Judge Bonello's dissenting opinion in Tysiac v. Poland

SEPARATE OPINION OF JUDGE BONELLO

1.  In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention.

2.  The decision in this case related to a country which had already made medical abortion legally available in certain specific situations of fact. The Court was only called upon to decide whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place.

3.  My vote for finding a violation goes no further than that.

Judge Borrego Borrego's dissenting opinion in Tysiac v. Poland

DISSENTING OPINION OF JUDGE BORREGO BORREGO

1.  To my regret, I cannot agree with the opinion of the majority in this case.

2.  The facts are very simple: a woman who suffered from severe myopia became pregnant for the third time and, as she was “... worried about the possible impact of the delivery on her health, she decided to consult her doctors” (see paragraph 9 of the judgment). Polish law allows abortion on condition that there is “a threat to the woman’s life or health ... attested by a consultant specialising in the field of medicine relevant to the woman’s condition” (see paragraph 39). Not only one, but three ophthalmologists examined the applicant and all of them concluded that, owing to pathological changes in her retina, it might become detached as a result of pregnancy, but that this was not certain (see paragraph 9). The applicant obtained medical advice in favour of abortion from a general practitioner. However, a general practitioner is not a specialist and the gynaecologist refused to perform the abortion because only a specialist in ophthalmology could decide whether an abortion was medically advisable (see paragraph 69).

Some months after the delivery, the applicant’s eyesight suffered deterioration and she lodged a criminal complaint against the gynaecologist. After consideration of the statements of the three ophthalmologists who had examined the applicant during her pregnancy and a report by a panel of three medical experts, it was concluded that “there was no causal link between [the gynaecologist’s] actions and the deterioration of the applicant’s vision”.

3.  It is true that the applicant’s eyesight has deteriorated. And it is also true that Poland is not an island country in Europe. But the Court is neither a charity institution nor the substitute for a national parliament. I consider that this judgment runs counter to the Court’s case-law, in its approach and in its conclusions. I also think it goes too far.

4.  Eight months ago, the same Section of the Court gave a decision concerning the application *D. v. Ireland* ((dec.), no. 26499/02, 28 June 2006). I do not understand why the Court’s decision is so different today in the present case.

5.  There is no unanimous position among the member States of the Council of Europe with regard to abortion. Some of them are quite restrictive, others are very permissive, but nevertheless the majority adopt an intermediate position.

Ireland is one of the most restrictive countries. As stated in Article 40 § 3 (3) of its Constitution, “the State acknowledges the right to life of the unborn ...”. Only in the case of a “real and substantial risk” to the mother’s life is there a possibility of a constitutional action, involving proceedings which are in principle non-confidential and of an unknown length, to obtain authorisation for a legal abortion.

Poland adopts an intermediate position: the Contracting Party’s legislation provides for a “relatively simple procedure for obtaining a lawful abortion based on medical considerations ... Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States” (see paragraphs 34 and 121 of the judgment).

6.  As to the debate on abortion, in *D. v. Ireland* (cited above, § 97) the Court also noted “the sensitive, heated and often polarised nature of the debate in Ireland”.

In the present case, the Court neglects the debate concerning abortion in Poland.

7.  Concerning the applicant in *D. v. Ireland*, there was a real risk to the life of the mother. The applicant was a woman who was eighteen weeks pregnant with twin sons when she was informed that one foetus had “stopped developing” by that stage and the second had a severe chromosomal abnormality (“a lethal genetic condition”). Some days later, she had an abortion in the United Kingdom. As a result of the strain, she and her partner ended their relationship, she stopped working, and so on.

8.  The Court’s approach with regard to abortion is different in both cases. I should say it is quite respectful in *D. v. Ireland*: “This is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay of the equal right to life of the mother and the ‘unborn’ ...” (ibid., § 90).

On the contrary, in the Polish case all the debate is focused on the State’s positive obligation of “effective respect” for private life in protecting the individual against arbitrary interference by the public authorities (see paragraphs 109 and 110 of the judgment). No reference is made to “the complex and sensitive balancing of equal rights to life ... of the mother and the unborn” mentioned in *D. v. Ireland*. In the present case, the balance is one of a very different nature: “the fair balance that has to be struck between the competing interests of the individual and of the community as a whole” (see paragraph 111).

