hospital in Gdańsk had been to help her in exercising her right to have an abortion. It had not been the intention of the authorities to subject her to debasing or inhuman treatment. Any discomfort that she might have felt had been connected with normal travel circumstances. The national authorities had taken it upon themselves to organise the travel and to provide means of transport.

154. In the Government's assessment, the situation in which the first applicant had found herself could in no way be compared to the situation of the applicant in the case of *Tysiąc,* referred to above, or that of the applicants in the case of *A, B and C v. Ireland* [GC], cited above. It should be noted that she had obtained the medical service she requested within the time-limit provided for by the law.

155. The first applicant complained that she had been subjected to physical and mental suffering amounting to inhuman and degrading treatment by the medical and law-enforcement authorities. Following the decision of the Lublin District Court, the first applicant had been taken from her mother's custody, put in a police car, and driven around for hours without proper food, water or access to a toilet. In the shelter she had been locked up and not given prompt medical assistance despite vaginal bleeding and intense pain.

156. When the first applicant had finally been allowed to have a legal termination of pregnancy, she had been driven in secret by the Ministry of Health to a hospital approximately 500 kilometers from her home. The applicant had not been provided with information on post-abortion care and immediately after the abortion she had been driven back home. The first applicant had been unnecessarily and repeatedly questioned about the circumstances concerning the rape, which had been traumatic for her. The circumstances of the case, seen as a whole, had exposed the first applicant to serious uncertainty, fear and anguish. The case had become national news; she, along will her mother, had been harassed by various persons driven by their own agenda who had no regard whatsoever for their dignity or the difficulty and vulnerability of their situation.

B. The Court's assessment

157. According to the Court's well-established case-law, 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 level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII;

Kupczak v. Poland, no. 2627/09, § 58, 25 January 2011; *Wiktorko v. Poland*, no. 14612/02, §§ 44 and 54, 31 March 2009 and *R.R. v. Poland*, cited above, § 148).

158. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

159. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among many other authorities, *Iwańczuk v. Poland*, no. 25196/94, § 51, 15 November 2001, and *Wiktorko v. Poland*, cited above).

160. Although the purpose of such treatment is a factor to be taken into account, in particular, whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3. Moreover, it cannot be excluded that acts and omissions on the part of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under Article 3 (see, for example, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). The Court has also made findings of a breach of this provision in the context of reproductive rights (see *V.C. v. Slovakia*, no. 18968/07, §§ 106-120, ECHR 2011 (extracts).

161. For the Court's assessment of this complaint it is of a cardinal importance that the first applicant was at the material time only fourteen years old. The certificate issued by the prosecutor confirmed that her pregnancy had resulted from unlawful intercourse. The Court cannot overlook the fact that the medical certificate issued immediately afterwards confirmed bruises on her body and concluded that physical force had been used to overcome her resistance.

162. In the light of the above, the Court has no choice but to conclude that the first applicant was in a situation of great vulnerability.

163. However, when the applicant was admitted to Jan Boży hospital in Lublin pressure was exerted on her by the chief doctor who tried to impose her own views on the applicant. Furthermore, the applicant was obliged to talk to a priest without being asked whether she in fact wished to see one. Considerable pressure was put on her and on her mother. Dr W.S. made the mother sign a declaration acknowledging that an abortion could lead to the first applicant's death. The Court has already noted that no cogent medical reasons have been put forward to justify the strong terms of that declaration (see paragraph 102 above). The first applicant witnessed the argument between the doctor and the second applicant, the doctor accusing the second applicant that she was a bad mother.

164. The Court has already found that information about the case was relayed by the press, also as a result of the press release issued by the hospital. The first applicant received numerous unwanted and intrusive text messages from people she did not know. In the hospital in Warsaw the authorities failed to protect her from being contacted by various persons who tried to exert pressure on her. The applicant was harassed. The authorities not only failed to provide protection to her, having regard to her young age and vulnerability, but further compounded the situation. The Court notes, in particular, that after the first applicant requested protection from the police when she was accosted by anti-abortion activists after leaving hospital in Warsaw, protection was in fact denied her. She was instead arrested in the execution of the court's decision on her placement in the juvenile centre.

