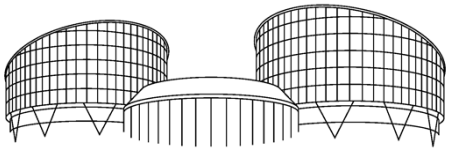

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF Y.P. v. RUSSIA

(Application no. 43399/13)

JUDGMENT

Art 3 • Inhuman and degrading treatment • Sterilisation without consent not reaching requisite threshold of severity in case circumstances • Decision made in context of unexpected and urgent situation, after thorough consideration by a medical panel, and driven by genuine concerns for health and safety • Absence of bad faith on doctors' part
Art 8 • Private life • Failure of doctors to seek and obtain express, free and informed consent for sterilisation, as required by domestic law ● Failure of national courts to establish responsibility • Art 8 procedural safeguards not respected • No redress for infringement

STRASBOURG

20 September 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Y.P. v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Mikhail Lobov, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 43399/13) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Y.P. ("the applicant"), on 11 June 2013;

the decision to give notice to the Russian Government ("the Government") of the complaints under Articles 3 and 8 of the Convention concerning the applicant's sterilisation and the lack of a judicial response in that connection and to declare the remainder of the application inadmissible;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 24 May and 5 July 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the applicant's sterilisation in a public hospital without her informed consent.

THE FACTS

2. The applicant was born in 1980 and lives in Krasnoyarsk. She was represented by Mr P. Tomarovskiy, a lawyer practising in Krasnoyarsk.

3. The Government were initially represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and later by his successor in that office, Mr M. Vinogradov.

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

I. BACKGROUND EVENTS

5. On 18 September 2007 the applicant had an urgent operation in municipal hospital no. 4 in connection with an ectopic pregnancy. Her right fallopian tube was removed.

6. On 24 September 2007 the applicant was discharged from hospital with a recommendation that for the next six months she avoid getting pregnant. It appears that she became pregnant three months after the surgery.

II. THE APPLICANT'S STERILISATION

7. On 1 August 2008 the applicant, who was then in the thirtieth or thirty-first week of pregnancy, was admitted to municipal maternity hospital no. 2 showing symptoms of rhesus incompatibility and excess amniotic fluid (polyhydramnios).

8. On 10 August 2008, after examining the applicant, doctors at the hospital decided to perform an emergency Caesarean section as the foetus's condition had deteriorated and there were signs of hypoxia.

9. The applicant signed a consent form for a Caesarean section without sterilisation. The consent form read as follows:

> "[I]n view of her diagnosis, pregnancy at 32-33 weeks, rhesus negative, suspected rhesus incompatibility, polyhydramnios, ..., hypoxia of the foetus, [the applicant] needs to undergo a Caesarean section without sterilisation. [The applicant] has been informed that examinations and the operation will be conducted in accordance with the standards set at maternity hospital no. 2, aiming to protect her from all possible complications. Nevertheless, complications such as bleeding during or after the operation, obstruction of the bowel, healing of the suture by secondary adhesion, or injury to the bladder, ureters or bowel, as well as the expansion of the scope of the operation, cannot be completely ruled out. On the basis of the foregoing, [the applicant] gives her consent to the Caesarean section and undertakes to follow all the doctor's recommendations."

10. On 11 August 2008 doctors at the hospital performed a Caesarean section on the applicant. They removed the baby, who was suffering from acute respiratory failure and a number of other serious complications. The baby later developed cerebral palsy.

11. During surgery the doctors also identified a rupture of the uterus, without bleeding. A medical panel was urgently convened, including the hospital's chief medical officer. They discussed whether to perform a hysterectomy or to suture the rupture and keep the uterus. Given the applicant's age, 28 years, the doctors decided to suture the rupture and keep the uterus. However, given the two surgical interventions on the uterus, the Caesarean section and the hysterography (repair of the uterus), the doctors decided that there was a real risk that the uterus would rupture in a future pregnancy, which could endanger the applicant's life, and that therefore she should be sterilised. They then sealed the applicant's left fallopian tube.

12. According to the applicant, she was told the day after the surgery that her only remaining fallopian tube had been sterilised, but she was not given any further details about what the procedure meant. The doctor in charge advised the applicant that her "husband does not need to know about the sterilisation" because "men have a negative view of such things". According to the applicant, she did not clearly understand the consequences of the procedure.

13. Two years later the applicant and her husband decided to have a child and as she could not get pregnant, she saw a gynaecologist, who explained that she could only get pregnant via *in vitro* fertilisation because she had been sterilised during the Caesarean section in 2008.

III. CIVIL PROCEEDINGS

A. The applicant's claim

14. On 22 August 2011 the applicant brought a civil claim against maternity hospital no. 2 in the Sovetskiy District Court of Krasnoyarsk ("the District Court"), seeking compensation in respect of non-pecuniary damage in connection with her sterilisation. She alleged that the doctors at the defendant hospital had acted in breach of existing legislation and regulations in sterilising her without her consent. She argued, in particular, that sterilisation had not been justified by the need to save her life as there had been no immediate risk to it at the time of the surgery. She complained that her right to choose to become a mother had been violated. She further submitted that after the sterilisation she had consulted various gynaecologists, who had confirmed that the state of her health, and in particular the condition of her uterus, did not show that she should avoid pregnancy, and that if she had not been sterilised she could have conceived naturally, without recourse to *in vitro* fertilisation.

B. The defendant hospital's submissions

15. The defendant hospital's representatives argued that she had been sterilised as part of preventive surgery aimed at saving her uterus. They submitted that the panel of doctors had considered two options during surgery: a hysterectomy, as recommended in cases of a ruptured uterus, or preserving the uterus and sterilising the applicant to prevent her from getting pregnant, which could possibly cause a new rupture of the uterus and put her life at risk. In either case, the applicant would have become infertile, but the second scenario had avoided a number of complications for the applicant's well-being. The doctors had thoroughly considered the consequences of each measure for the applicant's health and had decided against a hysterectomy. They had therefore done what, in their view, had been in the applicant's best

interests. The representatives argued that the decision about which path to take had had to be taken quickly during surgery, when it had been impossible to ask for the applicant's consent for sterilisation as she had been under the effects of strong medication.

16. The defendant hospital also argued that, in the applicant's case, sterilisation had not been the same as the intervention described in section 37 of the Healthcare Act (see paragraph 25 below), to which the provisions of that Act would have applied. According to the defendant hospital, the aim of the intervention in the applicant's case had been different as it had been aimed at preserving her uterus and eliminating any future danger to her life. They insisted that the applicant's consent to the expansion of the scope of the operation could be understood as her consenting to sterilisation.

C. Expert report of 21 May 2012

17. The District Court ordered a forensic medical expert examination. A panel of eight experts was appointed to establish how and when the rupture of the uterus had occurred; whether there had been any medical grounds for sterilisation of the applicant at the maternity hospital; whether it had been possible to keep the uterus without sterilisation; whether the applicant had been able to give her consent to or refuse sterilisation during the Caesarean section; whether any damage to the applicant's health had been caused by sterilisation, and, if so, how severe that damage had been; whether the medical services provided to the applicant had been of a high quality, and, if there had been any defects in those services, by whom and when they had been caused; and whether the doctors had complied with the existing methods and standards for such surgery.

18. In their report of 21 May 2012, the experts stated that the doctors' decision to keep the uterus but take away her ability to reproduce had been reasonable because any future pregnancy would threaten the applicant's life. The experts also pointed out that in accordance with Ministerial Decree no. 303 (see paragraph 26 below), sterilisation could be performed only with the woman's consent, and such consent had not been obtained in the present case.

19. The experts stated that the sterilisation procedure had been performed in accordance with existing standards, except for the lack of informed consent by the patient. At the same time, the experts emphasised that there had been "medical grounds" for sterilisation and that even if informed consent had not been given, the intervention had been justified.

20. The experts concluded that sterilisation had not caused any damage to the applicant's health as she had kept her sexual function and could still conceive by *in vitro* fertilisation. The experts noted that in cases like the applicant's, when a woman had tubal infertility, she and her partner were entitled to *in vitro* fertilisation free of charge.

