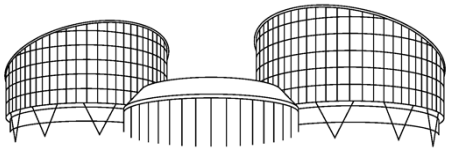

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF A.R. v. POLAND

(Application no. 6030/21)

JUDGMENT

Art 8 • Private life • Prolonged uncertainty, as to the applicable laws and the permissibility of abortion on foetal abnormality grounds, caused by the delayed publication and entry into force of the Constitutional Court's judgment introducing amendments, and resulting in the applicant travelling abroad for termination • Art 8 applicable • Impugned proceedings affected the applicant's Art 8 rights • Findings in *M.L. v. Poland* that the relevant judgment was not been adopted by a "tribunal established by law" relevant • Impugned restriction not issued by a body compatible with the rule of law requirements • Lack of required foreseeability owing to the general uncertainty as to the applicable legal framework • Interference not "in accordance with the law"

Prepared by the Registry. Does not bind the Court.

STRASBOURG

13 November 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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

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

Ivana Jelić*, President*,
Erik Wennerström,
Georgios A. Serghides,
Raffaele Sabato,
Frédéric Krenc,
Alain Chablais,
Anna Adamska-Gallant*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 6030/21) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms A.R. ("the applicant"), on 11 January 2021;

the decision to give priority to the application under Rule 41 of the Rules of Court;

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

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

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

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

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

Having deliberated in private on 4 March 2025 and 30 September 2025,

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

INTRODUCTION

1. The case concerns restrictions on abortion introduced by the Constitutional Court's judgment of 22 October 2020 declaring unconstitutional the relevant provisions, which had allowed for legal abortion in the event of foetal abnormalities, and the impact of that judgment on the applicant's personal situation. It raises issues under Articles 3 and 8 of the Convention.

THE FACTS

2. The applicant was born in 1981 and lives in Cracow. She was represented before the Court by Ms A. Bzdyń, Ms K. Ferenc and Ms. M. Gąsiorowska, lawyers practising in Warsaw.

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

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

BACKGROUND TO THE CASE

A. Constitutional Court case no. K 13/17

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

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

7. In October 2019 parliamentary elections were held.

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

B. Constitutional Court case no. K 1/20

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

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

11. On 27 January 2021 the Constitutional Court published the judgment of 22 October 2020, together with its reasoning, in the Journal of Laws. The judgment entered into force on the date of its publication.

C. Nationwide protests

12. The Constitutional Court's ruling prompted widespread protests, including demonstrations involving thousands of participants all over the country. The protests were organised by, among others, All-Poland Women's Strike, a women's social rights movement in Poland.

D. Federation for Women and Family Planning

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

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

E. The circumstances of the present case

15. The applicant submitted the pre-filled application form, to which she added some details about her personal situation. She stated that she had one preschool-age child. At the time of the delivery of the Constitutional Court's judgment (see paragraph 10 above) she had been fifteen weeks pregnant. The pregnancy was intentional. However, the results of medical tests taken on 5 November 2020 confirmed that the foetus she had been carrying suffered from a genetic disorder called trisomy 18. She had not wanted to risk that the judgment would be published before she would have completed the various steps required to qualify for a legal abortion (as provided by sections 4a(1)(2), 4a(3) and 4a(5) of the 1993 Act). She further submitted that she had been worried about the risk of borders closing because of COVID-19 restrictions and about the approach of some hospitals with respect to abortions even before the publication of the Constitutional Court's judgment. She also referred to the trauma she could have experienced in those hospitals on account of the use of the conscientious objection clause by medical practitioners there. For all those reasons, she had travelled to the Netherlands where the pregnancy was terminated in a private clinic on 12 November 2020. The applicant had been seventeen weeks pregnant on that date. The applicant submitted bills relating to the transport costs (1,235.36 Polish zlotys

(PLN) (approximately 300 euros (EUR)), accommodation (EUR 320) and medical fees (EUR 875)).

16. The applicant contended that she had suffered stress on account of the physical and psychological impact of her travelling abroad for an abortion, in addition to the financial burden the situation had entailed. She also submitted that she had had difficulties confirming her rights to a special shortened maternity leave because she had undergone the termination abroad. She had submitted the relevant documents in November 2020, yet her case had still been pending in January 2021.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

17. The relevant domestic law and practice as well as the relevant international documents are set out in detail in the judgment *M.L. v. Poland* (no. 40119/21, §§ 25-72, 14 December 2023).

18. In addition, the following information is relevant in the present case.

I. ACCESS TO LEGAL ABORTION

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

20. Initially, section 4a of the 1993 Act provided that legal abortion was possible until the twelfth week of pregnancy where the pregnancy endangered the mother's life or health; prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable life-threatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

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

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

23. Subsequently, on 22 October 2020, the Constitutional Court declared that section 4a(1)(2) of the 1993 Act, which allowed for legal abortion in the event of foetal abnormalities, was also incompatible with the Constitution. The judgment was published in the Journal of Laws on 27 January 2021 and entered into force on that date (see paragraphs 10 and 11 above).

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

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

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

2. (ceased to have effect)

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

4. (ceased to have effect)

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

(3) In cases listed under subsection (1), sub-paragraphs 1 and 2 above, abortion shall be carried out by a physician working in a hospital.

...

(5) Circumstances in which abortion is permitted under subsection (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 ..."

II. THE CONSTITUTIONAL COURT

A. Constitutional provisions

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

Chapter VIII. Courts and tribunals
Article 173

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

Article 188

"The Constitutional Court shall adjudicate on the following matters:

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

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

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

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

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

Article 190

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

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

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

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

5. ..."

