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Tongue, Z. orcid.org/0000-0002-4625-4773 (2024) Abortion and the European Court of Human Rights: Avoiding the Question? *European Human Rights Law Review*, 2024 (3). ISSN 1361-1526

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Abortion and the European Court of Human Rights: Avoiding the Question?

M.L. v Poland (App. No.40119/21)

European Court of Human Rights (Chamber): Judgment of 14 December 2023

Background

In October 2020, the Polish Constitutional Tribunal held that abortion on the grounds of foetal impairment was unconstitutional as it violated the foetus' right to life and dignity and amounted to discrimination.¹ The effect of this has been to narrow Poland's already restrictive abortion legislation such that abortion is now only legal on two grounds: where the pregnancy threatens the life or health of the pregnant person, and where the pregnancy results from rape.² In response to the Constitutional Tribunal's decision, mass protests broke out across Poland and were sustained for several months, delaying the implementation of the decision into law until 27 January 2021.³

The Polish government at the time, led by the right wing *Prawo i Sprawiedliwość* (PiS), had previously and unsuccessfully attempted to restrict the country's abortion law on multiple occasions.⁴ PiS had also heavily influenced the make-up of the Constitutional Tribunal since 2015, including the election of Julia Przyłębska, who presided over the abortion decision along with other "quasi-judges".⁵ This "constitutional crisis" had already been commented upon by a number of bodies including the European Commission and the European Parliament.⁶ In 2021, the European Court of Human Rights (ECtHR) found a violation of art.6 of the European Convention on Human Rights (ECHR) in *Xero Flor v Poland* in relation to the defective appointment of a judge to the Tribunal.⁷ Commentators have thus identified the influence of an anti-abortion political agenda on the Constitutional Tribunal.⁸ Indeed, it was a group of right-wing MPs that in 2017 first submitted the motion for constitutional review of the foetal impairment ground.⁹

The applicant in *M.L. v Poland* became pregnant in 2020 and had screening tests in mid-January 2021, which confirmed that the foetus she was carrying had trisomy 21 (Down's Syndrome).¹⁰ She was examined by three medical practitioners who confirmed that she

¹ Polish Constitutional Tribunal Ruling K1/20 (22 October 2020).

² Family Planning, Protection of the Foetus, and Conditions for the Admissibility of Abortion Act 1993, art.4.

³ BBC News, "Poland enforces controversial near-total abortion ban" (28 January 2021), <https://www.bbc.co.uk/news/world-europe-55838210>.

⁴ M. Bucholc, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon" (2022) 14 Hague Journal on the Rule of Law 73, 84-85.

⁵ A. Gliszczynska-Grabias and W. Sadurski, "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)" (2021) 17 *European Constitutional Law Review* 130, 137-138.

⁶ EU Commission Recommendation 2017/1520 of 26 July 2017 regarding the rule of law in Poland [2017] OJ L228/19; European Parliament Resolution 2017/2931 of 15 November 2017 on the situation of the rule of law and democracy in Poland [2018] OJ C356/44.

⁷ *Xero Flor v Poland* (App. No.4907/18), judgment of 7 May 2021.

⁸ M. Bucholc, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon" (2022) 14 Hague Journal on the Rule of Law 73, 93; A. Gliszczynska-Grabias and W. Sadurski, "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)" (2021) 17 *European Constitutional Law Review* 130, 137-138; M. Furgalska and F. de Londras, "Rights, Lawfare and Reproduction: Reflections on the Polish Constitutional Tribunal's Abortion Decision" (2022) 55 *Israel Law Review* 285, 299.

⁹ M. Bucholc, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon" (2022) 14 Hague Journal on the Rule of Law 73, 86.

