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REPUBLIC OF POLAND
MINISTRY OF FOREIGN AFFAIRS
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for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

Warsaw, 19 June 2007

EUROPEAN COURT OF HUMAN RIGHTS

Alicja TYSIĄC v. POLAND

Application *No. 5410/03*

REQUEST FOR REFERRAL TO THE GRAND CHAMBER
Submitted by the Government of Poland

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I. INTRODUCTION

1. The Government of the Republic of Poland ("the Government") have the honour of submitting to the European Court of Human Rights their request for referral to the Grand Chamber of the present case concerning the application filed by Ms Alicja Tysiąc ("the applicant"). The present case originates in an application (*No. 5410/03*) to the European Court of Human Rights ("the Court"), which was introduced on 15 January 2003.

2. Having analysed the Court's judgment of 20 March 2007, **the Government hereby submit a request for referral of the present case to the Grand Chamber, in accordance with Article 43 § 1 of the Convention.**

3. The Government wish to reiterate its preliminary objection to the consideration of the case on the grounds that the applicant has failed to exhaust the available domestic remedies. Should the Court consider otherwise, the Government submit that Article 8 of the Convention is not applicable in the case at hand, and in any case – there has been no violation of Article 8 of the Convention.

II. Justification of the Government's request for referral

1. Introductory remarks

4. The judgment rendered by the Fourth Section of the Court is not unequivocal and can be interpreted in either a broad or narrow manner.

5. The narrow interpretation is reflected in particular in § 104 of the judgment, wherein it was stated that "it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion", as well as in § 108. According to this interpretation of the judgment, a breach of the Convention was found due to the lack of a review procedure (a preventive measure), which would enable the determination whether in a given case the preconditions for termination of pregnancy in the situation of a threat to the mother's health are present. As an example of such a mechanism the Section points to the appeals procedure - to be followed in the case where a disagreement arises between the doctors or between the pregnant woman and the doctor (§ 119 read in connection with §§ 86 and 87). The lack of such a procedure was held to amount to a violation of the woman's right to protection of private and family life, guaranteed under Article 8 of the Convention.

6. However, the Court's judgment can also be interpreted in a broad manner. A substantive adjudication on the existence of the "right to abortion" under the Convention can be discerned in the judgment of 20 March 2007. This wider interpretation is evidenced in various parts of the judgment (*e.g.* §§ 116, 121), as well as in the dissenting opinion of Judge Borrego Borrego. Also Judge Bonello points to the possibility of adopting such a broad interpretation.

7. In both interpretations important questions arise justifying a request for referral of the case to the Grand Chamber. The referral request is admissible in this instance because it raises serious issues of general importance, as well as questions affecting the interpretation and application of the Convention. These issues are specified in detail in the latter part of the request.

8. Already the first (narrow) interpretation of the judgment gives rise to the serious question of whether – and for what reasons – the positive obligations of the State, flowing from Article 8 of

the Convention, may require that procedures be established for preventive control of the application of regulations on the admissibility of abortion in the situation where a woman's health is endangered, where a disagreement arises between the doctors' diagnoses or between the opinions of the woman and her doctor.

9. In the view of the Government, Article 8 of the Convention does not compel the States Parties to establish appeals procedures for doctors' opinions which are required for access to medical care in general, or specifically for access to abortion where the mother's health is endangered.

10. In accordance with Article 4a § 5 of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination (hereinafter: "the 1993 Act"), in the wording given to it by the Law of 30 August 1996, a discrepancy in the medical diagnoses on the existence of the precondition of the threat to the woman's health cannot hinder the possibility of terminating a pregnancy – one opinion of the competent specialist suffices for performing an abortion. The judgment of the Fourth Section of the Court is thus based on an erroneous finding with regard to Polish law: in § 121 indent 2 (also § 140) of the judgment it is asserted that two concurrent medical opinions are required to perform an abortion. Hence, in this respect the findings made by the Fourth Section are inconsistent with §§ 38 and 39 of the judgment.

11. The issues dealt with by the Fourth Section of the Court concern the relationship between the right to life (art. 2 of the Convention), the right to respect for private and family life (art. 8 of the Convention) and the autonomy of the States Parties to the Convention in regulating the issue of admissibility of abortion. This is a much debated subject all over the world and the Court's decision could have more than a secondary influence on this debate, even outside Poland. In fact, the judgment of the Fourth Section has already led to lively discussions in many other European countries. This has been demonstrated by the various articles which have appeared in the international press, such as for example "*The Guardian*" and "*Le Monde*" of 21 March 2007, and "*Le Figaro*" of 29 March 2007.