B. Publication of Constitutional Court's judgments

26. The Law of 20 July 2000 on Promulgation of Normative Acts and Certain Other Legal Acts (*Ustawa o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych* – "the 2000 Act"), sets out the conditions for the publication of legal acts. The relevant provisions read as follows:

Section 2 [Obligation to promulgate a normative act].

"(1) The publication of a normative act in the official gazette shall be obligatory.

(2) The obligation to promulgate a normative act which does not contain generally applicable provisions may be disapplied by way of separate law [to that effect]."

Section 3 [Immediate promulgation of acts].

"Normative acts shall be promulgated without delay."

27. Pursuant to section 21 of the 2000 Act the Prime Minister is responsible for the publication of legal acts in the Official Journal.

THE LAW

I. PRELIMINARY OBJECTIONS

28. The applicant complained that she was a potential victim of a breach of Article 8 of the Convention. While she had not been refused an abortion on the ground of foetal defects, the 1993 Act still breached her rights as she had been forced to adapt her conduct. She also complained under Article 8 of the Convention that the restriction had not been "prescribed by law" as (i) the

composition of the Constitutional Court had been incorrect and in breach of the Constitution, since Judges J. Piskorski, M. Muszyński and J. Wyrembak, assigned to the bench, had been elected by the *Sejm* to judicial posts that were already occupied; (ii) the appointment of Judge J. Przyłębska, the President of the Constitutional Court and the presiding judge in the relevant case, was also open to challenge; and (iii) Judge K. Pawłowicz, who had sat in the case, had not been impartial since she had previously been a member of parliament in favour of restricting abortion laws in Poland. Lastly, the applicant claimed to be a potential victim of a breach of Article 3 of the Convention as the prospect of being forced to give birth to an ill or dead child caused her anguish and distress.

29. The Government made several preliminary objections as to the admissibility of the application. They argued that it was incompatible *ratione materiae* and *ratione personae* with the provisions of the Convention. They further submitted that the applicant had not complied with the rule of exhaustion of domestic remedies. Lastly, they stressed that the applicant had abused the right of petition. The Court finds that these objections should be examined separately as regards the complaints under Articles 3 and 8.

A. Article 3

1. The parties

(a) The Government

30. The Government maintained that the complaint under Article 3 of the Convention was incompatible *ratione personae*, manifestly ill-founded and should be declared inadmissible for abuse of the right of petition. They further maintained that the present case did not disclose a level of severity sufficient to fall within the scope of Article 3 of the Convention. In their view, the case should be distinguished from *R.R. v. Poland* (no. 27617/04, §§ 159-60, ECHR 2011 (extracts)), in which the Court found that the applicant's suffering, caused by the doctors' intentional failure to provide timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy, had reached the minimum threshold of severity under Article 3 of the Convention. They noted that in the present case the applicant had not been refused termination of pregnancy or prenatal testing, had not experienced procrastination, undue delay or confusion in her diagnosis and treatment, and had not been treated in a humiliating manner.

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

separate different facts which affected a woman's emotional state in such a complex and distressing situation.

(b) The applicant

32. The applicant argued that the restrictions introduced by the Constitutional Court had caused her serious and real emotional suffering. She submitted that they had caused her uncertainty and left her feeling concerned for her future. She also submitted that following the abortion that she had had to undergo abroad, she had started psychological therapy in order to deal with the trauma that she had suffered.

33. The applicant referred to the United Nations (UN) Human Rights Committee's findings in *Mellet v. Ireland* (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013, 17 November 2016, UN Doc. CCPR/C/116/D/2324/2013) and *Whelan v. Ireland* (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2425/2014, 11 July 2017, UN Doc. CCPR/C/119/D/2425/2014), in which the Committee had stated that by prohibiting and criminalising abortion, the State in question had subjected the applicants to severe emotional and mental pain and suffering. She submitted that her situation was similar to that of the applicants in those cases and that she had experienced similar suffering and burdens.

2. The Court's assessment

34. The Court does not consider it necessary to address all the arguments advanced by the Government, since it finds that this complaint is inadmissible for the following reasons.

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

36. The Court observes that the applicant's complaint was formulated in generic terms with reference to the views expressed by the UN Human Rights Committee in two decisions concerning fatal foetal abnormalities. It further accepts that in the present case, travelling abroad for an abortion must have been psychologically arduous. However, having regard to the material before it, the Court considers that the applicant failed to the substantiate her claim that the restrictions introduced by the Constitutional Court resulted in treatment contrary to Article 3 of the Convention (compare *Tysiąc v. Poland*, no. 5410/03, § 66, ECHR 2007-I; *A, B and C v. Ireland* [GC], no. 25579/05, § 164, ECHR 2010 and *M.L. v. Poland*, cited above, §§ 83-84, the latter relating to a complaint expressed in very similar terms).

37. In the light of the foregoing, the Court finds that this complaint should be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Article 8

1. Jursidiction ratione materiae

(a) The parties

(i) The Government

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

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

40. Since the Convention did not grant a right to terminate a pregnancy or a right to specific medical services, and since none of its provisions could be interpreted as conferring such rights, a State could not be precluded from shaping its domestic regulations on reproductive healthcare services and access to abortion in line with its moral view enshrining the need to protect the life of an unborn child, also taking into account the broad margin of appreciation which States had in this area. Consequently, the Government were of the view that Article 8 of the Convention was not applicable.

(ii) The applicant

41. The applicant argued that the crux of the case was not the right to terminate a pregnancy as such, but the fact that as a direct consequence of the

Constitutional Court's judgment she could not access an abortion on the grounds of foetal abnormalities.

42. She further stated that she did not claim a right to abortion. She merely submitted that the legislation concerning availability of legal abortion touched on the most intimate sphere of her life, namely a decision whether to have a child or not and in what circumstances.