165. The Court has been particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a victim of sexual abuse. The Court considers that this approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse (see, *M.C. v. Bulgaria*, no. 39272/98, § 184, ECHR 2003-XII). The investigation against the applicant was ultimately discontinued, but the mere fact that they were instituted and conducted shows a profound lack of understanding of her predicament.

166. On the whole, the Court considers that no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings.

167. In the examination of the present complaint it is necessary for the Court to assess the first applicant's situation as a whole, having regard in particular to the cumulative effects of the circumstances on the applicant's situation. In this connection, it must be borne in mind that the Court has already found, having examined the complaint under Article 8 of the Convention about the determination of the first applicant's access to abortion, that the approach of the authorities was marred by procrastination, confusion and lack of proper and objective counselling and information (see § 108 above). Likewise, the fact that the first applicant was separated from her mother and deprived of liberty in breach of the requirements of Article 5 § 1 of the Convention must be taken into consideration.

168. The Court concludes, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.

169. The Court concludes that there has therefore been a breach of that provision.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

170. The Court notes at the outset that the applicants also made various other complaints under several Articles of the Convention.

171. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, this part of the application must be rejected as inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

172. 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

173. The first applicant requested the Court to award her just satisfaction in the amount of 60,000 euros (EUR) in respect of non-pecuniary damage. She submitted that the impact on the events concerned in the case had been extremely severe on her. She had been the object of comments expressed in public, in the media and directly to her. A book on the case by an anti-choice activist had been published, describing the events in a malicious and distorted manner. Her true identity and details of her private life had leaked to the media. She had suffered because her mother who had tried to protect and help her, was vilified in public. She had also been deprived of liberty. Her suffering during the summer of 2008 when the main events took place was intense, but she also suffered later when, for example, her teachers had made inappropriate comments and disclosed to her classmates what had happened to her.

174. The second applicant requested the Court to award her just satisfaction in the amount of EUR 40,000. She argued that she had suffered immense stress and anxiety caused by the treatment to which her daughter was subjected. She herself had fallen victim of hostility and hateful comments on the part of the hospital staff, anti-choice activists, the police, the general public and certain media. As the story leaked to the media and their identity had been disclosed, she had been unable to protect her child. Her own identity had been disclosed as well. She had to appear before the courts several times and was subjected to humiliating interrogations.

175. The Government did not comment.

176. The Court, having regard to the applicants' submissions, is of the view that in the circumstances of the case they must have experienced considerable anguish and suffering, not only in respect of the difficulties which arose in the determination of access to a lawful abortion, in so far as the 1993 Act allowed it, but also because of the unlawful disclosure of information about their case to the public and the unwelcome publicity it caused. The Court, having regard to the circumstances of the case seen as a whole, to the differences in the applicants' situations and deciding on equitable basis, awards EUR 30,000 to the first and EUR 15,000 to the second applicant.

B. Costs and expenses

177. The applicants claimed reimbursement of costs and expenses incurred in the domestic proceedings as well as in the proceedings before the Court itself, in the total amount of EUR 26 445,10. They referred to invoices which they had submitted.

178. Ms Gąsiorowska and Ms Kotiuk claimed EUR 16,445, comprising EUR 13,370 in fees plus VAT of 22 per cent) in respect of legal fees for work which they had carried out in the domestic proceedings and representing the applicants before the Court. The legal fees corresponded to 191 hours spent in preparation of the applicants' case for the purposes of representation before the domestic courts and the case before the Court, at an hourly rate of EUR 70. The time spent on the case included 50 hours of advising the applicants, helping them to respond to various letters and in helping them in filing appeals and motions, 5 hours of representing the applicants before the Lublin courts, 10 hours of representing them before the Warsaw courts, 25 hours of drafting criminal motions and appeals, two working days of meetings with the applicants, 15 hours consulting with assisting counsel and 20 hours spent in preparation of a response to the Court's questions.