12. There is no consensus amongst the societies of the Member States of the Council of Europe on the issue of abortion. There is no agreement on the question whether – and to what extent – abortion should be allowed or on the question of the procedure to be applied for the determination whether a pregnancy should be terminated. Hence, the Court's adjudication of his matter is crucial for the legal orders of all the State Parties, and in particular for those countries which – as is the case for Poland – do not have a review procedure with respect to medical diagnoses concerning the existence of preconditions for the termination of pregnancy, the creation of such a procedure being encouraged by the Fourth Section of the Court.

13. A heated debate on the relationship between the right to life of an unborn child and the right to respect for private and family life of the pregnant woman is also taking place in Poland. The Court took note of this in its judgment of 20 March 2007 by stating that "the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland" (§ 159). Hence, a final adjudication of this matter would also prove crucial for the ongoing debate within Polish society. The Government also note the dissenting opinion of Judge Borrego Borrego who found that "the Court neglected the debate concerning abortion in Poland".

14. The Court's case-law on the subject has become incoherent as a result of the judgment of 20 March 2007. In its earlier case-law the Court found that the question of admissibility of abortion does not fall within its jurisdiction, there being no consensus on this issue between the States Parties to the Convention, and the States being autonomous in their regulation of the subject matter. However, in its judgment in the case of *Tysiąc v. Poland* the Court took a

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different approach, making it thus necessary for the Grand Chamber to state clearly and decisively what the Court's position is on this matter.

15. Moreover, **less than one year ago the Fourth Section of the Court, which has rendered the judgment in the case of *Tysiąc v. Poland*, adopted the decision as to the admissibility of the case of *D. v. Ireland* of 27 June 2006 (application no. 26499/02), wherein an approach was taken that appears to contradict the one presented in the case at hand.** In the Irish case, a woman expecting twins, who already had two children, was told by doctors after the 14th week of gestation that one foetus had stopped developing in the 8th week and that the other was affected by a chromosome anomaly that is incompatible with life. The applicant travelled to England for the abortion, because in Ireland the law only allows a pregnancy to be terminated if it endangers the life (and not the health) of the woman. She subsequently appealed to the European Court, stating that Irish law contravened Articles 8, 13 and 14 of the Convention. The Fourth Section declared the application to be inadmissible due to the applicant's failure to exhaust the remedies available in Ireland: faced with the refusal to carry out an abortion, she could have appealed to the High Court and to the Supreme Court, but did not do so.

16. To justify its position in the case of *D. v. Ireland* the Section stated as follows: „[i]ndeed, as argued by the [Irish] Government, the X case illustrated the potential of the constitutional courts to develop the protection of individual rights by way of interpretation and the consequent importance of providing those courts with the opportunity to do so: this is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life [mother and foetus] and demanding a delicate analysis of country-specific values and morals" (§90). The Government agree with this reasoning, being convinced that in the case of *Tysiąc v. Poland* the Convention should be interpreted in the light of the immanent collision between the right of the mother to the protection of health and the unborn child's right to life and to the protection of its human dignity.

17. The factual circumstances of the present case were in many ways similar to those of the *D. v. Ireland* case. In the case of *Tysiąc v. Poland* the pregnant woman feared that her eyesight, which had already deteriorated due to severe myopia, would be further damaged by the pregnancy and subsequent delivery. Under the applicable Polish law a pregnancy can be terminated provided that at least one doctor specialising in the disease that could be aggravated by the pregnancy issues the appropriate certificate. However, none of the specialists (three ophthalmologists and a gynaecologist) who examined the applicant were able to confirm her fears. The only doctor who challenged the diagnosis of the applicant's health condition had been the general practitioner, whose opinion was of no legal significance under Polish law. For this reason the gynaecologist, whom the applicant had requested to perform the abortion, refused to terminate the pregnancy on the basis of an opinion issued by the general practitioner, but scheduled the applicant for another appointment. However, she never appeared for consultation – neither on the scheduled date nor at a later time. As a result, the pregnancy was not terminated. Several months after the delivery the applicant's eyesight deteriorated. In the applicant's view this had been a direct effect of the refusal to perform an abortion. The applicant did not have recourse to all the available domestic remedies, but limited herself to lodging a criminal complaint against the doctor who had refused to certify the existence of the precondition for terminating pregnancy. However, contrary to the applicant's assertions, after a thorough consideration by a panel of three medical experts (an ophthalmologist, gynaecologist and a specialist in forensic medicine) of the medical examinations performed on the applicant, it was established that the aggravation of the applicant's disease had not been caused by the pregnancy and delivery. Hence, the applicant had not been deprived of the possibility of terminating the pregnancy, since such a possibility never existed in her case. Her pregnancy did not pose a threat to her health, and her eyesight deteriorated for other reasons.