D. Court decisions

21. By a judgment of 21 September 2012, the District Court dismissed the applicant's claim. It relied on the conclusions of the expert report of 21 May 2012 and held that the lack of informed free consent in the applicant's case had not breached domestic law, in particular Ministerial Decree no. 303 (see paragraph 26 below), as there had been "medical grounds" for sterilisation. Those grounds had been established during the operation by a panel of doctors who, having discovered a ruptured uterus, had had to decide as a matter of urgency on the scope of the surgery, given that the rupture could have provoked heavy bleeding and endangered the applicant's life. The court noted that in those circumstances even a hysterectomy (removal of the uterus) would have been justified; however, the doctors had decided to keep the uterus, suture the rupture and sterilise her as part of an operation to save her organs.

22. The District Court also noted, with reference to the conclusions of the expert report of 21 May 2012, that the applicant's condition during surgery had prevented any conscious action on her part. It also considered that the suturing of the ruptured uterus and sterilisation had been the best solution in the applicant's case and had been performed as an expansion of the scope of the Caesarean section, to which the applicant had consented. The court agreed with the experts that sterilisation had been performed in order to protect the applicant's life.

23. The District Court dismissed the applicant's arguments about conflicting conclusions in the expert report, which, on the one hand, had stated that sterilisation had been necessary as a future pregnancy would put the applicant's life at risk, and, on the other hand, had stated that she could conceive by *in vitro* fertilisation. The court saw no conflict in those conclusions and quoted the experts' statements on the danger to the applicant of any future pregnancy. It noted that as she had been made fully aware of that danger, she was free to decide whether or not to try *in vitro* fertilisation.

24. On 12 December 2012 the Krasnoyarsk Regional Court ("the Regional Court") upheld the decision of the District Court on appeal. The Regional Court agreed with the District Court's conclusion that sterilisation had been performed as an extension of the Caesarean section, and that there had been medical grounds for sterilisation in the applicant's case.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. Healthcare Act

25. The Law on basic principles of public health (Federal Law no. 5487-1 of 22 July 1993 – "the Healthcare Act"), as in force at the relevant time, provided as follows, in so far as relevant:

Section 30: Rights of the patient

"When seeking medical advice and receiving medical treatment, a patient has the right to ... informed free consent to medical intervention ... [as well as the right to] refuse medical intervention."

Section 32: Consent to medical intervention

"Informed free consent by [the person concerned] is a prerequisite for medical intervention.

Where the condition of the person concerned does not allow him or her to express his or her will and medical intervention is urgent, the decision to perform [a medical intervention] shall be made by a panel of doctors ..."

Section 36: Artificial termination of pregnancy

"Every woman has the right to independently decide whether to become a mother."

Section 37: Medical sterilisation

"Medical sterilisation as a special procedure to deprive [the person concerned] of the ability to reproduce or as a birth control method may be carried out only upon a written application by a person who is at least 35 years old and has at least two children. If there are medical grounds for sterilisation and the patient has consented, it can be conducted irrespective of age and the number of children."

B. Ministerial Decree no. 303

26. Decree no. 303 of 28 December 1993 of the Russian Ministry of Health, in force at the material time, reiterated the principles set out in section 37 of the Healthcare Act. It also provided a list of medical grounds for sterilisation.

II. INTERNATIONAL MATERIALS

A. Council of Europe documents

The Convention on Human Rights and Biomedicine

27. The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine of 1997, also known as the Convention on Human Rights and Biomedicine or the Oviedo Convention (Council of Europe Treaty Series No. 164), is the only binding international treaty in the field, which is ratified by 29 States and signed by 7 others. The Russian Federation has not signed or ratified the Oviedo Convention. Its relevant provisions read as follows:

Article 1 – Purpose and object

"Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.

..."

Article 4 – Professional standards

"Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards."

Chapter II – Consent
Article 5 – General rule

"An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.

..."

Article 8 – Emergency situation

"When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned."

28. The relevant parts of the Explanatory Report to the Oviedo Convention provide:

"Article 4 – Professional standards

...

33. Further, a particular course of action must be judged in the light of the specific health problem raised by a given patient. In particular, an intervention must meet criteria of relevance and proportionality between the aim pursued and the means employed. Another important factor in the success of medical treatment is the patient's confidence in his or her doctor. This confidence also determines the duties of the doctor towards the patient. An important element of these duties is the respect of the rights of the patient. The latter creates and increases mutual trust. The therapeutic alliance will be strengthened if the rights of the patient are fully respected.

...

Article 5 – General rule

34. This article deals with consent and affirms at the international level an already well-established rule, that is that no one may in principle be forced to undergo an intervention without his or her consent. Human beings must therefore be able freely to give or refuse their consent to any intervention involving their person. This rule makes clear patients' autonomy in their relationship with health care professionals and restrains the paternalist approaches which might ignore the wish of the patient. ...

35. The patient's consent is considered to be free and informed if it is given on the basis of objective information from the responsible health care professional as to the nature and the potential consequences of the planned intervention or of its alternatives, in the absence of any pressure from anyone. Article 5, paragraph 2, mentions the most important aspects of the information which should precede the intervention but it is not an exhaustive list: informed consent may imply, according to the circumstances, additional elements. In order for their consent to be valid the persons in question must have been informed about the relevant facts regarding the intervention being contemplated. This information must include the purpose, nature and consequences of the intervention and the risks involved. Information on the risks involved in the intervention or in alternative courses of action must cover not only the risks inherent in the type of intervention contemplated, but also any risks related to the individual characteristics of each patient, such as age or the existence of other pathologies. Requests for additional information made by patients must be adequately answered.

36. Moreover, this information must be sufficiently clear and suitably worded for the person who is to undergo the intervention. The patient must be put in a position, through the use of terms he or she can understand, to weigh up the necessity or usefulness of the aim and methods of the intervention against its risks and the discomfort or pain it will cause.

...

Article 8 – Emergency situations

56. In emergencies, doctors may be faced with a conflict of duties between their obligations to provide care and seek the patient's consent. This article allows the practitioner to act immediately in such situations without waiting until the consent of the patient or the authorisation of the legal representative where appropriate can be given. As it departs from the general rule laid down in Articles 5 and 6, it is accompanied by conditions.

57. First, this possibility is restricted to emergencies which prevent the practitioner from obtaining the appropriate consent... An example that might be put forward is that

of a patient in a coma who is thus unable to give his consent (see also paragraph 43 above), or that of a doctor who is unable to contact an incapacitated person's legal representative who would normally have to authorise an urgent intervention. Even in emergency situations, however, health care professionals must make every reasonable effort to determine what the patient would want.

58. Next, the possibility is limited solely to medically necessary interventions which cannot be delayed. Interventions for which a delay is acceptable are excluded. However, this possibility is not reserved for life-saving interventions.

59. Lastly, the article specifies that the intervention must be carried out for the immediate benefit of the individual concerned."

B. United Nations

29. The Universal Declaration on Bioethics and Human Rights was adopted by UNESCO's General Conference on 19 October 2005. Its relevant provisions read as follows:

Article 5 – Autonomy and individual responsibility

"The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests."

Article 6 – Consent

"1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice."

30. The World Health Organisation (WHO) European consultation meeting on the rights of patients, held in Amsterdam in March 1994, endorsed a document entitled "Principles of the rights of patients in Europe" as a set of principles for the promotion and implementation of patients' rights in the European Member States of the WHO. Its relevant parts read as follows:

"2. INFORMATION

2.2 Patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment.

...

2.4 Information must be communicated to the patient in a way appropriate to the latter's capacity for understanding, minimizing the use of unfamiliar technical terminology. ...

...

