



QORTI ĊIVILI – PRIM'AWLA
ONOR. IMHALLEF MIRIAM HAYMAN LL.D.
(Sede Kostituzzjonali)

Seduta tallum l-Erbgha, l-ewwel (1) ta' Lulju, 2026

Rikors Nru: 499/2022MH

Numru:3

**Avukata Dr. Lara Dimitrijevic bhala mandatarja speċjali ta' Andrea
Prudente**

Vs

**L-Avukat tal-Istat, il-Ministru ghas-Sahha u Segretarja Parlamentari ghar-
Riformi u l-Ugwaljanza**

Il-Qorti,

Rat ir-rikors promotur fejn tressqet is-segweni lanjanza:-

- 1. “Illi l-esponenti u l-mahbub taghha gew Malta ghal btala meta hija kellha 14-il gimgha tqala;*
- 2. Illi tul il-btala l-esponenti bdiet tkorri t-tqala taghha u ghaldaqstant i kellha tirrikori ghal kura medika gewwa l-Isptar Mater Dei. Illi tul il-vista hija giet informata li hija bdiet bil-korriment taghha iżda minhabba li kien ghad hemm l-qalb tal-fetu thabbat, t-tobba ma kienux f'posizzjoni li jaghmlu l-ebda intervent sabiex jghaddu ghal hlas tat-tqala peress li Malta ghandha projbizzjoni assoluta fuq l-abortion u peress li kien ghad hemm il-qalb tal-fetu jhabbat, ma*

setghatx tircievi kura ghal terminazzjoni minhabba li t-tobba huma prekluzi milli jaghtu tali assistenza;

3. *Illi ghaldaqstant, l-esponenti ma kellha l-ebda ghazla ghajr li tistenna sakemm ġisimha jkompli bil-hlas, process li jista' jiehu gimghat (u possibilmment xhur), u ghaldaqstant kellha tfittex kura barra minn xtutna peress li hajjitha u s-sahha taghha kienu f'riskju;*
4. *Illi wara li l-esponenti tkellmet mal-kumpanija tal-insurance taghha, huma kkonsidraw li l-qagħda medika taghha kienet wahda ta' periklu ghal hajja taghha, stante li hija segħtet tiżviluppa septisimìa u/jew emoreggija tenut kont il-kundizzjoni taghha u ghaldaqstant għamlu l-arrangjamenti sabiex hija tigi evakwata għewwa Spanja;*
5. *Illi din kienet tqala tant mistennija u pjanata għall-esponenti u l-mahbub taghha, Jay u għalkemm ma kienitx decizjoni faċli, hija ma kelliex ghazla ohra ghajr li tfittex tittermina t-tqala mingħajr aktar dewmien stante li l-hajja taghha kienet qedha fil-periklu;*
6. *Illi din l-esperjenza kienet wahda ferm trawmatika għall-esponenti li għadha qed tbgħati sal-gurnata preżenti;*
7. *Illi hija esperjenzat dan kollu minhabba li l-ligi taghna ma tippermettix terminazzjoni ta' tqala taht kwalunkwe cirkostanzi, anke jekk il-hajja u s-sahha tal-persuna tkun f'riskju;*
8. *Illi fl-umili fehma tal-esponenti dan jikkostitwixxi nuqqas serju fl-**obbligazzjonijiet pożittivi** tal-intimati, jew min minnhom, fil-qadi ta' dmiriethom, partikolarment is-salvagwardja tas-sigurta', id-dinjita u l-privatezza tal-esponenti u l-mahbub taghha. Konsegwentement, in-nuqqas ta' access għal kura medika jammonta għal ksur tad-drittijiet fundamentali tal-esponenti, u dan anke in vista tar-raġunijiet segwenti:-*
 - a. *Illi n-nuqqas assolut ta' access għal terminazzjoni ta' tqala pogħha l-hajja tal-esponenti f'riskju serju u wassal għal delungar tat-trattament taghha hekk rakkomandat skond l-istandards internazzjonali.*
 - b. *Illi n-nuqqas assolut ta' access għal terminazzjoni f'dawn it-tip ta' cirkostanzi ikkostitwixxa trattament inuman u degradanti;*
 - c. *Illi dan qed ikollu impatt fuq il-hajja privata taghha;*

