WRITTEN OBSERVATIONS

submitted to the

EUROPEAN COURT OF HUMAN RIGHTS

in the case

Anita KRŪZMANE against Latvia

no. 33011/08

by the

EUROPEAN CENTRE FOR LAW AND JUSTICE

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The ECLJ written observations focuse mainly on the following complaint :

> "*The applicant complains under Article 8 of the Convention that, owing to the negligence of a doctor, she was denied adequate and timely medical care in the form of an antenatal screening test which would have indicated the risk of her foetus having a genetic disorder and which would have allowed her to choose whether to continue the pregnancy. She also complains that the national courts, by wrongly interpreting the Medical Treatment Act, failed to establish an infringement of her right to respect for her private life in this regard."*

The full statement of facts provided by the Court is available at the end of this brief.

* * *

This case may provide an opportunity for the Court to clarify its case-law with regard to eugenics and abortion. This is necessary due to some visible confusion in the existing case-law[1], and this is made possible considering the large number of important cases currently before the Court[2] on this issue. These cases focus on different aspects of abortion and should be considered together to achieve a coherent body of case-law. These aspects include the question of access to abortion for minors, the right to conscientious objection, the right of mothers to information on abortion and risks involved, the "*right to a healthy child*" by prenatal diagnosis and pre-implantation genetic diagnosis, which implies the right to select and remove the embryo and the right to abortion for eugenic reasons. The ECLJ was authorized to intervene in several of these cases, and also previously before the Grand Chamber in the cases of *A, B. and C. v. Ireland*, and *S. H. v. Austria*.

In the present case of *Anita KRŪZMANE v. Latvia*, the Court has a major responsibility. The Court, "conscience of Europe"[3], is called upon this time to adjudicate on eugenics. On this decision depends the continuation of the condemnation of eugenics and abortion as a tool of eugenics, or rather its standardization.

If the daughter of Mrs. Anita KRŪZMANE was born without a disability, there would be no KRŪZMANE case; if this child had not been born, having been screened and aborted, there would be no case. Specifically, the applicant complains of having given birth to a disabled daughter and of not being able to have an abortion due to a failure of screening. In reality, the

[1] *Vo v. France*, No. 53924/00, [GC], judgment of 8 July 2004, *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, judgment of 26 October 2004, *D v. Ireland*, No. 26499/02, decision of 27 July 2006, *Tysiac v. Poland*, No. 5410/03, judgment of 20 March 2007, *A. B. and C. v. Ireland*, No. 25579/05, [GC], judgment of 16 December 2010, *R. R. v. Poland*, No. 27617/04, judgment of 26 May 2011;

[2] Among the pending cases identified: *Z v. Poland* No. 46132/08; *P. and S. v. Poland*, No. 57375/08; *Csoma v. Romania*, No. 8759/05; *Kruzmane v. Latvia*, No. 33011/08, *Ozçakmak v. Turkey*, No. 24573/08;

[3] "The Conscience of Europe, 50 years of the European Court of Human Rights", Council of Europe, October 2010;

ultimate question behind the convoluted wording of the applicant's complaint[4], which the Court must respond to, can be summarized as follows: "*Does the Convention guarantee a right to eugenics for parents, and in particular to the procedure of prenatal screening-elimination of sick or disabled fetuses? If so, does the State have a positive obligation in this regard*?"

It should be kept in mind that people with trisomy (Down's syndrome) do not suffer and are generally happy.
Abortion and eugenics are contrary to the Convention, as it was conceived, drafted and intended by its authors. There is no doubt that in 1950, just after the Second World War, the drafters of the Convention rejected abortion and eugenics, and for them it was inconceivable that one day one would ever claim to make abortion and eugenics rights based on the Convention. It is the duty of the Court to not totally abandon protecting the lives of unborn children in a society in which selfishness, materialism and commercialism tend to deny the value and humanity of life, for better ending or exploiting it. If the Court had interpreted the Convention in order to tolerate the practice of abortion, it should in the same time also place limits on this practice, with regard to for example "*late abortion*" (notably after the threshold of viability) and "*selective abortion*" depending on the child's characteristics, particularly genetics (according to the sex and state of health of the child).

Although the lack of abortion rights and the prohibition of eugenics are well established in international and European law, it is necessary to recall the principles applicable in this case (I), taking into account a certain confusion introduced in the recent case-law of the Court and in this present application to construct such rights on misguided premises that must be corrected (II).

1. The Applicable principles

1. The European Convention protects prenatal human life

Human life is both a "*common good*" of the society and a "*private good*" which everyone enjoys; this explains why society not only has a negative obligation to refrain from violating it (or any other private good), but also a positive obligation to protect and promote it (like any other common good). This double nature of private and common good of the human life also explains why pregnancy does not fall exclusively within the private life of the mother[5].
The international human rights instruments recognize life as a primary right[6]. The "*principle of sanctity of life is protected under the Convention"*[7] and recognized by the Court, which

[4] *"The applicant complains under Article 8 of the Convention that, owing to the negligence of a doctor, she was denied adequate and timely medical care in the form of an antenatal screening test which would have indicated the risk of her foetus having a genetic disorder and which would have allowed her to choose whether to continue the pregnancy";*
[5] *Bruggemann and Scheuten v. Germany*, No. 6959/75, Report of the former Commission 12 June 1977, p. 138, §§ 59, 60 and 61 and *Boso v. Italy*, No. 50490/99, decision of 5 September 2002;
[6]The United States Declaration of Independence 1776, the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the United Nations Declaration of the Rights of the Child 1959, Convention on the Rights of the Child 1989, Declaration of the Rights and Duties of Man 1948,

affirms that " *the right to life is an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights*"[8].

The Convention contains no *ratione temporis* limitation on the scope of the right to life: it protects "*everyone*"[9], for the entire duration of their life. This is normal, because life is a material reality before becoming an individual right: life either exists or does not. It is a fact that everyone's life spans from conception to death. Every human life is a continuum that begins at conception and advances in stages until death.

If determining the limits of physical life is not difficult to assess, however, the development of practices such as *in vitro* fertilization, abortion and euthanasia have impaired the coincidence *ratione temporis* between the physical life itself and its legal protection: the right "detaches" itself from its real object. Since the legalization of those practices, the right to life does not necessarily protect life anymore, but only a part of life whose extent varies according to national legislation[10].