3. CONSENT

3.1 The informed consent of the patient is a prerequisite for any medical intervention.

3.2 A patient has the right to refuse or to halt a medical intervention. The implications of refusing or halting such an intervention must be carefully explained to the patient."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant complained that she had been subjected to inhuman and degrading treatment as a result of being sterilised without her consent. She referred to Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

32. The Government argued that the applicant could not be said to have been subjected to inhuman and degrading treatment in breach of Article 3 on account of her sterilisation. They pointed out to the absence of any medical or physiological consequences of that medical intervention. They also argued that although the applicant could no longer conceive naturally, she could benefit from *in vitro* fertilisation.

33. The applicant maintained her complaint, arguing that the sterilisation had had serious psychological and emotional effects on her and her relationship with her husband.

34. The Court observes that cases concerning medical interventions, including those carried out without the consent of the patient, will generally lend themselves to be examined under Article 8 of the Convention (see, for instance, *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX; *Glass v. the United Kingdom*, no. 61827/00, § 70, ECHR 2004-II; *M.A.K. and R.K. v. the United Kingdom*, nos. 45901/05 and 40146/06, § 75, 23 March 2010; *Solomakhin v. Ukraine*, no. 24429/03, § 33, 15 March 2012; and *Csoma v. Romania*, no. 8759/05, § 45, 15 January 2013). In a number of cases the Court has nonetheless accepted that under certain conditions, medical interventions can reach the threshold of severity to be regarded as treatment prohibited by Article 3 of the Convention. In particular, it has found that the sterilisation of a mentally competent adult without her full and informed consent, when there was no immediate threat to her life, amounted to treatment contrary to Article 3 of the Convention. The Court reached that conclusion taking into account the particular circumstances of the cases concerned, including the fact that the applicants belonged to a vulnerable population group (Roma); their young age and the fact that they were at an early stage of their reproductive life; the absence of imminent medical necessity; and the serious medical and psychological after-effects of the

sterilisation procedure (see *V.C. v. Slovakia*, no. 18968/07, §§ 116-19, 8 November 2011; *N.B. v. Slovakia*, no. 29518/10, §§ 79-80, 12 June 2012; and *I.G. and Others v. Slovakia*, no. 15966/04, § 123-25, 13 November 2012).

35. In this connection, the Court reaffirms that the assessment of whether a particular form of ill-treatment reaches the threshold of severity capable of bringing it within the scope of Article 3 is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among other authorities, *Akopyan v. Ukraine*, no. 12317/06, § 103, 5 June 2014). The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (see *Gäfgen v. Germany* [GC], no. 22978/05, § 89, ECHR 2010). Although the purpose of such treatment is a factor to be taken into account, in particular the question of whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see, among other authorities, *V.C. v. Slovakia*, cited above, § 101). In order for treatment to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment (ibid., § 104).

36. In the present case, the applicant was sterilised, as the doctors considered that her future pregnancy could lead to a rupture of her uterus and thus put her life at risk. The Court is mindful that sterilisation constitutes a major interference with a person's reproductive health status and concerns one of the essential bodily functions of human beings (see *V.C. v. Slovakia*, cited above, § 106). It notes the applicant's general argument that her sterilisation had had psychological and emotional effects on her and her relationship with her husband (see paragraph 33 above) and is prepared to accept that she felt humiliated and degraded. At the same time, the Court observes that during a routine medical intervention (Caesarean section), the health professionals were suddenly faced with a situation (ruptured uterus), where they had to decide as a matter of urgency on the scope of the surgery, and where even a hysterectomy (removal of uterus) could have been justified (see the first-instance court's relevant findings, with reference to an expert

report, in paragraphs 21 and 22 of the draft). The decision to keep the uterus, suture the rupture and sterilise the applicant had been taken by a panel of doctors including the chief medical officer, after a thorough consideration, on the medical grounds that were confirmed by the subsequent expert report (see paragraph 19 above), and was considered by those health professionals to be necessary to prevent a risk to the applicant's life in the future (see paragraphs 11 and 15 above).

37. Against that background, the Court considers that when taking the decision to sterilise the applicant the doctors had not acted in bad faith, let alone with an intent of ill-treating or degrading her. The said decision, albeit clearly disrespectful of the applicant's autonomy was driven by the doctors' genuine concerns for her health and safety. The Court furthermore does not discern any additional elements such as, for instance, the applicant's particular vulnerability, to enable it to conclude that the requisite threshold of severity was reached in the particular circumstances of the present case to bring Article 3 into play.

38. The Court has therefore no sufficient basis to conclude that the applicant was treated in such a way as to reach the threshold of Article 3 of the Convention. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

39. The applicant complained that her right to respect for her private life had been breached as a result of her sterilisation without her informed consent and that she had received no adequate response at the domestic level in that connection. She relied on Article 8 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to respect for his private ... life ..."

A. Admissibility

40. The Government were of the view that the sterilisation had had no adverse physical or psychological consequences for the applicant and that therefore her right to respect for her private life as secured by Article 8 of the Convention was not engaged.

41. The applicant maintained her complaint.

42. The Court reiterates that the notion of "private life" includes a person's physical and psychological integrity (see, for instance, *Tysiąc v. Poland*, no. 5410/03, § 107, ECHR 2007-I, and the cases cited therein) and also applies to decisions both to have and not to have a child or become parents (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I; *A, B and C v. Ireland* [GC], no. 25579/05, § 212, ECHR 2010;

and *R.R. v. Poland*, no. 27617/04, § 180, ECHR 2011). Moreover, individuals' involvement in the choice of medical care provided to them and consent to such treatment fall within the scope of Article 8 of the Convention (see *A.K. v. Latvia*, no. 33011/08, § 63, 24 June 2014, with further references). Having regard to the circumstances of the present case, the Court considers that the applicant's complaint falls within the scope of Article 8 of the Convention.

43. It notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

44. The applicant argued that her sterilisation in the absence of her informed consent had constituted a serious interference with her rights secured by Article 8 of the Convention. She contended, in particular, that she had not consented to the sterilisation as required by international standards. Nor had her sterilisation been in compliance with the relevant domestic law (see paragraphs 25-26 above), which provided that informed and free consent was a prerequisite for medical intervention, and that sterilisation required informed consent by the patient. She also stressed in that connection that the consent form which she had signed prior to her Caesarean section had specifically excluded sterilisation.

45. Furthermore, the applicant argued that there had been no medical necessity for her sterilisation. In particular, it had not been a life-saving intervention since there had been no established risk to her life that required her urgent sterilisation without her consent at the time when a Caesarean section had been performed. The applicant argued that any potential risk to her life during future pregnancies could not be regarded as sufficient grounds for sterilising her in the absence of her full and informed consent. She pointed out that in an attempt to prevent some hypothetical risks, the doctors had in fact inflicted very serious harm on her health, having rendered her infertile. The applicant also maintained that she had had no adequate judicial response at the domestic level in connection with her sterilisation without her consent.

46. The Government argued that even assuming that the sterilisation procedure had constituted an interference with the applicant's right to respect for her private life under Article 8 of the Convention, that interference had been justified under the second paragraph of that provision.

47. They contended that the consent form signed by the applicant provided for the possibility of expanding the scope of the surgery and that, therefore, the applicant had consented to the sterilisation. Moreover, during the Caesarean section the doctors had detected a rupture of the applicant's uterus, the condition that had put her life at immediate risk. In such

circumstances, the doctors would have been justified in removing the uterus, but instead they had chosen to preserve that organ and to sterilise the applicant to exclude any risk to her life in the future. In that connection, the Government argued that there had clearly been a medical necessity for the intervention in question, and more specifically the risk of grave health problems during future pregnancies had justified performing the sterilisation without the applicant's clearly expressed consent. In particular, they noted the high risk of rupture of the uterus along the post-operative scar.

48. The Government also argued that it was still possible for the applicant to become pregnant through *in vitro* fertilisation. They also insisted that the applicant had been provided with adequate judicial protection of her rights at the domestic level, given that her claim against the hospital had been examined at two levels of jurisdiction.