(b) The Court's assessment

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

44. The Court further observes that it previously held that the prohibition of abortion in Poland on the grounds of foetal malformation, where abortion had been sought for reasons of health and well-being, came within the scope of the applicant's right to respect for private life, and that Article 8 was applicable (see *M.L. v. Poland*, cited above, § 94, with a reference to *A, B and C v. Ireland*, § 214).

45. The Court does not discern any reason to hold differently in the present case, which concerns access to legal abortion in a situation of foetal genetic disorder (namely trisomy 18). It follows that Article 8 of the Convention is applicable and the Government's objection must be dismissed.

2. Alleged lack of victim status

(a) The parties

(i) The Government

46. The Government submitted that the applicant could not be regarded as a victim of a violation of Article 8. In particular, the Government referred to the Court's position on "potential victims" as set out in *Dudgeon* (cited above), *Norris v. Ireland* (26 October 1988, Series A no. 142) and *S.A.S. v. France* ([GC], no. 43835/11, ECHR 2014 (extracts)). They also noted that the present application had been lodged before the publication of the Constitutional Court's judgment on 27 January 2021. The applicant, however, despite having been in a situation which had allowed her to terminate the

pregnancy in Poland, had not made use of that possibility but instead had decided to terminate the pregnancy abroad.

(ii) The applicant

47. The applicant disagreed with the Government's submissions that she could not claim to be a victim of a breach of the Convention. She submitted that there were no doubts under the Court's case-law that a pregnant woman who sought an abortion could claim to be a victim of a breach of Article 8 of the Convention (*P. and S. v. Poland*, no. 57375/08, §§ 79-84, 30 October 2012).

48. She submitted that the judgment of the Constitutional Court had created a legal environment within which she had suffered uncertainty and fear because of the unclear status of that judgment under the domestic law prior to its publication.

(b) The Court's assessment

49. The Court reiterates that Article 34 of the Convention does not allow complaints *in abstracto* alleging a violation of the Convention. The Convention does not provide for the institution of an *actio popularis* (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014), meaning that applicants may not complain about a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention. However, an individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a "victim", within the meaning of Article 34, if he or she is required either to modify his or her conduct or risk being prosecuted, or if he or she is a member of a category of persons who risk being directly affected by the legislation (see, in particular, *S.A.S. v. France*, cited above, §§ 57 and 110, and the references cited therein, *A.M. and Others v. Poland* (dec.), no. 4188/21, § 72, 16 May 2023 and *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, §§ 460-64, 9 April 2024).

50. The Court notes that the present application is readily distinguishable from the cases of *A.M. and Others v. Poland* (cited above, § 86) and *K.B. and K.C. v. Poland* ((dec.), nos. 1819/21 and 3639/21, §§ 59-63, 4 June 2024) where the applicants had complained of a risk of a future violation, and the Court concluded that they had failed to put forward any reasonable and convincing evidence that they were at real risk of being directly affected by the amendments introduced by the Constitutional Court's judgment. It should also be distinguished from that of *M.L. v. Poland* (cited above) in which the Court concluded that the applicant was "directly affected" by the legislative change in question. In the latter case the applicant had qualified for a legal abortion on the ground of foetal abnormalities and a hospital appointment had

been scheduled, but the Constitutional Court's judgment had entered into force just before her appointment, making it impossible to have an abortion in Poland on those grounds (ibid. §§ 100-04) and for that reason the applicant had travelled abroad to terminate the pregnancy.

51. In the present case despite arguing that the applicant could not be considered a "victim" for the purposes of Article 34, the Government did not dispute the core factual submission that she had travelled abroad for an abortion. Regarding her reasons for doing so, the Court observes that shortly after the delivery of the Constitutional Court's judgment the applicant received the results of genetic tests confirming that the foetus suffered from a serious genetic disorder – trisomy 18 (see paragraph 15 above). She subsequently travelled to the Netherlands, where the pregnancy was terminated in November 2020. As the Government rightly pointed out, at the relevant time abortion on grounds of foetal abnormality was still legal in Poland. However, the Court notes that judgments of the Constitutional Court have to be published without delay (see paragraph 26 above). The publication would have removed the possibility for the applicant to obtain a legal abortion in Poland with immediate effect (see paragraph 11 above). The Court therefore accepts that the applicant risked being directly affected by the impending change in law resulting from the Constitutional Court's judgment and therefore travelled abroad for an abortion for reasons of health and well-being.

52. The Court further accepts the applicant's argument that that caused her pain and suffering (see paragraph 16 above). Undoubtedly, obtaining an abortion abroad, away from the support of her family, rather than undergoing the procedure in the security of her home country, constituted a significant source of added anxiety (compare, *A, B and C v. Ireland*, § 126 and *M.L. v. Poland*, § 101, both cited above).

53. As regards the financial burden of travelling abroad, the applicant, who travelled at her own expense, submitted that her travel costs and medical fees had amounted to EUR 1,495 (see paragraph 15 above). The Court observes that those costs could have constituted a considerable expense for the applicant.

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

55. Given the above considerations, the Court finds that the applicant was not a potential victim but was "directly affected" by the legislative change in question (see *M.L. v. Poland*, cited above, § 104).

