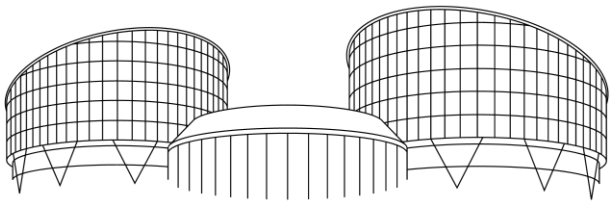

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF R.R. v. POLAND

(Application no. 27617/04)

JUDGMENT

STRASBOURG

26 May 2011

FINAL

28/11/2011

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

In the case of R.R. v. Poland,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 29 March 2011 and on 10 May 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 27617/04) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms R.R. ("the applicant"), on 30 July 2004. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Ms Monika Gąsiorowska and Ms Irmina Kotiuk, lawyers practising in Warsaw, assisted by Ms Christina Zampas. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8 of the Convention. She also invoked Article 3 of the Convention. The applicant further complained under its Article 13 that she did not have an effective remedy at her disposal.

4. The parties replied in writing to each other's observations.

5. In addition, third-party comments were received from the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, from the International Federation of Gynaecology and Obstetrics and from the International Reproductive and Sexual Health Law Programme, University of Toronto, Canada, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973.

7. Early in December 2001 the applicant visited Dr S.B. in a hospital in T., in the region covered by the then Małopolska Regional Medical Insurance Fund (replaced later by the countrywide National Health Fund). Having performed an ultrasound scan, Dr S.B. estimated that the applicant was in the 6th or 7th week of pregnancy.

8. On 2 January 2002, in the 11th week of her pregnancy, the applicant – who was at that time 29 years old, was married and had two children – was registered as a pregnant patient in her local clinic.

9. On 23 January and 20 February 2002 ultrasound scans were performed, in the 14th and 18th weeks of the applicant's pregnancy. On the latter date Dr S.B. estimated that it could not be ruled out that the foetus was affected with some malformation and informed the applicant thereof. The applicant told him that she wished to have an abortion if the suspicion proved true.

10. The Government submit that in January and February 2002 the applicant visited Dr S.B. at a private clinic. They argue that such an institution had no right to issue a referral to any public health institution.

11. The applicant disagrees. She first submits that at the material time Dr S.B. worked both at a public hospital in T. – where she visited him in December 2001 and in February 2002, after the second scan – and at a non-public clinic. She further submits that the Polish health care system is composed of so-called public health units and non-public health units. The latter, most often being first contact and basic care institutions, have financing contracts with the public National Health Fund (and had such contracts with its predecessors, the Regional Medical Insurance Funds, at the material time). Medical services available in non-public clinics are partly financed by public funds, constituted by premiums paid by all persons covered by the universal system of health insurance. Doctors working for non-public units have the same rights and duties to provide health care to patients as doctors employed by public units, including a right to refer a patient to a public unit.

12. Subsequently, the applicant went to a hospital in T. The results of a third ultrasound scan performed in that hospital confirmed the likelihood that the foetus was suffering from some malformation. A genetic examination by way of amniocentesis was recommended by Dr O., in order to confirm or dispel this suspicion.[1]

13. On 28 February 2002 the applicant had another ultrasound scan in a private clinic in Łódź. She had no referral from Dr S.B. and had therefore to pay for the service herself. Under the applicable laws, her expenditure could not be reimbursed. The results of that scan confirmed the likelihood that the foetus was affected with an unidentified malformation. Genetic tests were recommended again.

14. She was subsequently received by Professor K.Sz. in Łódź, a specialist in clinical genetics. A genetic test was again recommended. Professor K.Sz. recommended that the applicant should obtain a formal referral from her family doctor, S.B., to have the test carried out in a public hospital in Łódź, which was outside her region covered by the then Universal Medical Insurance Fund.

Subsequently, Dr S.B. refused to issue a referral, because in his view the foetus' condition did not qualify the applicant for an abortion under the provisions of the 1993 Act (see paragraph 66 below).

15. The Government submit that no reference to the possibility of the foetus being affected with Edwards syndrome was ever made.

16. The applicant disagrees. She submits that during that visit she was told that the scan gave rise to a suspicion of either Edwards or Turner syndrome. [2]

17. In the first week of March 2002 the applicant and her husband visited Dr S.B. during his night duty at the hospital in T. They demanded termination of the pregnancy. He refused and indicated that the results of the ultrasound scan could not be treated as a sole ground for diagnosis that the foetus was affected with severe malformation. He proposed having a

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1. For prenatal genetic testing an amniocentesis must be performed and karyotyping done on the extracted fluid. Karyotyping is a test to identify chromosome abnormalities associated with malformation or disease.

2. Turner syndrome: Turner syndrome, a medical disorder that affects about 1 in every 2,500 girls, is a genetic condition in which a female does not have the usual pair of two X chromosomes. Girls who have this condition usually are shorter than average and infertile due to early loss of ovarian function. Other health problems that may occur with TS include kidney and heart abnormalities, high blood pressure, obesity, diabetes mellitus, cataract, thyroid problems, and arthritis. Girls with TS usually have normal intelligence, but some may experience learning difficulties. Edwards syndrome: A rare genetic chromosomal syndrome where the child has an extra third copy of chromosome 18, more severe than the more common Down syndrome. Causes mental retardation and numerous physical defects that often cause an early infant death.

panel of doctors from the same hospital review his decision. The applicant refused.

18. On 11 March 2002 the applicant was admitted to a public hospital in T., within her region covered by the National Health Insurance Fund, and requested advice. She was told that a decision on termination could not be taken at that hospital and was referred to a university hospital in Kraków, to a pathological pregnancies ward, in another region of the Fund, for further diagnosis ("*w celu dalszej diagnostyki*").

19. During the applicant's stay in the hospital in T. a hospital lawyer was asked to give an opinion with a view to ensuring that the laws on the availability of legal abortion were respected. The applicant was also told that termination of pregnancy would entail a serious risk to her life and that the two caesarean births which she had previously had constituted the most important risk factor in deciding whether she should have a genetic test at all.

20. On 14 March 2002, immediately after being discharged from the T. hospital, the applicant travelled 150 kilometres to Kraków. She went to see Dr K.R. at Kraków University Hospital. He criticised her for contemplating a termination. She was also informed that the hospital categorically refused to carry out abortions and that no abortions had ever been performed there for the last 150 years. She was also refused a genetic examination, Dr K.R. being in the opinion that it was not necessary in her case. She stayed in the hospital for three days and had another ultrasound scan performed, the results of which were inconclusive. Urine and blood tests were also performed. She was discharged on 16 March 2002. The applicant's discharge record stated that the foetus was affected with developmental abnormalities ("*wady rozwojowe płodu*"). The same was stated in a medical certificate signed by Dr K.R. He recommended genetic testing in order to establish the character of the ailment.

21. On 21 March 2002 the applicant again contacted Professor K.Sz., who had examined her in February. Another ultrasound scan performed in a private clinic where Professor K.SZ. received patients confirmed the suspicion of malformation. The applicant obtained a referral from the professor to the Mother and Child Hospital in Łódź, but he informed her that he was in fact not competent to issue it. The professor told her that in order to have a genetic test carried out in Łódź, which was outside her region, she needed a referral issued by a doctor practising in her region and, in addition, an approval by a regional insurance fund, together with an undertaking that it would reimburse the costs of the test to the regional fund where the test was to be performed. The professor advised her to report to the Łódź hospital as an emergency patient, claiming that she was about to miscarry, as it was likely that she would then be admitted to that hospital.

22. Subsequently, on 22 March 2002, the applicant asked Dr K.R. for a referral.

The Government submit that Dr K.R. could not refer the applicant for a genetic test in Kraków because neither the University Hospital nor any other hospital in Kraków carried out such tests as a routine procedure. The applicant disagrees. She submits that Dr K.R. told her that she would not obtain the referral for testing because if the results were positive she would want to have an abortion.

23. Afterwards, on the same day, she again unsuccessfully asked Dr S.B. for a referral to the Łódź hospital.

24. The Government submit that the applicant obtained from him a referral to the same Kraków University Hospital where she had already been hospitalised between 11 and 14 March. The applicant disagrees and submits that no referral was issued to her.

The Court notes this discrepancy in the parties' submissions and notes that no copy of that referral has been submitted to it.

25. On 24 March 2002 the applicant went to the Łódź Mother and Child Hospital.

26. The Government submit that she went to the hospital with a referral issued by Professor K.Sz.

27. The applicant disagrees. She submits that she went to that hospital without a referral, as advised, and was admitted as an emergency patient.

28. Genetic test (amniocentesis) was performed there on 26 March 2002, in the 23rd week of pregnancy, and the applicant was told that she had to wait two weeks for the results.

29. The Government submit that the tests were carried out despite the fact that the applicant had not sought from the Małopolska section of the medical insurance fund any approval for financing them.

30. The applicant was discharged from the Łódź hospital on 28 March 2002. Before the results were available, on 29 March 2002 the applicant, increasingly desperate as by then she was very afraid that the foetus was suffering from severe genetic abnormalities, reported to the T. hospital, where she submitted a written request for an abortion. Dr G.S. told her that he could not take such a decision himself. He had to speak with the consultant.

31. By a letter of 29 March 2002 the applicant requested the hospital in T. to terminate the pregnancy, referring to the provisions of the 1993 Act. She requested that in case of a negative reply it should be made in writing "as soon as possible".

32. On 3 April 2002 the applicant went to that hospital again and was told that the consultant could not see her because he was ill. The visit was rescheduled for 10 April 2002. On the same day she wrote a letter of complaint to the director of the T. hospital, submitting that she had not received adequate treatment and that she felt that the doctors were

intentionally postponing all decisions in her case so that she would be unable to obtain an abortion within the time-limit provided for by law.

33. On 9 April 2002 she again requested doctors at the T. hospital to carry out an abortion. She referred to the results of the genetic tests which she had received on that date. The certificate, established by Professor K.Sz., confirmed that the karyotype indicated the presence of Turner syndrome. The certificate further read:

> "A chromosomal aberration and an ultrasound image were established, indicating the presence of congenital defects which can have a serious impact on the child's normal development. Further handling of the case under the provisions of the 1993 law on termination of pregnancy can be envisaged. A relevant decision should be taken with due regard to the parents' opinion".

The doctors in the T. hospital refused to carry out an abortion, Dr G.S. telling her that it was too late by then as the foetus was able at that stage to survive outside the mother's body.

34. On 11 April 2002 the applicant again complained in writing to the Director of the T. hospital about the manner in which her case had been handled and about the procrastination on the part of Dr G.S.

35. In April 2002 the applicant and her husband submitted a number of complaints to various health care system institutions. In a reply from the Ministry of Health, dated 16 May 2002, it was stated that "it was impossible to establish on the basis of the available documents why the genetic tests were postponed until 28 February 2002 when the foetus had already become capable of surviving outside the mother's body."

36. On 29 April 2002 she received a reply from the T. hospital to her complaints of 29 March 2002 and 3 April 2002. The letter contained an account of the facts of the case and quoted provisions of the 1993 Act. No assessment of the lawfulness of the conduct of the medical staff involved was made.

37. On 11 July 2002 the applicant gave birth to a baby girl affected with Turner syndrome.

38. On 31 July 2002 the applicant requested the prosecuting authorities to institute criminal proceedings against the persons involved in handling her case. She alleged serious failure on the part of the doctors, acting as public agents, to safeguard her interests protected by law, on account of their failure to perform timely prenatal examinations. As a result, the applicant had been denied information on the foetus' condition and, consequently, divested of the possibility to decide for herself whether or not she wished to terminate her pregnancy in the conditions provided for by law, and she had been forced to continue it.

39. On 16 December 2002 the Tarnów District Prosecutor discontinued the investigations, finding that no criminal offence had been committed. The prosecutor relied on an expert opinion prepared by the Białystok Medical University, according to which under the 1993 Act legal abortion was

possible only when foetal malformation was severe. It was not possible to assess whether malformations of a foetus were severe enough to justify an abortion until the foetus was able to live on its own outside the mother's body. It concluded that in the applicant's case an abortion would have been possible until the 23rd week of pregnancy. The applicant appealed.

40. On 22 January 2003 the Regional Prosecutor allowed her appeal and ordered that the investigation be re-opened. Additional medical evidence was taken during the investigation. On 5 December 2003 the prosecutor again discontinued the investigation, finding that no criminal offence had been committed.

41. The applicant appealed, complaining, *inter alia*, that the prosecuting authorities had failed to address the critical issue of whether, in the circumstances of the case, genetic tests should have been carried out in order to obtain a diagnosis of the foetus' condition. Instead the investigation had focused on whether or not the applicant had a right to an abortion under the applicable law.

42. Ultimately, on 2 February 2004, the competent court upheld the decision of the prosecuting authorities. The court held that doctors employed in public hospitals did not have the quality of "public servants", which in the circumstances of the case was a necessary element for the commission of the criminal offence of breach of duty by a public servant.