2. The Court's assessment

(a) General principles

49. The Court reaffirms that although the right to health is not as such among the rights guaranteed under the Convention and the Protocols thereto (see *Jurica v. Croatia*, no. 30376/13, § 84, 2 May 2017, and the cases cited therein), the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence with access to proceedings in which they may, where appropriate, obtain compensation for damage (ibid.; see also *Trocellier v. France* (dec.), no. 75725/01, ECHR 2006-XIV). This latter procedural obligation will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained. Disciplinary measures may also be envisaged (see *Mehmet Ulusoy and Others v. Turkey*, no. 54969/09, § 91, 25 June 2019, with further references).

50. Furthermore, the Court reiterates that in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity (see *V.C. v. Slovakia*, cited above, § 105, and the cases cited therein). It has emphasised that it is important for individuals facing risks to their health to have access to information enabling them to assess those risks. It has held in particular that the Contracting States are bound to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable impact of a planned medical procedure on their patients' physical integrity

and inform patients of these consequences beforehand in such a way that the latter are able to give informed consent (see *Ioniță v. Romania*, no. 81270/12, § 84, 10 January 2017, and the cases cited therein).

51. As regards, more specifically, sterilisation, the Court has noted that it affects reproductive health status and had repercussions on various aspects of the applicants' private and family life under Article 8 (see *V.C. v. Slovakia*, cited above, § 143). As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established. However, the position is different in the case of the imposition of such medical treatment without the consent of a mentally competent adult patient. Such a way of proceeding is to be regarded as incompatible with the requirement of respect for human freedom and dignity, one of the fundamental principles on which the Convention is based (ibid., §§ 106-07, in the context of assessment of the same complaint under Article 3).

(b) Application of the general principles in the present case

52. On the facts, the Court observes that the applicant was sterilised in a public hospital in the context of a delivery by Caesarean section. The doctors found a rupture of her uterus and decided to suture it up and to sterilise the applicant to prevent her from getting pregnant in the future, as they considered that a pregnancy could put her life at risk. The domestic courts subsequently considered, in essence, that (a) the applicant had in fact consented to sterilisation as that intervention had been performed as an expansion of the scope of the Caesarean section; (b) that an unexpected complication (a rupture of the uterus) during the Caesarean section had required urgent action to save the applicant's life, and that even a more radical intervention, such as a hysterectomy, would have been justified; and (c) that in any event it was open to the applicant to have recourse to *in vitro* fertilisation (see paragraphs 21-24 above). The Government advanced similar arguments (see paragraphs 47-48 above).

53. In this connection, the Court observes that the relevant consent form, which the applicant signed prior to her Caesarean section, explicitly excluded sterilisation (see paragraph 9 above). Moreover, the expert report clearly pointed to the applicant's lack of informed consent for her sterilisation (see paragraphs 18-19 above), that finding being accepted by the first-instance court (see paragraph 21 above). The Court cannot accept the argument that the applicant's sterilisation had been performed as an expansion of the Caesarean section, and that therefore the applicant could be regarded as having consented to it. It emphasises that sterilisation is not a procedure that can be routinely carried out as part, or as an expansion, of a Caesarean section

or of any other medical intervention, unless the patient has given her express, free and informed consent to that particular procedure. The only exception concerns emergency situations in which medical treatment cannot be delayed and the appropriate consent cannot be obtained (see *V.C. v. Slovakia*, cited above, § 108).

54. As the facts reveal, no such emergency was established in the present case. The Court observes that during the Caesarean section the doctors identified a rupture of the applicant's uterus, a life-threatening situation that required urgent action on their part. It further notes the District Court's finding to the effect that even a more serious intervention, such as a hysterectomy, would have been justified in that situation (see paragraph 21 above). At the same time, it is clear that the doctors resolved the emergency situation by suturing the applicant's uterus, whereas the sterilisation was not an indispensable element of the surgery necessary to prevent an immediate risk to the applicant's life. Indeed, that procedure had been defined by the relevant health professionals as "preventive surgery" (see paragraph 15 above).

55. In this connection, the Court reiterates that sterilisation as such is not, in accordance with generally recognised standards, a life-saving medical intervention (see *N.B. v. Slovakia*, cited above, § 73). Since the applicant was a mentally competent adult patient, her informed consent was a prerequisite to the procedure, even assuming that the latter was a necessity from a medical point of view (see *V.C. v. Slovakia*, § 110). The fact that the doctors had considered the procedure in question necessary because the applicant's life and health would be seriously threatened in the event of a further pregnancy cannot affect that position (see *N.B. v. Slovakia*, cited above, § 74). What is relevant is that such a threat was not imminent as it was likely to materialise only in the event of a future pregnancy. It could also have been prevented by means of alternative, less intrusive methods. In those circumstances, the applicant's informed consent could not be dispensed with on the basis of an assumption on the part of the hospital staff that she would act in an irresponsible manner with regard to her health in the future (see *V.C. v. Slovakia*, cited above, § 113).

56. The Court cannot accept the argument to the effect that no damage had been inflicted on the applicant's health as a result of the procedure under consideration as she could have recourse to *in vitro* fertilisation. It fails to see how that argument can be reconciled with the alleged necessity to sterilise the applicant with a view to preventing future pregnancies so as to avoid any possibly life-threatening deterioration of her health. It further notes that at the time of the medical intervention in question the applicant was only 28 years old, that is, at her full reproductive age, and that she was permanently deprived of her natural reproductive capacity. The sterilisation thus caused serious damage to her health.

57. It is therefore clear that the applicant's sterilisation, which grossly affected her physical integrity, was not a life-saving medical intervention and that it was carried out without her informed consent. It remains to be ascertained whether the applicant was afforded an effective remedy capable of providing her with an adequate judicial response in connection with the damage she suffered (see paragraph 49 above).

58. The Court observes that the applicant brought a civil claim against the maternity hospital, seeking compensation in respect of non-pecuniary damage in connection with her sterilisation. The national courts examined and dismissed that claim at two levels of jurisdiction, relying on the reasons summarised in paragraph 52 above. The Court notes however that those reasons were to a large extent conflicting and could have even been understood as mutually exclusive. It further considers that, by refusing to establish the doctors' responsibility for the applicant's sterilisation without her express, free and informed consent, with reference to the medical necessity of that intervention, the national courts in essence endorsed the approach which stood in conflict with the principle of the patient's autonomy, established both in the domestic law and at the international level (see paragraphs 25-30 above). In this connection, the Court finds it difficult to reconcile with the procedural safeguards enshrined in Article 8 that the medical intervention with such serious consequences was performed without respecting the rules and safeguards created by the domestic system itself (see paragraphs 18 and 25-26 above; compare *Csoma*, cited above, § 57). It also observes that the applicant was not afforded any redress in that connection.

59. The foregoing considerations are sufficient to enable the Court to conclude that the applicant suffered an infringement of her right to respect for her private life as a result of the doctors' failure to seek and obtain her express, free and informed consent as regards her sterilisation, in line with the domestic law. Moreover, the remedy in place did not make it possible to have the responsibility of the doctors established and to obtain redress for the infringement of her right to respect for her private life.

60. There has accordingly been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

62. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

63. The Government disputed that claim as excessive and unreasonable.

64. The Court reiterates that it has found a violation of the applicant's right to respect for her private life. It considers that she incurred non-pecuniary damage, which cannot be compensated for by the mere finding of a violation. It thus considers it appropriate to award the applicant EUR 7,500 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

65. The applicant also claimed EUR 570, representing the amount she paid for the expert examination and the costs and expenses incurred before the domestic courts, and EUR 1,200 for the costs and expenses incurred before the Court.

66. The Government argued that the applicant's claim concerning the amount paid for the expert examination should not be granted as she had been unsuccessful in the civil proceedings. They further contested the applicant's claim as regards the costs and expenses incurred in the proceedings before the Court, arguing that those could not be said to have been actually incurred, as the agreement between the applicant and her representative stipulated that the above-mentioned amount would only be payable if the Court adopted a judgment finding a violation of her rights.

67. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. A representative's fees are considered to have been actually incurred if an applicant has paid them or is liable to pay them (see *Zelikha Magomadova v. Russia*, no. 58724/14, §126, 8 October 2019, with further references). Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 1,770 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

68. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint under Article 8 of the Convention concerning the applicant's sterilisation without her express, free and informed consent and the lack of an adequate judicial response in that connection admissible, and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,770 (one thousand seven hundred and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, by five votes to two, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Deputy Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Elósegui;
(b) partly dissenting opinion of Judge Serghides;
(c) partly dissenting opinion of Judge Pavli.

G.R.
O.C.

CONCURRING OPINION OF JUDGE ELÓSEGUI

I. THE MESSAGE OF THE JUDGMENT ON INFORMED CONSENT

1. In the present case, I fully share the majority's ruling. In my concurring opinion, I would like to highlight some elements of the judgment that I consider very important in relation to the right to informed consent of patients in the health field, as well as the clear message for medical professionals, especially in the field of gynaecology. From the judgment it is clear that the doctors did not act in accordance with the *lex artis*, not only in reference to the fact that they did not respect the patient's right to informed consent, but also in terms of medical practice because they did not follow medical standards, since the sterilisation was not a life-saving intervention (paragraph 55).

2. In addition, if there is no immediate risk to life, doctors must respect the instructions given by the patient and should not supplant him or her in that decision-making. Even more serious, in gynaecological matters, is to perform a sterilisation that has irreversible effects and affects a characteristic that is part of the person's identity, such as the possibility of procreating and having one's own offspring (see paragraph 36).

II. VIOLATION OF ARTICLE 8 ON THE RIGHT TO INFORMED CONSENT AND LACK OF *LEX ARTIS* OF DOCTORS IN THIS SPECIFIC CASE

3. The Court reiterates that the sterilisation as such was not in accordance with generally recognised standards (paragraph 55). The doctors performed a tubal ligation which was not necessary at the time because there was no immediate danger to life. The operation could have been limited to suturing the uterus. Nor was a hysterectomy essential, that is, removing the entire uterus. Simply, a patient who had expressly said that she did not want to be sterilised could have been warned of the inconvenience of having an immediate second pregnancy and advised to wait as long as was convenient. According to the extensive medical literature, there are many cases of women in these same circumstances who have had a second pregnancy some time after a ruptured uterus. The doctors in this case clearly took an intrusive and paternalistic attitude, treating the patient as if she were a minor incapable of making her own decisions (see paragraph 55).

4. In my experience as part of a Bioethics Committee of the Autonomous Community of Aragon (with 11 hospitals) and the Hospital Ethics Committee of my university in Zaragoza (for 15 years), I have verified that it is quite common in gynaecology to impose the points of view of the doctor about patients, presenting as necessary and obligatory certain medical acts that are not so in reality. For example, it is very common that, after a first Caesarean delivery, in the second Caesarean women are pressured to be sterilised as if

that were the only viable possibility when in fact there are less intrusive alternatives (as indicated in the judgment in paragraph 55). Along the same lines, amniocentesis prior to childbirth, which is in no way compulsory and carries risks for the foetus, occurs quite frequently in my country (Spain), as if it were practically a legal obligation for patients from 35 years onwards. What is different is that in Spain the legal framework allowed the interruption of pregnancy in certain cases, such as the possible malformation of the fetes (now the interruption of pregnancy is not subject to any cause). But there are many women who do not want to make use of this diagnostic possibility of the amniocentesis test. These women are pressured by health personnel as if they were ignorant or irresponsible.

5. From the point of view of the *lex artis*, the scientific and legal reasoning of both the doctors and the judges who intervened in this case is not substantiated. In the judgment, which I share in its entirety, some of this reasoning is noted. The patient's problem was that her uterus was damaged and after the operation it is accepted practice that before a second pregnancy it should be ensured that the wounds on the uterus are already healed. For this purpose, the patient must be informed of her state of health and that there are less intrusive alternative means to delay a new pregnancy (paragraph 55).

6. What is surprising is to note how the doctors defended their position, as the Government claim in their argument, that the applicant's right to fertility had not been violated, because even if she had had a tubal ligation, she could opt for fertilisation *in vitro*. However, the applicant had problems getting pregnant because her uterus was damaged. With *in vitro* fertilisation, a pregnancy also involves using the woman's own uterus, therefore, advising that route amounts to treating the patient as if she were ignorant. *In vitro* fertilisation poses many more health problems and does not even guarantee success. In addition, for it to be with her own eggs, it would first be necessary to perform ovarian hyperstimulation and then extract them, etc. In short, this is all nonsense compared to a much safer and less harmful solution such as keeping the tubes and waiting a few years to try a new pregnancy. As indicated in paragraph 56, if the medical indication to sterilise the patient was to avoid a risk of any other pregnancy, it makes no sense to advise her that she could opt for *in vitro* fertilisation because the risk to the uterus would be the same.

7. Paternalism and decision-making substitution for the patient's wishes is evident in the attitude of the doctor who treated her after the operation, who did not clearly inform her, according to the patient's level, that she had become infertile. Moreover, he also advised her not to inform her husband of something that he also had the right to know because it affected his own sexuality (see paragraph 12).

III. PRIOR INFORMED CONSENT OF THE PATIENT EXCLUDING STERILISATION

8. Apart from the question of the lack of *lex artis*, even if the doctors thought that sterilisation could be advisable, since it was not essential to perform it urgently in that operation because the life of the patient was not in danger, they should not have performed it; even more so with the aggravating circumstance that the patient had expressly indicated that she did not want to be sterilised. Therefore, the Court has also refused to accept the argument that broad consent for a Caesarean section could include presumed consent for sterilisation (see paragraph 53). The situation in the specific case perfectly allowed that, once the situation of Caesarean delivery and suturing the uterus was completed, the patient at a later time could be informed about the possibility of waiting before having another pregnancy or of being subjected to a tubal ligation, with a clear explanation that the consequences would be that she would never be able to have children. Regarding the latter, she was not even adequately informed once the sterilisation had been carried out (see paragraph 12).

IV. ON THE NON-APPLICATION OF ARTICLE 3 OF THE CONVENTION

9. I also agree with the judgment that this case does not meet the threshold for Article 3 to be applied. In addition to the reasons stated therein, I would like to add a few more to explain why I have voted with the majority on this point. In my opinion, this specific case should be distinguished from other situations of sterilisation based on eugenics, and from situations of forced sterilisation scheduled in advance for women belonging to a certain group, for reasons of racial discrimination or poverty. Given my experience as a participant as an academic expert in the United Nations conferences on women's rights, from the one in Beijing in 1995 to its subsequent follow-ups, and also because of my academic research on women's rights, including bioethical aspects (reproductive rights), I am very aware of the existence of such violations of rights in many parts of the world. The UN cases about forced sterilisations are in the context (many concerning complete forced sterilisation against indigenous women in Peru and so on) of pre-programmed official sterilisation campaigns by the State. In other situations, such as those concerning Roma or Afro-American women, they have been performed with an eugenic (also racist) intention.

Bearing all this in mind, I consider that the international and geographical context of the United Nations (composed of 193 countries with very different problems and levels of development) is very different from that of a European institution. This is not to say that women's rights are not universal, of course they are. What I mean is that the level or context of violations is not always the same.

10. In addition, I would like to emphasise that in our case we are, in the European Court of Human Rights, acting as judges. This means that our role as a judge must be limited to resolving the specific case, in accordance with the facts presented in the dossier and in the court before us, based on the criteria of the Convention and the general principles of our case-law. For more than thirty years I have dedicated myself to research, to academic life, I have advised NGOs advocating the empowerment of women (such as, for example, in Bolivia), I have been an expert in advising on legislative projects on equality of woman, I have been part of the Spanish Development Cooperation Council for three years, as an expert in gender. In these areas, proposals for legislative improvement can be indicated, and statements made in the abstract, but all of this is different from the role to be assumed as a judge. Precisely for this reason, in the case before us, the judgment establishes that it is not a eugenic action, that is, it has not intentionally been sought to sterilise women so that people of a certain race are not born, that malformations are avoided, or that mothers with physical or mental illnesses do not have offspring.