While, when the Convention was drafted, there was a coincidence between the limits of physical life and the right to life (explicit derogations being indicated in the text), the Court has gradually accepted this "*separation*" by allowing States, within their margin of appreciation, the possibility to determine when life begins and subsequently to reduce the scope of article 2.

Thus, the Court itself has never redefined (as to reduce) the scope of Article 2: it has never excluded in principle prenatal life (neither the dying life) from its field of application[11]. More subtly, the Court has allowed States to derogate from the protection conferred by article 2 leaving (to a limited extent) the determination of the scope of this article in their margin of national appreciation[12]. By doing so the court follows the lines traced by the Commission. However, the Court affirmed that the unborn (embryo and fetus) belongs to the human species, potentially protecting him against inhuman treatments that the Court would not wish to tolerate. In doing so, the Court follows the line drawn by the former Commission[13].

African Charter on Human and Peoples Rights1981, American Convention on Human Rights 1969, Declaration of Human Rights in Islam, 1990;

[7] *Pretty v. UK*, No. 2346/02, judgment of April 29, 2002, § 65;

[8]. *Pretty v. UK*, No. 2346/02, judgment of 29 April 2002, § 65 ; *McCann and others v. RU*, judgment of 27 September 1995, § 147 and *Streletz, Kessler and Krenz v. German*, [GC], Nos. 34044/96, 35532/97 and 44801/98, §§ 92-94 ;

[9] This is confirmed by the Consultative Assembly's preparatory work in 1949, which clearly shows that these are rights that one enjoys just because one exists: "*the Committee of Ministers has asked us to establish a list of rights which man, as a human being, would naturally enjoy*". Preparatory work, vol. II, p. 89;

[10] Some countries exclude the unborn child from the scope and allow abortion until the fourth and ninth months, others protect the embryo against the biotechnological manipulations from the 6th or the 14th day;

[11] *Boso v. Italy*, No. 50490/99, decision of 5 September 2002: "*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*" "and Vo v. France, No. 53924/00, [GC], Judgment of July 8, 2004, § § 86 and 95 "*the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her" and "even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention*";

[12] *Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, § 82;

[13] The Commission did not exclude the unborn child from the protection of the right to life, it indicated that it was not necessary to decide this question (*H. v. Norway*, No. 17004/90, Dec. of the former Commission on May 19, 1992, *Bruggemann and Scheuten v. Germany*, No. 6959/75, Report of the former Commission on July 12, 1977, *X. v. UK*, No. 8416/79, in December of the previous Commission May 13, 1980, § 7, *Reeve v. UK*, No. 24844/94, Dec. of the former Commission on November 30, 1994, *Boso v. Italy*, No. 50490/99, decision of September 5, 2002) and had referred the matter at the discretion of Member States (*H. v. Norway*, No. 17004/90,

However, the Court affirmed membership in "*the human species*"[14] of the embryo and the unborn child. In affirming the humanity of the embryo and fetus, the Court has retained the means to protect it against inhuman and degrading treatment as it deems unacceptable. With regard to other provisions of the Convention, it should be noted that, in several cases, the Court has recognized their applicability to prenatal life[15].
Unlike the ECHR, which has refused to determine the beginning of the legal protection enjoyed by the human embryo, the Grand Chamber of the Court of Justice of the European Union, in *Oliver Brüstle v. Greenpeace eV* Case (C 34/10), decided on 18 October 2011, defines the embryo as follows: "*every human ova must, from the stage of fertilization, be considered a " human embryo " within the meaning and application of Article 6, paragraph 2 c) of the Directive, since this fertilization is likely to trigger the development process of a human being* "(§ 35). The Court stated that this definition "*should be considered [e], for the purposes of the Directive as meaning an autonomous concept of European Union law, which must be interpreted uniformly in the territory of the latter*" (§ 26). This definition is directly imposed on all Member States, including Latvia. Considering that "*respect for fundamental principles safeguarding the dignity and integrity of Man*" is enjoyed by human beings "*at different stages of its formation and development*"[16], the ECJ has clearly established the principle of the legal protection of dignity and integrity of the human embryo, which runs counter to the commercial exploitation and patenting inventions whose implementation requires the destruction of human embryos.
International law also protects human prenatal life, the Convention on the Rights of the Child of 20 November 1989 also recalls the principle, already stated in the Declaration of the Rights of the Child, adopted in November 20, 1959 by the General Assembly of the United Nations, according to which "*the child, because of his lack of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as after birth*" (emphasis added).

Countries that have kept a keen awareness of the value of human life maintained the link between law and its object: they protect the right to life from the beginning of life to its natural end, by prohibiting the creation of unimplanted *in vitro* embryos, voluntary abortion and euthanasia. These States that uphold the entire scope of Article 2 as encompassing a responsibility to protect life before birth, may use Article 2 for this purpose: they respect fully their obligations, beyond the minimum threshold as it is *currently* defined by the Court (with scarce precision), according to Article 53 of the Convention[17] which establishes that the State can freely provide a wider protection of human rights than the one guaranteed by the Convention. Thus, the means used by those States to protect life (especially the prohibition of

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Dec. of the former Commission on May 19, 1992 and *Boso v. Italy*, No. 50490/99, decision of 5 September 2002) ;

[14] *Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, § 82;

[15] *H. v. Norway*, No. 17004/90, decision of the former Commission of 19 May 1992. The father of a fetus complaint to the Court under Article 3 of the Convention, showing that no measure had been taken to avoid the risk of suffering of the fourteen week old fetus during an abortion. With this occasion, the former Commission applied this provision of the Convention and considered the complaint ill-founded, for lack of evidence of fetal distress, "*having regard to the abortion procedure as describe*d";

[16] See in particular recital 16 of the Directive: "*Whereas patent law must be exercised with respect for fundamental principles safeguarding the dignity and integrity of man*";

[17] Article 53 of the Convention reads as follows: " *Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party*";

abortion) contribute to the achievement of obligations freely consented by the State, according to Articles 2 and 53 of the Convention.

2. The Convention does not create a right to abortion

In response to applications requiring the recognition of a right allowing a violation of the human life, the European Court clearly stated that "*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in a way which would confer to an individual a right to choose to die rather than to live"*[18], and that "*Article 8 cannot, accordingly, be interpreted as conferring a right to abortion"*[19]. Moreover, the Court declared inadmissible several applications against the national legal limitations in that that they did not recognize a right to abortion[20].

