



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

FIRST SECTION

DECISION

Applications nos. 1819/21 and 3639/21

K.B. against Poland

and K.C. against Poland

The European Court of Human Rights (First Section), sitting on 4 June 2024 as a Chamber composed of:

Marko Bošnjak, *President*,

Alena Poláčková,

Krzysztof Wojtyczek,

Ivana Jelić,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Ilse Freiwirth, *Section Registrar*,

Having regard to the above applications lodged on 23 December 2020 and 8 January 2021 respectively,

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

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

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

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

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

Having deliberated on 15 November 2022 and 4 June 2024, decides as follows:

THE FACTS

1. The applicant in the first case, Ms K.B. (“the first applicant”) was born in 1993.
2. The applicant in the second case, Ms K.C. (“the second applicant”) was born in 1982.
3. Both applicants live in Warsaw and are Polish nationals. They were represented before the Court by Ms A. Bzdyń, Ms M. Gąsiorowska and Ms K. Ferenc, lawyers practising in Warsaw.
4. The Polish Government (“the Government”) were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

The circumstances of the case

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

1. Background to the case

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

6. 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 plodu ludzkiego i warunkach dopuszczalności przerywania ciąży* – “the 1993 Act”), which related to legal abortion on the grounds of foetal abnormalities.

7. 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.

8. In October 2019 parliamentary elections were held.

9. 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

10. 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).

11. On 22 October 2020 the Constitutional Court, sitting in plenary (thirteen judges), held by a majority of eleven votes to two that sections 4a(1)2 and 4a(2) (1st sentence) of the 1993 Act were incompatible

with the Constitution. The bench included Judge K. 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.

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

(c) Street protests

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

(d) Federation for Women and Family Planning

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

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

2. The present case

16. The applicants in the present case lodged their applications using the pre-filled application forms and only attached the copies of documents prepared by FEDERA (namely copies of the Constitutional Court's judgment, legal opinions prepared by the Commissioner for Human Rights of the Republic of Poland, the Helsinki Foundation for Human Rights and the Polish Bar Council, and press articles). At the beginning of their application forms both applicants added a few phrases describing their personal circumstances. However, they did not attach any documents or medical certificates in support of their submissions.

(a) Application no. 1819/21

17. The applicant submitted that she was twenty-seven years old and that she had been in a long-term relationship for eight years. She was getting married the following year and until recently had planned to start a family. However, she had discovered that her partner suffered from a chromosome abnormality and she thought that they would face a struggle to conceive a

child. In her words, she had been informed that her chance of having a healthy pregnancy was lower than 50% and that there was a very high risk of a chromosome-related condition. If she became pregnant there was a high probability that she would have a miscarriage or that the baby would die shortly after birth. She also submitted that the Constitutional Court's judgment had had a chilling effect on her family plans. She was so worried that she had put aside the decision to start a family.

(b) Application no. 3639/21

18. The applicant submitted that getting access to adequate medical care in Poland had been difficult for many years. She further stated that she was thirty-eight years old and thus at increased risk of having a child with genetic abnormalities. Shortly before the delivery of the Constitutional Court's judgment she had discovered that she was pregnant. She had therefore been very anxious until she received her medical test results.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

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

20. 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 pregnancy termination ("Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży" – "the 1993 Act").

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

22. 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.

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

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

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

25. 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.

...”

COMPLAINTS

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

27. The applicants also complained under Article 8 of the Convention that the restriction had not been “in accordance with the 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, who had presided in the present 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.

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

THE LAW

A. Joinder of the applications

29. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly (Rule 42 § 1 of the Rules of Court).

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

30. The applicants complained that they were potential victims of a breach of Articles 3 and 8 of the Convention on account of the Constitutional Court's judgment of 22 October 2020. They also complained that the restriction of their rights under Article 8 had not been "in accordance with the law". These provisions of the Convention read, in so far as relevant, as follows:

Article 3

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

Article 8

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

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

1. The parties' submissions

(a) The Government

31. The Government submitted at the outset that the applicants could not be regarded as victims of a violation of Articles 3 or 8. In particular, the Government referred to the Court's position on "potential victims" as set out in *Dudgeon v. the United Kingdom* (22 October 1981, Series A no. 45), *Norris v. Ireland* (26 October 1988, Series A no. 142) and *S.A.S. v. France* ([GC], no. 43835/11, ECHR 2014 (extracts)).

32. The Government noted that, in order to claim to be a "potential victim", an applicant had to produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally would occur; mere suspicion or conjecture was insufficient. In that regard they submitted that the applications had been lodged before the publication of the Constitutional Court's judgment on 27 January 2021. The second applicant, who had been pregnant at the time of lodging her application with the Court, had not submitted that the foetus had been diagnosed with a severe and

irreversible abnormality or an incurable life-threatening disease. In their submissions the applicants had focused on the composition of the Constitutional Court rather than on a description of the facts of their individual situations. They had not provided any documentary evidence relating to their individual circumstances or medical conditions. The extremely limited information that they had submitted was not sufficient to determine their medical situations.

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

34. Conversely, in the case at hand the Constitutional Court's judgment of 22 October 2020 not only had not affected the applicants but could affect them only in very specific circumstances involving future and uncertain events. The Government concluded that the application forms contained very little information concerning the applicants and had been introduced following a national campaign organised by a pro-choice NGO which had posted a template application form online. In their view the applicants had aimed to request the Court to review, *in abstracto*, the relevant law and practice concerning termination of pregnancy and to contribute to the political debate relating to reproductive rights and access to termination of pregnancy in Poland. Such complaints should be considered as having the nature of an *actio popularis*, the bringing of which the Convention did not envisage.