11. I believe that context is very important. Our case is a common case of emergency surgery on a woman who was already thirty or thirty-one weeks pregnant in which the foetus showed signs of cerebral hypoxia, that is, it did not get enough oxygen to the brain and, had the Caesarean delivery not been performed, it would have died *in utero*. During the Caesarean section it was proven that the child had suffered "from acute respiratory failure and a number of other serious complications. The baby later developed cerebral palsy" (paragraph 10). Added to these circumstances is the previous clinical history of the patient, which is important to take into account in order to fairly calibrate the actions of the doctors. The patient had already had a previous ectopic pregnancy, for which she had undergone an emergency operation and in which one of her fallopian tubes had to be removed (paragraph 5). After that operation, the doctors advised her to wait six months before becoming pregnant again (paragraph 6). Despite medical advice, she became pregnant after three months. Therefore, in view of these facts, this explains two attitudes that must be weighed in the balance. That of the mother who, having only one fallopian tube, indicated in her informed consent that she did not want to be sterilised, and the attitude of the doctors who, with this medical history and the sudden subsequent discovery of the rupture of the uterus, decided to ligate the tubes, as an alternative to complete removal of the uterus, although both solutions involved sterilisation.

12. I will develop below the reasons why I think that Article 3 of the Convention on degrading treatment, mistreatment and torture is not applicable in this situation. I believe that causing sterilisation without consent is very serious and that it affects a fundamental element of the identity of men and women. But all of this can be treated and has been treated in the judgment as a violation of Article 8 of the Convention. I think that the context in which

the Court applied and decided a violation of Article 3 in the case of Roma women in Slovakia (see cases cited at paragraph 34 of the judgment) is completely different from the present case. In those situations of sterilisation of Roma women there is some programming and a determined intention in which the sterilisation is carried out by family planning to reduce births in those groups that normally have more children than the rest of the population, with more poverty, and less social inclusion. That whole context is very different from the present case, i.e. a situation which is occurring more commonly in many European hospitals where there are more and more Caesarean deliveries[1]. In the Slovakian cases, there was a clear element of racial discrimination, where the woman was seen as part of a group (stigmatisation)[2]. All those other contexts are very far away from the context of an urgent delivery of a baby which in the course of an operation had unexpected complications.

13. Neither the element of racial discrimination, nor any of those elements of premeditation is present in the case that we have now adjudicated. As stated in the judgment, it is true that the element of harmful intent is not always necessary in order to apply Article 3 (see paragraph 35).

However, I consider that in the specific case of sterilisation of a woman in the health field, the element of intent is very important for the application of Article 3. In my case, what has led me to opt for the majority ruling also on this point, on Article 3, is that due to my legal experience in the health field, I believe that it is very important to differentiate between criminal liability, civil liability and administrative responsibility. If health personnel act with intent (within all possible types of intent in criminal law) we enter into criminal liability (subjective element). If we are facing harmful conduct without intent, we enter into the application of civil law. These differences from the legal point of view and the imputation of acts or professional malpractice are crucial.

14. Even if, according to ECHR case-law, the threshold of Article 3 can be reached in a generic way, possibly in spite of good intentions, I find it doubtful to apply that Article to doctors who have acted in good faith, even if they were wrong (paragraph 37). To begin with, I would in no way say that the three cases of sterilisation of Slovak Roma women were done with good intentions, since the intention was clearly racial discrimination, although in

[1] To give a specific example, in Spain in 2022, 25% of deliveries are by Caesarean section. One of the reasons is late maternity, which makes childbirth more complicated, as well as the legalisation of obstetrics. See Charo Barroso, "Uno de cada cuatro bebés nace por cesárea de España" ("One in four babies in Spain are born by Caesarean section"), https://www.natalben.com/cesarea/demasiadas-cesareas-en-espana (accessed 6 September 2022).

[2] Also the case *M. v. France* (no. 42821/18, 26 April 2022, inadmissibility decision for non-exhaustion of domestic remedies) is different from the present one because it is related to intersex situations which are very specific.

those judgments of our Court we did not want to directly address the question of racial intent through Article 14 and omitted to deal with that point.

15. Turning to the present case, seeing the whole context, as I said above when dealing with Article 8, it is clear to me that there was a clear lack of respect for the patient's informed consent and her previously expressed wish, thus showing serious abuse and authoritarianism on the part of health professionals. In addition, there was also a clear lack of *lex artis*. But all of this can be framed within civil liability and lack of professional negligence, in this non-criminal case.

16. To reach the conclusion that the conduct of the doctors in this case was intentional, domestic criminal proceedings would have been necessary, but none were brought. The patient initiated a civil action for compensation, seeking damages (see paragraph 14). As a judge in Strasbourg and according to the data presented to us in this specific case, I do not have sufficient elements to judge whether or not there was a subjective element of malice on the part of the doctors who acted (malicious intent). For all these reasons, it seemed more prudent to me not to apply Article 3 of the Convention.

17. In conclusion, I think that there was no absolute therapeutic need for sterilisation and therefore there was malpractice. In addition, informed consent was lacking, but in my opinion there was no malicious intent or direct intent (first degree) or indirect or incidental intent (second degree), or criminal professional negligence (reckless imprudence). It could be added that Article 3 would be applicable even if there is no malicious intent, but I repeat that taking into account all the specific circumstances of this case, inhuman or degrading treatment also requires a certain intention of the person who performs it, even more so in this health context. If Article 3 is applied to all these situations (even in the absence of any intent) the door would be open to all kinds of accusations against health personnel by criminal avenues. In any event, this possibility is always available in most of the criminal codes of the 46 member States of the Council of Europe, but this requires individualised proof of the subjective element, otherwise there are other avenues open for compensation such as civil, administrative and disciplinary sanctions of professional associations; because criminal law is the last resort. This does not mean either that Article 3 can only be applied to claimants belonging to vulnerable groups. That is not what the judgment intends to say. The reasoning is simply the other way around: systematic discrimination based on the fact of belonging to a vulnerable group, whether characterised by race, colour, poverty, cultural level or handicap, would entail a clear element of malicious intent on the part of health professionals, and the relevant act would be carried out with premeditation, elements which are not present in the case of our applicant.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

I. Introduction

18. The present case concerns the sterilisation of the applicant in a public hospital in the context of a delivery by Caesarean section, despite her express and written pre-operation refusal to be sterilised and without there being an imminent threat to her health that might have justified sterilisation.

19. I agree with point 2 of the operative part of the judgment that there has been a violation of Article 8 of the Convention, but I respectfully disagree with point 1 in fine of the operative part, namely, that "the remainder of the application [is] inadmissible". In particular, I disagree with the majority's finding that Article 3 of the Convention is not applicable in the present case. On the contrary, my view is that there has also been a violation of Article 3, as regards the right to be free from inhuman or degrading treatment, which would have enabled me to propose an increase in the amount of non-pecuniary damage to be awarded to the applicant if I had not been in the minority in this connection.

II. Sterilisation against the patient's will amounts to treatment contrary to Article 3, international law and domestic law

20. As the judgment rightly indicates (see paragraphs 36 and 51), sterilisation constitutes a major interference with a person's reproductive health status and concerns one of the essential bodily functions of human beings.

21. It is my submission that the sterilisation the applicant has suffered against her will involved a violation of her personal integrity and in particular irreversible bodily harm to her as well as humiliation and disrespect to her as a human being and in particular as a woman, and therefore that it was contrary to Article 3 of the Convention.

22. In this connection, paragraph 32 of the United Nations Human Rights Council Report A/HR/C/22/53, 11 February 2013 (Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez) states:

> "The mandate has recognized that medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned ..."

Sterilisation without consent is also prohibited directly or indirectly by many other "international materials", some of which are mentioned under this heading in the judgment (see paragraphs 27-30)[1].