The interpretive power is real, but not unlimited: "*the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of evolutive interpretation, derive from these instruments a right that was not included at the outset. This is particularly so here, when the omission was deliberate*"[21]. Moreover and in any case, the Court cannot interpret the Convention *contra legem* creating a new right diametrically opposed to an existing right guaranteed by the text of the Convention. In this respect, the Convention should be read as a whole, the Court recognized that it cannot, on one hand, impose an obligation to protect life by law and, on the other hand, condemn a State because of its policy of preventing abortion or suicide[22].

3. The State has a positive obligation to protect life

The Convention protects every human life by providing in Article 2 the right to "a*nyone*" within the jurisdiction of a Member State to have his life protected "*by law*"[23]. The obligation to protect everyone's life requires the State not only "*to refrain from intentional and unlawful taking of life ("negative obligation" of the State requiring it not to interfere), but also to take appropriate steps to safeguard the lives of those within its jurisdiction* ("*positive obligation*" of the State requiring to guarantee individuals the effective enjoyment of this right)"[24]. The State has a margin of appreciation in determining the means by which this positive obligation will be fulfilled. The role of the Court, analyzing on a case by case basis, is to assess, according to the circumstances of each case, whether the State took the necessary steps to secure "*everyone's right to life*".

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[18] *Pretty v. UK*, No. 2346/02, Judgment of April 29, 2002, § 39;

[19] *A., B. and C. v. Ireland*, No. 25579/05, [GC], Judgment of 16 December 2010, § 214;

[20] In *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*, 26 October 2004, No. 16471/02, the Court declared inadmissible an application against *"the Portuguese law on abortion and on abortion on demand was considered by the applicants as contrary to a number of provisions of the Convention because it prohibits the termination of pregnancy on request of the pregnant woman*";

[21] *Johnston and others v. Ireland*, No. 9697/82, Judgment of 18 December 1986, § 53;

[22] *Haas v. Switzerland*, No. 31322/07, Judgment of January 20, 2011, § 54;

[23] *Pretty v. UK*, No. 2346/02, Judgment of April 29, 2002, § 39;

[24] *H. v. Norway*, No. 17004/90, Dec. of the former Commission on May 19, 1992, *LCB v. UK*, Judgment of 9 June 1998, § 36 and *Pretty v. UK*, No. 2346/02, Judgment of April 29, 2002, § 38;

4. Abortion is a derogation to the right to life

Contrarily to the Court that renders the scope of Article 2 variable according to the margin of appreciation doctrine, most national laws allow abortion by derogation from the principle of the right to life. Therefore, national laws do not question the principle of the applicability of the right to life to the period of life before birth: they maintain this applicability, but allow only a limited possibility to derogate to the rule[25]. Thus, abortion is not a right in itself, it is a *limited* freedom to the principle from which it derogates, that is to say, from the positive obligation to protect life and from the competing interests.

5. If the State allows abortion, it remains subject to the positive obligation to protect life and to struck a fair balance between the competing interests

It is worthy to recall that in the process of the State's appreciation of the various legitimate interests, a fundamental right, such as the right to life and to health, cannot be subordinated or put on the same footing with a right which is not guaranteed by the Convention[26]. Thus, there is no equivalence or possible balance between the right to life enjoyed by every member of the human species and the alleged "right to abortion" of the mother.

The fact that a State allows a derogation to a right does not wave the State's obligations under the Convention with respect to this right and to other rights affected by this measure. The Court recalled several times that <u>*once*</u> the State decides to allow abortion, "*the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*"[27]. The Court has already had the opportunity to identify a number of these fundamental rights and "*legitimate interests involved*" that the State must consider while organizing the access to abortion.

These include the right to life of the unborn child[28], the interests of society, including the protection of morals, one aspect of which is the right to life of the unborn child[29], the legitimate interest to limit the number of abortions[30], parental rights, the mother's right to information, especially about risks associated with abortion, the right to protection of health of the mother, especially concerning the risks to abortion[31], the right to respect for physical integrity against forced abortions, the right to freedom of conscience of individuals and health

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[25] Under the doctrine of *conditional applicability* of the Convention, this recognition in the domestic sphere should not be without consequences for the treaty obligations under Article 2;

[26] *Chassagnou et al.v. France* [GC], Nos. 25088/94, 2833/95 and 2844/95, judgment of 29 April 1999, § 113: "*where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right*";

[27] *A., B. and C. v. Ireland*, No. 25579/05, [GC], Judgment of 16 December 2010, § 249 and *R.R. v. Poland*, No. 27617/04, Judgment of May 26, 2011, § 187;

[28] *H. v. Norway*, No. 17004/90, judgment of the former Commission of 19 May 1992, *Boso v. Italy*, No. 50490/99, decision of 5 September 2002 and *Vo v. France,* No. 53924/00, [GC], judgment of 8 July 2004, §§ 86 and 95;

[29] *Open Door qnd Dublin Well Woman v. Ireland*, judgment of 29 October 1992, § 63, and *A., B. and C. v. Ireland*, No. 25579/05, [GC], judgment of 16 December 2010, §§ 222 and 227;

[30] *Odièvre v. France*, [GC], No. 42326/98, judgment of 13 February 2003, § 45;

[31] *Csoma v. Romania*, No. 8759/05, case communicated on 7 July 2011;

professionals[32], respect for the freedom of health care institutions based on ethical or religious beliefs[33], protection of vulnerable persons[34], the prohibition of eugenics, the protection of human body parts, particularly against commercial exploitation of cells and tissues of embryos and aborted fetuses (especially in cosmetics)[35], or the respect of the dignity of the human body.
The Parliamentary Assembly of the Council of Europe and The United Nations have recently affirmed the necessity of banning sex selective[36]. This is consistent with Article 14 of Oviedo Convention[37], under which "*The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex* (...)". Similarly, we can think that the Court would not tolerate the practice of late abortions - performed after the threshold of viability of the child[38], or selective abortion on grounds such as race of the child or color of his skin, or circumstances of conception (natural or illegitimate child), or the economic resources of the parents or the number of children already conceived (one child policy China). Such abortions do not only affect Article 2, but also articles 3, 12 and 14.