18. In the present case the Fourth Section of the Court adopted a different approach than in the case of *D. v. Ireland*. Admittedly, the Section stated that "it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion" (§104). Nevertheless, some findings of the judgment of 20 March 2007 openly contradict this assertion. The Court based its reasoning on the assumption that "[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it" (§ 116). In the same paragraph the Section spoke of a "chilling effect" with reference to the possibility of performing abortion, this term having hitherto been used in connection with fundamental rights: "legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility [...] can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect". The Fourth Section subsequently found that there had been a violation of Article 8 of the Convention, stressing that "it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case" (§ 124).

19. The Court perceived the case at issue from a rather unusual perspective. The Government note the Court's statement, whereby: "the State regulations on abortion relate to the traditional balancing of privacy and the public interest" (§ 107). This approach is inconsistent with the Court's earlier case-law on the subject. **In its decision as to the admissibility of the case *D. v. Ireland* the Court found that the domestic regulations and practice relating to abortion should be evaluated in the light of the immanent collision between the equal rights of a mother and those of an unborn child** (§ 90). Also in the case of *Boso v. Italy* (application no. 50490/99) the Court made reference to the balance struck between "on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests".

20. The judgment in the case of *Tysiąc v. Poland* seems to be based on assumptions that are entirely different from those made in the case of *D. v. Ireland.* The difference between the two cases is made all the more clear by the fact that Irish law is more restrictive than Polish law. However, Polish law is very similar – within the scope in which a violation of the Convention was found – to the legislation in force in many other European States.

21. The great significance of the present case was noticed by the Fourth Section of the Court itself: "[t]he Court is further of the view that the Convention issues involved in the case were also of considerable novelty and complexity" (§ 159).

22. The judgment of 20 March 2007, adopted by a majority of votes, has raised controversies amongst the judges themselves, which is demonstrated by the separate opinion of Judge Bonello and the dissenting opinion of Judge Borrego Borrego.

23. The Government are of the view that the above-mentioned reasons are of an exceptional nature and comply with the criteria laid down in Article 43 of the Convention.

2. <u>Inadmissibility of the application due to the non-exhaustion of the available domestic remedies (Article 35 § 1 of the Convention)</u>

24. The Court joined the examination of the question of exhaustion of domestic remedies to the merits of the case, stating that "it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion"

(§ 128). Hence, the Court's decision on exempting the applicant from the duty to exhaust the domestic remedies and on granting the application were based on the same grounds (§ 129).

25. In the Government's opinion such an approach shows error of judgment. As is well known, the alleged violation of the Convention supposedly resulted from the lack of a review procedure for medical diagnoses concerning the existence of preconditions for the termination of pregnancy. It is thus only natural that before it is established whether the said lack of a review procedure constitutes a breach of the Convention, the domestic remedies should be exhausted, so as to provide the State with the possibility of redressing the violation, *i.e.* removing the defects of the national regulations. Hence, the question of whether "preventive" control is more effective than compensatory liability, in relation to the inability to perform an abortion, is of no importance. In accordance with the Court's case law, the applicant should have filed a constitutional complaint with the Constitutional Court, relying on the argument that the 1993 Act is incomplete to the extent established by the Court in its judgment of 20 March 2007 (*Szott-Medyńska v. Poland*, application no. 47414/99). Filing a constitutional complaint would have been possible following the initiation of compensation proceedings in connection with a defective normative act. However, **as opposed to the *D. v. Ireland* case, the Court did not consider in the case at hand the issue of exhaustion of domestic remedies with regard to the possibility of lodging a constitutional complaint.**

26. The applicant also failed to have recourse to the possibility of obtaining compensation pursuant to Articles 19 and 19a of Law of 30 August 1991 on medical health boards. On the basis of these provisions she could have claimed compensation, arguing that the general practitioner had allegedly gone beyond her powers by providing her with erroneous information as regards the threats to her health and issuing her a certificate for the termination of pregnancy despite the fact that she was not authorised thereto, these circumstances being supposedly the source of her fears (see § 52 and § 54 of the motion for referral). It needs to be stressed that the criminal proceedings had an entirely different subject, *i.e.* the issue of the deterioration of the applicant's eyesight. No judgments have thus been delivered in Poland dealing with the applicant's fears in connection with her pregnancy.

3. Inapplicability of Article 8 of the Convention

27. In § 105 of the judgment the Fourth Section of the Court stated as follows: „it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and that it relates to the applicant's right to respect for her private life". The Court next referred to the case of *Bruggeman and Scheuten v. Germany* (report of the Commission of 12 July 1977, application no. 6959/75): "legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (§ 106).