9.  In *D. v. Ireland*, everything must be objective. In the present case, everything is subjective.

Concerning the Irish woman, the Court’s decision states: “It is undoubtedly the case that the applicant was deeply distressed by, *inter alia*, the diagnosis and its consequences. However, such distress cannot, of itself, exempt an applicant from the obligation to exhaust domestic remedies” (see *D. v. Ireland*, cited above, § 101).

In the eighteenth week of pregnancy, with a real risk to her life and facing a non-confidential procedure of unknown length, the Irish woman was obliged to exhaust domestic remedies. She “sought advice, informally, from a friend who was a lawyer who had told her that if she wrote to the authorities to protest, the State might try and prevent her travelling abroad for a termination and ... she was not prepared to take this risk”. But, in her case, the Court did not consider “that informally consulting a friend amount[ed] to instructing a solicitor or barrister and obtaining a formal opinion” (ibid., § 102).

It is very interesting to compare this statement with the one in the Polish case, in which the applicant “feared that the pregnancy and delivery might further endanger her eyesight”. In this case the Court considers this fear “sufficient” and “is of the view that her fears cannot be said to have been irrational” (see paragraph 119 of the judgment).

10.  The majority have based their decision that there has been a violation of Article 8 on the fact that the Contracting Party has not fulfilled its positive obligation to respect the applicant’s private life.

I disagree: before the delivery, five experts (three ophthalmologists, one gynaecologist and one endocrinologist) did not think that the woman’s health would be threatened by the pregnancy and the delivery.

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 paragraph 21).

That being said, 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 (see paragraph 10).

I have difficulty understanding the reasons that led the Court to consider in the Irish case that the opinion of a lawyer – a friend of the applicant’s – was not “a formal opinion” and consequently should not be taken into account, whereas such status was granted to the opinion of a general practitioner in the present case.

11.  If the experts’ opinion was unanimous and strong, why was it not taken into consideration?

I am afraid the answer is very simple: in paragraph 116 the Court “further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case” (“legal prohibition on abortion”/“legal abortion”: no comment).

I find it very difficult to accept that such a discreditable assessment with regard to the medical profession in Poland comes not from one of the Parties, but from the Court.

12.  Abortion is legal under Polish law, but the circumstances in this case do not correspond to those in which Polish law allows an abortion.

The reasoning behind the Court’s conclusion that there has been a violation of the Convention is as follows.

Firstly, the Court attaches great relevance to the applicant’s fears, although these fears were not verified and, what is more, they turned out to be unfounded.

Secondly, the Court tries to compare the unanimous opinion of eight specialists to the isolated and muddled opinion of a general practitioner.

Thirdly, it discredits the Polish medical specialists.

And finally, the judgment goes too far as it contains indications to the Polish authorities concerning “the implementation of legislation specifying the conditions governing access to a lawful abortion” (see paragraph 123).

13.  The 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? I consider that the Court contradicts itself in the last sentence of paragraph 104: “[I]t is not the Court’s task in the present case to examine whether the Convention guarantees a right to have an abortion.”

In conclusion, this judgment, despite the relevant Polish law, is focused on the applicant’s opinion: “It [the Ordinance of 22 January 1997] only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged” (see paragraph 121).

I consider that the Court’s decision in the instant case favours “abortion on demand”, as is clearly stated in paragraph 128: “Having regard to the circumstances of the case as a whole, it cannot therefore be said that ... 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.”

14.  I respectfully consider that it is not the task of the Court to make such statements. I regret to have to say this.

It is true that there was a controversy in this case. On the one hand, we have Polish law, the unanimous opinion of the medical experts, and the confirmed lack of a causal link between the delivery and the deterioration of the applicant’s eyesight. On the other hand, we have the applicant’s fears.

How did the Contracting Party solve this controversy? In accordance with domestic law. But the Court decided that this was not a proper solution, and that the State had not fulfilled its positive obligation to protect the applicant. Protection with regard to domestic law and medical opinion? According to the Court, the State should have protected the applicant, despite the relevant domestic law and medical opinions, because she was afraid. And the judgment, on the sole basis of the applicant’s fears, concludes that there has been a violation of the Convention.

15.  All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.

I would never have thought that the Convention would go so far, and I find it frightening.