All these rights and legitimate interests, which are not exhaustive, but require to be further clarified with the development of litigations, frame the actions of the State in defining the legal framework of abortion, should it decides to legalize it.

6. Specific rights and interests in the present case

Regarding the present case, it is necessary to develop the following rights and interests:

a. Stigmatization of disabled persons and of their families: "the handiphobia"

Screening for genetic diseases in order to eliminate the foetus rather than to cure them, constitutes a systemic incitement to discrimination and violence on the grounds of health, disability and physical characteristics of the disabled persons. The victims of this structural

[32] *Tysiac v. Poland*, No. 5410/03, judgment of 24 September 2007, § 121 and *R.R. v. Poland*, No. 27617/04, judgment of 26 May 2011, § 206;
[33] *Rommelfanger v. RFA,* No. 12242/86, decision of the former Commission of 6 September 1989;
[34] "*Children and other vulnerable persons are entitled to State protection, in the form of effective deterrence by sheltering them from severe forms of interference in key aspects of their privacy*" and *mutatis mutandis Covezzi Morselli v. Italy*, No. 52763/99, § 104, May 9, 2003; *Stubbings et al. United Kingdom* 24 September 1996, Reports 1996-IV, § 64, *mutatis mutandis*, *Z. and other v. United Kingdom* [GC], no 29392/95, § 73, *A. v. United Kingdom*, judgment of 23 September 1998, § 22;
[35] See Report of Orianne Merger, *L'utilisation des embryons et fœtus issus d'interruptions de grossesse, spontanées ou volontaires*, 2004. University of Paris XII, INSERM, 2004, http://www.ethique.inserm.fr/ ;
[36] On October 3, 2011, the Parliamentary Assembly of the Council of Europe adopted Résolution1829 (2011) and Recommendation 1979 (2011) on sex selective abortion, admitting that abortion has negative effects on society, and therefore abortion cannot but be limited, and where it is legal, it must be regulated;
[37] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV .1997;
[38] The most extreme is the "partial-birth abortion" infanticide performed during labor at term, and allowed in some states in North America;

incentive are not only the embryos and fetuses aborted or destroyed, but also those who survived this screening-elimination procedure, and who are considered to be socially guilty of being born. This stigma is a violation of the rights of the disabled persons[39]. Lawsuits were introduced and are pending before the courts by the families of persons with trisomy (Down's syndrome) denouncing the stigmatizing discourses inciting to the elimination of the persons having trisomy[40].

b. Preserving the freedom of parents to not eliminate their future handicapped child

Social pressure and that of the medical profession in favor of the systemic elimination of disabled unborn children impose a strong constraint on the parents' freedom in choosing to keep the child[41]. Faced with a diagnosis of pathology or the mere announcement of a statistical risk of disease, we must think at the real autonomy of the patient faced with the medical argument, and at means preserve it. Almost always, following the announcement of the illness or disability, medical discourse gains power over the consciousness of patients who rely entirely on medicine. It may be noted that the Universal Declaration on Human Genome and Human Rights requires, in Article 5.2 (b) "*the free, prior and informed consent*" of the person in respect of a diagnosis of the genome of an individual and (c) "*the right of everyone to decide whether to be informed of the results of genetic examination and its consequences should be respected.*" These protective provisions should also apply to the mother or to the parents of the unborn child subject to the diagnosis.
Furthermore, the eugenic pressure is doubled by a lack of information on disability. This is particularly the case of trisomy (Down's syndrome) (see Appendix) which is the subject of negative stereotypes while the very people with Down's syndrome do not suffer and are generally happy.

c. The prohibition of eugenics and genetic discrimination

Prohibition of eugenics is the basis of medical law which is based on the principles of the therapeutic purpose of medicine. The purpose of medicine is to heal; it is not to eliminate the sick or to advance science at the expense of patients. This was a stark reminder during the Nuremberg trials. This principle is reflected in particular by the well-established principle[42] of the primacy of man over the interests of science and society.
- *In European law*, Article 3 of the Charter of Fundamental Rights, on "*the right to personal integrity*," *states that "in the fields of medicine and biology, the following must be respected in*

[39] See in particular the Declaration of the Rights of Mentally Retarded Persons, proclaimed by the UN General Assembly in its resolution 2856 (XXVI) of 20 December 1971;
[40] See for example the action brought against the spokesperson for a hospital in Bucharest to have told a newspaper after the abortion of a child with Down's syndrome 24 weeks that "*a child with Down's syndrome is dead for society. In other words, he torments his parents for at least 20 years*", the court upholding the action. Judgment of trial court of Bucharest No. 786 of January 27, 2012;
[41] See the dissertation of Michele GOUSSOT-SOUCHET, *Confrontée à l'interruption sélective de grossesse, quelle est l'autonomie de la patiente face a l'argumentation médicale? Analyse des aspects éthiques de la décision d'interruption sélective de grossesse pour anomalie grave d'un jumeau bichorial*, Paris Descartes University, INSERM, November 2009. See also Memory Research Ethics Georges de Paris 5 ABITAYEH, *Complexité du consentement dans l'interruption médicale de grossesse,* http://www.ethique.inserm.fr;
[42] See in particular Article 2 of the Oviedo Convention;

particular (...) the prohibition of eugenic practices, in particular those aiming at the selection of persons. " The adverb *particularly* indicates that it is eugenics as such which is forbidden, and that this prohibition is not conditioned to the purpose of selecting persons. This Article 3 of the Charter also applies before birth, as evidenced by the following provision on the prohibition of reproductive cloning of human beings, and the interpretation made by the Grand Chamber of the Court of Justice in the *Brüstle* case.
- *At national level*, eugenics is also widely prohibited. For example, French law establishes the principle of respect for the integrity of the human species, which prohibits, among other things, eugenics described as a "*crime against mankind*."

d. The prohibition of discrimination on grounds of genetic heritage[43] is one of the requirements arising from the prohibition of eugenics

This principle is well established, and we recall that the Oviedo Convention states that "*Any form of discrimination against a person because of his or her genetic heritage is prohibited*" (Article 11). Similarly, the Universal Declaration on Human Genome and Human Rights[44] states: "*everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics*" (Art. 2) and therefore, *" no one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity* " (Article 6).

e. The transformation of prenatal medicine into medical eugenics

The systematization of the couple "*screening-suppression*" has become an obstacle to scientific and human progress to the point that scientists and doctors are publicly concerned. Thus, in France alone, there is an initiative which to date includes nearly 900 doctors and health professionals involved in prenatal medicine[45], to alert about the evolution of prenatal diagnosis, particularly on screening for Down's syndrome. They ask in particular 1) *the balance of information given to women with Down's syndrome*, 2) *loosen the constraint of widespread screening and* 3) *organize a national debate on the issue of eugenics*[46].