- d. Illi dan in-nuqqas ta' access ghal terminazzjoni tat-tqala jikkostitwixxi diskriminazzjoni a bażi tal-generu tal-esponenti.*
- 9. Illi n-nuqqas ta' protezzjoni u access ghal kura medika tikkostitwixxi ksur tad-drittijiet fundamentali kwa mara ai termini tal-European Charter of Human Rights, Universal Declaration of Human Rights, Civil and Political Rights Covenant, Convention of Elimination of Discrimination Against Women, ICPD Programme of Action, Beijing Platform for Action, kif ukoll il-hajja tal-esponenti, il-hajja privata, kif ukoll tesponi ghal trattament inuman u degradanti u diskrimintaorja fil-konfront tagħha ai termini tal-Artikolu **Article 2, 3, 8 and 14 of the European Convention of Human Rights** li jiffirma parti integrali mill-Ligijiet ta' Malta;**
- 10. Illi fil-kumpless ta' dawn iċ-ċirkustanzi għandu jirriżulta ksur lampanti tad-drittijiet fundamentali tal-esponenti, hekk kif ikkontemplati fl-Artikolu 32 magħdud mal-artikoli 33, 36 u 45 tal-Kostituzzjoni ta' Malta; l-Artikolu 1 magħdud mal-artikoli 2, 3, 8 u 14 tal-Konvenzjoni Ewropeja għall-Protezzjoni tad-Drittijiet tal-Bniedem.**

Għaldaqstant, l-esponenti titlob bir-rispett sabiex dina l-Onorabbli Qorti jogħgobha:

- 1. Tiddikjara u tiddeciedi illi l-ligi vigenti, senjatament l-Artikolu 241 u 243 tal-Kodici Kriminali tal-Kap 9 tal-Ligijiet ta' Malta tammonta għal ksur tad-drittijiet fundamentali tal-esponenti taħt l-Artikoli 32, 33, 36 u 45 tal-Kostituzzjoni ta' Malta; l-Artikoli 2, 3, 8 u 14 tal-Konvenzjoni Ewropeja għall-Protezzjoni tad-Drittijiet tal-Bniedem;**
- 2. Konsegwentement tiddikjara u tiddeciedi illi gew vjolati d-drittijiet tar-rikorrenti taħt l-istess artikolu 32, 36 u 45 tal-Kostituzzjoni ta' Malta u l-Artikolu 2, 3, 8 u 14 tal-Konvenzjoni Ewropeja għall-Protezzjoni tad-Drittijiet tal-Bniedem;**
- 3. Tillikwida kumpens in lineja ta' danni pekunjarju u non-pekunjarji sofferti mill-esponenti b'konsegwenza tal-leżjoni tad-drittijiet fundamentali tagħha kif premess u tikkundanna lill-intimati sabiex iħallsu l-istess fi żmien qasir u perentorju.**

Bl-ispejjeż kontra l-intimati li huma minn issa ngunti in subizzjoni."

Rat ir-risposta tal-intimati li laqgħu għat-talbiet bis-segwenti:¹

1. *“Illi in linea preliminari, sabiex din l-azzjoni tkun tista’ tirnexxi, ir-rikorrenti għandha ggib prova tal-prokura sabiex turi li hija mandatarja speċjali ta’ Andrea Prudente;*
2. *Illi in linea preliminari wkoll, mingħajr preġudizzju għas-suespost, u b’referenza għall-paragrafu disgħa (9) tar-rikors promotur, skont l-**artikolu 161(1) tal-Kapitolu 12 tal-Liġijiet ta’ Malta**, proċeduri quddiem il-qrati superjuri ta’ Malta għandhom jinbdeu permezz ta’ rikors ġuramentat, sakemm il-ligi ma tiddisponix mod ieħor. Filwaqt li l-**artikolu 2(1) tal-Leġislazzjoni Sussidjarja 12.09** jiddisponi illi proċedimenti quddiem din l-Onorabbli Qorti skont l-**artikolu 46(1) tal-Kostituzzjoni u l-artikolu 4(1) tal-Kap. 319 tal-Liġijiet ta’ Malta** jistgħu jsiru permezz ta’ rikors, ma hemm ebda artikolu simili illi jippermetti li kawża dwar allegat ksur tal-Karta tad-Drittijiet tal-Bniedem tal-Unjoni Ewropea ssir permezz ta’ rikors sempliċi, u mhux rikors ġuramentat. Għalhekk, jekk ir-rikorrenti qiegħda tilmenta minn ksur tal-Karta, ir-rikors promotur huwa irritu u null ai termini tal-**artikolu 789(1) tal-Kap. 12 tal-Liġijiet ta’ Malta**;*
3. *Illi in linea preliminari wkoll u mingħajr preġudizzju għas-suespost, il-Ministru għas-Saħħa u s-Segretarja Parlamentari għar-Riformi u l-Ugwaljanza mhumie x il-leġittimi kontradditturi fil-proċedura odjerna stante illi r-rikorrenti qed tallega, inter alia, illi l-ligi penali vigenti illeditilha d-drittijiet kostituzzjonali tagħha, u għalhekk għandhom jiġu lliberati mill-osservanza tal-gudizzju;*
4. *Illi in linea preliminari wkoll u mingħajr preġudizzju għas-suespost, il-Ministru għas-Saħħa u s-Segretarja Parlamentari għar-Riformi u l-Ugwaljanza ġew imħarrka hażin f’din il-kawża għaliex skont l-**artikolu 17(8) tal-Att dwar l-Amministrazzjoni Pubblika (Kap 595 tal-Liġijiet ta’ Malta)** is-Segretarju Permanenti huwa rappreżentant ġuridiku tal-Gvern f’atti u azzjonijiet ġudizzjarji dwar kull haġa li taqa’ taħt il-firxa tal-attività tal-Ministeru li għalih ikun assenjat. Jiġi b’hekk li l-Ministru għas-Saħħa u s-Segretarja Parlamentari għar-Riformi u l-Ugwaljanza*