43. On 11 May 2004 the applicant filed a civil lawsuit with the Kraków Regional Court against doctors S.B., G.S. and K.R. and against the Krakow and T. hospitals. She argued that the doctors dealing with her case had unreasonably procrastinated in their decision on her access to genetic tests and had thereby failed to provide her with reliable and timely information about the foetus' condition. They had also failed to establish the foetus' condition in time for her to make an informed decision as to whether or not to terminate the pregnancy. As a result of an unjustified delay in obtaining relevant information she had been divested of the possibility of exercising an autonomous choice as to her parenthood.

The applicant further argued that the laws in force authorised abortion in specific situations. However, that right had been denied her as a result of difficulties in obtaining timely access to genetic tests and the lengthy delay before she had ultimately obtained such access.

The applicant referred to section 4 (a) 1.2 of the 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and to Articles 23 and 24 of the Civil Code guaranteeing so-called personal rights.

The applicant argued that the circumstances in which the determination of her access to genetic testing had been decided had breached her personal rights and dignity and had deeply humiliated her. No regard had been had to her views and feelings.

She also claimed compensation from Dr S.B. for hostile and disparaging statements about her character and conduct which he had made in a press interview about her case. He had disclosed to the public details about her and the foetus' health covered by medical secret and told the journalist that the applicant and her husband were bad and irresponsible parents.

44. She claimed just satisfaction in a total amount of PLN 110,000 for breach of her rights as a patient and her personal rights. She also sought a declaration that the three medical establishments were responsible in respect of future costs to be borne by the applicant in connection with her daughter's treatment.

45. On 28 October 2004 the Tarnów District Court found S.B. guilty of having disclosed to the public, in an interview he had given to the press, information covered by medical secrecy, including the fact that she had envisaged the termination of the pregnancy. It conditionally discontinued the proceedings against him and fixed a period of probation.

46. On 19 October 2005 the Kraków Regional Court awarded the applicant PLN 10,000 against S.B., finding that in a press interview published in November 2003 he had disclosed information relating to the applicant's health and private life in connection with her pregnancy. He had also made disrespectful and hurtful comments about the applicant's conduct and personality.

47. The court dismissed the remaining claims which she had lodged against doctors G.S. and K.R. and against the hospitals. The courts found that the applicant's personal and patient's rights had not been breached by either of these doctors or the hospitals. There had been no procrastination on the doctors' part in the applicant's case. Under the World Health Organisation standards termination was permissible only until the 23rd week of pregnancy, whereas the applicant had reported to the hospitals concerned when she was already in the 23rd week of pregnancy, and on 11 April 2002 she had been in the 24th week. Hence, neither her right to decide about her parenthood nor her rights as a patient had been breached in such a way as to place the defendants at fault.

48. On 12 December 2005 the applicant appealed. She submitted that the right to health-related information was protected both by Article 24 of the Civil Code, providing for legal protection of personal rights, and by section 19 of the Medical Institutions Act of 1992. In her case doctors S.B., K.R. and G.S. had been of the view that genetic tests were relevant to establishing the foetus' condition, but had not given her the necessary referral. K.R. had not been able to cite any legal basis for his refusal. G.S. had stated before the court that he had not issued a referral because the applicant had not asked for one. However, it was for a doctor with the required professional knowledge to decide what tests were called for in a given medical situation. The testimony given by the defendants had clearly shown that their conduct in the case had failed to comply with the

applicable legal provisions. The doctors had tried to shift the responsibility for the way in which her case had been handled to the applicant, despite the obvious fact that the fundamental responsibility for the proper handling of a medical case lay with them as health professionals. The doctors had also been well aware, as shown by the evidence which they had given, that the applicant had been desperate, in reaction to information that the foetus might be affected with a genetic disorder.

49. The applicant submitted that the doctors' conduct had breached the law, in particular section 2 (a) of the 1993 Act in so far as it imposed on the authorities an obligation to ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem, or of an incurable life-threatening ailment. The applicant had therefore had such a right, clearly provided for by the applicable law, but the defendants had made it impossible for her to enjoy that right.

50. On 28 July 2006 the Kraków Court of Appeal dismissed the applicant's appeal and upheld the first-instance judgment, endorsing the conclusions of the lower court.

51. On 11 July 2008 the Supreme Court allowed her cassation appeal, quashed the judgment of the appellate court in its entirety on grounds of substance and ordered that the case be re-examined.

The Supreme Court observed that the applicant's claim was two-pronged: it was based firstly on the failure to refer her for genetic testing and, secondly, on the breach of her right to take an informed decision which resulted from this failure.

52. As to the first part of her claim, the Supreme Court observed that it was not open to doubt (and had been confirmed by an expert opinion prepared for the purposes of the criminal investigation) that only genetic testing could confirm or dispel suspicions that the foetus was affected with Turner syndrome. The doctors concerned had known of the procedure. They were obliged, under the Medical Institutions Act 1992 (*ustawa o zakładach opieki zdrowotnej*), insofar as it guaranteed patients' rights, to refer the applicant for genetic testing of their own motion, without her asking for it. Under the same Act, the applicant had a legally protected right to obtain adequate information about the foetus' health. Had the doctors had conscientious objections to issuing a referral, they should have informed the applicant thereof and referred her to another practitioner who would have referred her for the testing, in accordance with the applicable laws on the medical profession governing the relevant procedure, but they had failed to do so.

53. The procedures governing the carrying out of genetic tests and their financing by various parts of the then Medical Insurance Fund, applicable at the material time, could not be validly relied on as exempting doctors from issuing a referral, in particular as those procedures were not of a statutory character and could not be plausibly relied on to justify restricting the applicant's rights as a patient. The obligation to refer the applicant had not, contrary to the courts' position, ended on the date when legal abortion of a foetus affected with suspected malformation was no longer possible (that is, after the 22nd week), since there were no legal – or medical – grounds on which to automatically link genetic testing with access to legal abortion. Furthermore, at the material time there had been no temporal limitation in law on the carrying out of these tests during pregnancy. It was only in 2004 that an ordinance had been enacted under which genetic testing became available only until the 22nd week of pregnancy.

54. The Supreme Court considered that there were therefore good reasons to accept that the doctors dealing with the applicant's case had breached her personal rights within the meaning of Article 24 of the Civil Code and her patient's rights guaranteed by the Medical Institutions Act. They had been aware that only genetic testing was capable of determining the foetus' genetic situation, but had still refused a referral; instead they had sent her for various tests carried out in a hospital setting which were not relevant to such a diagnosis.

Moreover, the lower courts had erred in their finding that the applicant had not suffered non-pecuniary damage as a result of the doctors' acts. Such damage had been caused by the distress, anxiety and humiliation she had suffered as a result of the manner in which her case had been handled.

55. As to the second part of the applicant's claim, the Supreme Court observed that it transpired from the case-law of the Supreme Court (IV CK 161/05, judgment of 13 October 2005; see paragraph 80 below) that a right to be informed about the foetus' health and to take informed decisions, in the light of that information, as to whether to continue the pregnancy or not was a personal right within the meaning of the Civil Code. If a child affected with a genetic problem was born as a result of failure to carry out genetic testing, a claim for just satisfaction (*zadośćuczynienie*) arose on the parent's part. The lower courts had erred in that they had found that there was no adequate causal link between the doctors' conduct in the applicant's case and the fact that she had not had access to legal abortion. In this respect the court noted that there had been enough time between the 18th week of the pregnancy, when the suspicions had arisen, and the 22nd, when the time-limit for legal abortion had expired, to carry out genetic testing. When the tests had finally been carried out, the applicant had received the results two weeks later. The tests should therefore have been carried out immediately after the suspicions had arisen, but instead, as a

result of procrastination on the part of doctors S.B., G.S. and K.R., they had ultimately been conducted much later.

56. The court finally held that the amount of PLN 10,000 to be paid by doctor S.B. for denigrating statements he had made in a press interview about the applicant was, in the circumstances of the case, manifestly inadequate.

57. Hence, the judgment had to be quashed and the case remitted for re-examination in its entirety.

58. On 30 October 2008 the Kraków Court of Appeal gave a judgment. It stated, referring to the findings of the Supreme Court, that Dr S.B. had failed to refer the applicant for genetic testing as soon as the suspicions as to the foetus' condition had arisen. He had referred her twice to the Kraków hospital, despite the fact that she had already been at that hospital and that no genetic tests had been carried out at that time. The court held that the applicant's claim of PLN 20,000 should therefore be allowed.

59. It further amended the judgment of the first-instance court by increasing to PLN 30,000 the just satisfaction to be paid to the applicant by S.B. for breach of her personal rights in making denigrating public statements about her in the press.

60. In so far as the action was directed against the T. hospital, the court held that the applicant had not received a proper diagnosis. Dr G.S., working at the T. hospital, had not referred her for genetic testing, but only to Kraków hospital, even though he had been aware that genetic testing was not carried out there. When the applicant had eventually received the results of the tests and, relying on them, had asked G.S. on 29 March 2002 to perform an abortion, a written negative reply had been served on her a month later, namely on 29 April 2002.

61. In respect of Kraków University Hospital, the court noted that when the applicant had been admitted there on 14 March 2002, she had already had the results of the scan made by Professor K.Sz. in Łódź, which strongly indicated that the foetus was affected with Turner syndrome. In such circumstances, the hospital was under an obligation to carry out tests in order to either confirm or dispel these suspicions, but had failed to do so. Other tests had been carried out instead, concerning a possible inflammatory condition of the foetus, which were irrelevant for the diagnosis of Turner syndrome. The hospital had exposed the applicant to unnecessary stress, while the correct diagnosis had not been made. The defendants had been aware that time was of the essence in the availability of legal abortion, but had failed to accelerate their decision-taking. The hospitals were liable for the negligent acts of their employees in so far as it was their duty to provide the applicant with full information about any genetic disorder of the foetus and how it might affect its development and to do so in time for her to prepare herself for the prospect of giving birth to a child with a genetic disorder. Moreover, the doctors had failed to make any record of their

refusals and the grounds for them, an obligation imposed on them by section 39 of the Medical Profession Act.

62. As Kraków University Hospital had a higher referral level, its liability was more serious as a high level of professional skill could have been reasonably expected of it. The applicant had legitimately expected that she would obtain diagnostic and therapeutic treatment of the requisite quality, whereas her case had in fact been handled with unjustifiable delays.

63. Having regard to the defendants' failure to respect the applicant's rights, the court awarded the applicant PLN 5,000 against T. Hospital of St. Lazarus and PLN 10,000 against Kraków University Hospital, and dismissed the remainder of her appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

64. Article 38 of the Constitution reads as follows:

> "The Republic of Poland shall ensure the legal protection of the life of every human being."

65. Article 47 of the Constitution reads:

> "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

B. The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and related statutes

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

Section 2 (a) of the 1993 Act reads:

> "The State and local administration shall ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening ailment."

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

> "1. An abortion can be carried out only by a physician where
>
> 1) pregnancy endangers the mother's life or health;

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

3) there are strong grounds for believing that the pregnancy is a 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; 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. 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."

68. An ordinance issued by the Minister of Health on 22 January 1997, on qualifications of doctors authorised to perform abortions, contains two substantive sections. In its section 1, the requisite qualifications of doctors authorised to perform legal abortions in the conditions specified in the 1993 Act are stipulated. Section 2 of the Ordinance reads:

"The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman's condition."

69. On 21 December 2004 the Minister of Health enacted an Ordinance on Certain Medical Services (*rozporządzenie Ministra Zdrowia w sprawie zakresu świadczeń opieki zdrowotnej)*. An Appendix No. 3 to this Ordinance, entitled Scope of Medical Prenatal Services (...) (*Zakres lekarskich badań prenatalnych (...)*) read, in so far as relevant:

"1. Prenatal tests are to be understood as examinations and diagnostic procedures carried out in respect of pregnant women during the first and second trimesters of pregnancy where there is an increased risk of genetic ailment or malformation, but not later than in the 22nd week of pregnancy.

2. Prenatal tests comprise: 1) non-invasive examinations [including ultrasound scans and biochemical tests [marking of serum levels in a pregnant woman's blood]; 2) invasive tests [including biopsy of the trophoblast and amniocentesis].

3. Prenatal tests are recommended, in particular, where ... 5) results of the ultrasound scan carried out during the pregnancy indicate an increased risk of the foetus being affected with a chromosomal aberration or other malformation."

C. Relevant provisions of the Criminal Code

70. Termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 § 1 of the Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists such a termination may be sentenced to up to three years' imprisonment. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act.

71. Under Article 157 (a) 1, causing physical damage to an unborn child is a criminal offence punishable by a fine, by limitation of liberty, or by imprisonment of up to two years.

D. Patients' rights

72. At the relevant time, patients rights were provided for by the Medical Institutions Act 1992 (*ustawa o zakładach opieki zdrowotnej*). Its section 19 (2) provided that a patient had a right to obtain information about his or her condition.