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[43] Article 6 of the Universal Declaration on the Human Genome and Human Rights of UNESCO (11 November 1997), Article 11 of the Oviedo Convention; Steering Committee on Bioethics (CDBI) Working Group on protection of the embryo and fetus (CDBI-CO-GT3), June 19, 2003;
[44] Adopted within UNESCO November 11, 1997;
[45] Committee to Save the Prenatal Medicine - http://www.sauverlamedecineprenatale.org/ ;
[46] We repeat the summary of their appeal:

1 / Rebalancing the information given to women of Down's syndrome: To enable decisions knowingly, you must include information on Down's syndrome the contribution of families and community networks directly affected by this handicap. These people will witness the everyday life with children with Down's syndrome, also taking account of the positive dimension of their existence.

2 / loosen the constraint widespread screening: Find the freedom to prescribe or not testing. This is the system rebuild the confidence of practitioners: they must be responsible to propose tests, in conscience, depending on the health situation of women (age, background) and his real expectation. Because it is also to meet some patients who say they are harassed by the proposals of systematic tests.

3 / To organize a national debate on the issue of eugenics: It is necessary democratic debate. It should aim at the

f. In principle, predictive genetic testing (PGT) should have an exclusively medical or therapeutic purpose

One of the consequences of the fundamental principle of the therapeutic purpose of medicine is that predictive genetic tests themselves should also have a medical purpose. Thus, the Oviedo Convention lays down the following principle: "*tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counselling*" (Article 12). Likewise, the Recommendations of PACE No. 1046 of 1986[47] states that " *All interventions on the living embryo in vitro or in utero or on the foetus whether inside or outside the uterus shall be permitted, unless its object is the well-being of the child to be born and the promotion of its development*".

Regarding genetic diseases without treatment, screening has no therapeutic or medical purpose, it is neither a "*care*" nor "*treatment*": it is an "*act*" achieved in the medical context, which violates the fundamental principle of the therapeutic purpose of medicine, orienting it toward the elimination of the patient rather than of the disease, and ultimately towards eugenics. In fact, eugenics is tolerated in many countries, provided that it is linked and limited to the individual sphere.

g. The risk of systematic screening

Faced with this prospect of eugenics, the last barrier that legislators seem to oppose is to refuse the institutionalization of eugenic policies that cause the systematic screening. The Comité Consultatif National d'Ethique français (CCNE) in its Opinion No. 107 states in this sense: "*The criterion which allows for differentiating Down's syndrome screening (with its consequences as to the medically-motivated abortion) from a eugenic policy is that none of its successive steps (screening, diagnosis, termination) are mandatory. Nothing will be imposed to couples*"[48]. It immediately adds, "*The difference between the obligation to speak and encouragement to proceed is both fundamental and fragile*." (page 12). In the same sense, after noting that the prenatal diagnosis "*raises also ethical issues related to the decision whether to continue or not the pregnancy in cases of an unfavorable outcome*" and that "*the risk of excessive use of techniques (possibility of eugenics, sex selection or other characteristics for non-medical reasons) as well as the risk of disclosure or improper use of genetic information from the PGT also raise ethical problems*", the European Group on Ethics, in its opinion[49] also indicates - against the systematization of the PGT- that "*no prenatal genetic testing must be imposed by law, by public health services or by any other*

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practical application prenatal medicine, and especially with Down's syndrome, the disposition of the bioethics law in 1994 stating that "any eugenic practice in the organization and selection of persons is prohibited";

[47] Recommendation on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial upheld this principle;

[48] See National Consultative Ethics Committee for Health and Life Sciences, Opinion No. 107, " Opinion on ethical issues in connection with antenatal diagnosis: Prenatal diagnosis (PND) and Preimplantation Genetic Diagnosis (PGD)", p. 12 available here: http://www.ccne-ethique.fr/docs/Avis_107.pdf ;

[49] Group of Advisers on the Ethical Implications of Biotechnology to the European Commission, Opinion No. 6 *on the ethical aspects of prenatal diagnosis;*

institution or person. Tests should be done only upon the request of the woman or of the couple after they have been fully informed, namely by genetic counseling."(paragraph 2.2).

It is on this systematization that the Court is called to decide on: by inviting the Court to state that she had against the State a subjective right to benefit from the "screening-elimination" procedure of her child with Down's syndrome, the applicant proposes to the Court to engage itself in this slippery slide, which from tolerating individual eugenics, leads to the institutionalization of eugenics.

The above developments suffice to answer this question and oppose the applicant's request. However, there are also some confusions to be pointed out which may induce in error the Court.

II. Errors to dispel

Even though the Court, notably the Grand Chamber, has clearly stated that there is no right to abortion deriving from the Convention, some confusion has arisen in the recent case-law of the Court aiming to create such a right from a misguided basis which should be denounced.

1. The difference between medical care (without a therapeutic aim) and medical treatment (with a therapeutic aim)

The application submitted to the Court introduces a confusion between medical care (without a therapeutic aim) and care or treatment (with a therapeutic/medical aim) with the purpose of applying to the Down's syndrome screening test the same legal rules as for care or treatment with a therapeutic/medical aim. It is important to understand that there is a difference of nature of these two acts, and that this difference explains the existence (and requires the application) of different legal rules for different medical acts, depending on whether or not they have a therapeutic purpose. The provisions of the *Medical Treatment Law* invoked by the applicant (sections 23 and 41) only concern "*medical treatment*" and expose the general principles of medical law concerning doctors' obligations and the rights of patients. On the other hand, the practice of PGT, dealt with by Ordinance No. 324, is part of "*antenatal and prenatal care*" and it is not a "*medical treatment*": it is a screening. It is, therefore, an error to pretend to apply the provisions of the *Medical Treatment Law* to the screening.