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

3. Non-exhaustion of domestic remedies

(a) The parties

(i) The Government

57. The Government submitted that the applicant had failed to exhaust domestic remedies as she had not provided the Polish authorities with an opportunity to address, and thereby potentially remedy, the alleged violations of the Convention. As submitted by the applicant, she had been fifteen weeks pregnant at the time when the Constitutional Court's judgment had been delivered. When she had discovered that the foetus suffered from trisomy 18, she had decided to travel to the Netherlands to undergo a termination of pregnancy there. However, the Constitutional Court's judgment of 22 October 2020 removing the provision allowing for legal abortion in the event of foetal abnormalities from the 1993 Act had only entered into force on 27 January 2021, the date of its publication. Thus, the applicant could have terminated the pregnancy in Poland, had the relevant medical tests confirmed severe and irreversible damage of the foetus or that it suffered from an incurable life-threatening disease.

58. In any case, even if the applicant had had difficulties in accessing legal abortion in Poland, the Government maintained that she had had a number of remedies at her disposal. They noted that a complaint under section 31 of the Law of 6 November 2008 on patients' rights ("the 2008 Act") or a complaint to the Patients' Rights Ombudsman (see *M.L. v. Poland*, cited above, § 44) were available to women who had been refused lawful terminations of pregnancy and those who had been refused prenatal examinations. They further submitted, in general terms, that domestic law provided for various types of civil, criminal and disciplinary proceedings against medical practitioners. Moreover, the right to family planning and the right to lawful termination of pregnancy were considered personal rights within the meaning of Articles 23 and 24 of the Civil Code. Consequently, the applicant could have had recourse to civil compensatory remedies under Articles 23 and 24, in conjunction with Article 448 of the Civil Code.

(ii) The applicant

59. The applicant disagreed with the Government's submissions. She submitted firstly that proceedings under the 2008 Act were not effective in the case of women seeking a legal abortion. In that regard, she referred to the findings made by the Committee of Ministers in the process of executing the judgment in the case of *Tysiąc* (cited above). In particular, it was noted during that process that the appeal mechanism created by the 2008 Act had a number of apparent deficiencies, such as excessive formal requirements and delays. It was further stressed that a guarantee that such appeals would be examined urgently was of the essence for effective access to lawful abortion. The

applicant argued that the Government had failed to indicate any example of an effective use of the appeal mechanism under the 2008 Act.

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

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

(b) The Court's assessment

62. The Court reiterates that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies that are available and sufficient in respect of his or her Convention grievances (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014, and, most recently, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, §§ 138-45, 27 November 2023).

63. As regards a complaint under section 31 of the 2008 Act, the Court has previously held that that remedy was not effective in a situation of a woman seeking to have a legal abortion (see *M.L. v. Poland*, cited above, § 113). Similarly, in view of its previous findings (see *Tysiąc*, § 118, and *v. Poland*, § 114, both cited above) the Court does not consider that the civil remedies mentioned by the Government could have proved effective in the present case.

64. In so far as the Government alleged that the applicant had not attempted to obtain a legal abortion in Poland, the Court considers that that objection is closely linked to the merits of the applicant's complaint under Article 8. Accordingly, it joins that objection to the merits.

4. Abuse of the right of petition

(a) The parties

(i) The Government

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

66. They maintained that the applicant's arguments in relation to the Constitutional Court were of a political nature and aimed to discredit that

court. The applicant had exercised her right of application to describe the functioning of the Constitutional Court in a negative manner, rather than to protect her rights under the Convention. Furthermore, the perception of the applicant that she could not have legally terminated her pregnancy in Poland was unsubstantiated and unverified, as she had not had any recourse to domestic remedies.

(ii) The applicant

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

(b) The Court's assessment

68. The Court reiterates that the concept of "abuse" within the meaning of Article 35 § 3 (a) of the Convention must be understood in its ordinary sense according to general legal theory – namely, the harmful exercise of a right for purposes other than those for which it is designed (see *Zhdanov and Others v. Russia*, nos. 12200/08 and 2 others, § 79, 16 July 2019).

69. The Court further reiterates that it has previously examined an analogous objection in a similar case and rejected it (see *M.L. v. Poland*, cited above, § 122).

70. In the present case, the Government's arguments are based on their own perception of the applicant's possible intentions behind her decision to lodge an application with the Court. Consequently, having regard to its case-law on the issue, the Court finds, despite the arguments raised by the Government with regard to the applicant's conduct and the context of the application, that the applicant's complaint cannot be regarded as an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention. It accordingly dismisses the Government's preliminary objection.

C. Overall conclusion on admissibility

71. The Court finds that the applicant's complaint under Article 8 of the Convention is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

72. The applicant complained that she was a victim of a breach of Article 8 of the Convention on account of the Constitutional Court's judgment of

22 October 2020. She also complained that the restriction had not been "prescribed by law" given the allegedly incorrect composition of the Constitutional Court. That provision of the Convention reads, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicant

73. The applicant submitted that there had been an interference with her right to respect for her private life under Article 8 of the Convention on account of the restrictions resulting from the Constitutional Court's judgment of 22 October 2020.

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

75. The applicant maintained that the interference with her rights under Article 8 had not been in accordance with the law, as the composition of the bench of the Constitutional Court had included judges appointed in an unlawful manner. With respect to Judge M. Muszyński, she pointed out that the circumstances of his election had previously been examined by the Court (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021). As regards Judge J. Wyrembak and Judge J. Piskorski, they had replaced two other deceased judges who had been elected by the eighth Sejm to judicial posts which had already been filled. The applicant submitted that the Constitutional Court's judgment of 22 October 2020 had been delivered by a bench which had included three judges who had been improperly appointed and thus had not been authorised to sit in the Constitutional Court.

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

77. In addition, the applicant noted that Judge K. Pawłowicz, who had previously been a member of parliament, had signed the 2017 application to the Constitutional Court seeking to have certain provisions of the 1993 Act declared incompatible with the Constitution (see paragraph 6 above). The judge had also participated in many public debates relating to abortion and expressed her views on the issue.

