

[TRANSLATION] ...

THE FACTS

The applicant, Mr Giampiero Boso, is an Italian national who was born in 1960 and lives in Eraclea. He was represented before the Court by Ms W. Viscardini, of the Padua Bar.

A. The circumstances of the case

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

The applicant was married. In 1984 his wife, who was pregnant, decided to have an abortion despite his opposition. Her pregnancy was terminated on 10 October 1984.

On 8 November 1984 the applicant brought an action against his wife in the San Donà di Piave magistrate's court, seeking compensation for the infringement of his rights as a potential father and of the unborn child's right to life. The applicant further challenged the constitutionality of Law no. 194 of 1978, arguing that it contravened the principle of equality between spouses as enshrined in Articles 29 and 30 of the Italian Constitution in that it left it entirely to the mother to decide whether to have an abortion and took no account of the father's wishes.

The applicant's wife maintained that she had acted in accordance with section 5 of Law no. 194 of 1978, by which she alone had the right to decide whether to undergo an abortion.

In an order (no. 389) of 31 March 1988 the Constitutional Court declared the constitutionality issue manifestly ill-founded on the ground that the Law complained of was based on a policy decision to grant the mother full responsibility for an abortion, and that that decision was not illogical, especially as the effects of pregnancy, both physical and mental, were felt primarily by the mother.

Having regard to the Constitutional Court's decision, the magistrate's court dismissed the applicant's action in a judgment of 18 May 1990.

The applicant appealed against that judgment to the Venice District Court. He raised a further constitutionality issue, submitting that section 5 of Law no. 194 of 1978 infringed Articles 2, 8 and 12 of the Convention and Articles 2, 10 and 11 of the Italian Constitution.

In a judgment of 24 June 1993 the Venice District Court dismissed the appeal on the ground that the right to compensation under Article 2043 of the Civil Code presupposed that the applicant's wife's conduct had been unlawful, whereas she had acted in accordance with Law no. 194 of 1978. The Court further held that the constitutionality issue raised by the applicant

was essentially the same as that raised at first instance and accordingly declared it manifestly ill-founded.

The applicant appealed on points of law to the Court of Cassation, arguing, in particular, that section 5 of Law no. 194 of 1978 infringed Articles 2, 8 and 12 of the Convention, which protected the right to life and the right to found a family.

In a judgment of 19 June 1998, the text of which was deposited at the registry on 5 November 1998, the Court of Cassation dismissed the applicant's appeal.

It had regard to the Constitutional Court's decision of 31 March 1988 and further held that declaring the abortion legislation unconstitutional would not have had any bearing on the applicant's claim for compensation. The claim was in any event bound to fail in the absence of any unlawful conduct on the part of the applicant's wife, who had made use of a right to which she was entitled.

B. Relevant domestic law

Law no. 194 of 1978 allows doctors to terminate a pregnancy in specified circumstances.

By section 4 of the Law, a woman may decide to have her pregnancy terminated before the twelfth week where continuation of the pregnancy, childbirth or motherhood might endanger her physical or mental health, in view of her state of health, her economic, social or family circumstances, the circumstances in which conception occurred or the likelihood of abnormalities or of malformations of the foetus.

The woman may apply to a health centre (*struttura socio-sanitaria*), a clinic (*consultorio*) established under Law no. 405 of 2 July 1975 or her doctor.

By sections 2 and 5 of the Law, clinics and health centres must carry out the necessary medical examinations. Where an abortion is requested because of the impact of economic, social or family circumstances on the pregnant woman's health, they must also

(a) examine possible solutions to the problems, together with the woman and, with her consent, the potential father;

(b) help the woman to overcome the problems that have led her to request an abortion; and

(c) take any appropriate measures to help the woman by providing her with all the necessary assistance both during the pregnancy and after the birth.

Where the woman applies to her doctor, the doctor carries out the necessary medical examinations and, together with the woman and the potential father, discusses the reasons for her decision to request an abortion, having regard also to the results of the examinations. The doctor

informs the woman of her rights, the welfare facilities available to her, and the clinics and health centres at her disposal.

In cases of emergency, a doctor from the clinic or health centre or the woman's own doctor immediately issues her with a certificate attesting that termination of the pregnancy is urgently required. On the basis of the certificate, the woman may report to one of the establishments authorised to perform abortions.

If the results of the medical examination indicate that there is no emergency, the doctor draws up a certificate, which the woman must also sign, attesting that she is pregnant and that her request for an abortion has been made in accordance with section 4 of the Law. At the same time the doctor gives her seven days to think the matter over. Once that period has elapsed, the woman may request the termination of her pregnancy at an authorised establishment, on the basis of the medical certificate.