The recent developments in the law introduced exemptions allowing for the harm of life, dignity, and in particular to the integrity of the person in cases where such acts have a non-therapeutic purpose for the person herself. This is case of laws decriminalizing abortion[50], euthanasia, contraceptive sterilization[51], and scientific research on the person (including the embryo) without a direct personal benefit for the person herself, etc. These acts

[50] Both surgical and medical ;
[51] In France, described by "the Supreme Court in an opinion (6 July., 1998, D.: JCP G 1998, IV, 3005, Juris-Data no. 1998-003278) to affect the integrity of the human body, prohibited by Article 16-3 of the civil Code, contraceptive sterilization is now rendered lawful by the legislature (L. No. 2001-588, July 4. 2001: JCP G 2001, III, 20528);

depart from the principle of therapeutic purpose of medicine, and this is why they follow a special legal regime which seeks to protect other rights and interests involved, including the principles of dignity, integrity, primacy of human beings, respect for the consent, and limitation of the harm to the physical integrity of the person.[52] The World Health Organization (WHO) has issued some recommendations recognizing that the main purpose of the genetic screening should remain the prevention and early treatment of diseases, and that they should not be in principle used in the absence of treatment.[53]
Applying to the screening of Down's syndrome the qualification and the legal rules applied to a medical treatment would be a serious error implying serious consequences, both anthropological and practical: this would systematize screening and identify medicine with eugenics. As stated by WHO, "*Genetic testing can be done on a voluntary basis and not on a mandatory one*"[54]; this is true for all non-therapeutic medical procedures.
We should also add that in the present case, applying the sale legal rules to screening of Down's syndrome as to medical treatments would also have the effect of retroactively imposing new obligations on the doctor.

2. The distinction between the health of the mother and that of her unborn child

It is also worthy to clear up the confusion that tends to confound the mother and the child. With regard to their bodies, the body of the child it is not absorbed by the mother's body. Medically and legally, it is *distinct* (in medicine, the unborn child is a patient). The Commission stated in this sense that "*Article 8 § 1 of the Convention could not therefore be interpreted as meaning that pregnancy and its termination were, in principle, solely a matter of the private life of the mother*" and "*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.*"[55]

As to their health, the health of the mother is not confounded with the health of the child. Thus, in the present case, the mother is not suffering from any illness, her health is not threatened by her child's trisomy. The case with Mrs. Kruzmane differs from other cases related to pathological pregnancies[56] where the health of the mother and the child's life were linked. She can not claim to be affected in her right to health and therefore, the applicant has no direct or indirect "*victim status*" under the Convention.

3. The right to respect for physical integrity

In the case of *R.R. v. Poland*, the Court, in its understanding of "*right to respect for physical integrity*" contradicts the meaning of this right, by making it in substance an expression of the

[52] See Puppinck, PhD, author of the standards in bioethics, Dir. Gerard Memeteau, Faculty of Law, Poitier, 2009, p. 500;
[53] Cited in the Report of the French Agency of Biomedicine, Current status of prenatal diagnosis in France, 2008;
[54] *WHO guidelines, 1998, Ibid, quoted p. 10;*
[55] *Bruggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Commission Report of July 12, 1977, § § 59 and 61;
[56] *Tysiac v. Poland*, No. 5410/03, judgment of 20 March 2007, § § 119, 120 and 127;

"*right to dispose of one's body*."[57] Or, the right to physical integrity is the fundamental principle of criminal law and medical law according to which *one cannot harm the integrity of the human body except in case of medical necessity for the person*.[58] Abortion, as an act involving penetration of the physical integrity of the mother and fetus is in itself a harm of the integrity of the human body. The Section of the Court has therefore run completely counter the meaning of this right.

4. As to the impossibility of the applicant to "choose"

It is to be noted the hypocrisy of the statement according to which the prejudice of the applicant lies in her impossibility to "*choose whether to continue the pregnancy*". Her choice is without doubt. It is obvious that what it is at stake here it is not the ability to choose, but the fact that she could not have an abortion. Moreover, in order to complain against the fact that she could not "*chose*", it is to be assumed the existence on one hand of the recognition of the legal "freedom" to choose – which does not exist with respect to abortion and on the other hand the fact that this freedom was *constrained* (as for the freedom to choose one's own religion), which is not the case in the present case.

5. Article 8 does not guarantee a right to a child, even less a "right to a healthy child"

It should also be noted that neither Article 8 nor Article 12 guarantee the right to a child[59], or the "*right to a healthy child*." On this point, we refer to our observations submitted in the cases of *Costa and Pavan v. Italy* and *S.H. v. Austria*[60] in which we showed that only the desire to procreate *naturally* is included in the field of the right to respect for private life, while the desire to procreate *artificially* exceeds private life, because it necessarily requires the action of society and involves other rights and social interests.

6. The Convention does not guarantee a right to a certain standard or to a particular type of medical care

This is constantly stated by the Court[61], including in the Section's judgment in *S. H. v. Austria*: *"Such reasons may be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general, and the Court would emphasize that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation."* (§ 74). States have no positive obligation to legalize artificial procreation or, *a fortiori,* preimplantation genetic diagnosis or prenatal diagnosis.

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[57] The alleged "right to dispose of her body" is contrary to the fundamental principle of the inalienability of the human body;

[58] According to the wording of Article 16-3 of the French Civil Code;

[59] *S. H. v. Austria*, No. 57813/00, admissibility decision of 15 November 2007, § 4. *X and Y v. United Kingdom*, No. 7229/75, December 15, 1977, 12 DR 32. *Margarita Šijakova and Others v. "The Former Yugoslav Republic of Macedonia*" (December), No. 67914/01, 6 March.2003 "the right to procreation is not Covered by Article 12 or Any Other Article of the Convention";

[60] Elles sont publiées sur le site http://eclj.org/Cases/ ;

[61] See especially *Tysiac v. Poland*, No. 5410/03, March 20, 2007, *Cyprus v. Turkey*, GC, No. 25781/94; *Nikky Sentges c. Netherlands,* No. 27677/02, December;

After this overview of the applicable principles and pitfalls to avoid in developing a coherent body of case-law on eugenics and abortion, it remains to be addressed the inadmissibility reasons of the present application, adding, if it should have been necessary, new grounds for rejecting the application.

