WRITTEN OBSERVATIONS

Submitted to the European Court of Human Rights

in the case

B.B. v. Poland

(Application No. 67171/17)

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1. The application, as communicated by the Court, does not cite any court decision challenged by the applicant. Moreover, the explanations of the facts and Polish law deserve to be reordered to understand the situation.

Facts

2. The applicant, B.B., after having had four miscarriages, began in vitro fertilization (IVF) in early November 2013, when she was 38 years old. This artificial procreation technique has an average success rate of around twelve percent per cycle at this age.[1] Despite this low probability, the applicant was able to conceive the child by IVF in a private clinic.

3. On January 26, 2014, a prenatal examination at the Holy Family Hospital in Warsaw showed that the pregnancy was going well for the child (12 weeks).

On February 5, 2014, due to the four previous miscarriages, a cervical cerclage was placed for preventive purposes (13 weeks).

On March 28, 2014, another prenatal examination revealed foetal malformations (22 weeks). At its conclusion, the applicant was informed about the possibility of terminating the pregnancy. She was immediately transferred for further examination to a specialized center with better diagnostic instruments (the Mother and Child Institute), where the child's disability was confirmed. The applicant received yet again information about abortion.

The applicant wished to have an abortion, but as the pregnancy was over 22 weeks and her son was viable outside her body, this was not legal under Polish law (see our development below).

4. Dr Bogdan Chazan, then Director of the Holy Family Hospital in Warsaw, took into account the applicant's wish not to continue the pregnancy to term. On April 2, 2014, he discontinued her anti-contraction medication and on April 4, he agreed to remove the cerclage, which was done on April 7. The purpose of these medical procedures was to allow for a possible natural miscarriage. He further stated: "It was obvious to me that the damage that abortion could cause to the mother, especially at this age of pregnancy, was more dangerous to her than carrying the baby to term" (see annex).[2]

5. On April 14, the applicant renewed her request for an abortion (> 24 weeks) in writing. On April 16, Dr Chazan responded in writing of his conscientious objection to such an act. As the legal deadline was passed by more than two weeks, he did not indicate a contact for a doctor performing abortions.

6. On an unspecified date, during the twenty-fourth week of pregnancy, the applicant applied to the Bielany Hospital, which is well known in Poland for performing abortions. She was informed that the legal deadline for performing an abortion on her child had passed. In this hospital, two tests confirmed the diagnosis and indicated the potentially fatal nature of the child's disability (April 18 and June 4). On June 30, 2014 (35 weeks), the applicant's son was

[1] « Fécondation in vitro : définition, étapes, prix, taux de réussite », *Le Journal des femmes – Santé*, 24 June 2019.
[2] L'ensemble des citations du témoignage du docteur Chazan (voir annexe) est traduite par nos soins.

born prematurely at the Bielany Hospital, by caesarean section, one month before the due date. He received palliative care and died on July 9 of the same year.

Procedure

In this case, the procedure and the political-media campaign are inseparably linked.

7. On June 9, 2014, the applicant filed a complaint before the Ombudsman for Patients' Rights (or "Commissioner") against Dr Chazan. This non-judicial procedure resulted in a finding of violations of the applicant's rights. The Ombudsman is not a judicial body; he is appointed by the government, in this case by the Minister of Health of the Tusk Government.

On June 10, 2014, a criminal complaint was filed by the Alliance of the Democratic Left, a Polish political party.

On June 11, 2014, the Polish press published a statement by Prime Minister Tusk (Civic Platform) stating, "No matter what his conscience tells him [the doctor] must apply the law. Every patient must be assured of this." He added, "If prosecutors decide that a law has been broken, the courts will have to rule on the matter."[3]

In July 2014, MP Piotr Ikonowicz, one of the founders of the Polish Socialist Party, publicly called Dr Chazan "the incarnation of Satan," a "possessed" person, a "degenerate," a "person without conscience."[4]

In the Polish Parliament, former Prime Minister Leszek Miller (former Communist Party) called Dr Chazan a "psychopath."[5] He apologized in April 2016.