[1] See for example Article 5 of the Convention on Human Rights and Biomedicine (the Oviedo Convention), providing that "[a]n intervention in the health field may only be carried out

23. Carrying out sterilisation without the consent of the patient is a violation not only of Article 3 of the Convention and international law, but also of the domestic law, namely, section 36 of the Russian Healthcare Act (providing that "[e]very woman has a right to decide independently whether to become a mother ...") and section 37 of the same Act, providing that "[m]edical sterilisation as a special procedure to deprive [the person concerned] of the ability to reproduce or as a birth control method may be carried out only upon a written application by a person who is at least 35 years old and has at least two children" (see also, on these two sections, paragraph 25 of the present judgment).

III. Sterilisation against the patient's will as an instance of situational vulnerability

24. I argue that the present case involves an instance of situational vulnerability[2]. The applicant had a situational vulnerability *vis-à-vis* the public doctors, agents of the State, who proceeded with her sterilisation, which the judgment regrettably overlooks. The applicant, who was then in her thirtieth or thirty-first week of pregnancy and had problems with her pregnancy, being in a vulnerable situation, was admitted to a municipal (public) maternity hospital. In particular, she showed symptoms of rhesus incompatibility and excess amniotic fluid, and after being examined, ten days later, doctors at the hospital decided to perform an emergency Caesarean section as the foetus's condition had deteriorated and there were signs of hypoxia (see paragraphs 7-8 of the judgment). They removed the baby, who was suffering from acute respiratory failure and a number of other serious complications; it later developed cerebral palsy.

Before the operation in question, the applicant had made it clear in writing to the doctors that she did not want to be sterilised. So she had entrusted them with a task under the condition that she expressly stipulated, i.e. not to be sterilised. During the operation, the applicant was unconscious under general anaesthetic, so she was not in a position to observe what was happening to her or be able to prevent it, by strongly reiterating to the doctors her adamant refusal to proceed with her sterilisation or even leaving the bed and walking out of the operating theatre. Ultimately this relationship of trust was breached

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after the person has given free and informed consent to it", and, similarly, Article 6 of the Universal Declaration on Bioethics and Human Rights adopted by UNESCO's General Conference in 2005, providing for the prior, free and informed consent based on adequate information of any medical intervention of the person concerned.

[2] On situational vulnerability regarding Article 3 cases, see Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR – Absolute Rights and Absolute Wrongs*, Oxford: Hart Publishing, 2021, 103; Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Chapter 3 on "A Typology of the Court's Approach to Vulnerability under Article 3 ECHR"), Oxford: Hart Publishing, 2021, 31, 33, 38, 63-64, 78, 112-113.

by the public doctors who proceeded with the sterilisation, thus going clearly against the applicant's wish, even though the sterilisation was unnecessary. As the facts of the application reveal (see paragraph 54 of the judgment) no medical emergency was established in the present case and as the judgment (see paragraph 55) reiterates, by referring also to *N.B. v. Slovakia* (no. 29518/10, § 73, 12 June 2012), sterilisation as such, is not, in accordance with generally recognised standards, a lifesaving intervention. What is very important – and the judgment also considers as relevant (see paragraph 55) – is that the threat in the present case was not imminent, as it was likely to materialise only in the event of a future pregnancy and it could have been prevented by means of alternative, less intrusive methods. Moreover, the judgment (see paragraphs 56 and 57) goes on to say that it is clear that the applicant's sterilisation, which grossly affected her physical integrity, was not a life-saving intervention and that it was carried out without her informed consent. Furthermore, the judgment (see paragraph 53) rightly does not accept the argument of the respondent State that the applicant's sterilisation was performed as an expansion of the Caesarean section and that therefore the applicant could be regarded as having consented to it. Another relevant point to be made is that the applicant argued that sterilisation had a strong psychological and emotional impact on her and her relationship with her spouse. Not only is this noted in the judgment (see paragraphs 33 and 36), but the judgment also accepts (see paragraph 51) that sterilisation has a bearing on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life.

25. The Court in *Bouyid v. Belgium* ([GC], no. 23380/09, § 107, 28 September 2015) explained what a situational vulnerability meant in terms of Article 3 of the Convention, although it was based on different facts from those of the present case. In *Bouyid* the Court found the following relevant:

> "... persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the applicants' cases – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty to protect them ... In inflicting the humiliation of being slapped by one of their officers they are clearly disregarding this duty."

26. As in *Bouyid*, where the applicants had a situational vulnerability *vis-à-vis* the police officers who slapped them in the face while they were in police custody, the applicant in the present case had a situational vulnerability *vis-à-vis* the doctors of the public hospital who operated on her under general anaesthetic and proceeded also with her sterilisation, being herself helpless to prevent it and in any event not expecting that the doctors would breach their trust towards her. What makes the situational vulnerability common in both cases is that the person in question is in the hands or under the authority of another, a State agent, and helpless to prevent an act of the latter that is of a degrading or ill-treating nature towards him or her. The applicants in both

cases may be considered vulnerable due to the particular situation in which they find themselves.

27. In my view the judgment restrictively confines the applicability of the right under Article 3 only to instances of vulnerability presented to the Court in previous cases (see paragraphs 34 and 35 of the judgment), though it is clear that the instances of vulnerability should not be exhaustive, as vulnerability depends on the facts of each case.

28. Furthermore, the judgment fails to see that the applicant's vulnerability in the present case was an apparent instance of vulnerability falling within the ambit of Article 3.

29. Though the present case is a clear case of vulnerability coming under the existing case-law within the ambit of Article 3, since the applicant was vulnerable even before her operation, suffering as she was from her pregnancy problems, I argue that the vulnerability of the victim does not need to pre-exist the act of humiliation or ill-treatment or degrading treatment against him or her. To be precise, in my humble view, *the very act* of humiliation or ill-treatment can create a situational vulnerability, if the victim is helpless to deal with such a situation.

IV. *Combined* positive and negative obligations of State to secure the applicant's bodily integrity and prevent her sterilisation

30. It is my submission that the applicant, by signing the relevant pre-operation document required by the hospital, expressly stating her refusal to undergo sterilisation and agreeing to have a Caesarean operation on that condition, and the doctors of the public hospital by proceeding with the operation on that condition, triggered a *combined* positive obligation and negative obligation of the respondent State to respect this mutual trust and secure the applicant's bodily integrity on the one hand, and to abstain from violating her bodily integrity by performing sterilisation, on the other.

31. Regrettably, however, the *combined* positive and negative obligations were not fulfilled by the respondent State in the present case, but on the contrary they were violated.

V. The principle of effectiveness dictates that Article 3 is applicable in the circumstances of the case

32. It is also my proposition that the right not to be subjected to inhuman or degrading treatment would not be practical and effective but only theoretically and illusory if, in the particular circumstances of the present case, as described above, Article 3 of the Convention were not to be found

applicable. The principle of effectiveness[3] should be applied not only at the merits stage of a complaint but also in the examination of applicability or admissibility, dictating that Article 3 should be declared applicable in the circumstances of the present case.

33. The failure to apply the principle of effectiveness in the present case at the admissibility stage would result in rendering null and void the right to be free from inhuman or degrading treatment at the root of its protection, since finding a complaint inadmissible would close the door to the protection of a right irreversibly. A restrictive interpretation of a right at either of the above-mentioned stages would militate against the principle of effectiveness securing the effective protection of the right in question, this being the primary aim of the Convention.

VI. No need to show intent to cause suffering in substantiating inhuman or degrading treatment

34. According to the case-law of the Court[4], unlike torture, inhuman and degrading treatment can be made out without the element of intent (*dolus*) of the authorities to cause suffering to or humiliate the victim. The absence of such purpose, though being a relevant factor or consideration, cannot inevitably lead to a finding that there has been no violation of Article 3.

35. Thus the finding in the judgment (see paragraph 37) of the absence of bad faith on the part of public doctors when taking the decision to sterilise the applicant cannot conclusively rule out a finding of a violation of Article 3.

VII. Conclusion

36. In conclusion, it is my opinion that there has been a violation of Article 3 as well as Article 8 of the Convention, and if I were not in the minority, I would proceed to determine a higher amount of non-pecuniary damage than that awarded by the majority, considering my finding of a double violation under both Articles. I therefore disagree also with points 3 and 4 of the operative part of the judgment on just satisfaction.