28. The Government wish to object at this point to the cited reasoning. Both the Government, and third parties (non-governmental organisations), have expressed their doubts about the application of Article 8 of the Convention in the case at hand (see § 102 of the judgment). It also needs to be noted that while making a reference to the case of *Bruggeman and Scheuten* the Court disregarded the context in which the statement cited by it had been made, and which seems to have had a meaning that was quite different from the one suggested by the Court: "[h]owever, **pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus**" (§ 59). The Commission next confirmed this view by stating that "not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother. Art. 8(1) cannot be interpreted as meaning that pregnancy and its

termination are, as a principle, solely a matter of the private life of the mother" (§ 61). Summing up the Commission found as follows: "There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion [...] which was not yet under public discussion at the time the Convention was drafted and adopted" (§ 64).

29. In the view of the Government, the present case is not related to a sphere that is covered by Article 8 § 1 of the Convention. As a result, the Polish State was under no positive obligation, unlike what was suggested by the Court (§§ 107 and 110), which – bearing in mind the subject of the present case – would have to have amounted to the obligation to grant access to abortion or provide any particular procedure for the performance of an abortion.

4. Compliance with Article 8 of the Convention

30. Although the Government are convinced that Article 8 of the Convention is not applicable to the present case (see the reasoning above)**, should the Court find otherwise the Government submit that in any case there has been no violation of Article 8 of the Convention in the present case.**

31. The guarantees provided for in Article 8 § 2 of the Convention also do not oblige the States Parties to the Convention to eliminate the so-called "chilling effect"(§ 116 of the judgment), as a result of which doctors are supposedly dissuaded from issuing certificates permitting the termination of pregnancy. Due to the conflicting interests of the pregnant woman and the unborn child one can just as well speak of a "chilling effect" in the case where doctors are discouraged from issuing the said certificates and in the case (if the perspective of the unborn child is to be taken into consideration) where they are encouraged, or even compelled, thereto. The States Parties are nevertheless autonomous in deciding on the direction to be taken in situations that are dubious from a medical point of view. **The Fourth Section of the Court seems to expect that the Contracting Parties adopt such legislation concerning the admissibility of abortion which would be based on the principle of *in dubio pro libertatem*, pursuant to which the termination of pregnancy would be possible even in dubious situations. However, the Polish constitutional order is based on entirely different assumptions and relies on the principle of *in dubio pro vita humana*.** In the Government's opinion, the Convention provides no grounds for challenging the latter principle.

32. For the same reasons the Government also disagrees with the Court's position that "once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it" (§116). If one were to accept this assertion, the States Parties would have to be faced with the dilemma whether to entirely ban abortion or to treat it as a "right" which should be enforced effectively and unconditionally. However, even when the termination of pregnancy is in certain cases permitted, this does not predetermine the question of how the admissibility of abortion shall be perceived – whether as a right or merely as a precondition excluding the illegality of a doctor's action. In the Polish legal order the admissibility of abortion constitutes an exception from the principle of protection of life. As a result of accepting such a model the regulations concerning the possibility of terminating pregnancy are interpreted in the light of the principle of *exceptiones non sunt extendendae*. The Polish legal system is in this respect similar to the model that has been adopted by the Federal Republic of Germany, where the admissibility of abortion amounts to the constitutional exclusion of the illegality of an otherwise illegal action („Rechtsfertigugnsgrund", see the judgment of the German Federal Constitutional Court of 28 May 1993, BVerfGE 88, p. 203 *et seq.*). In the situation where the possibility of terminating pregnancy functions merely as an exceptional exclusion of the illegality of an action, the lawmaker can – as opposed to what was found by the Court – create a

legal framework that will minimise access to abortion and protect human life to the greatest extent possible. The above is a direct implementation of the assumptions on which the Polish Constitution is based, seeing that, in the light of the constitutional protection of life, abortion is not an option that is favoured by the Polish legal system, even in the case of a collision between the life of a child and other values. It needs to be stressed at this point that it does not follow from the Convention in any way that the States Parties have a duty either to guarantee a "right to abortion" or recognise abortion as legal within certain boundaries. Also the Court did not find – whether in the judgment of 20 March 2007 or in its other judgments and decisions on this subject matter – that such obligations rest with the State Parties.