E. Rights and obligations of doctors

73. Under section 39 of the Medical Profession Act (*ustawa o zawodzie lekarza*), a doctor may refuse to carry out a medical service, invoking her or his objections on the ground of conscience. He or she is obliged to inform the patient where the medical service concerned can be obtained and to register the refusal in the patient's medical records. Doctors employed in health care institutions are also obliged to inform their supervisors of the refusal in writing.

74. Section 31.1 of the Medical Profession Act 1996 provides that physicians are under an obligation to provide to the patient, or his or her representative, comprehensible information about his or her health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of a decision to have recourse to them or not, and about possible results of therapy and prognosis.

75. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts, a doctor may, on his or her own initiative or at a patient's request and if he or she finds it reasonable in the light of the requirements of medical science, obtain an opinion of a relevant specialist or arrange a consultation with other doctors.

F. Civil liability in tort

76. Articles 415 et seq. of the Polish Civil Code provide for liability in tort. Under this provision, whoever by his or her fault causes damage to another person, is obliged to redress it.

77. Pursuant to Article 444 of the Civil Code, in cases of bodily injury or harm to health, a perpetrator shall be liable to cover all pecuniary damage resulting therefrom.

78. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

> "The court may grant an adequate sum as pecuniary compensation for non-pecuniary damage (*krzywda*) suffered by anyone whose personal rights have been infringed. Alternatively, the person concerned, without prejudice to the right to seek any other relief that may be necessary to remove the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific social interest. ..."

G. Case-law of the Polish courts

79. In a judgment of 21 November 2003 (V CK 167/03) the Supreme Court held that unlawful refusal to terminate a pregnancy where it had been caused by rape, that is to say in circumstances provided for by section 4 (a) 1.3 of the 1993 Act, could give rise to a compensation claim for pecuniary damage sustained as a result of such refusal.

80. In a judgment of 13 October 2005 (IV CJ 161/05) the Supreme Court expressed the view that a refusal of prenatal tests in circumstances where it could be reasonably surmised that a pregnant woman ran a risk of giving birth to a severely and irreversibly damaged child, that is to say in circumstances set out by section 4 (a) 1.2 of that Act, gave rise to a compensation claim.

H. Relevant non-Convention material

1. Texts adopted within the Council of Europe

81. On 21 June 1990 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (90) 13 on prenatal genetic screening, prenatal genetic diagnosis and associated genetic counselling. The recommendation contains, *inter alia*, the following principles:

> "The Committee of Ministers [...] noting that in recent decades considerable progress has been achieved in detecting genetic abnormalities in the child to be born, through genetic screening and through prenatal diagnosis of pregnant women, but also noting the fears that these procedures arouse;

Considering that women of childbearing age and couples should be fully informed and educated about the availability of, the reasons for and risks of such procedures;

Convinced that the genetic diagnosis and screening must always be accompanied by appropriate genetic counselling but that such counselling should in no cases be of a directive nature and must always leave the woman of childbearing age fully informed to take a free decision; ...

Recommends that the governments of the member States adopt legislation in conformity with the Principles contained in this Recommendation or take any other measures to ensure their implementation.

"Prenatal diagnosis" is the term used to describe tests used to confirm or exclude whether an individual embryo or foetus is affected by a specific disorder.

Principle 1 : No prenatal genetic screening and/or prenatal genetic diagnosis tests should be carried out if counselling prior to and after the tests is not available.

Principle 2 : Prenatal genetic screening and/or prenatal genetic diagnosis tests undertaken for the purpose of identifying a risk to the health of an unborn child should be aimed only at detecting a serious risk to the health of the child. ...

Principle 4 : The counselling must be non-directive; the counsellor should under no condition try to impose his or her convictions on the persons being counselled but inform and advise them on pertinent facts and choices. ...

Principle 9 : In order to protect the woman's freedom of choice, she should not be compelled by the requirements of national law or administrative practice to accept or refuse screening or diagnosis. In particular, any entitlement to medical insurance or social allowance should not be dependent on the undergoing of these tests.

Principle 10 : No discriminatory conditions should be applied to women who seek prenatal screening or diagnostic testing or to those who do not seek such tests, where these are appropriate."

82. In 2008 the Parliamentary Assembly of the Council of Europe adopted Resolution 1607 (2008) "Access to safe and legal abortion in Europe". This resolution, in so far as relevant, reads:

"1. The Parliamentary Assembly reaffirms that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women's rights must be used to reduce the number of both unwanted pregnancies and abortions.

2. In most of the Council of Europe member states the law permits abortion in order to save the expectant mother's life. Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother's physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. The Assembly is nonetheless concerned that, in many of these states, numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed

and possess adequate financial means can often obtain legal and safe abortions more easily.

3. The Assembly also notes that, in member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.

4. The Assembly takes the view that abortion should not be banned within reasonable gestational limits. A ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.

...

6. The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.

7. The Assembly invites the member states of the Council of Europe to:

7.1. decriminalise abortion within reasonable gestational limits, if they have not already done so;

7.2. guarantee women's effective exercise of their right of access to a safe and legal abortion;

7.3. allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion;

7.4. lift restrictions which hinder, *de jure* or de facto, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover ..."

83. The provisions of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), adopted in Oviedo, Spain, on 4 April 1997, in so far as relevant, read:

"Article 5 – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. ...

Article 10 – Private life and right to information

Everyone has the right to respect for private life in relation to information about his or her health.

Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed."

2. *The texts adopted within the United Nations*

84. The Polish Government, in their fifth periodic report submitted to the Committee (CCPR/C/POL/2004/5), stated:

"106. In Poland data about abortions relate solely to abortions conducted in hospitals, i.e. those legally admissible under a law. The number of abortions contained in the present official statistics is low in comparison with previous years. Non-governmental organisations on the basis of their own research estimate that the number of abortions conducted illegally in Poland amounts to 80,000 to 200,000 annually.

107. It follows from the Government's annual Reports of the execution of the [1993] Law [which the Government is obliged to submit to the Parliament] and from reports of non-governmental organisations, that the Law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in public health care system units who invoke the so-called conscience clause, while at the same time women who are eligible for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman. There [are] no official statistical data concerning complaints related to physicians' refusals to perform an abortion. ... In the opinion of the Government, there is a need to [implement] already existing regulations with respect to the ... performance of abortions."[1]

85. The United Nations Human Rights Committee considered the fifth periodic report of Poland (CCPR/C/POL/2004/5) at its 2240th and 2241st meetings (CCPR/C/SR.2240 and 2241), held on 27 and 28 October 2004 and adopted the concluding observations which, in so far as relevant, read:

"8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned (art. 6).

1. The report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999.

The State party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament."

86. The Committee on the Elimination of Discrimination against Women (CEDAW), at its 37th session, held from 15 January to 2 February 2007, considered the combined fourth and fifth periodic report (CEDAW/C/POL/4-5) and the sixth periodic report of Poland (CEDAW/C/POL/6). It formulated the following concluding comments:

"24. ... The Committee is concerned about the lack of official data and research on the prevalence of illegal abortion in Poland and its impact on women's health and life.

... 25. The Committee urges the State party to take concrete measures to enhance women's access to health care, in particular to sexual and reproductive health services, in accordance with article 12 of the Convention and the Committee's general recommendation 24 on women and health. It calls on the State party to conduct research on the scope, causes and consequences of illegal abortion and its impact on women's health and life. It also urges the State party to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use of the conscientious objection clause."

3. The International Federation of Gynaecology and Obstetrics

87. The objective of the International Federation of Gynaecology and Obstetrics (FIGO) is to promote sexual and reproductive health and rights through educational research and advocacy activities. In 1991 its Ethics Committee issued a statement on Ethical Issues Concerning Prenatal Diagnosis of Disease in the Conceptus. It states that:

"Prenatal diagnosis has become an established service in the care of pregnant women. Further advances, especially at the molecular level, will expand the accuracy and diagnostic scope of manifest disease in later life. Such information may lead to termination of pregnancy, genetic engineering or to adjustments in future life-style. There is also the potential danger of stigmatization or discrimination against the parent or the child identified as affected by some disorder or potential disorder. ...

A potential benefit of prenatal diagnosis is the rejection of the diseased conceptus when requested by the woman and permitted by the law. The legal position and the likely attitude of the woman to termination of pregnancy should be ascertained in advance.

Prior to undertaking diagnostic procedures, women should be counseled about the risks and benefits of the technique to be used. Such counseling should be factual, respectful of the woman's view, and non-coercive. Consent should be obtained for the use of the procedure.

Women should not be denied the availability of prenatal diagnosis because they will not agree in advance to pregnancy termination as an option. Nor should the techniques be withheld on social or financial grounds.

Knowledge of prenatally diagnosed disease should not be used as justification for withholding normal medical support or services during pregnancy, at birth, or thereafter, which are desired by the parents.

Equity requires that these important diagnostic services are made as widely available as possible. ...”

88. The FIGO Ethics Committee’s 1991 statement on Ethical Aspects of Termination of Pregnancy Following Prenatal diagnosis states, *inter alia*, that:

“3. Knowledge acquired by prenatal diagnosis allows for the possibility of termination of pregnancy in those countries where this is legal. This raises serious ethical questions with regard to the degree of abnormality and the reduction in quality of life which may justify this course of action. The attitude of the parents, particularly the woman, after counseling, is of major importance in reaching a decision. It is unethical for anyone to bring pressure to bear on the couple with a view to their accepting a particular option.

4. Doctors should be aware of the desire of parents for a “perfect baby”. However, this wish is unrealistic and parents should be counselled accordingly.

5. Termination should be discouraged when the disorder is treatable and will not necessarily affect the future quality of life.

6. In enabling parents to reach an appropriate decision the primary concern should be the quality of life and the longevity of the individual. A second consideration must be the effect that the birth and life of such a child might have on the woman herself and on her family. In this regard consideration must also be given to the effect of the termination of the pregnancy on the physical and/or psychological health of the woman and her family. A third concern is the availability of resources and support for long-term care.”

89. The Committee’s 1994 statement on the Ethical Framework for Gynecologic and Obstetric Care requires that:

“3. when decisions regarding medical care are required, women be provided with full information on available medical alternatives including risks and benefits. Informing women and obtaining their input and consent, or dissent, should be a continuing process.

4. If a physician is either unable or unwilling to provide a desired medical service for non-medical reasons, he or she should make every effort to achieve appropriate referral.”

THE LAW

90. The applicant complained that the facts of the case had given rise to a breach of Article 3 of the Convention which, insofar as relevant, reads as follows:

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

91. The applicant further complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to respect for her private life and her psychological and moral integrity had been violated by the authorities' failure to provide her with access to genetic tests in the context of her uncertainty as to whether the foetus was affected with a genetic disorder and also by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention, insofar 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."

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The applicant's status as a victim

1. The parties' submissions

92. The Government first submitted that the applicant had rejected their friendly settlement proposal. In their view, she had therefore lost her status as a victim of a breach of her rights guaranteed by the Convention.

They further submitted that she had lost that status also because the Kraków Court of Appeal, in its judgment of 30 October 2008, awarded her PLN 65,000 and that judgment subsequently became final.

93. The Government argued that the Supreme Court, in its judgment of 11 July 2008, had held that the right to family planning and the related right to legally terminate the applicant's pregnancy on conditions provided for by Polish law had to be regarded as a personal right within the meaning of the Civil Code. These rights were therefore to be seen as falling within the ambit of Articles 3 and 8 of the Convention. The Supreme Court and the Court of Appeal had thereby acknowledged that the applicant's rights had been breached and afforded redress to her.

94. The applicant argued that the violations of the Convention in her case had resulted from the lack of review procedures available in connection with the doctors' refusal to provide her with prenatal diagnosis and care and from the unregulated and chaotic practice of conscientious objection under Polish law, which formed the basis of her complaints under the Convention.

She further emphasised that she had received insufficient compensation for the breaches of her rights.

In addition, the domestic courts had failed to address the systemic shortcomings of Poland's health care and legal system disclosed by her case. She referred to the case of *M.A v. the United Kingdom* (no. 35242/04, ECHR 2005 – VIII) where a family judge had apologised for the failures in the child care system which had come to light against the background of an individual case, had carried out an explicit and detailed analysis of the system's shortcomings and had made a list of recommendations to avoid repetition of similar violations. She argued that this should have served as a model approach for dealing with her case.

95. The applicant concluded that, in any event, the damages awarded to her on the domestic level should not be used as a means of avoiding the State's compliance with its obligations under the Convention.

2. The Court's assessment

96. In so far as the Government referred to the friendly settlement negotiations between the parties, the Court first reiterates that in accordance with Article 38 § 2 of the Convention, friendly settlement negotiations are confidential and without prejudice to the parties' arguments in the contentious proceedings. Pursuant to Rule 62 of the Rules of Court, no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings. In any event, in the present case the applicant refused the terms of the proposed settlement. Her refusal to settle the case has therefore no incidence on her victim status (see, *Chebotarev v. Russia*, no. 23795/02, § 20, 22 June 2006, *mutatis mutandis; Nina Kazmina and Others v. Russia*, nos. 746/05, 13570/06, 13574/06, 13576/06 and 13579/06 (Sect. 1) (Eng), § 25, 13 January 2009; *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, § 74, ECHR 2003-VI).

97. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V). An applicant's status as a victim of a breach of the Convention may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court (see *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; and *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003). The adequacy of that redress falls to be assessed in the light of all the circumstances of the case seen as a whole (see, *mutatis mutandis*, *Dubjaková v. Slovakia* (dec.), no. 67299/01, 19 October 2004). The applicant's victim status also depends on whether the domestic

authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 *et seq*., and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X).

98. The Court has therefore to examine whether the national authorities have acknowledged, either expressly or in substance, the breach of the rights protected by the Convention.

99. It notes in this connection that the applicant, in her civil case brought before the domestic courts, complained about the doctors' failure to refer her for the purposes of genetic testing and about the resultant breach of her right to make an informed decision as to the continuation of pregnancy (see paragraph 43 above).

100. Furthermore, she complained that her personal rights, including her right to respect for personal dignity, had been breached as a result of the manner in which the issue of her access to genetic tests had been determined (see paragraph 43 above).

101. The Court observes that the Supreme Court, in its judgment of 11 July 2008, held that the right of a pregnant woman to be informed about the foetus' health in a timely manner and to take informed decisions in the light of that information as to whether to continue the pregnancy or not was a personal right within the meaning of the Civil Code. The Supreme Court found that the legal assessment of the doctors' conduct in connection with the applicant's access to genetic testing made by the lower courts was untenable. It accordingly quashed, in its entirety, the judgment of the Kraków Court of Appeal, given on 28 July 2008. As a result, in its subsequent – and final – judgment of 30 October 2008 the Kraków Court of Appeal reversed its previous position and acknowledged that the applicant's patient's and personal rights had been breached.

102. The Court notes that in its judgment the Supreme Court had shown a thorough understanding of the legal issues arising in the case and interpreted them in a manner showing regard for the applicant's dignity and personal autonomy, values protected by the provisions of the Polish Civil Code. It carefully weighed them against other interests involved in the case. In particular, the Supreme Court emphasised a patient's right of access to information relevant to her or his health, including about the foetus' condition. It also held that the applicant had suffered distress, anxiety and humiliation as a result of the manner in which her case had been handled (see paragraph 54 above).

103. As to the first set of issues raised by the applicant's case (see paragraph 99 above) the Court notes that the applicant submitted them to the Court, alleging that they had given rise to a breach of Article 8 of the Convention (see paragraph 91 above). The Court considers that this part of

the Government's objection is closely linked to the substance of the applicant's complaint under this provision and that its examination should therefore be joined to the merits of that complaint.

104. In so far as the Government's objection as to the applicant's victim status also concerns the applicant's complaint under Article 3 of the Convention (see paragraph 90 above), the Court is of the view that the amounts awarded at the domestic level must be viewed against the background of the case seen as a whole. The civil case concerned the protection of the applicant's dignity. The issues involved in the case were therefore of the utmost importance for her.

105. It is in this context that the adequacy of the award made in the civil proceedings must be assessed. The courts awarded the applicant PLN 65,000 for all three kinds of complaints which she had made in respect of the way in which she had been treated by the health professionals.

106. However, the Court observes that that amount covered also her claim for defamation against S.B., one of the doctors who had made disparaging statements about her in a press interview. He was ordered to pay PLN 50,000, of which PLN 30,000 concerned the claims arising in connection with the interview. Only the amount of PLN 20,000 concerned the same issues as those examined by the Court in the present case and arising in connection with the circumstances surrounding Dr S.B.'s failure to issue to the applicant a prompt referral for genetic testing.

107. The Court further notes that the applicant was also awarded PLN 5,000 against the hospital in T. and PLN 10,000 against the Kraków University Hospital in respect of the breach of her rights as a patient. These amounts have to be added to the sum of PLN 20,000 referred to in the above paragraph. In sum, the amount of the domestic award relevant for the case before the Court in its entirety was therefore PLN 35,000.

108. The Court notes that in the case of *Tysiąc v. Poland* it examined whether the Polish State had complied with its positive obligation under Article 8 of the Convention to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a legal abortion. It awarded the applicant EUR 25,000 [1] in respect of a breach of this provision. This amount was almost three times higher than that awarded by the domestic courts in the present case in respect of the applicant's complaints made both under Article 3 and Article 8 of the Convention. The Court is therefore of the view that, having regard to the circumstances of the case, the amount of PLN 35,000 cannot be regarded as financial redress commensurate with the nature of the damage alleged by the applicant (compare and contrast *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I).

1. PLN 100,000 at the relevant time.

109. The Court finds that the applicant has not ceased to be a victim of a breach of Article 3 of the Convention within the meaning of Article 34 of the Convention. The Government's objection in this respect is accordingly dismissed.

3. Exhaustion of domestic remedies

110. The Government submitted that the applicant had failed to exhaust relevant domestic remedies. The Polish legal system provided for legal avenues which made it possible, either by means of criminal proceedings or civil compensation claims, to establish liability on the part of doctors for any damage caused by medical malpractice.

111. They argued that Article 8 of the Convention did not entail a duty for the State either to establish a general preventive mechanism for review of medical decisions, or to create an appeal procedure regarding access to medical services, even where access to another medical service hinged on a prior diagnostic service. This was also the case for medical services where the time factor was crucial, such as chemotherapy, for instance, as well as services which were essential in order to prevent serious health damage or even death. There were no reasons for departing from this general rule where medical decisions could help to determine whether a foetus was suffering from possible genetic malformation.

112. Furthermore, the State's choice between creating preventive measures or retroactive ones, such as civil or criminal liability, depended on assumptions made by public powers with respect to a conflict between the rights of a pregnant woman and those of an unborn child. The obligations imposed by Article 8 did not exclude perceiving the life of an unborn child as of such crucial value as to render acceptable a risk of wrongful medical diagnosis concerning the existence – or otherwise – of conditions which would make an abortion lawful. Likewise, such a perception of the interests involved could also justify limiting the legal avenues for challenging such a diagnosis to retroactive ones. Obviously, only a woman who wished to terminate her pregnancy would resort to a potential review mechanism in relation to a medical diagnosis impinging on the foetus' rights. As a result, only an unborn child would bear the risk of such a diagnosis being incorrect.

113. The Government further submitted that the applicant should have resorted to a constitutional complaint to challenge the provisions of the 1993 Act. The Court had already held a constitutional complaint to be an effective and sufficient domestic remedy.

114. The applicant submitted that the civil proceedings did not provide sufficient and effective remedies with respect to the breaches alleged. Procedures in which decisions concerning the availability of lawful abortion were reviewed *post factum* could not fulfil such a function (*Tysiąc*, cited above, § 118). Retrospective measures alone were not sufficient to provide

appropriate protection for the physical and psychological integrity of individuals in such a vulnerable position as the applicant (*Tysiąc*, § 124). The available legal framework as applicable at the material time did not contain any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met (*Tysiąc*, § 127).

115. She further argued that she had sought information on the health of the foetus, through prenatal genetic examination, which would have enabled her to make an informed decision, based on medical evidence, as to whether to continue her pregnancy or not. Instead, due to systemic problems in the health care system and, in particular, the State's failure to implement existing laws on conscientious objection and on access to prenatal health care services and to lawful abortion, the doctors had intentionally denied her timely information and health services that should have been considered normal and accessible, lawful and appropriate in the circumstances of her case. Delaying prenatal diagnostic testing also delayed the taking of potential informed decision as to whether to request a termination of pregnancy, to which the applicant was entitled, ultimately making abortion impossible.

116. In so far as the Government refer to a constitutional complaint as a remedy relevant in the applicant's circumstances, the Court is of the view that such a complaint would not have been an effective means of protecting the applicant's right to respect for her private life for the following reasons.

The Court notes, firstly, that it has already dealt with the question of the effectiveness of the Polish constitutional complaint (*Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no 8812/02, 8 November 2005; *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005). It examined its characteristics and, in particular, found that the constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation resulted from the direct application of a legal provision considered by the complainant to be unconstitutional. In the present case, the complaints raised by the applicant cannot be said to have originated from any single legal provision or even from a well-defined set of provisions. They rather resulted from the way in which the laws were applied in practice to her case. However, it follows from the case-law of the Polish Constitutional Court that it lacks jurisdiction to examine the way in which the provisions of domestic law were applied in an individual case.

117. Furthermore, the Court has already held that the constitutional courts were not the appropriate *fora* for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to resolve through evidence, largely of a medical nature, whether a woman had established the existence of circumstances in which legal abortion could be sought under the 1993 Act (see, *mutatis*

mutandis, *A, B and C v. Ireland* [GC], no. 25579/05, § 258, 16 December 2010).

118. The Court therefore dismisses the Government's preliminary objection as regards the applicant's failure to exhaust domestic remedies by not lodging a constitutional complaint.

119. Furthermore, 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 is closely linked to the substance of the applicant's complaints under Article 8 § 1 read together with Article 13 of the Convention, and should be joined to the merits of the case.

120. The Court further notes that 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.

II. THE MERITS

121. The Court will first set out the submissions received from third parties who were granted leave to intervene in the case (A.). It will then examine the merits of the applicant's complaints under Articles 3, 8 and 13 of the Convention (B., C. and D.).

A. Third parties' submissions

1. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights

122. Because the decision to continue or terminate a pregnancy had a profound effect on a woman's private life, including her physical and moral integrity, any interference with this decision must be analysed in light of the woman's right to privacy. This was true regardless of whether the interference directly affected the woman's access to legal abortion or affected it indirectly, by denying her the prerequisite healthcare she needed in order to make a decision regarding continuation or termination of the pregnancy. Numerous international conventions broadly recognised a woman's right to the highest attainable standard of health, including access to appropriate reproductive care. Privacy was particularly important in the case of sexual and reproductive healthcare, which must be provided in a manner consistent with women's rights to personal autonomy.

123. Access to prenatal genetic examinations touched upon reproductive health-related aspects of the right to privacy. Access to information was

particularly important in the context of health, as individuals cannot make meaningful healthcare decisions without access to health-related information. Accurate knowledge of an individual's health status was necessary to enable that individual to understand her health care options and protect her bodily integrity by deciding which health care treatment she would avail herself of.

124. This right to information applied with regard to a woman's own reproductive status, knowledge of which was particularly important if women were to be empowered to preserve their bodily integrity by making reproductive health care decisions. Pregnant women might need access to prenatal examinations in order to obtain accurate information about their own health and the health of their foetus, particularly where there were other indications of genetic malformation. Genetic examinations were often the most reliable method for detecting foetal genetic defects.

125. States must allow individuals to make health care decisions in an active and informed manner. Genetic examinations were one important source of information on foetal health. Obstructing access to examinations necessary to make reproductive decisions interfered with women's reproductive health care decision-making. Without information about whether a foetus was healthy or severely malformed, a woman could not make crucial decisions regarding prenatal treatment or whether to carry the foetus to term. When a country permitted abortion in cases of foetal genetic defect, women must have access to prenatal genetic examinations in order to exercise their right to a legal abortion.

126. One way in which States interfered with a woman's right to decide on a legal abortion was to make such abortions unavailable in practice. The Human Rights Committee had expressed concern regarding States that professed to grant women access to legal abortion but allowed practices to continue that interfered with actual access to abortion services.

127. Where a State allowed providers to conscientiously object to providing health services, it must ensure that it had other adequate procedures in place to safeguard women's ability to effectively exercise their rights under Article 8 of the Convention, including the right to an abortion where legal and the right to information regarding their health status.

128. The consensus among UN Treaty Monitoring Bodies and international health organisations was that the right of a health care provider to conscientiously object to the provision of certain health care services must be carefully regulated so that it did not effectively deny a woman the right to obtain such services which were guaranteed by the law, in this case pursuant to Article 8 of the European Convention.

2. International Reproductive and Sexual Health Law Programme of the Law Faculty, University of Toronto

129. The protection of prenatal life was an important social and moral value in all Contracting Parties. However, it must be asked whether protecting this value was a legitimate reason to deny women access to prenatal tests that will assist them, rather than their doctors, to make informed decisions as to whether to pursue consequent treatment.

130. There was widespread regional and international recognition of the importance of ensuring women's right to equal access to health care systems generally, and access to timely diagnostic treatment and lawful abortion.

131. Where uniform European standards existed regarding women's timely access to medically-indicated diagnostic tests and consequent lawful treatment, Contracting Parties' margin of appreciation was greatly diminished.

132. The stereotype that motherhood was women's natural role and destiny was discriminatory when it implied that all women should be treated only as mothers or potential mothers, and not according to their individual needs not to become mothers at certain points in their lives. When Contracting Parties incorporated such a stereotype into the delivery of health care services, it disadvantaged women. Discriminatory stereotypes limited the ability of individual women to make autonomous decisions about their health and their private and family life that could conflict with their role as mothers or future mothers.