¹ Folio 13.

għandhom, għal din ir-raġuni wkoll, jiġu meħlusa mill-ħarsien tal-gudizzju;

5. *Illi in linea preliminari wkoll u mingħajr preġudizzju għas-suespost, ir-rikorrenti ma tistax tressaq il-kawża tagħha fuq l-**artikolu 32 tal-Kostituzzjoni ta' Malta** għaliex skont l-**artikolu 46(1) tal-Kostituzzjoni ta' Malta**, dan mhuwiex wieħed minn dawk l-artikoli li jagħti dritt ta' azzjoni quddiem qorti b'setgħat kostituzzjonali. Għalhekk it-talbiet tar-rikorrenti, kif imsejsa fuq dan l-artikolu, huma improponibbli u għandhom jiġu miċhuda minnufih;*
6. *Illi mingħajr preġudizzju għall-paragrafi preċedenti, fil-mertu, l-allegazzjonijiet ta' ksur tad-drittijiet fundamentali tar-rikorrenti u l-pretensjonijiet tal-istess huma għal kollox infondati fil-fatt u fid-dritt, kif ser jirriżulta fil-mori tal-kawża;*
7. *Illi l-istrumenti legali l-oħra citati fir-rikors promotur, u ċjoe dawk imsemmija f'paragrafu disgħa (9), ma jagħtux lok għad-drittijiet li jistgħu jiġu eżerċitati minn individwi kontra l-Istat f'kawża ta' idoli kostituzzjonali. Dan għaliex jikkostitwixxu merament dikjarazzjoni ta' principji illi l-firmatarji jixtiequ jabbraċċjaw meta l-awtoritajiet kompetenti relattivi tal-Istat jespletaw l-inkarigu tagħhom;*
8. *Illi safejn l-ilment tar-rikorrenti jinsab imsejjes fuq l-allegazzjoni ta' ksur tad-dritt għall-ħajja, kif imħares bl-**artikolu 33 tal-Kostituzzjoni ta' Malta** u l-**artikolu 2 tal-Konvenzjoni Ewropea**, dan huwa assolutament bla bażi fil-fatt u fid-dritt, peress li hadd mill-intimati ma qiegħed ħajjet ir-rikorrenti fil-perikolu. Fis-sewwa hadd mill-intimati ma kellu l-animus necandi li jneħhi ħajjet ir-rikorrenti jew l-animus nocendi li jikkaguna xi ħsara għal saħħet ir-rikorrenti. Fi kwalsiasi każ, u kif ser jirriżulta fil-mori tal-kawża, għall-kuntrarju ta' dak allegat f'paragrafu hamsa (5) tar-rikors promotur, ir-rikorrenti qatt ma kienet fil-periklu li titlef ħajjitha meta kienet rikoverata fl-Isptar Mater Dei;*
9. *Illi dwar l-ilment fuq ksur tal-**artikolu 36 tal-Kostituzzjoni** u l-**artikolu 3 tal-Konvenzjoni Ewropea**, l-esponenti jwieġbu bl-aktar mod kategoriku li l-esponenti bl-ebda mod u taħt l-ebda ċirkostanza ma esponew jew isoġġettaw lir-rikorrenti għal xi trattament inuman jew degradanti. Kuntrarjament għal dak allegat fir-rikors promotur, ir-rikorrenti kellha l-assistenza medika kollha meħtieġa sakemm kienet fit-territorju Malti. Barra minn*