On July 21, 2014, the former mayor of Warsaw (Hanna Gronkiewicz-Waltz, Civic Platform) dismissed Dr Chazan as hospital director.

On August 26, 2014, a civil liability procedure was initiated against the hospital and its insurance for moral damages by the Ombudsman, which was joined by the applicant and her husband.

On April 30, 2015, the prosecutor abandoned the criminal proceedings initiated by the complaint of the Alliance of the Democratic Left.

On May 30, 2015, the Ombudsman dropped his disciplinary proceedings against Dr Chazan.

On April 27, 2017, the civil procedure was also abandoned following a settlement between the parties (including the applicant).

On August 21, 2017, B.B. filed a petition with the ECHR.

8. At the same time, an ongoing procedure was initiated by Dr Chazan challenging the legality of his dismissal by the Mayor of Warsaw.

[3] "PM Tusk: Doctors are not above the law", *Radio Poland*, 11 June 2014 (free translation).
[4] Declaration published on the site goniec.com.
[5] Natalia Dueholm, "Former Polish prime minister apologizes for calling pro-life doctor a 'religious psychopath'", *Life Site News*, 19 April 2016.

9. Since then, Dr Chazan has been struggling to find work. For a long time he was treating patients on a voluntary basis in the Caritas organization. In 2019, the municipality of Warsaw opposed his hiring as a gynaecologist in a public hospital in the city. He is now a lecturer at the University of Kielce.

On the admissibility

10. This request poses a clear problem of admissibility, and it is surprising that the Court agreed to communicate it. Indeed, no domestic decision is challenged before the ECHR, even though various effective remedies were available and have been used. Having reached an agreement, the applicant no longer has the status of victim.

11. This request is in fact the continuation of a vast political-media campaign developed from the facts in question at a time when the Polish government was more favourable to abortion than the current government. It aims to obtain from the Court a condemnation of Poland to facilitate the recourse to abortion. It is in fact an *actio popularis*, carried out as part of a strategic litigation operation. The applicant is moreover represented by a member of the strategic litigation team of the Helsinki Foundation of Poland. She was previously represented by another lawyer who was arrested in August 2015 for organized crime involving the extortion of 248 disabled persons; he too is supported by the Helsinki Foundation.[6]

12. The absence of recourse to the domestic courts is contrary to the subsidiary nature of the ECHR; in particular, it has the effect of depriving the Court of knowledge of facts established in court, limiting it to the sole testimony of the applicant. For this reason, Dr Chazan has authorized us to attach his written testimony to our observations, so that his point of view may be known (see annex to the observations).

13. In substance, the Applicant complains that she suffered from the birth and death of her son and that she did not obtain an abortion *in utero*. She believes that the Polish health system is responsible for this, due to the refusal of doctors to abort her son in utero and that she was not informed in sufficient detail about how to obtain this "service."

Is the applicant's suffering an interference with her Convention rights?

14. The applicant's suffering is real; but its primary cause is the child's illness.

It has not been established that her suffering would have been less in the case of an abortion, all the more a late one. On abortion issues, the Court has already considered the psychological impact to be "by its nature subjective, personal and not susceptible to clear documentary evidence or objective proof."[7]

The assertion that seeing one's child die naturally would cause greater suffering than that caused by an abortion is not proven, even more so in the case of late abortion. Testimonies from parents who have chosen to let their child be born and die naturally are instructive in this regard. These

[6] Jacek Wierciński, Marcin Dubieniecki siedzi w areszcie bezprawnie? Helsińska Fundacja Praw Człowieka ma wątpliwości, Dziennik Zachodni, 30 September 2015.
[7] *A., B. et C. v. Ireland*, No. 25579/05, [GC], 16 December 2010, para. 126.

parents saw their child for a few hours or days, were able to accompany him or her and then mourn the loss. They did not have to bear the moral weight of having decided to end their child's life, and did not suffer the trauma of late abortion. These couples who accompanied the normal course of life were generally strengthened in the ordeal.[8] Conversely, an abortion imposes a form of moral guilt on those who decide to have it, does not allow the child to be mourned, and is a violent act.