133. Women should not be conditioned by State agents' withholding of available medical services that could diagnose severe foetal abnormalities when the law allowed them the private choice to terminate such pregnancies.

134. Accordingly, unjust denial or obstruction of diagnostic services on the basis of a woman's express intention to terminate a pregnancy was an interference with private life. A pregnant woman's suffering was too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision had been in the course of our history and culture. The destiny of the woman must be shaped to a large extent by her own conception of her spiritual imperatives and her place in society.

135. Women's private choices of the design and composition of their families should not be at the disposal of health care professionals or institutions that determine the allocation of available health care resources, or that seek to advance sex-specific norms based on religious or cultural ideologies through the denial of available diagnostic services in order to prevent outcomes of which they disapprove.

136. Women's human right to control their own bodies affected their capacity to serve their families, including dependent children and often dependent elderly family members. The design and composition of

women's family life, including how they proportioned resources of time and energy among healthy and disabled children, and among children and elderly family members, was a matter of deep personal and emotional significance.

137. There was a wide consensus that in the administration of health-care systems, Contracting Parties were obligated positively to ensure reasonable availability of diagnostic services to enable patients to have the information necessary to make medical decisions significant for their health and family well-being.

138. This principle of free and informed decision-making was found in codes of medical ethics and was reflected in national laws, court decisions of Contracting Parties, international legal norms and their application, and international guidelines on medical practice.

139. Doctors can exploit their professional authority to treat female patients according to their own beliefs and sex-based stereotypes, rather than according to the actual needs of such patients. When patients were treated in ways unrelated to their own medical needs, and to their own priorities and aspirations, but rather as a means to advance doctors' own ends, there was a form of degrading treatment. Denying women the exercise of reproductive autonomy through obstructing timely access to prenatal diagnostic tests might likewise violate Article 3. Any resulting involuntary continuation of a legally terminable pregnancy, and the birth of a child with severe abnormalities, would constitute a form of inhuman and degrading treatment.

140. Contracting Parties must account for the particular sex-specific vulnerabilities of women seeking prenatal genetic diagnosis. Such women often had existing dependent children for whom they had to care. They faced a very stressful decision, perhaps one of the most difficult decisions in their lives. As a result, they required non-judgmental counseling that enabled them to think through their particular life circumstances, personal values and priorities, usually under severe time constraints.

141. When Contracting Parties, in regulating health care systems, subjected pregnant women, faced with the possibility of births of children with severe abnormalities, to circuitous or obstructive means to obtain information or treatment, with the effect that they were denied opportunities to make timely decisions about legal abortion services, there was a violation of Article 14 of the Convention in relation to its Article 3.

142. Contracting Parties should be required to observe guidelines on the provision of prenatal genetic diagnosis. Such guidelines should include the ethical principle to consider first the well-being of the patient, and to ensure that this principle was implemented, irrespective of the sex of the patient.

3. The International Federation of Gynaecology and Obstetrics

143. The International Federation of Gynaecology and Obstetrics (FIGO) submitted that it could be useful for the Court to be aware of the Federation's and its Ethics Committee's findings and recommendations on women's access to medically indicated prenatal tests and exercise of reproductive choice, and on practitioners' exercise of rights of conscientious objection in a manner consistent with equal respect for the conscientious convictions of their colleagues and patients. The FIGO Ethics Committee recognised that some physicians might present false diagnostic or clinical reasons to decline to afford patients indicated care to which the physicians object, rather than "provide public notice of professional services they decline to undertake".

B. Alleged violation of Article 3 of the Convention

1. The parties' submissions

144. The Government submitted that on no occasion had the applicant been subjected to treatment which would result in a breach of Article 3 of the Convention. The applicant might have felt some stress or discomfort, but the treatment complained of had not approached the threshold of severity sufficient for it to fall within the ambit of this provision. Even assuming that the applicant's conversations with some doctors could have been stressful or unpleasant, or that the doctors had expressed their views in a rude or impolite manner, as the applicant seemed to consider, this did not raise any issue under Article 3.

In so far as the applicant was of the view that the doctors had treated her in a dismissive and contemptuous manner, repeatedly criticising her for her efforts to obtain access to prenatal testing and for the fact that she had envisaged a termination, the Government argued that nothing in the facts of the case suggested behaviour contrary to Article 3 of the Convention. The applicant's allegations of an intentional failure to provide necessary medical treatment had no basis in the facts of the case.

The Government rejected the supposition that inhuman or degrading treatment could result from the State's failure to enact what the applicant perceived as adequate legislation.

145. The applicant complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment as a result of the doctors' intentional failure to provide necessary medical treatment in the form of timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy within the time-limit laid down by the 1993 Act. She also complained that the doctors had treated her in a dismissive and contemptuous manner, repeatedly

criticising her for her efforts to have prenatal tests carried out and for the fact that she had envisaged an abortion as a possible solution to her predicament.

146. The applicant submitted that the repeated and intentional denial of timely medical care had been aimed at preventing her from having recourse to a legal abortion. The way in which she had been treated by the medical staff, including but not limited to degrading remarks related to her seeking medical information and tests which she had been legally entitled to receive, her unnecessary confinement for days in the Kraków hospital without explanation, only to conduct simple tests unrelated to genetic testing, and the unavailability of genetic testing within large areas of the country, as admitted by the State, had been humiliating and degrading and had had a continuing impact on the applicant's life.

147. The applicant further argued that she had been under additional duress because she had been aware that if the malformation had been severe enough she would seek a legal abortion, but could only do so within the time-limits allowed by law. Her husband had also wished for a legal abortion in the event of malformation of the foetus. She had known that had she been unable to obtain an abortion, she would be faced with having to raise a child affected with a lifelong ailment. This set of circumstances had caused her much distress and anxiety. The doctors had known about the time restrictions and about her position on terminating her pregnancy, but they had manipulated her and procrastinated, despite the obvious fact that termination of pregnancy was more dangerous later than earlier. Furthermore, Dr S.B.'s contemptuous attitude towards the applicant had been clearly shown in his interview.

2. *The Court's assessment*

(a) General principles

148. 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; *Jalloh v. Germany* [GC], no. 54810/00, § ..., ECHR 2006-IX).

149. 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 *Labita*, *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

150. 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; *Wiktorko v. Poland*, no. 14612/02, § 45, 31 March 2009).

151. 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. For example, the Court has found violations of that provision in many cases where the authorities dealt with requests to provide information of crucial importance for the applicants, for example about the whereabouts and fate of their missing relatives, disclosing a callous disregard for their vulnerability and distress (see, among many other authorities, *Kukayev v. Russia*, no. 29361/02, §§ 102-106; 15 November 2007; *Takhayeva and Others v. Russia*, no. 23286/04, §§ 102-104, 18 September 2008).

152. Moreover, it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 3 by reason of their failure to provide appropriate medical treatment (see, for example, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

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

153. Turning to the circumstances of the present case, the Court observes that the results of the ultrasound scan carried out in the 18th week of the applicant's pregnancy confirmed the likelihood that the foetus was affected with an unidentified malformation (see paragraph 9 above). Following that scan the applicant feared that the foetus was affected with a genetic disorder and that, in the light of the results of subsequent scans her fears cannot be said to have been without foundation. She tried, repeatedly and with perseverance, through numerous visits to doctors and through her written requests and complaints, to obtain access to genetic tests which would have provided her with information confirming or dispelling her fears; to no avail. For weeks she was made to believe that she would undergo the necessary tests. She was repeatedly sent to various doctors, clinics and hospitals far from her home and even hospitalised for several days for no clear clinical purpose (see paragraph 20 above). The Court finds that the determination of whether the applicant should have access to genetic testing, recommended by doctors in light of the findings of the second ultrasound scan, was marred by procrastination, confusion and lack of proper counselling and information given to the applicant.

Ultimately, it was only by following the advice given by Professor K.Sz., the only doctor who was sympathetic to her plight, that the applicant obtained admission to a hospital in Łódź by means of subterfuge. She

reported to that hospital as an emergency patient and finally had the tests conducted in the 23rd week of her pregnancy, on 26 March 2002. The applicant obtained the results on 9 April 2002, two weeks later.

154. The Court notes that it was not in dispute that it was possible only by means of genetic tests to establish, objectively and in the manner dictated by modern medical science and technology, whether the initial diagnosis was correct. Indeed, this was never challenged either by the Government in the proceedings before the Court or by the defendants in the domestic civil proceedings.

155. The Court further notes that it has not been argued, let alone shown, that at the material time genetic testing as such was unavailable for lack of equipment, medical expertise or funding. On no occasion was the applicant told that it was impossible to carry out the tests for any kind of technical or material reasons.

156. In this connection, the Court cannot but note that the 1993 Act determining the conditions permitting termination of pregnancy expressly and unequivocally provides, and provided at the relevant time, for the State's obligation to ensure unimpeded access to prenatal information and testing. Section 2 (a) of this Act imposed such an obligation on the State and local administration in particular in cases of suspicion of genetic disorder or development problems. This obligation covered all cases in which such suspicion arose in respect of a pregnancy, with no distinction whatsoever being drawn in the Act based on the severity of the suspected ailment (see paragraph 66 above).

157. The Court further observes that the Medical Profession Act clearly provides and provided at the material time for a general obligation for doctors to give patients comprehensible information about their condition, the diagnosis, the proposed and possible diagnostic and therapeutic methods, the foreseeable consequences of a decision to have recourse to them or not, the possible results of the therapy and about the prognosis (see paragraph 74 above). Likewise, the Medical Institutions Act, applicable at the material time, provided for patients' right to obtain comprehensive information on their health (see paragraph 72 above). Hence, there was an array of unequivocal legal provisions in force at the relevant time specifying the State's positive obligations towards pregnant women regarding their access to information about their health and that of the foetus.

158. However, there is no indication that the legal obligations of the State and of the medical staff regarding the applicant's patient's rights were taken into consideration by the persons and institutions dealing with the applicant's requests to have access to genetic testing.

159. The Court notes that the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much

information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care. Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case. The Court emphasises that six weeks elapsed between 20 February 2002 when the first ultrasound scan gave rise, for the first time, to a suspicion regarding the foetus' condition and 9 April 2002 when the applicant finally obtained the information she was seeking, confirmed by way of genetic testing. No regard was had to the temporal aspect of the applicant's predicament. She obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by section 4 (a) paragraph 2 had already expired.

160. The Court is further of the view that the applicant's suffering, both before the results of the tests became known and after that date, could be said to have been aggravated by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them.

It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case. The Court can only agree with the Polish Supreme Court's view that the applicant had been humiliated (see paragraph 54 above).

161. The Court is of the view that the applicant's suffering reached the minimum threshold of severity under Article 3 of the Convention.

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

C. Alleged violation of Article 8 of the Convention

1. The parties' submissions

(a) The Government

163. The Government submitted that pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life. Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that

certain interests relating to pregnancy were legally protected (Eur. Comm. HR, *Brüggemann and Scheuten v. Germany*, Report of 12 July 1977, DR 10, p. 100). Polish law protected the human foetus in the same manner as the mother's life and it therefore allowed for termination of pregnancy only in the circumstances prescribed in the 1993 Act. The Government were of the view that in the applicant's case the conditions for lawful termination had not been met.

164. The Government argued that in the applicant's case the Court should not focus solely on the question of whether the applicant had been deprived of her right to receive genetic counselling. They stressed that ultimately the applicant had obtained access to a prenatal genetic examination, as requested.

165. If the applicant was of the view that as a result of the delay in having access to genetic tests she had been deprived of the possibility of terminating her pregnancy, then the question arose whether in her case such a possibility genuinely existed on the basis of the Act. However, this could not be determined with the requisite clarity, as at the material time there had been no consensus in Poland as to whether Turner syndrome could be said to be a serious enough malformation within the meaning of the 1993 Act to justify a legal abortion.

Moreover, the medical expert opinion prepared for the purposes of the criminal investigation indicated that Turner syndrome did not qualify as either a severe or a life-threatening condition. Hence, the doctors involved in the applicant's case could not have issued a certificate authorising termination.

Insofar as the applicant seemed to imply that another foetal malformation – Edwards syndrome – had been suspected, her medical records did not show this to have been the case. In any event, if the applicant relied primarily on what she perceived as her right to have an abortion on the grounds of foetal malformation, the Government were of the view that such a right could not be derived from the State's positive obligation to guarantee adequate health care. Furthermore, according to the Government's submission, any genetic examination of the foetus had at that time to be performed prior to the 22nd week of pregnancy.

166. The Government further submitted that they strongly disagreed with the reasoning adopted by the Court in its judgment in the case of *Tysiąc v. Poland*, concerning the potential threat to the pregnant woman's health caused by pregnancy and by the refusal of termination. However, even if the present case were to be assessed from the point of view of the principles developed in that judgment, no support could be found therein for the applicant's position. The question of voluntary termination of pregnancy for eugenic reasons, concerned in the present case, could not be derived from the State's positive obligations to provide adequate medical care.