Beyond the first ninety days, an abortion may be carried out

(a) where pregnancy or childbirth entails a serious threat to the woman's life; or

(b) where conditions entailing a serious threat to the woman's physical or mental health have been diagnosed, including serious abnormalities or malformations of the foetus.

The abortion process is covered by the Personal Data Protection Act (Law no. 675/1996).

There is no provision in law allowing the potential father to prevent an abortion from taking place.

COMPLAINTS

1. The applicant submitted that the legislation in force in Italy on the voluntary termination of pregnancy was contrary to Article 2 of the Convention in that it authorised abortion and thus allowed a foetus to be deprived of its life.

2. Relying on Article 8 of the Convention, the applicant complained that the legislation on the voluntary termination of pregnancy conferred on the mother the right to decide to have an abortion and took no account of any opposition from the father.

3. Under Article 12 of the Convention, the applicant submitted that by affording a woman the possibility of an abortion, Italian legislation prevented the father from founding a family.

THE LAW

1. The applicant challenged Law no. 194 of 1978, under which his wife had been able to terminate her pregnancy, to the detriment of the foetus. He alleged a violation of Article 2 of the Convention, the first paragraph of which provides:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The Court accepts that in the circumstances of the case, the applicant, as a potential father, was so closely affected by the termination of his wife’s pregnancy that he could claim to be a victim, within the meaning of Article 34 of the Convention, of the legislation complained of as applied in the present case (see *X. v. the United Kingdom*, no. 8416/79, Commission decision of 13 May 1980, Decisions and Reports (DR) 19, p. 244).

The Court further notes that the Convention does not define either the term “everyone” or the term “life”. It observes that Article 2 contains two fundamental elements: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions.

The Court has held that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). This obligation goes beyond the duty to secure the right to life by putting in place criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the suppression and punishment of breaches of such provisions. It may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115, and *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III).

The Court considers that it is not required to determine whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted above. Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, the Court notes that in the instant case, although the applicant did not state the number of weeks that had elapsed before the abortion or the precise grounds on which it had been carried out, it appears from the evidence that his wife’s pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978.

In this connection, the Court notes that the relevant Italian legislation authorises abortion within the first twelve weeks of a pregnancy if there is a risk to the woman’s physical or mental health. Beyond that point, an

abortion may be carried out only where continuation of the pregnancy or childbirth would put the woman's life at risk, or where it has been established that the child will be born with a condition of such gravity as to endanger the woman's physical or mental health. It follows that an abortion may be carried out to protect the woman's health.

In the Court's opinion, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests. Having regard to the conditions required for the termination of pregnancy and to the particular circumstances of the case, the Court does not find that the respondent State has gone beyond its discretion in such a sensitive area (see *H. v. Norway*, no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 155).

It follows that this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that it had been impossible for him to have any influence on his wife's decision to have an abortion, and alleged a violation of Article 8 of the Convention.

Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as 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 well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Court notes that, as the Commission has stated, “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” (see *Brüggemann and Scheuten v. Germany*, no. 6959/75, Commission's report of 12 July 1977, DR 10, p. 100, and *X. v. the United Kingdom*, cited above, at p. 254). However, the Commission has also taken the view that the potential father's right to respect for his private and family life cannot be interpreted so widely as to embrace the right to be consulted or to apply to a court about an abortion which his wife intends to have performed on her (see *X. v. the United Kingdom*, cited above, at p. 254, and *H. v. Norway*, cited above, at p. 170).

The Court considers that any interpretation of a potential father's rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination.

As the Court noted above, the abortion in the instant case was carried out in accordance with Italian legislation and thus pursued the aim of protecting the mother's health.

Accordingly, any interference with the right protected under Article 8 which might be assumed in the circumstances of the case was justified as being necessary for the protection of the rights of another person (see *H. v. Norway*, cited above, at p. 170).

It follows that this part of the application is likewise manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Relying on Article 12 of the Convention, the applicant complained that the legislation on the termination of pregnancy had prevented him from founding a family.

In accordance with its case-law (*E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61), the Court reiterates that an interference with family life which is justified under paragraph 2 of Article 8 of the Convention cannot at the same time constitute a violation of Article 12.

The Court has already held that the complaint under Article 8 of the Convention is manifestly ill-founded. It therefore considers that the same conclusion applies in the instant case under Article 12 of the Convention.

It follows that this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.