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[3] On the principle of effectiveness as applied in another Article 3 case, see my partly concurring, partly dissenting opinion in *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021.

[4] See, *inter alia, M.S.S. v. Belgium* [GC], no. 30696/09, § 22, 21 January 2011; *Jalloh v. Germany* [GC], no. 54810/00, §§ 106-107, 11 July 2006; *V. v. the United Kingdom,* no. 24888/94, § 71, 16 December 1999; and *R.R. v. Poland,* no. 27617/04, § 151, 26 May 2011. See further discussion on this, in *Mavronicola*, *op. cit.*, 74.

PARTLY DISSENTING OPINION OF JUDGE PAVLI

1. In 1927 the United States Supreme Court decided the case of Carrie Buck, a 20-year-old woman who had been forcibly sterilised while confined at the Virginia State Colony for Epileptics and Feeble-Minded. Buck was, in fact, neither epileptic nor intellectually disabled: her misfortune was to have been born poor, raped at the age of sixteen while living in a foster home and have her daughter taken away by her foster parents, who also managed to persuade a local judge to commit her to the State colony. Writing for the Supreme Court majority, Justice Oliver Wendell Holmes Jr., an otherwise widely respected jurist, argued that "it is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." He added, infamously, "Three generations of imbeciles are enough."[1] Worst of all, this judgment laid the groundwork for legitimising decades of State-sponsored sterilisation of mostly poor and Black women in the American South and beyond.[2]

2. There is no evidence that the applicant in the present case suffered from any intellectual or other disability. There is, however, every indication that the medical team at Krasnoyarsk municipal hospital no. 2 treated her, during and after her emergency surgery, with utter contempt as regards her autonomy and her ability to make informed decisions about her own reproductive life.

3. This would appear to be the first case involving a woman's forced sterilisation in which the Court has held that, in contrast to earlier similar cases, her ordeal did *not* reach the threshold of inhuman or degrading treatment under Article 3 of the Convention. This despite reaffirming the Court's long-standing position – confirmed by another Section of the Court as recently as this past April in recapitulating the applicable general principles in the case of *M. v. France* ((dec.), no. 42821/18, § 62, 26 April 2022)[3] – to the effect that "the sterilisation of a mentally competent adult without her full and informed consent, when there was no immediate threat to her life, amounted to treatment contrary to Article 3". This latter finding is consistent with the practically unanimous position of other international human rights bodies, including leading United Nations mechanisms – such as the UN

[1] *Buck v. Bell*, 274 U.S. 200.

[2] See, for example, Linda Villarosa, "The Long Shadow of Eugenics in America", *The New York Times*, 8 June 2022.

[3] « La stérilisation d'une *personne* pratiquée sans finalité thérapeutique et sans son consentement éclairé est ainsi *en principe incompatible* avec le respect de la liberté et de la dignité de l'homme et constitutive d'un traitement contraire à l'article 3. Il en va de même des mutilations génitales » (references omitted, emphasis added). Notably, there is no reference to a "mentally competent adult"; the sterilisation of children or adults with disabilities raises complex questions that will have to be addressed by the Court in the future.

Human Rights Committee[4] and the UN Committee Against Torture[5] – and the Inter-American Court of Human Rights.[6] In the words of a former UN special rapporteur on torture, forced sterilisation is "an act of violence and a form of social control, and violates a person's right to be free from ill-treatment."[7] The general principle is not qualified by reference to any form of special vulnerability of the victim, though these can certainly add to the gravity of the prohibited treatment.

4. Referring to the line of Slovak cases involving the forced sterilisation of Roma women, the majority notes that the Court found Article 3 applicable in those cases "taking into account the particular circumstances of the cases concerned, including the fact that the applicants belonged to a vulnerable population group (Roma); their young age and the fact that they were at an early stage of their reproductive life; the absence of imminent medical necessity; and the serious medical and psychological after-effects of the sterilisation procedure" (see paragraph 34 of the present judgment).

5. Every single one of those factors, bar one, is also present in the current case. These include the two central aspects of the relevant Article 3 analysis, namely that the applicant did not provide prior and informed consent to a sterilisation procedure that was, furthermore, not medically necessary to prevent any immediate harm to her life. The single distinction is that the present applicant is not an ethnic Roma woman. This is one of the two primary grounds on which the majority distinguishes this case from the Slovak line of cases. A second ground – and a novel factor implicitly added by the majority to the Article 3 analysis – relies on the finding that "the doctors had not acted in bad faith, let alone with an intent of ill-treating or degrading her" (see paragraph 37 of the judgment). I find both distinguishing factors to be deeply problematic.

6. Turning first to the vulnerability question, the majority seems to assume that only full-blown racism can cause medical personnel to violate the Article 3 rights of their patients. The record in the present case includes no information on the applicant's social or educational background; it suffices to say that, apart from ethnicity, many other characteristics may render patients vulnerable in a medical environment in which doctors and other medical personnel occupy a position of often unquestioned authority. Without

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[4] See General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, paragraph 11.

[5] See, among others, Concluding observations on the third periodic report of the Czech Republic, Doc. CAT/C/CR/32/2, 3 June 2004, paragraphs 5-6.

[6] *I.V. v Bolivia*, judgment of 30 November 2016, paragraph 266 ("The Inter-American Court considers that non-consensual or involuntary sterilization may cause severe mental and physical suffering by permanently ending a woman's reproductive capacity, causing infertility, and imposing serious and lasting physical changes without her consent.").

[7] Juan E. Méndez, Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/31/57, 5 January 2016, paragraph 45.

wishing to speculate on the reasons behind the applicant's treatment in this specific case, the fact remains that such treatment was highly disrespectful and indeed contemptuous towards both the applicant and her husband. Ultimately, one would think that lying unconscious on an operating table while her reproductive function was being impaired permanently and unnecessarily, and without her prior consent, is by definition sufficient to place any woman (or any person, for that matter) in a position of great vulnerability.

7. The second distinguishing feature – the doctors' supposedly well-meaning attitude towards her future health – is equally unpersuasive in my view. As the majority concedes (see paragraph 35 of the judgment), the lack of an intent to debase or humiliate is not decisive under our case-law in determining the inhuman or degrading nature of the treatment. More importantly, seen from an historical perspective, reliance on the supposed good faith (or paternalism?) of medical personnel may lead us down some fairly dark paths. It is possible that the Virginia doctors who sterilised Carrie Buck, or the Slovak doctors who sterilised the Roma applicants in our earlier cases, sincerely thought that the procedure was in their patients' best interests. It is possible, indeed likely, that Justice Holmes thought this was also the case for the "three generations of imbeciles". It is even possible that some of our contemporary fellow citizens hold similar opinions. And yet, it is a school of thought that ought to make us cringe, being invariably based on contempt for the targeted person's autonomy and equal dignity.

8. There are two additional factors that weigh heavily, in my view, in favour of finding that the Article 3 threshold has been met in this case. First, this was not a case of sterilisation caused by medical negligence: the surgical team at the Krasnoyarsk hospital made a deliberate decision to seal her single remaining fallopian tube, following internal discussions after they had already attended to the genuine medical emergency (the torn uterus). Secondly, the information that was given to the applicant and her spouse *after* the procedure – concerning its real nature and its consequences for the couple's reproductive life – was so cruelly and deliberately misleading that they were kept in the dark for several years as they tried to become pregnant again.

9. The applicant in the present case was involuntarily sterilised in the name of saving her from supposed future health risks, by doctors who somehow felt entitled to make that unnecessary and untimely decision in her stead. This plain fact is recognised in lucid terms in the unanimous part of the judgment finding a violation of the applicant's Article 8 rights. Yet, the message sent by today's holding on the applicability of Article 3 is that such treatment was not serious enough to reach the threshold proscribed by that cardinal provision of the Convention. To meet the threshold future victims of forced sterilisation would be required to prove some degree of (undefined)

special vulnerability as well as malicious intent on the part of the medical personnel.

10. I must respectfully dissent, in the hope that this approach will be reversed swiftly by the Court, before it causes any irreparable harm.