¹⁰ *M.L. v Poland* (App. No.40119/21), judgment of 14 Dec 2023 at [18]-[19].

qualified for a legal abortion, and she was scheduled for an appointment on the 28 January 2021.¹¹ However, the day before she was due to have her abortion, the legal ground for abortions in cases of foetal impairments was repealed. Her doctor informed her on the 28 January that she could no longer obtain a legal abortion in Poland.¹² The following day, the applicant travelled to the Netherlands for a legal abortion at a total cost of €1,220.¹³ The applicant alleged a violation of arts 3 and 8 ECHR, as the Constitutional Tribunal had deprived her of the opportunity to have an abortion on the grounds of foetal impairment.¹⁴ She also alleged a violation of art.6 in relation to the Constitutional Tribunal, but the ECtHR did not proceed with this claim.¹⁵

Held

- (1) The complaint concerning art.3 was inadmissible. The ECtHR found that, notwithstanding the applicant's emotional and mental pain, the facts of the case did not disclose a level of severity falling within the scope of art.3.¹⁶
- (2) The complaint concerning art.8 was admissible. Legislation concerning abortion touches upon one's private life, so art.8 applied in this case.¹⁷
- (3) There was a violation of art.8. The ECtHR limited its assessment to the state's negative obligations: there was a lack of foreseeability as to the date of the legal change, and thus the applicant had been "deprived of the proper safeguards against arbitrariness".¹⁸ Moreover, the influence of PiS on the Constitutional Tribunal undermined the lawfulness of the interference with the applicant's art.8 rights as the Tribunal is not "compatible with the rule of law requirements".¹⁹
- (4) The state was to pay the applicant €15,000 in respect of non-pecuniary damage and €1,004 in respect of pecuniary damage.²⁰

Analysis

Violation of art.8 ECHR

Despite the fact that a violation of art.8 was found, the decision in *M.L. v Poland* reiterates the ECtHR's reluctance to direct Member States to legalise abortion. As Cosentino has highlighted, the ECtHR is yet to find a substantive violation of art.8 in respect of abortion and instead limits its analysis to questions of procedure.²¹ In the previous cases of *Tysic v Poland* and *P. and S. v Poland*, violations of art.8 were found in circumstances where the applicants ought to have qualified for the existing legal grounds for abortion (risk to the health and pregnancy resulting from rape, respectively) but were denied access.²² In *Tysic*, the ECtHR emphasised the importance of the clarity of the law and stated that "once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities

¹¹ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [20].

¹² *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [22].

¹³ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [23]-[24].

¹⁴ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [73].

¹⁵ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [73]-[74].

¹⁶ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [84]-[85].

¹⁷ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [93]-[95].

¹⁸ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [175]-[176].

¹⁹ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [175]-[176].

²⁰ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [181]-[182].

²¹ C. Cosentino, "Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence" (2013) 15 *Human Rights Law Review* 569, 587.

²² *Tysic v Poland* (App. No.5410/03), judgment of 20 March 2007; *P. and S. v Poland* (App. No.57375/08), judgment of 30 October 2012.

to obtain it.”²³ While the Court noted the applicant’s severe distress and anguish, and the near-blindness she suffered as a result of giving birth, it did not find that the denial of an abortion *per se* gave rise to the violation—it was the lack of effective implementation of the legislation that was held to be the issue.²⁴ In *P. and S.*, a violation of art.8 was similarly found on the basis that there was no procedure for guaranteeing timely access to legal abortion services.²⁵

The ECtHR’s approach in distinguishing between legal and non-legal grounds for abortion was most clearly set out in *A, B, C v Ireland*.²⁶ In this case, the Court distinguished between the three applicants, all of whom had travelled to England for an abortion. At the time, abortion was only permitted on the basis of a risk to the pregnant person’s life.²⁷ The first and second applicants would not have qualified for a legal abortion in Ireland, so the ECtHR held that there was no violation of their art.8 rights.²⁸ However, as the third applicant had cancer in remission, but could not access information on whether she would qualify for a legal abortion or be able to access chemotherapy in Ireland if her cancer returned, a violation of art.8 was found.²⁹ As with the above Polish cases, this finding was based not upon the applicant being unable to have an abortion in Ireland but instead on the lack of an “accessible and effective procedure” in place to determine whether or not she would legally qualify for one.³⁰

In distinguishing between the three applicants, the ECtHR applied the margin of appreciation. The Court commented on “the sensitivity and complexity of the question of extending the grounds for lawful abortion in Ireland” and the lack of a European consensus on foetal personhood.³¹ The ECtHR therefore afforded a broad margin of appreciation to the state on the question of balancing “the right to life of the unborn”, as protected in the Irish Constitution at the time, and the art.8 rights of the three applicants.³² In effect, this means that the ECtHR does not impose obligations on Member States to legalise abortion. As Cosentino notes, states are granted “complete deference on the circumstances in which to allow an abortion” and the ECtHR only concerns itself with the coherence between law and practice.³³