*hekk, fir-rikors kostituzzjonali mkien ma jissemma' x'kien it-tratament inuman u degradanti li allegatament gie mwettaq mill-esponenti. Jigi b'hekk li l-lanzanza tar-rikorrenti abbażi tal-**artikolu 36 tal-Kostituzzjoni u l-artikolu 3 tal-Konvenzjoni Ewropea** mhix ġustifikata u wisq anqas misthoqqa;*

10. *Illi inoltre, m'hemm l-ebda ksur tal-**artikolu 8 tal-Konvenzjoni Ewropea** peress li ma kien hemm l-ebda indhil mill-intimati fil-ħajja privata tagħha jew tal-familja tar-rikorrenti. Għalhekk isegwi li ma jistax jinstab ksur tal-**artikolu 8 tal-Konvenzjoni Ewropea**. F'dan il-kuntest, l-esponenti josservaw li r-rikorrenti ma elaborat xejn dwar din ix-xilja. Tassew imkien fir-rikors kostituzzjonali ma gie spjegat b'liema mod l-intimati indahlulha fi ħwejjigha jew fil-ħajja privata tagħha jew tal-familja tagħha. Minkejja dan, anki jekk din l-Onorabbli Qorti ssib li ssussista tali ndhil, dan ma kienx illegittimu peress li kwalsiasi agir differenti tal-Istat seta' biss iwassal għal ksur tad-disposizzjonijiet relattivi, senjatement **artikoli 241 u 243 tal-Kapitolu 9 tal-Liġijiet ta' Malta**, iċċitati fir-rikors promotur. Għalhekk inkwantu dan l-ilment ma gie x suffiċjentement infisser, dan għandu jigi mwarrab ukoll;*
11. *Illi dak li qiegħed jintalab mir-rikorrenti ipoggi lill-intimati, jew min minnhom, f'sitwazzjoni fejn ikollhom imorru kontra d-disposizzjonijiet tal-**Kapitolu 9 tal-Liġijiet ta' Malta** u dan ma jistax jigi aċċettat;*
12. *Illi għal dak li jirrigwarda l-ilment fuq ksur tal-**artikolu 45 tal-Kostituzzjoni ta' Malta u tal-artikolu 14 tal-Konvenzjoni**, jiġifieri l-ilment mibni fuq allegata diskriminazzjoni, dan huwa infondat fil-fatt u fid-dritt għaliex ma kien hemm l-ebda diskriminazzjoni li saret mill-intimati fil-konfront tar-rikorrenti;*
13. *Illi mingħajr preġudizzju, u b'referenza għat-tmien (8) paragrafu tar-rikors promotur, l-esponent jissottometti li l-ilment fuq dan l-artikolu ma jistax jirnexxi għax ir-rikorrenti ma fissritx fuq liema bażi u status giet diskriminata;*
14. *Illi għall-kuntrarju ta' dak li qiegħda ssostni r-rikorrenti, semmai, l-obbligu pożittiv min-naħa tal-intimati fil-qadi ta' dmirijiethom huwa li jsalvaw il-ħajjiet. Importanti li jigi enfasizzat li ħajjet ir-rikorrenti ma kienet fl-ebda periklu sakemm kienet fit-territorju Malti u dan kif ha jirriżulta waqt is-smiġħ tal-kawża;*

15. *Illi l-abort jikkostitwixxi reat f'Malta u r-rikorrenti kienet taf, jew imissha kienet taf dan (ignorantia legis neminem excusat). Għalhekk l-esponenti jishqu li ma tistax tigi f'dan l-istadju til-menta minn allegat ksur tad-drittijiet fundamentali tagħha meta kienet hi stess li poġġiet lilha nnifisha f'dik il-qagħda. Id-diffikultajiet tar-rikorrenti, semmai, ġew imqanqla min-natura inerenti tat-tqala per se u mhux mill-allegata omissjoni tal-intimati, jew minn minnhom, milli jippermettu l-intervent mediku mixtieq minnha, intervent li jikkostitwixxi ksur tal-ligijiet kriminali domestiċi. Dan speċjalment meta t-trattament mogħti lir-rikorrenti kien, fl-opinjoni professjonali tat-tobba, fl-aqwa interess tal-qagħda tar-rikorrenti f' dak il-mument.*

16. *Salv eċċezzjonijiet ulterjuri jekk ikun il-każ.*

Għaldaqstant fid-dawl tas-suespost, l-esponenti umilment jitolbu lil din l-Onorabbli Qorti jogħġobha tiċhad it-talbiet kollha tar-rikorrenti bl-ispejjeż kontra tagħha.”