III. QUESTIONS OF ADMISSIBILITY

The case raises several questions of admissibility:

- Non-exhaustion of domestic remedies, as the applicant has not submitted, not even in substance, her complaint concerning the interpretation by the domestic courts of the law on medical treatment ("*Medical Treatment Act*") and to the manner in which this interpretation has had an impact on her private life.

- Incompatibility ratione personae, as it was not established whether, according to the domestic law, the applicant was in one of the situations allowing an abortion, in order for her to consider herself a "*victim*" of the alleged negligence of the doctor. In addition, the applicant knew about the possibility of having access to the AFP test, especially since she had already given birth to a child with a genetic disease (§ 7). The situation of the applicant is different than the one of the applicant in the *RR v. Poland* case, where the applicant had "*persistently but unsuccessfully sought access to prenatal genetic testing*"[62]. The applicant never asked her doctor for a test.

- Incompatibility ratione materiae, as the applicant is trying to challenge the outcome of the criminal proceedings against the doctor for negligence. Or, the Convention does not guarantee a right to open criminal proceedings against third parties or a right to convict them[63].

- Fourth instance, as the applicant's complaint is essentially challenging the outcome of both criminal and civil procedures. The applicant asks the Court to reestablish the facts already established by the domestic courts (regarding the negligence of the doctor) and to substitute its interpretation of domestic law (erroneously by confusing *act* and *treatment*), and this even though the applicant did not raise this complaint before the domestic courts. Or the Court, even if it operates a European supervision of the compliance with the Convention, it can not exceed the limits of its jurisdiction giver by the contracting States, by their sovereign will, according to Article 19 of the Convention[64]. The Court must respect the autonomy of each legal system and accept that it is not competent to deal with errors of fact or law allegedly committed by a domestic court, unless it is "*arbitrary, blatant, and obvious,*

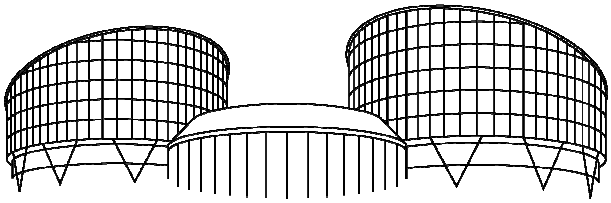
[62] *R. R. v. Poland*, No. 27617/04, judgment of 26 May 2011, § § 196, 197;
[63] *Priebke v. Italy*, No. 48799/99, December April 5, 2001, *Serraino v. Italy*, No. 47570/99, December January 10, 2002 and *Perez v. France* [GC], No. 47287/99, § 70;
[64] Article 19 of the Convention states: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up a European Court of Human Rights."

contrary to justice and common sense,"[65] and insofar as they infringe rights and freedoms protected by the Convention. It can not assess for itself the elements of fact or law which led a national court to adopt a decision rather than another one. Otherwise, it would have set itself up as judge of the third or fourth instance and it would ignore the limits of its mission.[66]

Finally, we would like to add a series of supporting documents listed below on Down's syndrome and its screening.

[65] *Sisojeva et al. v. Latvia* [GC], § 89 [GC], § 89: the Court can not challenge the findings and conclusions from national bodies, particularly with regard to establishing the facts of the case, the interpretation and application domestic law, eligibility and assessment of the evidence at trial, the substantive fairness of the outcome of civil litigation and the guilt or innocence of an accused in a criminal case. The only event that the Court may exceptionally submit such findings and conclusions in question is if they are tainted, contrary to justice and common sense, itself a violation of the Convention;
[66] *García Ruiz v. Spain* [GC], § 28; *Perlala v. Greece*, § 25.

STATEMENT OF FACTS PROVIDED BY THE COURT



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

Application no. 33011/08
by Anita KRŪZMANE against Latvia

STATEMENT OF FACTS

THE FACTS

1. The applicant, Ms Anita Krūzmane, is a Latvian national who was born in 1961 and lives in Rīga Parish. She is represented before the Court by Ms S. Olsena, a lawyer practising in Rīga.

A. The circumstances of the case

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

1. Antenatal medical care

3. On 18 October 2001 the applicant, who was forty years old at that time and who had two children, underwent a gynaecological examination at the Ādaži Hospital (*SIA Ādažu slimnīca*). Her doctor, L., estimated that the applicant was in the fifth or sixth week of pregnancy.

4. According to the applicant's medical records examined by the national courts, on 15 January 2002, in her eighteenth week of pregnancy, the applicant had an appointment with doctor L. The doctor suggested that the applicant have a consultation with a specialist and, *inter alia*, issued a referral for the applicant to undergo an alpha-fetoprotein ("AFP") test. The applicant later alleged that she had not in fact been referred for the AFP test by doctor L. and, consequently, had not taken the test.

5. From 24 to 31 January 2002, the applicant was admitted to the Ādaži Hospital as an inpatient due to feeling generally unwell. From February to June 2002 the applicant regularly consulted doctor L. On 5 June 2002 the applicant gave birth to a daughter suffering from Down's syndrome.

2. Examination of the quality of the applicant's medical care

6. After the birth of her daughter, the applicant complained to the Inspectorate for Quality Control of Medical Treatment (*MADEKKI* – "the Inspectorate") about the quality of the antenatal medical care provided by L. In particular, the applicant complained that the doctor had failed to refer her for the AFP test, which would have indicated the risk of foetal abnormality.

7. On 25 July 2002 the Inspectorate noted that, according to the applicant's medical records, on 15 January 2002, in the eighteenth week of the applicant's pregnancy, doctor L. had referred her for the AFP test. However, the doctor had failed to ensure that the applicant took the test. It also established that the applicant had failed to inform the doctor that her eldest son had suffered from a congenital genetic disorder. It established that the applicant had received antenatal medical care in accordance with national law, save for the AFP test. The Inspectorate concluded that doctor L. had failed to ensure that the applicant took the AFP test, which was contrary to Ordinance No. 324 concerning antenatal and prenatal care, issued by the Ministry of Welfare on 20 October 1995. The doctor was given an administrative fine.

3. Attempts to institute criminal proceedings

8. On 20 October 2004 the applicant asked the Office of the Prosecutor to investigate alleged negligence on the part of doctor L. She also asked the office to investigate alleged falsification of her medical records. According to the applicant, the doctor had entered data into her medical records after the fact, including a referral of her for the AFP test. To prove the allegation, she submitted an unauthorised copy of her medical records made in 2002 which did not contain a referral for the AFP test.