The ECtHR’s finding of an art.8 violation in *M.L. v Poland* falls in line with this previous jurisprudence. Central to the ECtHR’s reasoning was the fact that the applicant had qualified for a legal abortion, and was scheduled to have that abortion, but the law was suddenly changed. The lack of procedural safeguards against this arbitrariness gave rise to the violation.³⁴ Thus, while this *particular* applicant ought to have been permitted to have her scheduled abortion, this does not mean that others ought to be permitted to have abortions on the grounds of foetal impairments. This point can also be emphasised in relation to the ECtHR’s comments on the Constitutional Tribunal. The legal change in question was the result of the decision in October 2020, made by a body that did not meet the requirements of independence and impartiality.³⁵ With reference to *Xero Flor*, the ECtHR stated that the legal change could not be said to be lawful.³⁶ Had the same change been passed by the *Sejm* (the lower house of Poland’s

²³ *Tysic* (App. No.5410/03), judgment of 20 March 2007 at [116].

²⁴ *Tysic* (App. No.5410/03), judgment of 20 March 2007 at [124]-[125].

²⁵ *P. and S.* (App. No.57375/08), judgment of 30 October 2012 at [110]-[111].

²⁶ *A, B, and C v Ireland* [GC] (App. No.25579/05), judgment of 16 December 2010.

²⁷ Constitution of Ireland art.40.3.3. This was repealed by the 36th Amendment in 2018, paving the way for the Health (Regulation of Termination of Pregnancy) Act 2018.

²⁸ *A, B and C* (App. No.25579/05), judgment of 16 December 2010 at [241].

²⁹ *A, B and C* (App. No.25579/05), judgment of 16 December 2010 at [267]-[268].

³⁰ *A, B and C* (App. No.25579/05), judgment of 16 December 2010 at [267]-[268].

³¹ *A, B and C* (App. No.25579/05), judgment of 16 December 2010 at [223]-[225].

³² *A, B and C* (App. No.25579/05), judgment of 16 December 2010 at [241].

³³ C. Cosentino, “Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence” (2013) 15 *Human Rights Law Review* 569, 587.

³⁴ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [175].

³⁵ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [174].

³⁶ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [173]-[175].

Parliament) or by a Court operating in accordance with the rule of law, it would be lawful. This is relevant for potential future cases: while the margin of appreciation would apply for a pregnant person discovering that the foetus they were carrying had an impairment *after* 27 January 2021, the ECtHR could again find a violation in relation to the lawfulness of the Tribunal’s decision. In their dissenting opinion, Judges Wojtyczek and Paczolay stated that the majority had ‘opted for a major change of paradigm’ in its approach to the Constitutional Tribunal and the lawfulness of the decision.³⁷ They argued that this was a marked departure from the ECtHR’s long-established practice of ‘conducting a very limited review’ of the lawfulness of an art.8 interference, simply requiring some basis in domestic law.³⁸ However, this decision—as with the ECtHR’s previous jurisprudence—cannot be interpreted to mean that prohibitions on abortion on the grounds of foetal impairments legitimately passed into law would violate art.8. In this respect, *M.L. v Poland* contributes very little to the development of abortion rights standards at the ECtHR.

Inadmissibility of art.3 ECHR

M.L. v Poland also highlights the ECtHR’s reluctance to engage art.3 in cases concerning abortion. While the ECtHR did find a violation of art.3 in the cases of *P. and S. v Poland* and *R.R. v Poland*, this was again not connected to the denial of abortion services *per se* but to the degrading way the authorities had treated the applicants.³⁹ In *P. and S.*, a fourteen-year-old rape victim attempting to obtain an abortion had been taken into custody, repeatedly questioned over the traumatic circumstances of the rape, and harassed after her story was leaked to the news.⁴⁰ In *R.R.*, the applicant was denied access to prenatal testing that would have enabled her to decide whether or not to have an abortion. In finding a violation of art.3, the ECtHR in *R.R.* commented on the fact that the applicant had been humiliated and “shabbily treated by the doctors dealing with her case.”⁴¹ The ECtHR did, however, highlight the applicant’s “acute anguish” and “painful uncertainty concerning the health of the foetus, her own and her family’s future and the prospect of raising a child suffering from an incurable ailment.”⁴²