167. If, on the other hand, the applicant held the State responsible for the delay in her access to genetic testing, the Government argued that she herself had contributed to that delay as she had insisted on having genetic testing carried out in a particular hospital, in Łódź, outside her region. This had inevitably led to the prolongation of the relevant procedures.

168. The Government further referred to the provisions of the Minister of Health's Ordinance of 22 January 1997 (see paragraph68 above), arguing that it provided for a procedure governing decisions on access to abortion. They further stated that section 37 of the Medical Professions Act 1996 made it possible for a patient to have a decision taken by a doctor as to the advisability of an abortion reviewed by his or her colleagues. In the present case, Dr S.B. had offered the applicant the possibility of convening a panel of doctors to examine her case, but the applicant had refused.

169. Lastly, the Government argued that the applicant should have availed herself of the procedural possibilities provided for by administrative law. The public health institutions should be considered as administrative agencies, subject to the provisions of the Code of Administrative Procedure. Consequently, the refusal of admission to a hospital for the purposes of a voluntary termination constituted an administrative decision of the hospital's management and, as such, was subject to administrative supervision procedures provided for by that Code.

(b) The applicant

170**.** The applicant submitted that the public powers' failure to implement laws and regulations governing access to prenatal examinations and termination of pregnancy in the context of sections 2 (2) (a) and 4(a) of the 1993 Act, including the lack of procedures to ensure whether the conditions for a lawful abortion under section 4 (a) had been met, and the failure to implement and oversee the laws governing the practice of conscientious objection, resulted in insufficient protection of her rights guaranteed by the Convention.

171. The 1993 Act itself did not contain any procedural provisions. The 1997 Ordinance, referred to by the Government, did not provide for any particular procedural framework to address and resolve controversies arising in connection with the availability of lawful abortion. Section 37 of the Physicians' Act did not provide for review of medical decisions, but simply granted doctors discretion to seek a second opinion from a colleague. It did not provide for a mechanism which could be invoked by a patient. Insofar as the Government relied on the administrative procedure, diagnostic or therapeutic decisions were not decisions in the administrative sense and could not be challenged under the provisions of the Code of Administrative Procedure.

172. The applicant further referred to the Council of Europe's Committee of Ministers' Recommendation No. R (90)13 to Member States

on Prenatal Genetic Screening, Prenatal Genetic Diagnosis, and Associated Genetic Counselling (see paragraph 81 above). It stated that where there was an increased risk of passing on a serious genetic disorder, access to preconception counselling and diagnostic services should be readily available. Moreover, the applicant argued that many Council of Europe member States included prenatal examinations as part of routine obstetric services. When an ultrasound scan indicated a possibility of the foetus having a genetic disorder, genetic counselling and examination were made available according to detailed guidelines adopted through State regulations. In the present case, however, the applicant had been unable to obtain timely access to genetic testing, which clearly contravened the applicable principles.

173. The applicant submitted that the violation of her rights had originated also in the unregulated practice of conscientious objection. The refusal of the Kraków University Hospital to provide certain services on grounds of conscientious objection constituted a failure to ensure the availability and accessibility of reproductive health services. The public health care institutions, being public entities, had a duty to provide legal health services to the public. The State had a duty to ensure that the laws governing conscientious objection were complemented by implementing regulations or guidelines balancing the medical staff's right to object against the patient's rights to obtain access to lawful medical services.

174. Furthermore, the applicant emphasised that in any event health care providers should not be allowed to rely on conscientious objection in respect of diagnostic services. In the present case Doctors K.R. and S.B. had effectively refused to provide diagnostic care out of concern that the applicant, having obtained the diagnostic results, might seek the termination of her pregnancy. The applicant submitted that under the established medical doctrine of informed consent, patients should be informed of all risks, benefits and alternatives to treatment in order to make a free and informed decision in their best interest. Refusing to diagnose a potentially serious illness on the basis that the diagnosis might subsequently lead to a therapeutic act to which the doctor concerned objected on grounds of conscience was incompatible with the very concept of conscientious objection.

175. The applicant argued that this confusion was clearly demonstrated also by the Government's argument that the decision whether to give the applicant access to genetic testing hinged on whether the termination of pregnancy was considered safe in her circumstances and, also, on whether the time-limits for termination of pregnancy provided for by the 1993 Act were respected. The Government had further stated that any genetic examination of a foetus should be performed prior to the 22nd week of pregnancy (see paragraph 164 above). These statements clearly implied the existence in medical practice in Poland at the material time of a

misconception that all women, including the applicant, seeking to undergo prenatal genetic examination did so solely for the purpose of terminating their pregnancies. As a result, because of the politically charged climate surrounding abortion, women were often unable to obtain access to prenatal genetic testing.

176. The applicant had also been denied adequate and timely medical care in the form of prenatal genetic examinations. Such testing would have made it possible to establish whether in her case the conditions existed for a lawful termination of pregnancy within the meaning of the 1993 Act. This breach of the Convention had occurred because the State had failed to provide a legal framework regulating disagreements between a pregnant woman and doctors as to the need to have prenatal genetic tests carried out or to terminate pregnancy (see, in the latter respect, the case of *Tysiąc v. Poland*, cited above, § 121). Nor was a procedure available for having decisions taken by doctors in respect of a woman's request for termination of pregnancy reviewed or supervised, even on grounds of foetal abnormalities. The State was under a positive obligation to create a legal mechanism for handling such cases, including the provision of a precise time-frame within which a decision should be taken. However, the Polish State had failed in its duty.

The applicant referred in this connection also to the lack of adequate regulations and oversight in cases such as hers, where doctors or public medical institutions refused to provide medical services and invoked the conscience clause.

177. Under the applicable law, in order to be lawful, an abortion on grounds of foetal abnormality had to be carried out before the foetus became viable, which was normally thought to be in the 24th week of pregnancy. In the applicant's case, the absence of a proper procedural framework had resulted in procrastination, with the result that during her pregnancy she had suffered growing fear, anguish and uncertainty. She had also been denied a right to a legal abortion which she had under domestic law.

178. She finally submitted that she had given birth to child suffering from a severe ailment who required life-long medical care. As a result, her life and that of her family had been irremediably and negatively affected, not only by her suffering over the fate of her ill daughter, but also by the necessity of providing her with special day-to-day care and organising regular specialised medical care, which was costly and relatively difficult to obtain in Poland. She submitted that bringing up and educating a severely ill child had taken a toll on her mental health and well-being, as well as that of her other two children. Her husband had left her after the baby had been born.

3. The Court's assessment

(a) Applicability of Article 8 of the Convention

179. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case in so far as it relates to the applicant's right to respect for her private life.

180. The Court reiterates that "private life" is a broad concept, encompassing, *inter alia*, the right to personal autonomy and personal development (see, among many other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I). The Court has held that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). The notion of private life concerns subjects such as gender identification, sexual orientation and sexual life (*Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36) a person's physical and psychological integrity (*Tysiąc v. Poland*, cited above, § 107, ECHR 2007-IV). The Court has also held that the notion of private live applies to decisions both to have or not to have a child or to become parents (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV).

181. The Court has previously found, citing with approval the case-law of the former Commission, that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur.Comm. HR, *Bruggeman and Scheuten v. Germany*, cited above; *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII; *Vo v. France* [GC], no. 53924/00, § 76, ECHR 2004-VIII; *Tysiąc*, cited above, §§ 106-107; *A, B and C v. Ireland* [GC], no. 25579/05, § 212, 16 December 2010). It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or *vis-à-vis* the foetus (*Vo v. France, cited above*, § 82).

182. The Court concludes that Article 8 of the Convention is applicable to the circumstances of the case.

(b) General principles

183. 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, namely 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 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)*, judgment of 24 March 1988, Series A no. 130, § 67).

184. 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*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

185. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (*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-...; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC], cited above, § 42). In addition, 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 (*Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; *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) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures in the context of abortion (*Tysiąc v. Poland* , cited above, § 110; *A, B and C v. Ireland* [GC], cited above, § 245).

186. The Court has already held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see, among many other authorities, *E.B. v. France* [GC], no. 43546/02, § 92, ECHR 2008-...). The reasons for that conclusion are that the issue of such protection has not been resolved within the majority of the Contracting States themselves and that there is no European consensus on the scientific and legal definition of the beginning of life (*Vo v. France, cited above,* § 82). However, the Court

considers 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, 16 December 2010, §§ 235 and 237).

Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. In the absence of such 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 also 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* cited above, § 214).

187. Moreover, as in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 49). While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose 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).

188. The Court notes the applicant's submission that the failure to allow her timely access to prenatal genetic tests had amounted to an interference with her rights guaranteed by Article 8. Furthermore, the Court has found that prohibition of the termination of pregnancies sought for reasons of health and /or well-being amounted to an interference with the applicants' right to respect for their private lives (see *A., B., and C. v. Ireland*, cited above, § 216).

However, in the present case the Court is confronted with a particular combination of a general right of access to information about one's health with the right to decide on the continuation of pregnancy. Compliance with the State's positive obligation to secure to their citizens their right to effective respect for their physical and psychological integrity may necessitate, in turn, the adoption of regulations concerning access to information about an individual's health (*Guerra and Others v. Italy*, 19 February 1998, § 60, *Reports* 1998-I; *Roche v. the United Kingdom* [GC], no. 32555/96, § 155, ECHR 2005-X; *K.H. and Others v. Slovakia*, no. 32881/04, §§ 50-56, ECHR 2009-... (extracts)). Hence, and since the nature of the right to decide on the continuation of 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 this provision of the Convention (see, *mutatis mutandis*, *Tysiąc v. Poland*, cited above, § 108).

189. The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; and *Różański v. Poland*, no. 55339/00, § 61, 18 May 2006). While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (see *Tysiąc v. Poland*, cited above, § 107).

190. The notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, in assessing the positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see, e.g., *Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008; *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67; *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 76, ECHR 2006-VII).

191. 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*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this 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*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 62 and 64). The Court has already held that in the context of access to abortion a relevant procedure should guarantee to a pregnant woman at least a 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).

(c) Compliance with Article 8 of the Convention

192. When examining the circumstances of the present case, the Court cannot overlook its general national context. It notes that the 1993 Act specifies situations in which abortion is allowed. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 70 above).

193. The Court has already found that the legal restrictions on abortion in Poland, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case (see *Tysiąc v. Poland*, no. 5410/03, § 116, ECHR 2007-IV). It further notes that in the circumstances of the present case this was borne out also by the fact that the T. hospital's lawyer was asked to give an opinion on steps to be taken with a view to ensuring that the conditions of the 1993 Act as to the availability of abortion were respected. The Court is of the view that provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this chilling effect.

194. The Court further notes that in its fifth periodical report to the ICCPR Committee, relevant for the assessment of the circumstances obtaining at the relevant time, the Polish Government acknowledged, *inter alia*, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 84 above). It further notes the concern expressed by the Committee on the Elimination of Discrimination against Women as regards access by women in Poland to reproductive health services and to lawful abortion (see paragraph 86 above).

195. The Court notes that in its judgment in the case *Tysiąc v. Poland*, referred to above, it highlighted the importance of procedural safeguards in the context of the implementation of the 1993 Act in situations where a pregnant woman had objective grounds for fearing that pregnancy and delivery would have a serious negative impact on her health. In that case the Court held that Polish law did not contain any effective procedural mechanisms capable of determining whether the conditions existed for obtaining a lawful abortion on the grounds of danger to the mother's health

which the pregnancy might present, or of addressing the mother's legitimate fears (see *Tysiąc v. Poland*, cited above, §§ 119 – 124, ECHR 2007-IV).

196. The Court discerns certain differences between the issues concerned in the *Tysiąc v. Poland* case and those to be examined in the context of the present case, where the applicant persistently but unsuccessfully sought access to prenatal genetic testing. It was not access to abortion as such which was primarily in issue, but essentially timely access to a medical diagnostic service that would, in turn, make it possible to determine whether the conditions for lawful abortion obtained in the applicant's situation or not. Hence, the starting point for the Court's analysis is the question of an individual's access to information about her or his health.

197. The right of access to such information falling within the ambit of the notion of private life can be said to comprise, in the Court's view, on the one hand, a right to obtain available information on one's condition. The Court further considers that during pregnancy the foetus' condition and health constitute an element of the pregnant woman's health (see Eur. Comm. HR, *Bruggeman and Schouten v. Germany*, cited above, § 59, *mutatis mutandis*). The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention (*Pretty v. the United Kingdom*, cited above, § 61, ECHR 2002-III) by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life (e.g. by refusing consent to medical treatment or by requesting a given form of treatment).

The significance of timely access to information concerning one's condition applies with particular force to situations where rapid developments in the individual's condition occur and his or her capacity to take relevant decisions is thereby reduced. In the same vein, in the context of pregnancy, the effective access to relevant information on the mother's and foetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy.

198. In the present case the essential problem was precisely that of access to medical procedures, enabling the applicant to acquire full information about the foetus' health.