15. Physicians, in the practice of their profession, must often choose a lesser evil. In this case, they have chosen to remove devices used to prevent miscarriage, to deliver the child prematurely by caesarean section, and then to accompany the child to death with palliative care. If the birth was induced (which the facts do not indicate), then it was a true "termination of pregnancy," but without prior fœticide. Physicians may feel that the child and the mother were treated humanely, and that they practiced ethically.

16. Assuming that the suffering caused by the birth of the child is worse than that caused by its late abortion, which is not demonstrated, this suffering can only be attributable to the health care system if it is able to reduce it. Three conditions seem to be necessary for this to happen:

1. That the doctors were aware of the seriousness of the child's condition at a time when abortion could still be legally performed;

17. This fact has not been established because on April 14, 2014, Dr Chazan believed that the child would be viable; evidence of this is that he proposed to the applicant to give him up for adoption after his birth. In addition, the foetus had reached and exceeded 20 weeks, the viability threshold set by the WHO. It was following the examination of June 4, 2014 that the probably fatal nature of the malformations was established by the Bienaly Hospital. Dr Chazan states: "Prenatal examinations had given the boy a chance of survival, which was confirmed by a child surgeon" (see annex). In fact, the seriousness of the child's condition did not fully emerge until after his birth.

2. That it be established that the applicant was not given sufficient information about her possibilities of access to abortion;

18. The facts, as reported by the applicant, do not make it possible to know precisely what information about the abortion was given to the applicant. The fact is that neither the hospital nor the doctors have been convicted by a court of law for failure to provide information.

According to Dr Chazan, it is known in Warsaw that the hospital of the Holy Family does not perform abortions; moreover, he quickly referred him to the specialized institute Mother and Child. In his testimony, he says: "She could have done what she wanted in another hospital, but she insisted on having an abortion at the Holy Family Hospital" (see annex). Indeed, the applicant went to the Bienaly Hospital, which is well known in Poland for performing abortions.

[8] See « Avec Pierre-Marie : une grossesse particulière », vidéo de l'ECLJ, 30 January 2017.

3. That the practice of abortion be considered in Poland as a right or a freedom rather than a medical act;

19. Eugenic abortion is legal in Poland provided, among other things, that the child be not viable. This condition ensures the respect of the unborn child's right to life while allowing abortion.

Abortion is a medical act, especially when it is caused by the state of health of the child or the mother. It is therefore up to the doctors to assess whether it is justified to resort to it, with the mother's consent, taking into account the circumstances and in accordance with the law. The Court has already recognized that while there is a right to refuse care, the Convention *does not guarantee a right to receive specific medical care*. This also applies to "medical abortion," which should therefore be subject to the same rules as all health care with respect to the right to challenge a physician's refusal to provide it.

20. This approach is consistent with the Convention and its interpretation by the Court, which has already stated on several occasions that the Convention does not contain an autonomous right to abortion. The Court has thus held that "Article 8 of the Convention cannot be interpreted as conferring an autonomous right to abortion."[9] In addition, the Court has ruled inadmissible a number of petitions against national legal limitations in that they do not recognize a right to abortion.[10]

21. The Court's interpretative power is real, but not unlimited: "the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate."[11] Moreover, and in any event, the Court cannot interpret the Convention *contra legem* by recognizing a right that is diametrically opposed to a right guaranteed by the Convention. In this respect, the Convention must be read as a whole; it cannot, on the one hand, impose an obligation to protect life by law and, on the other hand, condemn a State for its policy of preventing abortion or suicide.[12]