33. At the same time, it needs to be stressed that **the question of determining how the procedures leading to the termination of pregnancy shall function cannot be separated from the issue of the preconditions for the admissibility of abortion themselves.** The "legal framework" defines the scope in which the "legislature decides to allow abortion". The scope of the permitted abortion and its social effect depend on many factors, which cannot simply be divided into substantive and procedural ones (*e.g.* quotas on the number of abortions that can be performed by a given physician or facility within a particular period of time or in proportion to other medical operations – this is the case in France and Italy; geographical restriction in the sense that the pregnant woman can for example only terminate the pregnancy in the area in which she resides – this is the case in Canada, and to some extent in Sweden; compulsory consultations aimed at dissuading the mother from terminating the pregnancy – this is the case is Germany; medical record keeping requirements, *etc.*).

34. For the reasons stated above it cannot be asserted that Article 8 includes the guarantee to establish "preventive" procedures for the termination of pregnancy. The Government cannot agree with the Court where it discredits the civil law remedy on the grounds that it was "solely of a retroactive and compensatory character" (§ 125). The question of choosing between "preventive" or "retroactive" measures is dependent on the acceptance of the assumptions concerning the existence of a conflict between the rights of the mother and the unborn child. The Government would once again like to stress at this point that the issue of admissibility of abortion must be considered in the light of the immanent collision between the rights of the mother to protection of health and the unborn child's right to life and to protection of its human dignity.

35. Due to the specific nature of the above-mentioned conflict in the Government's view the Convention does not impose on the States Parties the obligation to permit abortion for medical reasons. *A fortiori* Article 8 of the Convention does not prohibit States to introduce limitations as regards the contestation of medical diagnoses on the existence of preconditions for termination of pregnancy. One cannot speak of a breach of Article 8 all the more in the situation where the possibility of challenging the above findings is not excluded altogether, but only postponed until the time after delivery (in the scope of criminal responsibility, as well as civil and disciplinary liability). **The Government** thus **oppose any preference made by the Court for "preventive" measures, being of the opinion that such a preference is doomed to be arbitrary.**

36. The Government wish to note that if one were to accept the position of the Fourth Section of the Court, this would either lead to the elimination of the possibility of terminating pregnancy for medical reasons or lower the standard of protection of unborn children which is in force in countries that do not have the regulations that are being proposed by the Court. It is clear that a possible "appeal" from a medical opinion would be initiated by a woman wishing to terminate her pregnancy. An erroneous diagnosis could thus be changed only to the detriment of the unborn child. In the Government's opinion, Article 8 § 1 of the Convention does not provide the necessary grounds for introducing such an inequality.

37. The Government also disagree with the Court's reference to the judgment in the case of *Storck v. Germany* of 16 June 2005 (application no. 61603/00): "retrospective measures alone are

not sufficient to provide appropriate protection of the physical integrity of individuals in such a vulnerable position as the applicant" (§ 127). **The Court applied the standards that were developed for persons who had been placed in psychiatric institutions against their will to pregnant women.** This position yet again does not take into consideration the difference between the contrasting interests of the individual and the public interest, and the conflict between the health of a mother and the life of an unborn child. In the case indicated above the individual was exposed to the threat of having her rights contravened directly by the State, and was unable to oppose this violation. The applicant was put in a situation where she could at most hope to obtain damages in the undefined future, once the alleged reasons for detainment in the institution had ceased to exist. In the case of *Tysiąc v. Poland* a woman tried to compel the State to grant permission for destroying another legal subject (an unborn child). A compensation claim can be made instantaneously if the individual has incurred any damage. It is however doubtful whether the possibility of destroying another entity enjoys protection under the Convention. For the above reasons, the said limitation cannot be compared to that adopted in the case of *Storck v. Germany*.

38. Appeal mechanisms, the creation of which is being advised to Poland by the Court, do not function in all the States Parties to the Convention. Hence, there is no common standard to which reference could be made. Introducing an appeal procedure in the form of review bodies would not be desirable, particularly taking into account that it would be incompatible with the permitted grounds for an abortion, the only precondition being in this case a threat to the woman's health, which only a doctor can be the judge of. Proceedings before the so-called "appeals or review bodies", to which the Court made referenc e in § 88, were moreover introduced so as to discourage women from trying to terminate their pregnancies, rather than with the aim of "appeal".

39. The examples of appeals or review bodies cited by the Court in its judgment cannot be applied analogously to the present case. The composition of those bodies, as well as the fact that social workers and the pregnant women are members thereof, indicate that the States in question have adopted a liberal approach towards the preconditions for the termination of pregnancy. Hence, the systems functioning in those countries cannot be compared to the present case.