While the Convention does not guarantee as such a right to free medical care or to specific medical services, in a number of cases the Court has held that Article 8 is relevant to complaints about insufficient availability of health care services (*Nitecki v. Poland* (dec.), cited above; *Pentiacova and Others v. Moldova* (dec.), cited above). The present case differs from cases where the applicants complained about denial of or difficulties in obtaining access to certain health services for reasons of insufficient funding or availability. The Court has already found that it has not been argued, let alone shown, that there were any objective reasons why the genetic tests were not carried out immediately after the suspicions as to the foetus'

condition had arisen but only after a lengthy delay (see paragraph 154 above). The difficulties the applicant experienced seem to have been caused, in part, by reticence on the part of certain doctors involved to issue a referral, and also by a certain organisational and administrative confusion in the health system at the material time as to the procedure applicable in cases of patients seeking services available outside their particular region of the then Medical Insurance Fund and the modalities of reimbursement between the regions of costs incurred in connection with such services.

199. The Court emphasises the relevance of the information which the applicant sought to obtain by way of genetic testing to the decision concerning continuation of her pregnancy. The 1993 Act allows for an abortion to be carried out before the foetus is capable of surviving outside the mother's body if 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. Hence, access to full and reliable information on the foetus' health is not only important for the comfort of the pregnant woman but also a necessary prerequisite for a legally permitted possibility to have an abortion to arise.

200. In this context, the Court reiterates its finding made in the case of *Tysiąc v. Poland* that once the State, acting within the limits of the margin of appreciation, referred to above, 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 it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion (*Tysiąc v. Poland*, no. 5410/03, §§ 116 - 124, ECHR 2007-IV). In other words, if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women.

201. In the present case, the Court reiterates that six weeks elapsed from the date when the first concerns arose regarding the foetus' health until their confirmation by way of genetic tests (see also paragraph 152 above).

202. The Court stresses that it is not its function to question doctors' clinical judgment (see *Glass v. the United Kingdom*, cited above). It is therefore not for the Court to embark on any attempt to determine the severity of the condition with which the doctors suspected that the foetus was affected, or whether that suspected condition could have been regarded as entitling the applicant to a legal abortion available under the provisions of section 4 (a) of that Act. In the Court's view this is wholly irrelevant for the assessment of the case at hand, given that the legal obligation to secure access to pre-natal genetic testing arose under the provisions of the 1993 Act regardless of the nature and severity of the suspected condition (see paragraph 66 above).

203. The Court observes that the nature of the issues involved in a woman's decision to terminate a pregnancy 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 Court is of the view that there was ample time between week 18 of the pregnancy, when the suspicions first arose, and week 22, the stage of pregnancy at which it is generally accepted that the foetus is capable of surviving outside the mother's body and regarded as time-limit for legal abortion, to carry out genetic testing. The Court notes that the Supreme Court criticised the conduct of the medical professionals who had been involved in the applicant's case and the procrastination shown in deciding whether to give the applicant a referral for genetic tests. Such a critical assessment on the part of the highest domestic judicial authority is certainly, in the Court's view, of relevance for the overall assessment of the circumstances of the case.

204. As a result, the applicant was unable to obtain a diagnosis of the foetus' condition, established with the requisite certainty, by genetic tests within the time-limit for abortion to remain a lawful option for her.

205. In so far as the Government argued that in the present case access to genetic testing was closely linked, to the point of being identical, with access to abortion (see paragraph 112 above), the Court observes that prenatal genetic tests serve various purposes and they should not be identified with encouraging pregnant women to seek an abortion. Firstly, they can simply dispel the suspicion that the foetus was affected with some malformation; secondly, a woman carrying the foetus concerned can well choose to carry the pregnancy to term and have the baby; thirdly, in some cases (although not in the present one), prenatal diagnosis of an ailment makes it possible to embark on prenatal treatment; fourthly, even in the event of a negative diagnosis, it gives the woman and her family time to prepare for the birth of a baby affected with an ailment, in terms of counselling and coping with the stress occasioned by such a diagnosis. Furthermore, the Court emphasises that the 1993 Act clearly provides for a possibility of abortion in cases of certain malformations. It is not in dispute that some of these malformations could only be detected by way of prenatal genetic tests. Therefore the Government's argument has failed to convince the Court.

206. In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience and referred to 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 *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X). For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from

obtaining access to services to which they are entitled under the applicable legislation.

207. The Court further observes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 68 above), arguing that it provided for a procedure governing decisions on access to abortion. However, the Court has already held that this Ordinance did not provide for any procedural framework to address and resolve controversies between the pregnant woman and her doctors or between the doctors themselves as to the availability of lawful abortion in an individual case (see *Tysiąc v. Poland*, cited above, § 121).

208. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.

209. In so far as the Government relied on the instruments of civil law as capable of addressing the applicant's 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 afford the applicant a procedural instrument by which she could have fully vindicated 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 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). 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.

It therefore considers that it had not been demonstrated that Polish law contained any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to take, in the light of their results, an informed decision as to whether to seek an abortion or not.

210. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which would have allowed the applicant to establish her right to a lawful abortion in Poland. The uncertainty generated by the lack of legislative implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Poland on grounds referred to in this provision and the reality of its practical implementation (*Christine Goodwin*

v. the United Kingdom [GC], cited above, at §§ 77-78; and *S. H. and Others v. Austria*, cited above, at § 74, *mutatis mutandis*; *A, B and C v. Ireland* [GC], no. 25579/05, §§ 263-264, 16 December 2010).

211. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal procedures which make it possible to vindicate her rights, the Polish State complied with its positive obligations to safeguard the applicant's right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her.

212. The Court therefore dismisses the Government's preliminary objection concerning civil litigation as an effective remedy. Furthermore, the Court, having regard to the circumstances of the case seen as a whole, has already found insufficient the award made by the domestic courts in the civil proceedings for the violations alleged by the applicant (see paragraphs 103-108 above). Accordingly, it dismisses also the Government's preliminary objection that the applicant had lost her status of a victim of a breach of Article 8 of the Convention.

213. The Court reiterates that effective implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act would necessitate ensuring to pregnant women access to diagnostic services which would make it possible for them to establish or dispel a suspicion that the foetus may be affected with ailments. The Court has already found that in the present case it has not been established that such services were unavailable. Moreover, an effective implementation of the provisions of the 1993 Act cannot, in the Court's view, be considered to impose a significant burden on the Polish State since it would amount to rendering operational a right to abortion already accorded in that Act in certain narrowly defined circumstances, including in certain cases of foetal malformation (*A, B and C v. Ireland* [GC], cited above, § 261, *mutatis mutandis*). While it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (*Airey v. Ireland* judgment, § 26; cited above), the Court notes that the legislation in many Contracting States has specified the conditions governing effective access to a lawful abortion and put in place various implementing procedural and institutional procedures (*Tysiąc v. Poland* judgment, § 123).

214. The Court concludes that the authorities failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there has therefore been a breach of Article 8 of the Convention.

D. Alleged violation of Article 13 of the Convention

215. The applicant complained that the failure of the Polish authorities to create a legal mechanism that would have allowed her to challenge the doctors' decisions concerning the advisability of and access to prenatal examinations in a timely manner had amounted also to a breach of Article 13 of the Convention. Had such a framework existed, it would have made it possible for her to consider whether she wanted to have the pregnancy terminated in the conditions provided for in the 1993 Act.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

216. The Government submitted that Polish law provided for a procedure governing the taking of medical decisions concerning abortion on medical grounds. They referred to the 1993 Act and to the Ordinance of the Minister of Health of 22 January 1997. They further referred to section 37 of the Medical Profession Act 1996. They argued that it provided for the possibility of reviewing a therapeutic decision taken by a specialist.

217. The applicant submitted that the Polish legal framework governing the termination of pregnancy had proved to be inadequate. It had failed to provide her with reasonable procedural protection to safeguard her rights guaranteed by Article 8 of the Convention.

218. The Court observes that the applicant's complaint about the State's failure to put in place an adequate legal framework allowing for the determination of disputes arising in the context of a determination of access to diagnostic services relevant for the application of the 1993 Act, insofar as it allowed for legal abortion, essentially overlaps with the issues which have been examined under Article 8 of the Convention. The Court has found a violation of this provision on account of the State's failure to meet its positive obligations. It holds that no separate issue arises under Article 13 of the Convention (see Tysiąc v. Poland, cited above, § 135).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

219. 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

220. The applicant claimed compensation for pecuniary damage in the amount of EUR 9,000. This sum consisted of the estimated future medical expenses she would be obliged to bear in connection with her daughter's condition. She estimated her expenditure on adequate medical treatment which her daughter would have to seek in the future until her adulthood on the basis of information available on the website of the British Turner Association.

221. The applicant further requested the Court to award her just satisfaction in respect of non-pecuniary damage. She referred to the Court's judgment in the case of *Draon v. France* [GC], no. 1513/03, 6 October 2005. She further submitted that the intentional failure to provide the necessary medical services, the humiliating treatment of the applicant by doctors and the lack of protection and effective redress from the State should be considered as an aggravating factor and influence the amount of non-pecuniary damages to be awarded in the case. She emphasised that she had suffered and still experiences pain, distress and suffering which were and remain causally connected to the events complained of before the Court. She claimed EUR 65,000 in this respect.

222. The Government were of the view that the applicant had not sustained pecuniary damage in the amount claimed, which was purely speculative and exorbitant.

223. As to the applicant's claim for non-pecuniary damage, the Government submitted that it was excessive and should therefore be rejected.

224. The Court observes that the applicant's claim for pecuniary damage was based on the medical condition of her daughter.

The Court reiterates that it has found violations of the Convention on account of the manner in which the applicant's requests were handled by health professionals and because of the State's failure to create an effective procedural mechanism by which access to diagnostic services relevant for establishing the conditions of availability of legal abortion under Polish law could be secured. The Court does not discern any causal link between the violations found and the claim in respect of pecuniary damage. Accordingly, no award can be made under this head.

225. On the other hand, the Court has found that the applicant experienced considerable anguish and suffering, having regard to her fears about the situation of her family and her apprehension as to how she would be able to cope with the challenge of educating another child who was likely to be affected with a lifelong medical condition and to ensure its welfare and happiness. Moreover, the applicant had been humiliated by doctors' lack of sensibility to her plight. The Court has found a breach of both Articles 3 and 8 of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on equitable basis, the Court awards the applicant EUR 45,000.

B. Costs and expenses

226. The applicant claimed reimbursement of the costs and expenses incurred in the domestic proceedings and in the proceedings before the Court. The applicant had instructed two Polish lawyers to represent her before the Court.

227. The applicant claimed, with reference to invoices they had submitted, EUR 11,529 (comprising EUR 9,450 in fees plus VAT of 22 per cent) in respect of legal fees for work carried out by Ms M. Gąsiorowska and Ms I. Kotiuk who represented the applicant in the domestic proceedings and before the Court. Legal fees corresponded to 189 hours spent in preparation of the applicant's case before the domestic courts and the case before the Court, at an hourly rate of EUR 50.

The applicant further claimed reimbursement of travel costs borne in connection with the civil case conducted before the courts in Cracow in the amount of PLN 1,400 and EUR 1,000 in respect of telephone bills for conversations with the applicant in the years 2005-2008.

228. The applicant further argued that the case had raised complicated issues of law which necessitated expert advice in reproductive rights law. She claimed, with reference to invoices, EUR 8,223,75 in respect of legal fees for work carried out by an expert of the Center for Reproductive Rights, based in New York. Legal fees corresponded to 85 hours spent in preparation of the applicant's case, at an hourly rate of USD 150, equivalent to EUR 96,75. She argued that it had been well-established in the Court's case-law that costs could reasonably be incurred by more than one lawyer and that an applicant's lawyers could be situated in different jurisdictions (*Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III). This was justified by the novelty and complexity of the issues involved in the case which was comparable to the case of *Tysiąc v. Poland*, concerning access to legal abortion in Poland, but which related to different legal issues. She submitted that certain consequences followed from the involvement of foreign lawyers. In *Tolstoy Miloslavsky v. the United Kingdom* the Court stated that "given the great differences at

present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees ... does not seem appropriate" (*Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, § 77, Series A no. 316-B).

229. The Government requested the Court to decide on the reimbursement of legal costs and expenses only in so far as these costs and expenses were actually and necessarily incurred and were reasonable as to the quantum. They referred to the Court's judgment in the case of *Eckle v. Germany* (*Eckle v. Germany*, 15 July 1982, § 25, Series A no. 51).

230. The Government further submitted, in respect of the travel costs borne by the applicant's lawyers in 2005 and the amount claimed in respect of phone calls made from 2004 until 2008, that the applicant had failed to substantiate these costs by submitting relevant bills or documents.

231. They further submitted that the applicant had failed to provide the Court with information on lowest legal rates applicable in Poland. They were of the view that in cases of great importance to society, such as the present one, the lawyers should have followed good professional practices and, accordingly, either have acted *pro bono* or significantly reduced their fees. Generally, the Government were of the view that the amounts claimed by the applicant were exorbitant and could not be reimbursed.