179. Furthermore, the lawyers assisting the Polish lawyers on behalf of the Centre for Reproductive Rights, Ms Zampas and later Ms Westeson, claimed EUR 10,000 in respect of legal fees, corresponding to 100 hours at a hourly rate of EUR 100. They listed the following items: 70 hours spent in preparation of the case, 10 hours spent in communicating with Polish lawyers and 20 hours spent in drafting a response to the Court's questions.

180. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom (just satisfaction)*, nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX).

181. In the light of the documents submitted, the Court is satisfied that the legal costs concerned in the present case have actually been incurred.

182. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicants a global sum of EUR 16,000 in respect of fees and expenses, plus any tax on that amount that may be chargeable to the applicants.

C. Default interest

183. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government's preliminary objections concerning exhaustion of domestic remedies and lack of victim status as regards the Article 8 complaint about the determination of access to lawful abortion in respect of both applicants;

2. *Declares* admissible, unanimously, the complaints under Article 8 of the Convention concerning the determination of access to lawful abortion in respect of both applicants and the disclosure of their personal data, as well as the complaints under Articles 3 (the first applicant) and 5 (the first applicant) of the Convention, and the remainder of the application inadmissible;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention as regards the determination of access to lawful abortion in respect of both applicants, and *dismisses* in consequence the Government's preliminary objections;

4. *Holds* unanimously that there has been a violation of Article 8 of the Convention as regards the disclosure of the applicants' personal data;

5. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention in respect of the first applicant;

6. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the first applicant;

7. *Holds* unanimously

(a) that the respondent State is to pay the applicants, within three months of 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 30,000 (thirty thousand euros) to the first applicant plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) 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;

8. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	David Thór Björgvinsson
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano is annexed to this judgment.

D.T.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE DE GAETANO

1. I voted against a finding of a violation of Article 8 "as regards the determination of access to lawful abortion in respect of both applicants" (point 3 of the operative part of the judgment) for substantially the same reasons advanced in paragraphs 4 and 5 of my partly dissenting opinion in *R.R. v. Poland* (no. 27617/04, 26 May 2011). Neither the Convention generally nor Article 8 in particular confer a right to abortion. The issue was in this case – as it was in many other cases – one of regulatory frameworks and procedural mechanisms: in essence, how to enforce a "right" granted by domestic law in the face of opposition, direct or oblique, from public authorities. The issue should therefore have been examined under Article 6. Invoking Article 8 in such cases not only distorts the true meaning of "private life", but ignores the most fundamental of values underpinning the Convention, namely the value of life, of which the unborn child is the carrier. Calling the unborn child a foetus does not change the essential nature of what is at stake and of what an abortion entails.

2. Moreover, I fail to understand how it is possible to find also a violation of Article 8 in this case in respect of the second applicant (the mother of the minor). Apart from the fact that in this two-month saga the second applicant appears to have been something of an *éminence grise* in respect of the decision which should have been exclusively the first applicant's, to state, as the judgment does in paragraph 109, that "it cannot be overlooked that the interests and life prospects of the mother of a pregnant minor girl *are also involved* in the decision whether to carry the pregnancy to term or not" (my italics) gives a venal or mercenary slant to the concept of private life. Fundamental rights cannot be gauged by the yardstick of convenience or, worse, selfish interest.

3. As to Article 3 – and here I voted with the majority for a finding of a violation – just as the second applicant had a right and a duty to advise her daughter (but not to decide on her behalf) as to whether or not to terminate the pregnancy, the public authorities also had the duty to advise the second applicant as to what an abortion entails and of all its consequences. Such advice, however, should never have been allowed to degenerate, as happened in the instant case, into trickery, deceit and the emotional manipulation of a vulnerable person, which constitute an abuse of the dignity of the person. While the reluctance, indeed refusal, of some of the doctors to perform the abortion was understandable and was within their right to conscientious objection, the authorities' overall handling of the case was at best shambolic and at worst disgraceful. The violation of Article 3 stems not from the simple fact that some people (including the priest) tried to persuade the first applicant not to have an abortion but because of the

way they went about it, coupled with the publicity that was given by the authorities to the case, their disclosure of confidential information and their illegal arrest of the first applicant. Indeed, instead of being treated as a victim of rape and as person in need of help, she was treated as a criminal. Her parents fared only slightly better.