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

79. The applicant, who had referred to the uncertainty surrounding the publication of the Constitutional Court's judgment in her application, emphasised in her observations that over three months had passed between the date when that judgment was delivered and the date of its publication. The length of that period had not been provided for by law. While it was true that it had been possible for the Constitutional Court to fix a later date on which the judgment of 22 October 2020 would have entered into force, no such date had actually been fixed. Therefore, the general expectation had been that it would be published soon after delivery. However, a period of three months of uncertainty had ensued. In the applicant's view that delay had been for political reasons and owing to the country-wide protests on restrictions on abortion. The applicant maintained that that ambiguity had seriously undermined legal certainty at the material time.

80. Lastly, the applicant submitted that the restrictions imposed by the Constitutional Court's judgment were not justified as being "necessary in a democratic society". She maintained that there was no value in society which required protection by way of a ban on abortion. A decision on abortion was of a very sensitive, intimate and private nature, and each time such a decision was made for various reasons which were complicated, personal and particular to each individual. Therefore, such a decision could not be subject to a uniform official judgment delivered by the courts.

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

2. The Government

82. The Government, referring to the Court's case-law (see *Vo*, § 76, and *A, B and C v. Ireland*, § 216, both cited above), noted that not every regulation of the termination of pregnancy constituted an interference with the right to respect for the private life of the mother. They further submitted that the amendments to the 1993 Act introduced by the Constitutional Court's judgment could not be regarded as an interference with the applicant's rights. The Constitutional Court's judgment was in accordance with the relevant provisions of the Polish Constitution and international law. Since there was no right to abortion under the Convention, it could not be said that the introduction of more restrictive domestic regulations had breached its provisions. Moreover, the applicant had terminated the pregnancy abroad and had not taken advantage of the options provided in the 1993 Act as in force at the material time.

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

84. The Government stated that the 1993 Act had already been previously amended by the Constitutional Court. In its judgment of 28 May 1997, the Constitutional Court had declared that section 4a(1)(4), which had allowed abortion for so-called "social reasons" (material or personal hardship), was incompatible with the Constitution. The Government noted that it was the Constitutional Court's role to eliminate from the legal system regulations that were incompatible with the Constitution.

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

86. Furthermore, pursuant to Article 190 § 3 of the Constitution a judgment of the Constitutional Court should take effect from the date of its publication. Nevertheless, the Constitutional Court could specify another date for such a judgment to take effect.

87. The Government emphasised that an application for declaring sections 4a(1)(2) and 4a(2) unconstitutional had been submitted in accordance with Article 191 § 1 (1) of the Constitution and the composition of the bench had been formed in accordance with the applicable law. The judgment had been delivered by a majority of the judges and thus the allegations of irregularities in the appointment of the judges were not only groundless but also irrelevant for the outcome of case no. K1/20.

B. The third-party interveners

1. Council of Europe Commissioner for Human Rights

88. The Commissioner, referring in particular to her 2019 country visit to Poland (see *A.M. and Others v. Poland*, cited above, § 38), provided information on the legal framework and practical situation relating to access to abortion in Poland. The Commissioner noted that it had been reported that immediately after the delivery of the Constitutional Court's judgment and before its publication in the Official Journal –thus prior to its entry into force – certain hospitals had begun to refuse to perform abortions in cases of foetal impairment. She also provided a comparative overview showing an established European consensus in favour of access to safe and legal abortion care. The Commissioner elaborated on the harmful impact of restrictive legal and policy frameworks regarding access to abortion on women's human rights. She concluded that in order to ensure the effective protection of women's human rights, Poland should urgently guarantee to all women and girls full and adequate access to safe and legal abortion care by bringing its law and practice into line with international human rights standards, including the Convention, and regional best practices.

2. European Centre for Law and Justice

89. The European Centre for Law and Justice (ECLJ) submitted that eugenic abortion was contrary to human rights. Moreover, Poland had chosen to recognise unborn children as legal subjects and granted them legal protection from the moment of conception. By granting a child the right to non-discrimination on the grounds of disability, Poland was bringing itself into line with the most recent developments in international law, which prohibited mentioning disability as a specific ground for abortion.

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

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

care, all of which exposed them to risks to their health, exacerbated social inequities and violated their human rights.

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

4. Ordo Iuris – Institute for Legal Culture

92. The Ordo Iuris Institute made detailed submissions with regard to the beginning of human life and the legal status of *nasciturus* as defined in international documents, the Court's case-law and the *travaux préparatoires* to the Convention.

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

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

6. Clinique doctorale Aix Global Justice (Aix-Marseille Université)

94. The intervening organisation maintained that there existed a European consensus as regards the right to abortion, and an international consensus on the primacy of the life and health of pregnant women, which had to be taken into account in assessing the extent of the national margin of appreciation.

7. The Polish Ombudsman for Children ("the Ombudsman")

95. The Ombudsman stated that legislation permitting termination of pregnancy in cases of foetal abnormality in Poland was incompatible with the constitutional principle of the protection of life as the highest value. Referring

to the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities, the intervener argued that it was the duty of States to protect the life of a child both during the prenatal period and after birth.

8. International Federation of Gynecology and Obstetrics (FIGO)

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

9. Professor Fiona de Londras on behalf of eight legal scholars

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

98. The interveners argued that all persons who could become pregnant, all persons who were pregnant and all persons who received a diagnosis of foetal impairment were "victims" within the meaning of Article 34 of the Convention in respect of measures prohibiting abortion, including in cases of foetal impairment.