Rat l-atti kollha tal-kawża.

Semgħet ix-xhieda prodotti.

Rat in-noti ta' sottomissjonijiet u semgħet it-trattazzjonijiet.

Rat li l-kawża thalliet għas-sentenza llum.

Ikkunsidrat:

i. Fatti fil-Qosor.

Illi din il-kawża hija xprunata minn fatti li tista' tghid li bdew minn gewwa Seattle l-Amerika u spiċċaw fi Spanja, fejn ir-rikorrenti li kienet qed tesperjenza diffikulta' fil-gravidanza tagħha, spiċċat *di xelta* tittermina l-istess tqala gewwa Spanja.

Il-fatti fil-qosor kif ippreżentati lill-Qorti juru illi kemm ir-rikorrenti ukoll il-partner tagħha, fil-bidu tat-tqala tagħha, vjaġġaw lejn Malta għal btala. Jirrizulta ukoll mix-xhieda stess ta' Andrea Prudente illi qabel ma għamlet dan il-vjaġġ ma Jay Wheeler, il-partner tagħha u missier it-tarbija li kienet qed iġġorr, rat spotting ta' demm. Tixhed illi² minn naħa tas-servizzi mediċi Amerikani giet infurmata li dan kien normali u seta' meta jkollok x'taqsam mal-partner tiegħek fi stat ta' gravidanza. Anzi gie sugġerit lilha li tagħmel din is-safra twila u tmur tieġu pjaċir³. Hekk gara. Il-koppja għażlu li anke jqattgħu xi granet gewwa l-ġżira ta' Għawdex. Kien hemm li hija esperjenzat l-ewwel gwaj serju.

Darba hawn, kemm ir-rikorrenti ukoll il-partner tagħha, iġhidu illi matul il-lejl hi bdiet tara d-demm u daħlu l-isptar ta' Għawdex. Aktar tard wara li rċeviet il-kura minn hemm haġu mill-isptar, tant kienet tajba li anke marru jimxu, dan darba li Prudente giet rilaxxata mill-isptar ta' Għawdex.⁴

² Folio 334 et seq.

³ Folio 345.

⁴ Folio 254, xhieda ta' Jay Wheeler.

Nizzlu Malta. Kien hawn li Prudente esperjenzat telf ta' ilma amneotiku. Fittxew l-assistenza ta' Dr. Alberto Vella gewwa St. Thomas Clinic. Hemm ingħatat aktar mediċini, antibijotiċi.

Jgħidu, kemm ir-rikorrenti ukoll Wheeler, li fit-tieni vista gewwa St Thomas gew infurmati li għax ma kienx hemm ilma amneotiku madwar it-tarbija, li din kienet se tmut. It-tarbija pero' kellha *heart beat*.

Gew riferuti għal Mater dei.

Tista' tgħid li kien minn hawn illi r-rikorrenti u l-partner tagħha iħossu li gew aggravati.

Ikkunsidrat:

ii. Provi mressqa

Għall-iskop ta' eżami ta' kull attenzjoni medika li rċeviet Andrea Prudente gewwa Mater Dei, gie esebit l-file mediku tagħha minn **Gertrude Scerri**⁵.

⁵ Folio 308 Dok GX.

A priori għandu jingħad li ma ngabet ebda prova illi fil-konfront tal-management tas-sitwazzjoni tar-rikorrenti kien hemm xi *mismanagement* fil-konfront ta' mediċini u testijiet li hi għaddiet minnhom. Il-Qorti lanqas se tqies l-ilmenti mressqa mir-rikorrenti u Wheeler tal-kwalita ta' l-ikel, li ma ngħatatx biżżejjed maternity pads, attitudni ta' staff eċċ, għax għalkemm tissimpatizza mar-rikorrenti u missier it-tarbija, frankament tqieshom mhux biss mhux flokhom però ilmenti żejda u bla sens meta jidher li kienu qed jirċievu l-aħjar li l-Istat Malti seta' jagħtihom konsiderando wkoll li r-rikorrenti kienet irriżultat pożittiva għal COVID.