40. In its judgment of 20 March 2007 the Fourth Section of the Court found that the Polish regulations did not provide the applicant with procedural safeguards regarding access to "therapeutic abortion" (see § 115), finding that those regulations do not contain provisions relating to the situation "where a disagreement arises between the pregnant woman and her doctors, or between the doctors themselves" (§ 121). Relying on such reasoning the Court came to the conclusion that the Polish State has not complied with the positive obligations to safeguard the applicant's right to respect for her private life (§ 128).

41. The situations to which the Court has made reference in this context require a separate discussion. A possible difference of opinion between a doctor and a pregnant woman on the issue of whether the pregnancy will have a negative effect on the mother's health cannot be of great consequence from the perspective of the rights that are awarded protection under the Convention. It needs to be stressed at this point that **the decision on whether the pregnancy poses a threat to the health of a pregnant woman** (which is one of the preconditions for terminating a pregnancy under Article 4a of the 1993 Act) **cannot be based on the subjective feelings of the woman, but must be of *an objective nature* and rely on specialist medical knowledge, which the pregnant woman usually does not possess.** Relying solely on the impressions of a pregnant woman, when deciding whether there are reasons to believe that the pregnancy could put the woman's health at risk, would be incompatible with the *ratio* behind the introduction of this precondition for termination of pregnancy into the 1993 Act, *i.e.* the protection of a woman's health. **Such an approach would transform the Polish system of protection of the life of an unborn child into a system of "abortion on demand", which would amount to a direct contravention of the**

Polish Constitution. This becomes clear when one considers that the diagnoses of medical experts are contrasted with the subjective views of a pregnant woman, this situation being perceived as a conflict which can only be resolved by means of a special review procedure. The above is moreover evidenced by the requirement of taking the woman's opinion into account when making a decision on the termination of pregnancy. In any case, it remains unclear precisely in what way the woman's view should be taken into consideration and to what extent her feelings should be decisive for the final decision of the review body. Hence, making the existence of the said precondition dependent on the opinion of a pregnant woman cannot be treated as a Convention standard.

42. The Government agree at this point with the position of Judge Borrego Borrego, who considered that the above-mentioned factors were evidence of the fact that the Court's judgment favoured "abortion on demand". Judge Borrego Borrego stated as follows: "[t]he Court appears to be proposing that the High Contracting Party, Poland, join those States that have adopted a more permissive approach with regard to abortion. It must be stressed that "certain State Parties" referred to in paragraph 123 allow "abortion on demand" until eighteen weeks of pregnancy. Is this the law that the Court is laying down to Poland?" (§ 13 of the dissenting opinion). Judge Borrego Borrego was also right in noting that by taking the aforementioned position the Court contradicted itself as regards its earlier declaration that it is not its task in the present case to examine whether the Convention guarantees the right to have an abortion (§ 13).

43. If one were to accept the Court's proposal, every diagnosis – in all fields of medicine – would have to be subjected to an institutionalised review procedure. This procedure would have to be consulted whenever the patient would be of the opinion that a doctor has erred in evaluating his health condition or refused to perform a medical interference, which was necessary in the patient's view. Moreover, in the view of the Government, **Article 8 of the Convention does not include the general obligation to establish preventive appeals measures for medical diagnoses, even in the situation where access to medical services is dependent on such opinions. This is also the case for medical operations in which the time element is crucial and for operations to which the risk of causing severe detriment to the health or even loss of the patient's life are connected if the operation is not performed (*e.g.* chemotherapy).** The Government are of the opinion that Article 8 of the Convention also does not include the specific obligation to establish the said procedures where the patient is a pregnant woman and the medical service to be provided is the termination of pregnancy which in the woman's view poses a threat to her health.

44. The Government also disagree with the Court's view whereby an appeals procedure is considered as a remedy for solving the problem of the existence of discrepancies between the opinions of specialists. The Government wish to stress that **in the Polish legal order there can be no conflict between the diagnoses of specialists that would make it impossible for a woman to terminate the pregnancy.** In accordance with Article 4a § 5 of the 1993 Act, in the wording given to it by the Law of 30 August 1996, "the existence of the circumstances to which reference is made in paragraph 1 and 2 shall be certified by a doctor other than the one performing the abortion, unless there is a direct threat to the woman's life". The diagnosis of one specialist certifying that the mother's health is endangered is sufficient for the termination of pregnancy.

45. The Government moreover note that – contrary to what was found by the Court in its judgment – **under the Polish legal system women enjoy complete freedom in obtaining medical opinions concerning the existence of a precondition for the termination of pregnancy.** Firstly, they are free to choose the specialist that will decide whether the said precondition exists. Secondly, and most importantly, in the situation where a woman has doubts about the medical diagnosis on the existence of the precondition of threat to life, she has unlimited access to other specialists.