22. In international law, there is no right to abortion either, but rather a "right to life,"[13] a "right to marry and found a family"[14] or special protection for mothers "before and after the birth of children."[15] Such a right to abortion is included neither in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), nor in the recent Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention"). On September 23, 2019, on the occasion of the United Nations

[9] *A., B. and C., op. cit.*, para. 214.
[10] For example, in case No. 16471/02 Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal of 26 October 2004, the Court found inadmissible an application against "*Portuguese law on abortion and voluntary interruption of pregnancy as such infringes [on the ground that it is] contrary to a number of provisions of the Convention because it prohibits the interruption of pregnancy at the request of the pregnant woman*." (free translation)
[11] *Johnston and others v. Ireland*, No. 9697/82, 18 December 1986, para. 53.
[12] *Haas v. Switzerland*, No. 31322/07, 20 January 2011, para. 54.
[13] International Covenant on Civil and Political Rights, 16 December 1966, article 6.
[14] *Ibid.*, article 23.
[15] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, article 10.

General Assembly, 21 states, including Poland and two other member states of the Council of Europe, issued a joint declaration to recall that there is no international right to abortion.[16]

The hypothetical interference is proportionate to legitimate goals

23. Assuming that the Court finds (1) that the suffering suffered by the woman as a result of the birth of her son was worse than that which would have resulted from her abortion, (2) that this suffering reaches the level of severity required to constitute a violation of section 3, and (3) that this suffering is attributable to the health care system, it would then be appropriate to consider whether the doctors' decision was justified in light of competing rights and interests.

24. While, according to the Court, "a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State,"[17] the fact remains that "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.'"[18] Thus, the Convention neither imposes nor opposes the legalization of abortion, but the legal framework for abortion must be consistent with the Convention. When a particular case is brought before it, it is then up to the Court to "supervise whether the interference constitutes a proportionate balancing of the competing interests involved."[19] This is the crucial principle of reasoning developed by the Court; it is based on previous case law from which "It follows . . . that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms."[20]

25. The Court has already identified several competing rights and interests in case of abortion.

Abortion is not just a confrontation between the rights of the mother and the rights of the unborn child. As the Court has repeatedly stressed, "The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child."[21] Indeed, "pregnancy cannot be said to pertain uniquely to the sphere of private life,"[22] and "Art. 8(1) cannot be interpreted as meaning that pregnancy and its termination are as a principle, solely a matter of the private life of the mother."[23] Other legitimate rights and interests are at stake. In addition to those of the unborn child, the Court has so far been able to identify the legitimate interest of society to limit the number of abortions[24] or to protect morals.[25] It also recognises that the right to respect for the family life of the "potential father" and the potential grandmother is affected by the abortion of their child or grandchild.[26] The

[16] "Joint Statement on Universal Health Coverage United Nations," 74th Session of the UN General Assembly, 23 September 2019 (available here).
[17] *A., B. and C., op. cit.*, para. 249.
[18] *A., B. and C., op. cit.*, para. 249; *R. R. v. Poland*, No. 27617/04, 26 May 2011, para. 187; *P. and S. v. Poland*, No. 57375/08, 30 October 2012, para. 99; *Tysiąc v. Poland*, No. 5410/03, 20 March 2007, para. 116.
[19] *A., B. and C., op. cit.*, para. 238.
[20] *Vo v. France* [GC], No. 53924/00, 8 July 2004, para. 80.
[21] *A., B. C., op. cit.*, para. 213.
[22] Report drawn up by the Commission on 12 July 1977 in *Brüggemann and Scheuten v. FRG*, Application No. 6959/75, para. 59.
[23] *Ibid.*, para. 61.
[24] *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, para. 45.
[25] *Open Door and Dublin Well Woman v. Ireland*, No. 14234/88, 14235/88, 29 October 1992, para. 63; *A., B. and C., op. cit.*, paras. 222–227.
[26] See for example: *Boso c. Italie* (déc.), No. 50490/99, 5 September 2002.

