



Delayed publication of judgment restricting right to abortion undermined legal certainty

The case [A.R. v. Poland](#) (application no. 6030/21) concerned restrictions on abortion rights in Poland.

In today's **Chamber** judgment¹ in the case, the European Court of Human Rights held, unanimously, that there had been a **violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.

In a judgment of 22 October 2020, the Constitutional Court declared unconstitutional provisions of the Law on family planning, protection of the human foetus and conditions permitting the termination of pregnancy, which had allowed for legal abortion in the event of foetal abnormalities. The judgment was not published until 27 January 2021. The ruling prompted widespread protests, including demonstrations involving thousands of participants all over the country.

At the time of the delivery of the Constitutional Court's judgment, the applicant had been 15 weeks pregnant. Results of medical tests confirmed that the foetus suffered from a genetic disorder. She travelled to the Netherlands where the pregnancy was terminated in a private clinic.

The Court found, in particular, that the interference with the applicant's rights had been the result of the situation of considerable uncertainty in the time between the Constitutional Court's judgment being handed down in 2020 and its publication in 2021. It had been unclear during that time whether the restrictions on abortion on the grounds of foetal abnormalities had already taken effect or if abortion could still be legally performed.

The interference with the applicant's rights had not been "in accordance with the law", owing to both the composition of the bench of the Constitutional Court which had given the judgment of 22 October 2020 and because there had been a lack of foreseeability required under Article 8, 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 followed that there had been a violation of that provision.

On 8 July 2021 the Court gave notice to the Polish Government of 12 applications, including the applicant's, concerning abortion rights in Poland (see [press release](#)). Admissibility decisions have been delivered by the Court in [K.B. and K.C. v. Poland](#) (application nos. 1819/21 and 3639/21) and in [A.M. and Others v. Poland](#) (application no. 4188/21 and 7 others).

Principal facts

The applicant, A.R., is a Polish national who was born in 1981 and lives in Kraków.

The conditions for legal abortion in Poland are set out in 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").

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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; 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.

On 22 October 2020, following an application lodged by 104 parliamentarians, the Constitutional Court delivered a judgment holding, in particular, that the provisions allowing for legal abortion in the event of foetal abnormalities, were unconstitutional. The judgment was not published until 27 January 2021, and it entered into force on that date.

The ruling prompted widespread protests, including demonstrations involving thousands of participants all over the country. In January 2021 the Federation for Women and Family Planning, a Polish non-governmental organisation campaigning for sexual and reproductive rights, posted online a pre-filled application form and encouraged women of child-bearing age living in Poland to lodge applications with the Court.

The applicant submitted the pre-filled application form with additional details added. She stated that at the time of the delivery of the Constitutional Court's judgment she had been 15 weeks pregnant. Results of medical tests taken on 5 November 2020 confirmed that the foetus suffered from a genetic disorder called trisomy 18. She had not wanted to risk that the Constitutional Court's judgment would be published before she could undergo a legal abortion, so she had travelled to the Netherlands where the pregnancy was terminated in a private clinic.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 11 January 2021.

Relying on Article 3 (prohibition of inhuman and degrading treatment), the applicant argued that the restrictions introduced by the Constitutional Court had caused her serious and real emotional suffering. Relying on Article 8 (right to respect for private and family life), the applicant complained that she was a potential victim of a breach 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 that the restriction had not been "prescribed by law" on account of the composition of the Constitutional Court.

Comments were submitted by the Council of Europe Commissioner for Human Rights who exercised her right to intervene in the proceedings. Comments were also submitted by the European Centre for Law and Justice; Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, the International Planned Parenthood Federation European Network, Women Enabled International, Women's Link Worldwide, and World Organisation Against Torture; Ordo Iuris – Institute for Legal Culture; the UN Working Group on discrimination against women and girls, 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 cruel, inhuman or degrading treatment or punishment and the UN Special Rapporteur on violence against women, its causes and consequences; Clinique doctorale Aix Global Justice (Aix-Marseille Université); the Polish Ombudsman for Children; International Federation of Gynecology and Obstetrics; Professor Fiona de Londras on behalf of eight legal scholars; ADF International (Alliance Defending Freedom); and the Helsinki Foundation for Human Rights as third-party interveners.