10. ADF International (Alliance Defending Freedom)

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

11. Helsinki Foundation for Human Rights ("the HFHR")

100. The HFHR presented the results of a survey concerning access to abortion in Poland which had been conducted from November 2020 to January 2021. The information had been collected in the period between the Constitutional Court delivering the judgment of 22 October 2020 and the date on which the judgment had entered into force. The HFHR obtained information on the possibility of abortion being performed on the ground of foetal defects from 103 hospitals in Poland. In reply to the questionnaire, 56%

of the hospitals had declared that abortion procedures could be carried out for those reasons, 38% of the hospitals had indicated that such procedures could not be performed and 6% of institutions had provided unclear answers. Furthermore, it transpired from the survey that the COVID-19 pandemic was an additional factor that had restricted access to abortion since certain hospitals had been designated to exclusively treat COVID-19 patients.

101. In particular, the organisation submitted that the Constitutional Court's judgment of 22 October 2020 had affected the availability of legal abortion in Poland even before its publication in the Journal of Laws. After its delivery serious doubts about its legal force had arisen. The HRHR further pointed to a number of practical and procedural obstacles to accessing legal abortion in Poland.

12. Polish Bar Association

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

C. The Court's assessment

1. Whether the case concerns positive or negative obligations

103. The Court notes that the applicant did not allege that there was no procedure by which she could establish whether she qualified for a lawful abortion in Poland, but that her grievances rather concerned the argument that the Constitutional Court's judgment which had prohibited abortion on the grounds of foetal defects in Poland had disproportionately restricted her right to respect for her private life. Thus, the Court considers it appropriate to analyse her complaint as one concerning negative obligations (see *A, B and C v. Ireland*, § 216, and *M.L. v. Poland*, § 152, both cited above).

2. Whether there was an interference

104. The Court has previously held that not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother (see *A, B and C v. Ireland*, § 216, and *M.L. v. Poland*, § 153, both cited above).

105. In the present case, the Government argued that – as there was no right to abortion under the Convention – the introduction of more restrictive domestic regulations could not be regarded as an interference with the applicant's rights (see paragraph 82 above). Moreover, the applicant had terminated the pregnancy abroad and had not taken advantage of the procedures provided in the 1993 Act as in force at the material time. However, the Court is unable to accept this view.

106. The Court notes that although the Constitutional Court's judgment was delivered on 22 October 2020 it only took effect on the day of its

publication, namely 27 January 2021. While the 1993 Act remained unchanged until the latter date the Constitutional Court's judgment could have been published any time and it appears that a great feeling of uncertainty prevailed which was aggravated by the absence of transitional measures of any sort (see paragraphs 79, 88 and 101 above). The applicant herself also perceived that the Constitutional Court's judgment could be published at any time making it impossible for her to obtain a legal abortion in Poland (see paragraph 15 above). The situation was further exacerbated by the ongoing Covid-19 pandemic, during which it was not unreasonable for the applicant to fear that border closures might imminently occur, thereby eliminating the possibility of travelling abroad to access abortion services (ibid). Having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity, the Court would accept that in the specific circumstances of the present case this situation of prolonged uncertainty was capable of constituting an "interference" with the applicant's Article 8 rights.

107. To determine whether that interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article, namely, whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention.

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

(a) General principles

108. The expression "in accordance with the law" requires, firstly, that the impugned measure must have a basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in the subject matter and aim of Article 8. It states the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82, and *Juszczyszyn v. Poland*, no. 35599/20, § 261, 6 October 2022).

109. Secondly, the expression refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and that it should be compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, Reports of Judgments and Decisions 1998 II). The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts), with further references, and *De Tommaso v. Italy* [GC],

no. 43395/09, §§ 106-09, 23 February 2017). In particular, as regards the requirement of foreseeability, the Court has held that a rule was "foreseeable" if it was formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct (see, among many other authorities, *Malone*, cited above, § 67; *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; and *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 171, 15 November 2016).

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

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

111. The Court notes at the outset that the conditions for legal abortion in Poland are set out in the 1993 Act. The Constitutional Court's judgment of 22 October 2020, which declared as unconstitutional foetal defects as a ground for abortion, was published on 27 January 2021, after a delay of three months, and entered into force on the latter date (see paragraphs 11 and 23 above).

112. Turning to the circumstances of the present case, the Court observes that it has already found that the situation of uncertainty which ensued after the delivery of the Constitutional Court's judgment of 22 October 2020, and before it's publication on 27 January 2021, constituted an "interference" with the applicant's Article 8 rights (see paragraph 106 above). As regards the lawfulness of this interference, the parties' opinions diverged on whether it was lawful for the purpose of the Convention.

113. The applicant referred to several shortcomings in the process by which the Constitutional Court arrived at its judgment of 22 October 2020 which meant that it could not be regarded as having been delivered in accordance with the law (see paragraphs 75-78 above). She further emphasised that while the provisions of the 1993 Act had remained unchanged until 27 January 2021, there had been a lot of uncertainty and confusion in Poland both on the part of the healthcare system and for women of reproductive age after the delivery of the judgment on 22 October 2020 and that that ambiguity had seriously undermined legal certainty (see paragraph 79 above). The Government responded that the composition of the Constitutional Court bench in case no. K1/20 had been lawful and regular (see paragraph 86 above). Furthermore, and most importantly, between 22 October 2020 and 27 January 2021 the 1993 Act had remained unchanged (see paragraphs 57 and 82 above).

114. In that regard the Court firstly observes that the Constitutional Court's judgment of 22 October 2020 was adopted in the process of a constitutional review of the domestic legislation. The procedure was initiated pursuant to Article 191 § 1 (1) of the Polish Constitution, by a group of members of parliament who contested the constitutionality of section 4a(1)(2) of the 1993 Act (see paragraph 9 above). While it is true that the applicant was not a party to those proceedings, the proceedings before the Constitutional Court affected her rights, in particular her right to respect for her private life (compare *M.L. v Poland*, cited above, § 168).