9. In November 2004 and April 2005 the Saulkrasti Police Department refused to institute criminal proceedings. After having questioned doctor L., the investigators established that the applicant had been referred for the test but that she had not turned up for it. In addition, the investigators found that there were no technical means available to precisely establish the time when the contested data had been entered into the applicant's medical file. The Office of the Prosecutor overturned both decisions and remitted the complaint for further investigation. On 30 September 2005 the Saulkrasti Police Department repeatedly refused to institute criminal proceedings. It established that it was not possible to determine whether the disputed referral for the AFP test had been missing from the applicant's medical records in 2002.

10. Upon an appeal by the applicant, on 17 May 2006 the Office of the Prosecutor revoked the last-mentioned decision and the applicant's medical records were sent for technical analysis. The experts were asked to compare the original medical records and the copy of 2002 and establish whether the original documents had been modified. The expert report of 7 July 2006 concluded that the medical records were not falsified be that they had been supplemented with new information over an extended period of time. On 12 September 2006 the applicant was informed that the criminal proceedings had been terminated owing to the expiry of the statutory limitation period.

4. Civil proceedings

11. Meanwhile, on 16 August 2005 the applicant submitted a statement of claim for damages against the Ādaži Hospital. The applicant contended that owing to the defendant's negligence she had been unable to find out about any foetal abnormality and, thus, decide whether to terminate or continue the pregnancy. The applicant claimed compensation for non-pecuniary and pecuniary damage, compensation for lost wages and a lump-sum maintenance award for her daughter. It appears that she had also unsuccessfully requested the court to order a forensic expertise of the original medical records.

12. The lower court dismissed the claim. It concluded that there was no causal link between the actions of doctor L. and the birth of the applicant's child. Even if doctor L. had been given an administrative fine for her failure to ensure that the applicant took the AFP test, this was insufficient to prove that doctor L. had been at fault. As it could not be proved that the doctor had falsified the applicant's medical records, the court held that the applicant had failed to turn up for the AFP test and to inform the doctor of her eldest child's condition.

13. Upon an appeal by the applicant, on 17 April 2007 the Civil Chamber of the Supreme Court (*Augstākās tiesas Civillietu tiesu palāta*) examined the evidence with respect to falsification of the applicant's medical records in detail and dismissed the applicant's allegations. The court concluded that the applicant had been referred for the test and that the doctor could not be held at fault for the child's genetic condition. It also repeated the lower court's reasoning that no causal link could be established between the actions of the doctor and the child's condition. It also noted that

> "The result of the AFP test ... could neither confirm nor exclude genetic abnormality of a foetus, but would serve as an indication for further examination.
>
> Therefore the [applicant's] allegations that the results of the AFP test would have provided her [with] an opportunity to chose whether to continue with or terminate the pregnancy could not in itself serve as a basis to uphold the claim."

The court found no infringement of the applicant's rights and the claim for damages was accordingly dismissed.

14. In an appeal on points of law subsequently filed by the applicant, she argued that the appellate court had failed to correctly assess whether the actions of the defendant, i.e. the failure to ensure the AFP test, had infringed the applicant's right to find out about any foetal abnormality. On 26 September 2007 (the full text of the judgment was made available on 22 October 2007) the Senate of the Supreme Court dismissed the applicant's appeal on points of law, on the basis that it mainly concerned the assessment of evidence already examined by the lower courts.

15. On 1 August 2007 the applicant asked the Senate of the Supreme Court to reopen the civil proceedings on the basis of newly discovered evidence. In particular, she based her application on the expert report of 7 July 2006 (see above) of which she had not previously been aware. On 5 December 2007 the Senate dismissed the applicant's request.

B. Relevant domestic law

1. Medical Treatment Law

16. Section 23 provides that a patient has the right to refuse, in writing, to receive medical treatment. The patient's doctor is responsible for providing information on the consequences of the refusal. If the patient has agreed to follow a medical treatment plan, s/he is obliged to obey the instructions of medical personnel.

17. According to Section 41, a patient's doctor should explain a medical treatment plan to the patient and inform him or her of the possible complications of the prescribed treatment and medicines.

2. Ordinance No. 324 concerning antenatal and prenatal care, issued by the Ministry of Welfare on 20 October 1995

18. Pursuant to Paragraph II (3), as from 1 January 1996 medical institutions were ordered to ensure antenatal care in accordance with the provisions set out in Annex No. 1, the "Antenatal programme". The Annex provided that from the sixteenth to eighteenth week of pregnancy a certified general practitioner or gynaecologist shall, *inter alia*, refer patients older than thirty-five years old for an AFP test.

COMPLAINTS

The applicant complains under Article 8 of the Convention that, owing to the negligence of a doctor, she was denied adequate and timely medical care in the form of an antenatal screening test which would have indicated the risk of her foetus having a genetic disorder and which would have allowed her to choose whether to continue the pregnancy. She also complains that the national courts, by wrongly interpreting the Medical Treatment Act, failed to establish an infringement of her right to respect for her private life in this regard.

The applicant complains under Article 6 of the Convention of inequality of arms during the civil proceedings, in that the courts, without sufficient reasoning, dismissed her request that they order a forensic assessment of a piece of evidence submitted by the defendant.

She further complains under Article 6 that:

(i) the decision by which the Senate of the Supreme Court dismissed her application to reopen the civil proceedings was not subject to appeal;

(ii) she was deprived of access to court, in that she sustained considerable financial losses caused by the obligation to pay the defendant's expenses incurred during the civil proceedings; and

(iii) the investigation of her complaint regarding alleged falsification of her medical records was excessively lengthy.

The applicant also complains under Article 8 of the Convention of a violation of the protection of her personal data.

QUESTIONS TO THE PARTIES

1. Has there been unjustified interference with, or failure to respect, the applicant's private life within the meaning of Article 8 of the Convention by the fact that the applicant had allegedly failed to receive complete antenatal care as prescribed by the domestic law?

2. Was the expert report prepared in the course of the criminal proceedings available to the civil court?

The Parties are requested to submit other relevant materials from the civil proceedings and the investigation pursued by the Inspectorate for Quality Control of Medical Treatment concerning the alleged negligence of doctor L., especially the materials containing the latter's submissions about the contested events.