Court also recognised the State's obligation to inform women about the risks associated with abortion.[27] The Court further recognised that other rights may be affected in specific situations, such as the freedom of conscience of health professionals[28] and the autonomy and ethics of medical institutions.[29]

Respect for the unborn child

In this case, the main competing interest in abortion is respect for the child.

The life of the unborn child is protected.

26. Polish law recognises that the unborn child is a person and grants him/her protection from the moment of conception. This protection is reinforced from the threshold of viability. In the eyes of the doctor, the child is a patient in the same way as the mother. This approach is in line with the Convention. Indeed, the Court authorises States, within the limits of their margin of appreciation, to determine in their domestic legal order "the starting point of the right to life."[30] The Court refers the question of the starting point of life to domestic orders and has never held that - in the order of the Convention - the unborn child be not a person. Since the cases *Brüggemann and Scheuten v. FRG*[31] and *H. v. Norway*,[32] the Court has consistently refused to exclude the unborn child as a matter of principle from the scope of the Convention and to declare that the child be not a person within the meaning of Article 2 of the Convention. This is a subtlety to be understood: the Court allows States not to grant in their domestic order full protection *rationae temporis* to prenatal life, but in the Convention order, the Court does not deprive prenatal life of any protection, because unlike national laws which allow abortion for a certain period of time, "Article 2 of the Convention is silent as to the temporal limitations of the right to life"[33] and the Court has never ruled that the unborn child be not a person. If the Convention did not protect prenatal life, there would be no need to recognise a margin of appreciation for States in this respect, as any margin is necessarily inscribed within the framework of a pre-existing obligation. Judge Jean-Paul Costa explained as follows:

> "Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision."[34]

Indeed, the Court does not lack jurisdiction *rationae materiae* to assess the existence of an interference with the life of an unborn child; nor does it declare applications invoking Article 2 on behalf of stillborn children to be unfounded.[35] Finally, not only is Article 2 applicable to the unborn child, the Court has also applied other provisions, in particular Articles 3 and 8 in cases

[27] *Csoma v. Roumanie*, No. 8759/05, 15 January 2013.
[28] *Tysiąc*, *op. cit.*, para. 121; *R. R.*, *op. cit.*, para. 206.
[29] *Rommelfanger v. FRG* (dec.), No. 12242/86, 6 September 1989.
[30] *Vo* [GC], *op. cit.*, para. 82.
[31] *Brüggemann*, *op. cit.*, para. 60.
[32] *H. v. Norway* (dev.), No. 17004/90, 19 May 1992, p 167.
[33] *Vo* [GC], *op. cit.*, para. 75.
[34] separate opinion in *Vo* [GC], *op. cit.*, para. 10.
[35] *Şentürk*, para. 107.

where the father denounced the torture suffered by the child during the abortion[36] and the violation of respect for their family life.[37]

The protection of life and the prevention of abortion are international obligations

27. At the 1994 Cairo Conference, governments committed to "take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning" (8.25). This commitment was renewed the following year at the Fourth World Conference on Women, with States affirming that "every effort should be made to eliminate the need for abortion" (para. 160.k).[38]

The Assembly of the Council of Europe also called on European states to "promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure." (PACE, 2008).

Protecting the unborn child from the suffering of abortion

28. Abortion, especially late abortion, is traumatic for both the child and the woman. In France, in the case of late abortion, the foetus is usually killed by a lethal injection into the heart or umbilical cord and then the birth is induced. In some countries, a more brutal method, called dilatation-evacuation, is used. In England and Wales, this method is used in 76% of abortions between 15 and 19 weeks of pregnancy and in 44% of abortions after the twentieth week of pregnancy.[39] It is commonly used in the Netherlands and Canada. This method involves dilating the cervix and then removing the limbs of the foetus with forceps. To complete the abortion, the doctor makes sure that nothing is missing. This means that the body of the foetus is put together like a puzzle because it has been dismembered during the operation. If there was no prior injection to kill the foetus (as in England), or if the injection did not kill the foetus,[40] it means that the foetus was alive while being dismembered. At best he or she will have received some of the anaesthesia given to the mother. This frightening and cruel method is inhuman and constitutes real torture.