46. Although the Government are of the opinion that in the case at hand there was no discrepancy in the doctors' opinions (see below), it must be emphasised that in the situation where diagnostic doubts occur, the Polish legal system provides a procedure – defined in Article 37 of the Law of 5 December 1996 on the profession of doctor and dental surgeon (hereinafter: "the 1996 Law") – to clarify them. However, the Court did not pay sufficient attention to this procedure. The cited provision states as follows: "in the case of diagnostic or therapeutic doubts the doctor should seek – out of his own initiative or on the motion of the patient or his statutory representative – a second opinion of a competent medical specialist or a panel of doctors, if he judges this to be justified in the light of the requirements of medical knowledge". Although the Court is of the view that this provision does not create any procedural guarantees (§ 122), it must be noted that this regulation grants sufficient possibilities of preventive control of a diagnosis, since it is of an obligatory nature (limited only by medical knowledge), as well as due to the fact that a doctor can be held professionally liable in the case of a violation of this provision. Such liability occurs whenever any of the provisions of the 1996 Law are breached.[1] Article 37 of the 1996 Law may not refer directly to the case of a pregnant woman, but – in contrast to the Court's findings – it is applicable to the case of a pregnant woman as much as to the case of any other patient whose health condition is being diagnosed.

47. The Government cannot agree with the Court in its finding that there is no legal certainty in Poland, as a result of the statutory prohibition of abortion, which – if violated – results in the perpetrator's prosecution. It needs to emphasised that the criminalisation of abortion is a European standard. Firstly, even in countries that take a liberal stand towards the issue of termination of pregnancy, an abortion performed in breach of the conditions of its admissibility is an offence. Secondly, every medical interference involving an infringement of the patient's physical integrity carries the risk of criminal responsibility for the doctor. The fact that a doctor has to keep such a risk in mind is a manifestation of the protection of the rights of patients, *i.e.* the right to private life, to which the Court's judgment refers. It is also noteworthy that the Court has erroneously stated that Article 156 of the Criminal Code provides a basis for the prosecution of persons who have performed an abortion in violation of law (§ 116), since the illegal termination of pregnancy is penalised in Articles 152-154 of the Criminal Code. It is also worth stressing that – contrary to what might follow from § 116 of the judgment – doctors are not the only persons to whom the said provisions are addressed, as everyone can be prosecuted for an illegal abortion.

48. The Government also strongly oppose the Court's findings concerning the influence that the penalisation of abortion has on the practice of its performance where medical reasons justify the termination of pregnancy. It follows from the judgment that the legal prohibition of abortion causes doctors to be reluctant to get involved in any actions connected with abortion, even if there are legal bases for termination. This reasoning implies that doctors do not fulfil their duties, and – as was rightly stated by Judge Borrego Borrego – discredits Polish medical specialists (§ 12 of the dissenting opinion). Such a far-fetching argument should rely on data that is more objective and reliable than that submitted by the Polish Federation for Women and Family Planning, which is well known for its actions aimed at broadening the scope of admissibility of abortion.

49. Moreover, the Supreme Court has recently confirmed the admissibility of compensation claims related to the lack of possibility to perform abortion (judgment of 21 November 2003, V CK 16/03, judgment of 13 October 2005, IV CK 161/05 and the resolution of 22 February 2006, III CZP 8/06). **The Government are of the opinion that the threat of civil liability would be more ominous to doctors than the illusory risk of incurring criminal responsibility. Even**

[1] See Article 41 of the Law on medical boards, which states as follows: "[t]he members of the medical self-governing council shall be held liable before medical courts for conduct inconsistent with the ethics and occupational deontology and a breach of the regulations on the occupation of doctor".

assuming that doctors are affected by such considerations, one would expect doctors to certify the existence of preconditions for terminating pregnancy too frequently, rather than too rarely.

50. At this point the Government wish to submit some comments on the applicant's situation with reference to the facts established by the Court. In its judgment of 20 March 2007 the Court did not establish unequivocally what had been the contents of the diagnosis made by the three ophthalmologists whom the applicant had consulted during her pregnancy. The Court first found that three ophthalmologists had come to the conclusion that due to pathological changes in the applicant's retina the pregnancy and delivery constituted a risk to her eyesight, but nevertheless – in spite of the applicant's requests – refused to issue a certificate for the pregnancy to be terminated, relying solely on the risk – and not *certainty* – that as a result of the pregnancy the retina might detach itself (§ 9). Subsequently, the Court came to the conclusion that a disagreement arose between the doctors as to how the pregnancy and delivery might affect her eyesight. The Court stated that "[t]he advice given by the two ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition" (§ 119). The discrepancy described above shows that the Court has not clarified whether the ophthalmologists (and if so – how many of them) were of the opinion that the pregnancy and delivery constituted a threat to the applicant's health, so that one cannot be certain on what premises the Court based its judgment. This factor is however crucial for the present case, seeing that the Court, in finding that the Polish State has violated the Convention, referred to the applicant's fears, which were caused primarily by the allegedly divergent opinions of the doctors (see § 119).