115. Secondly, as regards the composition of the Constitutional Court's bench which issued the judgment of 22 October 2020, the Court has previously found in *M.L. v. Poland* (cited above) that the interference with the rights of the applicant in that case, was "not in accordance with the law" within the meaning of Article 8 of the Convention because it had not been adopted by "a tribunal established by law" (ibid., §§ 174-75). The Court considers that these findings regarding the compatibility of the issuing body with rule of law standards are also relevant in the present case. At the same time the Court notes that while in both cases the situations complained of originated from the same judgment of the Constitutional Court, the applicant in the present case was additionally affected by the uncertainty surrounding its legislative implications. In *M.L. v. Poland* the interference was caused by the entry into force of the Constitutional Court's judgment – which was published just before the applicant's appointment for an abortion, making it impossible to have an abortion performed on the grounds of foetal abnormalities (ibid., § 100). In the present case, at the time of the relevant events, the Constitutional Court's judgment had not yet entered into force, and the Court had already found that the interference with the applicant's Article 8 rights was caused by the prolonged situation of considerable uncertainty as to the applicable laws and the permissibility of abortion on the ground of foetal abnormalities (see paragraph 106 above).

116. In that context the Court observes that it was undisputed between the parties that the provisions of the 1993 Act allowing abortion on the ground of foetal abnormalities had only been formally struck down on 27 January 2021. Nevertheless, the applicant maintained that the ambiguity that followed the delivery of the Constitutional Court's judgment had seriously undermined legal certainty. Thus, the question that remains to be examined by the Court is whether at the time of the events in the present case the domestic law was sufficiently clear and foreseeable in order for the applicant to regulate her conduct (see *mutatis mutandis*, *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 107, ECHR 2002-II (extracts), and *A, B and C v. Ireland*, cited above, § 220 with further references and *Dubská and Krejzová*, cited above, § 171). In that connection, the Court observes that the requirement of foreseeability is of particular importance where a right previously available

under domestic law is being restricted (compare *M.L. v. Poland*, cited above, § 175).

117. The Court notes that the Constitutional Court's judgments take effect from the date on which they are published in the official publication in which the original normative act was promulgated, and that in general they are published immediately as provided in Article 190 of the Constitution (see paragraphs 25, 26 and 27 above). That said, the Constitutional Court may specify a different date from which a normative act that it has found unconstitutional will cease to be binding. In the present case the Constitutional Court in its judgment of 22 October 2020, did not indicate a different date for the relevant provisions of the 1993 Act to lose their binding effect.

118. Thus, in accordance with the Constitution and practice to date, it was expected that the judgment would be published at any time after its delivery. In this context the Court notes that the Constitutional Court's ruling sparked widespread protests, which only intensified the uncertainty as to the impact of the changes to the legislative framework on abortion (see paragraph 12 above). It remained unclear whether the restrictions on abortion on the ground of foetal abnormalities had already taken effect or if it could still be legally performed. The applicant's argument to that effect was also supported by the third-party interveners. The Council of Europe Commissioner for Human Rights submitted that immediately after the delivery of the judgment in question and before its publication certain hospitals had refused to perform abortions in case of foetal impairment (see paragraph 88 above).The HFHR stated, with reference to the results of a survey, that the Constitutional Court's judgment had affected the availability of legal abortion in Poland even before its publication in the Journal of Laws (see paragraphs 100 and 101 above).

119. The Court accepts the applicant's argument that the uncertainty created by the delayed publication, and hence the entry into force, of the Constitutional Court's judgment had undermined legal certainty at the material time. That prolonged confusion had direct and adverse consequences on the applicant's private life as she had been left in a state of ambiguity regarding her right to a legal abortion on the ground of foetal abnormalities. As a result of the uncertainty the applicant had been compelled to travel abroad for an abortion, which undoubtedly caused her significant additional stress.

120. In conclusion, the Court finds that the interference with the applicant's rights cannot be regarded as lawful for the reasons set out above (see paragraph 115 above). Moreover, there was a lack of the foreseeability required under Article 8 of the Convention, owing to the general uncertainty as regards the applicable legal framework caused by the delay in the publication of the Constitutional Court's ruling. It follows that the interference with the applicant's rights "was not in accordance with the law"

within the meaning of Article 8 of the Convention. There has accordingly been a violation of that Article.

121. In the light of the above considerations and in particular due to the situation of uncertainty which ensued following the delivery of the Constitutional Court's judgment of 22 October 2020 the Court dismisses the Government's preliminary objection that the applicant had not exhausted domestic remedies since she had not attempted to obtain a legal abortion in Poland (see paragraph 64 above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. 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

123. The applicant claimed 2,585 euros (EUR) in respect of pecuniary damage. This amount corresponded to the costs associated with her abortion in the Netherlands: the cost of the medical treatment in a private clinic, and the transport and accommodation costs incurred by her and the persons who supported her abroad. In that connection, she submitted an invoice from the clinic for EUR 875, proof of reservation of accommodation in the Netherlands for EUR 320.86, plane reservations for the applicant, her partner and her son for 4,933.11 Polish zlotys (PLN – approximately EUR 1,200; of which the applicant's ticket cost PLN 1,235.36 – approximately EUR 301), bills for psychological treatment for PLN 840 (approximately EUR 204) and a bill for translation for PLN 55.35 (approximately EUR 13). The applicant further claimed EUR 20,000 in respect of non-pecuniary damage, referring to the damage that she had suffered on account of being pregnant at the time the Constitutional Court had delivered its judgment and having to travel abroad to undergo an abortion after discovering that the foetus had trisomy 18.