29. The medical community had long been of the opinion that children, before the 29th-30th week, were not able to feel pain during abortion.[41] As a result, medical personnel routinely performed abortions on children, even in their twentieth week, without concern for inflicting any pain or suffering on the foetus, despite scientific studies that showed that foetuses and new-

[36] *H.* (dev.), *op. cit.*; *Boso*, *op. cit.*
[37] *H.* (dev.), *op. cit.*
[38] Programme of Action of the International Conference on Population and Development, Cairo, September 1994.
[39] Department of Health, Abortions Statistics, England and Wales: 2013, Table 7a p. 25, published June 2014.
[40] According to a study, injection actually causes death in 87% of cases. This means that in 13% of cases, the child survives. Nucatola D, Roth N, Gatter M. "A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as foeticide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion". Janvier 2010, 81(1):67-74.
[41] Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA, *A Systematic Multidisciplinary Review of the Evidence*, 294 *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* 8, 947-954 (2005).

borns can feel pain just as well or even better than adults.[42] Over the past 15 years or so, the medical community's view of the ability of the unborn child of 20 weeks or less to feel pain has changed.[43] Scientific studies also show that the foetus is sensitive to touch as early as eight weeks, and that they feel pain as early as the fourteenth week. At twenty weeks, the foetus possesses the "physical structures necessary to feel pain."[44] The researchers observed that "the foetus responds to the stimulation of a needle on the intrahepatic vein with vigorous body movement and breathing, which is not the case when the stimulation takes place on the placental cord."[45]

30. Foetal, and even embryonic, suffering is legally recognised in animals. Directive 2010/63/EU on the protection of animals used for scientific purposes[46] has established protection for these animals because of the recognition through scientific research that they can feel pain and suffering (para. 6). The Directive recognises that "Scientific evidence" show that "foetal forms of mammals" (which also includes human beings) "are at an increased risk of experiencing pain, suffering and distress" even before the third trimester of pregnancy.[47]

31. Late abortion is technically difficult to perform (at 20 weeks, the complication rate is ten times higher than before 10 weeks, according to official UK statistics)[48] and sometimes viable babies who were supposed to be aborted are born alive. After 21 weeks, some can breathe unaided for a long time. Being born alive after an abortion is not exceptional. This possibility is listed in the WHO list of diseases in Chapter XVI, *Certain conditions originating in the perinatal period, section P96.4 Termination of pregnancy, affecting fetus and newborn*.[49]

32. When a pregnancy is terminated after sixteen weeks, the method used is often to induce birth. Most of the time, the baby's heart stops during the contractions and the baby is born dead. However, some may survive labour, and their numbers increase with gestational age. From 22-24 weeks, as it is common for the baby to be born alive, most often a fœticide is practiced: an injection in the cord or sometimes directly into the baby's heart, preceded or not by an anaesthetic, to stop the heart. This is a technically difficult act, which can therefore have a high failure rate. According to one study, the success rate is 87%, i.e. there are 13% "failures"