51. Judge Borrego Borrego rightly found that there had been no discrepancy in the contents of the ophthalmologists' opinions. He found that before the delivery five experts (three ophthalmologists, a gynaecologist and an endocrinologist) did not think that the applicant's health might be threatened by the pregnancy and the delivery, while after the delivery the three ophthalmologists and a panel of three medical experts (ophthalmologist, gynaecologist and forensic pathologist) concluded that "the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight" (see § 10 of the dissenting opinion). Judge Borrego Borrego stated in this context as follows: "the Court 'observes that a disagreement arose between her doctors' (see paragraph 119). Good. On the one hand, eight specialists unanimously declared that they had not found any threat or any link between the pregnancy and delivery and the deterioration of the applicant's eyesight. On the other hand, a general practitioner issued a certificate as if she were an expert in three medical specialities: gynaecology, ophthalmology and psychiatry, and in a *totum revolutum* (muddled opinion), advised abortion".

52. The source of the applicant's alleged fears should probably be sought in the conduct of the general practitioner, who issued an opinion certifying the existence of medical preconditions for termination of pregnancy, whereas she should have referred the applicant to the competent specialist. The Government however wish to stress that the diagnosis of the general practitioner should not have been taken into consideration by the Court, as it was the opinion of a person who – under the applicable provisions – was not entitled to issue a certificate permitting the performance of an abortion. Pursuant to the provisions of the Ordinance of the Minister of Health of 22 January 1997 on the qualifications of occupational doctors, entitling to the termination of a pregnancy and determination that the pregnancy poses a threat to the life or health of a woman or indicates a great likelihood of a grave and irreversible disability in the foetus or an incurable disease threatening its life, the only person, who is entitled to determine whether the circumstances permitting the termination of pregnancy actually exist, is a doctor specialising in the field of medicine focusing on the type of disease from which a woman suffers. Bearing in mind the applicant's affliction, who had a serious eyesight disorder, the person competent to issue a certificate allowing abortion would have been an ophthalmologist, or possibly a gynaecologist. However, a general practitioner did not possess the necessary qualifications, so that his opinion

could not have been authoritative. Having regard to the above, **there are no grounds for stating that there had been any discrepancies between the diagnoses of the medical experts.**

53. The Government note that by relying on the opinion of the general practitioner the Court challenged the concurrent diagnoses of the ophthalmologists and gynaecologist (the copies of the opinions having been part of the case-file), from which it clearly follows that the precondition of the existence of a threat to the mother's health had not been met. By focusing on the subjective views of the applicant, which were in no way founded on the evidence material, the Court discredited the opinions of several medical experts, who are prominent specialists with an unblemished reputation. The findings made by the Fourth Section contradict the principle cited by the Court, according to which it is "not its function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition" (§ 119).

54. Even if one were to accept *in abstracto* the Court's view on the shortcomings of the Polish legal system, it is not possible to demonstrate in the case of *Tysiąc v. Poland* any causal link between the applicant's sufferings and the system applied in Poland for determining the admissibility of abortion, which is supposedly incompatible with the Convention. The Court's role is merely to consider whether the Convention has been breached by the States Parties to the Convention with respect to individual persons who have suffered harm directly. In its rulings the Court cannot review the legal systems of States in an abstract manner, whereas in the present case this rule has been breached. **The Court judged that Poland violated the Convention, although the real cause of the applicant's fears had not been the alleged defects in the Polish legal system, but solely the fact that the general practitioner had gone beyond her powers.**

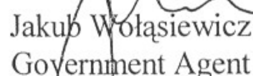
III. FINAL CONCLUSIONS

55. In view of the above observations, the Government of the Republic of Poland request under Article 43 § 1 of the Convention that the present application (no. 5410/03) be referred to the Grand Chamber.

56. The Government submit that the case raises serious issues of general importance, as well as questions affecting the interpretation and application of the Convention.

57. The Government wish to reiterate its preliminary objection to the consideration of the case on the grounds that the applicant has failed to exhaust the available domestic remedies.

58. Should the Court consider otherwise, the Government submit that Article 8 of the Convention is not applicable in the case at hand, and in any case - no violation of Article 8 of the Convention occurred.



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