Judgment was given by a Chamber of seven judges, composed as follows:

Ivana Jelić (Montenegro), *President*,

Erik Wennerström (Sweden),

Georgios A. **Serghides** (Cyprus),
Raffaele **Sabato** (Italy), Frédéric **Krenc** (Belgium),
Alain **Chablais** (Liechtenstein)
Anna **Adamska-Gallant** (Poland),

and also Ilse **Freiwirth**, *Section Registrar*.

Decision of the Court

Article 3

Having regard to the material before it, the Court considered that the applicant had failed to substantiate her claim that the restrictions introduced by the Constitutional Court had resulted in treatment contrary to Article 3 of the Convention. That complaint was, therefore, inadmissible.

Article 8

The Court started by finding that Article 8 was applicable in the applicant's case, and that she had been "directly affected" by the legislative change. She had travelled to the Netherlands, where her pregnancy had been terminated in November 2020. Following its delivery in October 2020, the Constitutional Court's judgment could have been published at any time and it appeared that there had been a great feeling of uncertainty, aggravated both by the absence of any transitional measures and the ongoing COVID-19 pandemic. In the specific circumstances of the case, the situation of prolonged uncertainty had constituted an "interference" with the applicant's Article 8 rights.

The Court observed that the Constitutional Court's judgment had been adopted in the process of a constitutional review of the domestic legislation. The procedure had been initiated by a group of members of parliament who had contested the constitutionality of certain sections of the 1993 Act. As regards the composition of the bench of the Constitutional Court which had delivered the judgment of 22 October 2020, the Court had previously found in [M.L. v. Poland](#) (application no. 40119/21) that the interference with the rights of the applicant in that case had not been "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. The Court considered that those findings were also relevant in this applicant's case.

While in both cases the situations complained of originated from the same judgment of the Constitutional Court, the applicant in this case had been additionally affected by the uncertainty surrounding its legislative implications. In *M.L. v. Poland* the interference had been caused by the entry into force of the Constitutional Court's judgment – which had been published just before M.L.'s appointment for an abortion, making it impossible for that abortion to go ahead. In A.R.'s case, the Constitutional Court's judgment had not yet entered into force and the interference had been caused by the prolonged situation of considerable uncertainty as to the applicable laws and the permissibility of abortion on the grounds of foetal abnormality. The question that remained for the Court was, therefore, whether, at the time, in A.R.'s case, the domestic law had been sufficiently clear and foreseeable to enable the applicant to regulate her conduct. The Court observed that the requirement of foreseeability was of particular importance where a right previously available under domestic law was being restricted.

The Court noted that judgments of the Constitutional Court in Poland enter into force on the date on which they are published and that in general judgments are published immediately. While the Constitutional Court may, however, specify a different future date on which the law found to be unconstitutional would cease to apply, it did not do so in the case in question. Additionally, the ruling had sparked widespread protests, which had only intensified the uncertainty as to the impact

of the changes to the legislative framework on abortion. It remained unclear whether the restrictions on abortion on the grounds of foetal abnormalities had already taken effect or if abortion could be still legally performed.

In conclusion, the Court found that the interference with the applicant's rights was not "in accordance with the law", owing to the composition of the bench of the Constitutional Court which had given the judgment of 22 October 2020 and because that there been a lack of foreseeability required under Article 8, 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 followed that there had been a violation of that provision.

Just satisfaction (Article 41)

The Court held that Poland was to pay the applicant 1,495 euros (EUR) in respect of pecuniary damage and EUR 15,000 in respect of non-pecuniary damage.

Separate opinion

Judge Serghides expressed a joint partly dissenting opinion. That opinion is annexed to the judgment.

The judgment is available only in English.

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Press contacts

echrp@echr.coe.int | tel.: +33 3 90 21 42 08

We are happy to receive journalists' enquiries via either email or telephone.

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Inci Ertekin (tel: + 33 3 90 21 55 30)

Jane Swift (tel: + 33 3 88 41 29 04)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.