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[42] Anand and Hickey, "Pain And Its Effects In The Human Neonate And Fetus" *The New England Journal Of Medicine*, Volume 317, Number 21: Pages 1321-1329, 19 November 1987 (accessible ici).
[43] *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep.*, 109th Cong., 1st Session, No. 109-57, 15 (Nov. 1, 2005); Pain-capable Unborn Child Protection Act, H.R. 36, 114th Cong., 1st Session, §2 (6) (May 14, 2015).
[44] Glover V. "The fetus may feel pain from 20 weeks", in: *The Fetal Pain Controversy, Conscience*. 25:3 (2004) 35-37.
[45] Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1321-1329 (1987); Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881 (1999).
[46] Directive 2010/63/UE of the European Parliament and of the Council of 22 September 2010on the protection of animals used for scientific purposes.
[47] See for example para. 9: "*This Directive should also cover foetal forms of mammals, as there is scientific evidence showing that such forms in the last third of the period of their development are at an increased risk of experiencing pain, suffering and distress, which may also affect negatively their subsequent development. Scientific evidence also shows that procedures carried out on embryonic and foetal forms at an earlier stage of development could result in pain, suffering, distress or lasting harm, should the developmental forms be allowed to live beyond the first two thirds of their development*."
[48] Department of Health, "*Abortion Statistics, England and Wales: 2011*", National Statistics, May 2012, page 22, tableau 8.
[49] Available here.

whereby the child is born alive and sometimes viable.[50] Precise data are available in the attached document.

33. This information on the reality of late abortion helps to understand the decision of some doctors not to perform it, and to "let nature take its course" by accompanying the mother and child. It is difficult to argue that the practice of such an abortion would have been more respectful of the child than a birth with palliative care, and would have caused less suffering to the child.

The description of this practice also helps to understand the reasons for the doctors' conscientious objection.

Respect for the freedom of conscience of doctors

34. In two cases concerning Poland, the European Court, considering that conscientious objection and access to abortion fall within the scope of Articles 9 and 8 of the Convention respectively and are in conflict, held that, once States decide to legalise abortion, they "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."[51] The Court refused to allow one right to prevail over the other and imposed an obligation on the State to create a mechanism to reconcile these competing rights. The Court emphasised this point, having noted that Polish law has recognised the need to ensure that doctors are not obliged to perform services to which they are opposed, and to establish a mechanism by which such a refusal can be expressed. This mechanism also includes elements to reconcile the right to conscientious objection with the interest of the patient.[52]

35. In the present case, it is not disputed that Polish law required doctors to inform the patient about her right to abort her pregnancy, to inform her of their possible objection and, in that case, to refer her to a non-objecting doctor.

36. The difficulty in the present case was for the doctors consulted to indicate such a non-objecting doctor. Dr Chazan testified that there were two reasons for this:

> I did not refer the patient to another doctor because I do not know of a list of doctors who perform abortions. I would have to call them from a phone book. Furthermore, by referring the woman to this doctor, I would actually be helping to organise the abortion, which for moral reasons I could not consider.

37. The first motive is a matter of principle, because to indicate such a doctor would have consisted in an indirect participation in the abortion, contrary to his convictions. The Polish Constitutional Court ruled in favour of Dr Chazan on this point, finding this obligation contrary to the Constitution.[53]

[50] Nucatola D, Roth N, Gatter M., "A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as feticide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion.", 2010 Jan;81(1):67-74. doi: 10.1016/j.contraception.2009.08.014. Epub., available here.
[51] *R. R., op. cit.*, para. 206; *P. and S., op. cit.*, para. 106.
[52] *P. and S., op. cit.*, para. 107.
[53] See case *K 12/14*, decision given on 7 October 2015.

38. The second ground is of a practical nature. It consists in the difficulty, if not impossibility, for a doctor to know in advance the decision of his colleagues on this specific case, especially before they have been consulted by the patient. In the present case, it should be noted that no doctor, including from the Bielany Hospital, which is known for its frequent practice of abortion, considered it to be justified.

39. One solution that would comply with the requirements laid down by the Court in its case-law would be, as in France, to ensure that a list of doctors and institutions performing abortions in Poland be publicised. In this way, patients could be directly informed by persons who have no objection in principle to the practice.

40. Eventually, it is worth mentioning Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe, which solemnly recalled that:

> No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.

41. Finally, the importance of conscientious objection in the medical field was recalled in Resolution 1928 of 24 April 2013 "*Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence*." PACE has called on states to:

> ensure the right to well-defined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education, in line also with various recommendations already adopted by the Assembly, provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed (para 9.10).

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