232. The Government took the same position in respect of the claim concerning costs incurred by the Centre for Reproductive Rights.

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

234. As to the amounts concerned, the Court first points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see, among many other authorities, Sunday Times *v. the United Kingdom (no. 1)* (former Article 50), judgment of 6 November 1980, Series A no. 38, § 30). The Court notes, in this connection, that the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland. It is also relevant to note in this connection the scarcity of relevant case-law of the Polish courts and lack of any established consensus in legal circles as to the degree and scope of protection which reproductive rights should enjoy under Polish law. The Court is further of the view that the Convention issues involved in the case were also of considerable complexity.

235. On the whole, having regard both to the national and the Convention law aspects of the case, the Court is of the opinion that they

justified recourse to three lawyers, including an expert in reproductive rights issues. As to the hourly rates claimed, the Court is of the view that they are consistent with domestic practice in both jurisdictions where the lawyers representing the applicant practise and cannot be considered excessive.

236. On the other hand, as to the costs claimed by the applicant, the Court notes that no documents have been submitted to show that these costs have actually been incurred.

237. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicant a global sum of EUR 15,000 in respect of fees and expenses, plus any tax on that amount that may be chargeable to the applicant.

C. Default interest

238. The Court considers it appropriate that the default interest 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* unanimously *to the merits* the Government's preliminary objections concerning exhaustion of domestic remedies and lack of victim status as regards the Article 8 complaint and *declares* the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention and *dismisses* by six votes to one the Government's above-mentioned preliminary objections;

4. *Holds* unanimously that it is not necessary to examine separately whether there has been a violation of Article 13 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zloty at the rate applicable at the date of settlement:
      (i) EUR 45,000 (forty-five thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 26 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President

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

(a) partly dissenting opinion of Judge Bratza;

(b) partly dissenting opinion of Judge De Gaetano.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. I am in full agreement with the conclusion of the majority of the Chamber that the applicant's rights under Article 8 of the Convention were violated in the present case and can in general subscribe to the reasoning in the judgment, drawing as its does on the Court's judgment in the case of *Tysiąc v. Poland*. In the *Tysiąc* case the Court emphasised that where, as in Poland, abortion was permitted on the grounds that the pregnancy endangered the mother's life or health, Article 8 required that domestic law should provide effective procedural mechanisms capable of determining whether the conditions existed for obtaining a lawful abortion in situations where a pregnant woman had objective grounds for fearing that the pregnancy or delivery would have a serious negative impact on her health.

2. There are, as the judgment points out, significant differences between the factual situation in the *Tysiąc* case and those in the present case. In the first place, it was not, as in *Tysiąc*, risks to the applicant's own life or health resulting from the pregnancy which were in issue in the present case but rather the fear that the foetus was suffering from irreversible damage. The primary and immediate concern of the applicant was to obtain an accurate medical diagnosis of the condition of the foetus, which would in turn have made it possible to determine whether or not the conditions for a lawful abortion applied in the applicant's case. According to the ultrasound scans performed in the 14th and 18th week of the applicant's pregnancy, the foetus appeared to be suffering from an unidentified congenital defect. Genetic testing by way of amniocentesis was recommended to confirm or dispel this suspicion and to identify the nature and seriousness of any foetal defect. Despite her persistent efforts, the applicant did not succeed in obtaining the required genetic tests until the 23rd week of her pregnancy and, even then, had to wait for a further two weeks before the results of the tests revealed the presence in the foetus of Turner syndrome, by which time it was in any event too late for an abortion to be carried out. It is the denial of prompt access to a medical diagnosis of vital importance to the applicant and the lack of any procedural mechanism to ensure that such a diagnosis was not so impeded or delayed as to deprive the applicant of any possibility of a lawful termination of her pregnancy that is at the heart of her complaint under Article 8 of the Convention.

3. It is not disputed that Article 8 is applicable in the circumstances of the present case. The Government place reliance, however, on the fact that the applicant ultimately obtained access to a prenatal genetic examination as she had requested and that, as the examination confirmed, the condition from which the foetus was found to be suffering did not in any event qualify as a severe or life-threatening condition which would have entitled her to a lawful termination. This to my mind is to take too narrow a view of the applicant's complaint under the Article. Whether or not the prenatal test had

shown that the foetus was severely and irreversibly damaged or suffered from an incurable life-threatening ailment for the purposes of the 1993 Act, the provision of effective access to accurate information on the condition of a foetus is unquestionably a vital element of the health and well-being of a woman during pregnancy and forms an integral part of her private life protected by that Article. The importance of prompt access to such information is further reinforced in a case such as the present, where delays in the provision of information seriously restrict the ability of the woman concerned to make an informed decision as to whether or not to seek a termination of her pregnancy.

4. For the reasons given in the judgment, I consider that the respondent State failed in its obligation to secure the applicant's rights under Article 8 in this regard. This failure was, in my view, aggravated in the present case by her treatment by the doctors and health professionals whom she had consulted, which was, as the judgment puts it, "marred by procrastination, confusion and lack of proper counselling". What must have appeared to the applicant to be a deliberate attempt to place obstacles in the way of discovering the precise condition of the foetus and thereby to deprive her any possibility of a lawful termination, can only have added to the sense of anxiety and frustration felt by a person in an already vulnerable state.

5. It is on this issue that I part company from the majority of the Chamber, who see the treatment of the applicant not merely as an aggravating factor in a violation of Article 8 but as giving rise to a separate violation of Article 3 of the Convention. This, in my view, is to extend the scope of that Article too far. It is true that the applicant was, to use the words of the judgment, "shabbily treated" by the doctors dealing with her case. At every turn, her repeated efforts to obtain the genetic tests which she was advised were necessary, and to which she was clearly entitled, were frustrated. It is true, too, that the Supreme Court was strongly critical of the manner in which the applicant's case had been treated, awarding damages to her for the distress, anxiety and humiliation she had been required to endure. However, it is also true that the threshold of Article 3 is and must remain a high one and that treatment must attain a minimum level of severity, if it is to fall within the scope of the Article. The circumstances of the present case are in my view far removed from those of physical or mental ill-treatment by officials of the State or degrading conditions of detention which have traditionally been the subject of findings of a violation of the Article. I can readily accept that in the weeks in which she awaited an accurate diagnosis, the applicant suffered intense anxiety and that this can only have been added to by what must have appeared to be the callous and obstructive attitude of the doctors. However, I do not consider that in all the circumstances of the case the applicant was subjected to degrading treatment for the purposes of Article 3 of the Convention. The judgment seeks to draw an analogy in this regard with cases of enforced disappearances, where the responsible

authorities systematically prevaricate or provide false information to applicants about the whereabouts and fate of their missing relatives. I am not persuaded that any true analogy can be drawn between such treatment, or the suffering and distress thereby caused, and the actions of the health professionals in the present case, prompted as they may have been to deter the applicant from pursuing the possibility of a termination of her pregnancy.

6. My conclusion that Article 8 alone was violated in the present case would have led me to award a lesser sum by way of just satisfaction, particularly since the applicant had received compensation at domestic level. However, in deference to the view of the majority that Article 3 was also violated, I have voted in favour of the sum awarded to the applicant.

PARTLY DISSENTING OPINION OF JUDGE DE GAETANO

1. I regret that I cannot share the Court's conclusions in their entirety in this case. I have voted for a finding of a violation of Article 3, but cannot share the majority's view in connection with the finding of a violation of Article 8. In light of this, I consider that the amount of non-pecuniary damages should have been less than actually awarded. However, since the majority have found a violation under both articles, then the amount of EUR 45,000 is substantially correct, and my vote under that head of the operative part of the judgment is to be understood subject to that *caveat*.

2. I also regret that the long-winded and at times convoluted way in which the judgment has been presented – with an attempt to pack into it every bit of information irrespective of the degree of relevance of that information to the core issue (see, for example, paragraphs 81 to 89, and 122 to 143) – leads the reader to miss the wood for the trees. Indeed, this case, like *Tysiaç* (*Tysiac v. Poland*, no. 5410/03, 20 March 2007), has in part been presented by the applicant, and the judgment approved by the majority has similarly been put together, in such a way as if this was an "abortion" case, or a case about the "right" to have an abortion. This is not so. Polish law allows a woman to seek an abortion in the narrowly defined circumstances envisaged in Section 4(a) of "the 1993 Act" (see para. 67 of the judgment). One may agree or disagree with that provision of law, but there is nothing this Court can do about it in the instant case; and indeed this Court has not been called upon to do anything about it. What this Court *has been called upon to examine* is whether, from the moment that there was some indication that the child the applicant was carrying might be suffering from some form of deformity or malformation, the treatment she received at the hands of the health care professionals with whom she came into contact was in breach of her fundamental human rights as protected by the Convention.

3. In its judgment of 11 July 2008 the Polish Supreme Court (see paragraphs 52 to 54) held, in substance, that the applicant, as a patient, had the right to be referred in a proper and efficient manner for the necessary genetic testing so that she could have the necessary information as soon as possible about her unborn child's health. That court likewise held that there were no legal or medical grounds on which to automatically link genetic testing with access to abortion under the 1993 Act. The facts, however, show that the applicant, who as a woman with child must be regarded as a vulnerable person in view of her condition (and irrespective of whether or not the child she was carrying had any abnormality), was subjected to what can best be described as a string of constructive prevarications by the health care professionals in question, and was shoved from pillar to post for several weeks, presumably because the doctors involved suspected that if the results were to show that the unborn child was affected with some

malformation, she would request an abortion. Now, apart from the fact that it is very doubtful whether a child suffering from Turner syndrome can be described as "severely damaged" or as "suffering from an incurable life-threatening ailment" for the purposes of the above-mentioned Section 4(a) of the 1993 Act[1], the doctors concerned were perfectly entitled, on grounds of conscientious objection, to refuse to terminate the life of the unborn child by performing an abortion or, indeed, even to refuse to refer the applicant for an abortion. What they were not entitled to do was to keep her in the dark and increase her distress and anxiety to such an extent that she was prepared to ask for an abortion – her *appel de détresse* – even without a proper diagnostic finding (see paragraphs 17 and 30). Instead of providing the necessary care and, above all, support to the parents who were facing the possible birth of a handicapped child, the system worked to push the applicant to take an extreme measure – the same measure that the doctors wanted to avoid. To that extent the Court's conclusions in paragraphs 159 to 161 are unimpeachable.

4. The matter could, and should, have stopped there. The majority, however, chose to go down the *Tysiaç* path. In *Tysiaç*, it will be recalled, the woman had requested an abortion because she claimed that otherwise her health – her eyesight – would suffer. The Court found that, once that a woman could in certain circumstances under Polish law ask for the termination of her unborn child's life to preserve her own health, when a referral was refused by the medical profession there had to be a procedure before an independent body competent to review that refusal to terminate the pregnancy and to review the relevant evidence; a procedure in which the pregnant woman could be heard in person, and where written grounds for the decision would be given (*Tysiaç* §117). For reasons which are still not entirely clear to me, the Court in that case chose to examine the issue under Article 8 instead of under Article 6. The very limited issue involved in that case was highlighted in the separate opinion of Judge Bonello: "The decision in this case related to a country which had already made medical abortion legally available in certain specific situations of fact. The Court was only called upon to decide whether in cases of conflicting views ... as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place. My vote for finding a violation goes no further than that." Even in the instant case the matter should, if at all, have been further examined under Article 6 and not under Article 8.

5. In the instant case there was no question of weighing the unborn child's life against the mother's or her health. By bringing Article 8 into the picture (as the Grand Chamber also did in *A, B and C v. Ireland*,

1. With reference to f.n. no. 2 at para. 16 it should be further noted that most of the medical literature on the subject is in agreement as to the fact that persons with Turner syndrome can have a normal life when carefully monitored by their doctor.

no. 25579/05, 16 December 2010), the Court is simply making things more difficult for itself in regard to the issue of the determination of the beginning of life and the unborn child's protection under a "more fundamental" provision of the Convention, namely Article 2. Notwithstanding all the "evolutive interpretations" of the Convention adopted by the Court, when it comes to the right to life of the unborn child the Court has been exceptionally pusillanimous, with only cursory references hinting at some form of protection (see, for instance, *Odièvre v. France* [GC], no. 42326/98 13 February 2003, § 45), the Court in most cases preferring to avoid the issue (*Vo v. France* [GC], no. 53924/00, 8 July 2004, § 85) or to invoke the "margin of appreciation" doctrine (as in *Boso v. Italy* (dec.) no. 50490/99, 5 September 2002). The Court, moreover, seems not to be giving the proper weight and importance to the clear proposition made by the Commission in its report of 12 July 1977 in the case *Brüggemann and Scheuten v. Germany* (Application no. 6959/75) to the effect that "...pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (§ 59). So we continue to drag Article 8 into the fray, making things "confused worse confounded". At one end of the spectrum the death penalty has been abolished; at the other end the unborn child's right to life remains in limbo.