Yet, in *Tysiac* and *A, B, and C*, the applicants’ claims under art.3 were rejected, finding that—as with *M.L.*—the distress caused to the applicants was not severe enough to meet the art.3 threshold.⁴³ The ECtHR’s finding that *M.L.*’s claim under art.3 was inadmissible is unfortunate, as this would have been an opportunity for the Court to bring its abortion jurisprudence in line with the recently more progressive stance of international human rights bodies such as the Human Rights Committee (HRC). In the judgment, the ECtHR refers to the cases of *Mellet v Ireland*⁴⁴ and *Whelan v Ireland*,⁴⁵ in which the HRC had found that requiring two pregnant women to travel to England for abortions in cases of fatal foetal impairments amounted to cruel, inhuman, and degrading treatment.⁴⁶ However, the ECtHR chose not to follow these decisions—an aspect of *M.L.* that Judges Jelić, Felici, and Wennerström critique in their partly concurring and partly dissenting opinion, whilst also highlighting the fact that the ECtHR

³⁷ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [53]-[55].

³⁸ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [53]-[55].

³⁹ *P. and S.* (App. No.57375/08), judgment of 30 October 2012; *R.R. v Poland* (App. No.27617/04), judgment of 26 May 2011.

⁴⁰ *P. and S.* (App. No.57375/08), judgment of 30 October 2012 at [163]-[167].

⁴¹ *R.R.* (App. No.27617/04), judgment of 26 May 2011 at [160].

⁴² *R.R.* (App. No.27617/04), judgment of 26 May 2011 at [159].

⁴³ *Tysiac* (App. No.5410/03), judgment of 20 March 2007 at [66]; *A, B, and C* (App. No.25579/05), judgment of 16 December 2010 at [164].

⁴⁴ *Mellet v Ireland* (2016) CCPR/C/116/D/2324/2013.

⁴⁵ *Whelan v Ireland* (2017) CCPR/C/119/D/2425/2014.

⁴⁶ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [50]-[51], [83].

acknowledged in *R.R.* the distress and vulnerability that surrounds a diagnosis of a foetal impairment.⁴⁷

The ECtHR's approach to art.3 in *M.L.* is therefore out of step with international human rights standards on abortion and appears at odds with its own comments in *R.R.* Given the ECtHR's propensity for applying a broad margin of appreciation in abortion cases, it seems reasonable to infer that the Court's avoidance around art.3 has much to do with the implications of such a finding. Ní Ghráinne and McMahon have argued that the brevity of the ECtHR's discussion on art.3 in *Tysiac* and *A, B, and C* is at least in part to do with the political sensitivity of the issue at hand.⁴⁸ Art.3 ECHR is an absolute right, to which the margin of appreciation does not apply. To find that a prohibition on abortion violated art.3 would therefore, in effect, place positive obligations on Member States to legalise abortion (either broadly or on a specific ground) in order to avoid future violations. This is a direction that the ECtHR has avoided going in by applying a broad margin of appreciation to art.8, and *M.L.* confirms that the ECtHR will continue deferring to states on the issue of abortion by avoiding engagement with art.3.

M.L. is just one of over 1,000 applications submitted to the ECtHR following the change to Poland's abortion law.⁴⁹ In June 2023, the ECtHR declared eight applications inadmissible as the consequences of the law were "too remote" for them to be considered victims.⁵⁰ As the ECtHR works through the remaining applications, its decisions are very unlikely to deviate from the script of avoidance that it has been following in respect of abortion.

Zoe Tongue

⁴⁷ *M.L.* (App. No.40119/21), judgment of 14 Dec 2023 at [50]-[51].

⁴⁸ B. Ní Ghráinne and A. McMahon, "Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?" (2019) 19 *Human Rights Law Review* 561, 569.

⁴⁹ European Court of Human Rights, 'Notification of 12 applications concerning abortion rights in Poland' (8 July 2021), <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-7074470-9562874&filename=Notification%20of%20applications%20concerning%20abortion%20rights%20involving%20Poland.pdf>.

⁵⁰ *A.M. and Others v Poland* (App. Nos 4188/21 and others), judgment of 16 May 2023.