124. The Government alleged that the applicant's claims were unfounded and, in any event, exorbitant. They noted that the applicant had submitted confirmation of a group reservation of plane tickets and accommodation, which indicated that those costs had not been borne by the applicant herself. They further argued that the claim relating to the reimbursement of psychological treatment had no specific connection with the alleged violation of the Convention.

125. The Court observes that in *A, B and C v. Ireland* (cited above, §§ 277-78) it rejected the applicant's claims in respect of pecuniary and non-pecuniary damage which were linked to her travelling abroad for an

abortion, as there was no established causal link between the violation found and the applicant's claims. However, in *M.L. v. Poland* (cited above, § 180) it found that there was a clear link between the violation found and the pecuniary damage alleged by the applicant, given that she had initially qualified for an abortion on the grounds of foetal abnormality but had been unable to have one carried out as the Constitutional Court's judgment had entered into force.

126. The applicant's situation in the present case is characterised by the general uncertainty which followed the delivery of the Constitutional Court's judgment and which impaired her ability to regulate her conduct accordingly (see, paragraph 120 above). While the circumstances differ from those in A, *B and C v. Ireland*, and are also distinguishable from *M.L. v. Poland*, the Court nevertheless considers that there is a causal link in the present case between the violation found and the pecuniary damage alleged by the applicant.

127. In relation to the applicant's claim in respect of pecuniary damage, the Court observes that the applicant did provide some evidence in support of the individual claims, namely invoices for medical, travel and accommodation costs amounting to EUR 1,495 in total. Having regard to the violation found (see paragraph 120 above), it considers that this amount should be reimbursed by the respondent State. It therefore awards the applicant EUR 1,495 in respect of pecuniary damage and rejects the remainder of the claim as unsubstantiated.

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

B. Costs and expenses

129. The applicant also claimed EUR 8,700 for the legal costs incurred before the Court. She stated that her lawyers had provided their services *pro bono*, but nevertheless asked the Court to award that sum.

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

131. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant did not pay

any fees to her representatives, who worked *pro bono*, nor is there any evidence that the applicant is under an obligation to pay any sum of money to the lawyers (compare, *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 370-72, 28 November 2017). In such circumstances, these costs cannot be claimed since they have not actually been incurred. The Court therefore rejects the claim for costs and expenses.

FOR THESE REASONS, THE COURT,

1. *Joins to the merits,* unanimously, one aspect of the Government's objection as to the non-exhaustion of domestic remedies (paragraph 64 above) and *dismisses* it;

2. *Declares*, unanimously, the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention;

4. *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 the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,495 (one thousand four hundred and ninety-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

5. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 November 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Ivana Jelić President

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

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. As indicated in the introductory paragraph of the judgment, the present case concerns restrictions on abortion introduced by the Constitutional Court's judgment of 22 October 2020 declaring unconstitutional the relevant provisions (which had allowed for legal abortion in the event of foetal abnormalities), and the impact of that ruling on the applicant's personal situation. As also stated in the introduction, the case raises issues under Articles 3 and 8 of the Convention.

2. I voted in favour of points 1-4 of the operative provisions of the judgment, but against point 5, which dismisses the reminder of the applicant's claim for just satisfaction.

3. In particular, I respectfully disagree with paragraph 131 of the judgment and the corresponding point 5 of the operative provisions, dismissing the claim for legal costs and expenses on the basis that they have not actually been incurred.

4. Paragraph 85 (page 29) of the Observations, submitted on behalf of the applicant and the applicants in parallel cases, states as follows:

> "All the applicants were requested by the Court at the stage of communication [of] the case to appoint a lawyer. All applicants engaged the lawyers who thoroughly dealt with multiple, complex, and time-consuming cases before the Court.
>
> The table below presents the time spent by the lawyers on the preparations.
>
> .... [a comprehensive table is provided]
>
> In the light of sensitive and important nature of the cases the lawyers work *pro bono* for the applicants. However, on a daily, commercial basis they would claim 150 EUR per every billable hour. The total value of the applicants' lawyers work amounts to 8,700 EUR. The lawyers believe those costs should be covered by the State as a part of the financial compensation."

5. It is my understanding that, in the present case, the applicants' lawyers agreed to act without seeking payment from the applicants if the case was unsuccessful; however, there also existed an agreement that, should the Court make an award for costs and expenses, those sums would be payable to counsel in remuneration for the work performed.

6. As is clear from their Observations (see paragraph 4 above), the applicants have provided a detailed statement of the legal services rendered and their value. The present case is not one of complete or absolute volunteer representation: the legal costs claimed are real, quantified and would become payable to counsel if the Court exercises its discretion to award them. Such an arrangement, which defers but does not waive remuneration, aligns with the approach adopted in *Pakelli v. Germany* (no. 8398/78 § 47, 25 April 1983), where the Court accepted that fees remain "actually incurred" if the lawyer has not definitively renounced them but only postponed their recovery. This, in contrast to *Merabishvili v. Georgia* ([GC], no. 72508/13,

§§ 370-72, 28 November 2017), where the applicant provided no evidence of any obligation to pay and his lawyers acted entirely free of charge, the present case is closer to the above-cited *Pakelli v. Germany*.

7. Consequently, the Court should have taken account of the documented legal work and awarded the costs claimed, not only because this would be just and fair for the applicants and their lawyers, but also to avoid discouraging representation in cases where applicants could not otherwise afford legal assistance. This would amount to the denial of a fundamental principle of the Convention, namely the principle of effectiveness, that is, the principle of the effective protection of the human rights concerned.

8. As the applicants pinpointed (see paragraph 4 above), it was the Court which asked them to appoint a lawyer at the communication stage. Equally, there is no doubt that without the assistance of the applicants' lawyers, it would have been extremely difficult to obtain such an important ruling.