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

36. Lastly, the Government submitted that the applications should be declared inadmissible as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention.

(b) The applicants

37. The applicants disagreed with the Government's submissions that they could not claim to be victims of a breach of the Convention. They submitted, referring to the Court's case-law (*Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Norris*, cited above; *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008; *Michaud v. France*, no. 12323/11, ECHR 2012; and *S.A.S. v. France*, cited above), that they were "potential victims" within the meaning of Article 34 of the Convention. Although they had not been denied access to legal abortion on the grounds of foetal malformation, they asserted that the 1993 Act, as amended on 22 October 2020, infringed their rights. This was because the national law

obliged them to adjust their conduct to its requirements, which in practice meant that they were confronted with a legal obligation to carry pregnancies to term even where the foetus was damaged or sick, and potentially to give birth to a seriously ill child.

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

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

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

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

2. *The third-party interveners*

(a) Council of Europe Commissioner for Human Rights

42. The Commissioner, referring in particular to her 2019 country visit to Poland (see *A.M. and Others v. Poland* (dec.), no. 4188/21, § 38, 16 May 2023), provided information on the legal framework and practical situation relating to access to abortion in Poland. She also provided a comparative overview showing an established European consensus in favour of access to safe and legal abortion care.

(b) European Centre for Law and Justice

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

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

44. 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 exposed women to risks to their health, exacerbated social inequities and violated their human rights.

(d) Ordo Iuris – Institute for Legal Culture

45. 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.

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

46. 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.

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

47. 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.

(g) The Ombudsman for Children (“the Ombudsman”)

48. The Ombudsman stated that legislation permitting termination of pregnancy in cases of foetal abnormality in Poland was incompatible with the constitutional principle of the protection of life as the highest value. Referring to the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities, the intervener argued that it was the

duty of States to protect the life of a child both during the prenatal period and after birth.

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

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

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

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

51. 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. Prohibitions and highly restrictive laws on abortion impacted on all people with the capacity for pregnancy; they formed a critical part of the legal, health and social environment in which they made decisions on their sexual and reproductive lives. The interveners further submitted that the prohibition and criminalisation of abortion was incompatible with international human rights law.

(j) ADF International (Alliance Defending Freedom)

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

(k) Helsinki Foundation for Human Rights (“the HFHR”)

53. 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 organisation further pointed to a number of practical and procedural obstacles to accessing legal abortion in Poland.

(I) Polish Bar Association

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

3. The Court's assessment

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

(a) General principles

56. The relevant general principles are set out in the judgment *M.L. v. Poland* (cited above, § 98) and in the decision *A.M. and Others v. Poland* (cited above, §§ 72-74).

(b) Application of those principles to the present case

57. The Court notes that the applicants in the present case complained of interference with their private life caused by the Constitutional Court's judgment of 22 October 2020. They submitted that, as women of child-bearing age, they had been affected by the changes to the legislative framework as they had had to adjust their conduct in the most intimate sphere of personal life.

58. The Court observes that in the leading case of *A.M. and Others v. Poland* (cited above) it reiterated that it was only in highly exceptional circumstances that an applicant might claim to be a victim of a violation of the Convention owing to the risk of a future violation (*ibid.*, § 77, and see also *Tauira and 18 Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports 83-B, p. 112 at pp. 130-31). The Court further found in that case that the applicants had failed to advance any convincing evidence that they were at real risk of being directly affected by the amendments in question and noted that the complete absence of detailed individual particulars or any documentary evidence relating to the applicants' personal circumstances made it impossible to assess their situation (*A.M. and Others v. Poland*, cited above, § 86). In view of those considerations, the Court concluded that the applicants in that case could not claim to be victims within the meaning of Article 34 of the Convention and declared the applications inadmissible.

59. The applicants in the present case formulated their arguments similarly to the applicants in *A.M. and Others v. Poland* (cited above) and complained about the risk of a future violation of the Convention. They did not claim that they had been directly affected by the changes to the legislative framework (contrast *M.L. v. Poland*, cited above, §§ 99-104).

60. In that context the Court has previously held that while women of child-bearing age in Poland, being exposed to the risk of pregnancy with

foetal abnormalities, might be affected by restrictions on access to therapeutic abortion, in order for an applicant to be able to claim to be a victim in such a situation she had to produce reasonable and convincing evidence of the likelihood that a violation affecting her personally would occur (*A.M. and Others v. Poland*, cited above, § 78).

61. However, the Court observes that both applicants used the pre-filled application forms prepared by FEDERA without attaching any documents relating to their personal circumstances. The first applicant, who claimed that her partner had a medical condition which allegedly caused a higher risk of foetal malformation for them (see paragraph 17 above) did not provide any medical evidence substantiating her claim in the original application (see paragraph 16 above). Nor did she submit any such evidence even in response to the Government's reasoned objections (see paragraph 26 above). Instead, she only stated that she had put aside the decision to start a family.

62. The Court further notes that the second applicant, who was pregnant at the time of lodging her application (see paragraph 18 above), merely stated that she had been at increased risk of having a child with genetic abnormalities owing to her age. Nevertheless, she also did not adduce any further explanation and evidence as to her individual circumstances, for example medical reports or any other relevant medical documents.

63. Given the material submitted in the present case and the conclusion in *A.M. and Others v. Poland* (cited above, § 86), the Court finds that the applicants failed to produce any reasonable and convincing evidence that they were at a real risk of being directly affected by the amendments introduced by the Constitutional Court's judgment.

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

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 27 June 2024.

Ilse Freiwirth
Section Registrar

Marko Bošnjak
President