Minn naħa l-oħra l-ilment tar-rikorrenti li fil-fatt xpruna din l-azzjoni hu marbut mal-fatt li darba li daħħlet l-isptar, titlef id-demm, ir-rikorrenti preżentat mhux biss dan it-telf, imma anke sitwazzjoni fejn il-kurdun niżel u hareġ mill-parti tagħha, ukoll infezzjoni fil-bladder fost l-oħrajn. **Il-vertenza ddur ma dak it-trattament li hi rċviet u dak li hi ppretendiet.**

Jibqa' kardinali għal dan l-eżami li mil-lat mediku it-tarbija kienet għadha ħajja u kellha qalbha tħabbat. Hawn beda id-diżgwid. Kellha pronjosi baxxa ta' vijabbilità tal-fetu.

Ir-rikorrenti kemm mir-riċerka tagħha, u għax mingħajr dubbju giet mitkellma minn tobba *pro choice*, ergo favur l-abortion, kienet imwerwra li hi

kienet se tmut minn *septicemia* jekk ma jsirx intervent tat-terminazzjoni ta' tqala. Kemm tramite Google ukoll informazzjoni li kienet qed tircievi, din il-povra omm giet sogġettata għal biża u pressjoni emottiva qawwija li jew titneħħa minn go fija t-tarbija jew tmut hi. *Sic et simpliciter* ġia a priori l-Qorti ma tiddejjaq xejn tghid li din il-mara spiċċat użata minn nies, hekk imsejjha *pro choice*, biex, bla ma jikkalkulaw l-emozzjonijiet tagħha u talmissier, jressqu 'l quddiem l-bidla legali aktar estrema mixtieqa minnhom, bl-Ingliż *she played ball to their beliefs*.

Andrea Prudente tesprimi l-inkwiet, il-biza' u l-emozzjonijiet tagħha waqt irrikoveru tagħha ġewwa Mater Dei u x'wassalha għal dawn il-proċeduri.⁶

Tixhed u tesprimi ruħha b'dan il-mod-

"...because of the ... giant ordeal and trauma where not only were we loosing our baby but we got caught up in a medical system that was not protecting the one life that could be saved..." tiddekrivi dan bħala *"dehumanising"*.⁷

*"I felt dehumanised because by insisting that there was no way to save the baby and refusing to intervene to keep me safe because I was at high risk of potentially ...infection."*⁸

⁶ Folio 334 et seq.

⁷ Folio 336.

⁸ Folio 338.

Tesprimi s-sentimenti tagħha hekk:

“Well my first question was in when we saw the ultrasound and there was no amniotic fluid, well how do we save the baby?... And the doctor was adamant that it was impossible and so then we asked what next, and he said really we cannot do anything because she still has a heartbeat, so I was experiencing a miscarriage prolonged and extended and the heartbreak of it because we wanted this baby, we planned for the pregnancy, We had been going to prenatal Dr visit, I had changed a lot about my life to protect the baby, and now we're losing her, and although there was nothing we could do to save her, there was something that we could do to keep me safe, and I was refused that treatment, so there was nothing to gain and there was everything to lose. And it was “

*...
“Devastated, distraught, confused, desperate the spirit it was overwhelming And it was all more intense when we realised that my life was at risk, and so not only we were losing our baby girl, I was potentially losing my life I for no reason, for nothing to gain.”⁹*

Tgħid li r-raguni li ngħataw għal din id-deċizzjoni kienet li Malta kienet *pro-life* u din kienet tgħodd bħala abort għax it-tarbija kienet għadha ħajja.

Biex jsibu soluzzjoni fittxew, anke bl-ghajnuna tal-insurance tagħhom, sptar barrani fejn setgħet isir din it-terminazzjoni voluta.

Spjegat li anke x-xelta li jmorru Majorca għat-terminazzjoni kienet terrifikanti –

“ it was terrifying to board a plane after Dr Vella warned us of the high risk of haemorrhage, that was why he did not want us to fly home, so the

⁹ Folio 339.

transport was very scary,when we arrived in Majorca it was night and day difference how we were treated at Mater Dei. ”

Majorca saritilha t-terminazzjoni tat-tqala minha mixtieqa, bl-insurance tkopri l-ispejjeż.

Tispjega li minhabba dak li okkorra hi spiċċat issofri minn PTSD tant li tixhed li:

“...I started seeing a trauma therapist who diagnosed PTSD, and we began working through processing everything that happened and trying to unbundle the loss of our baby from the sort of legal medical catastrophe that happened around it.”¹⁰

Mistoqsija dwar l-informazzjoni li kienet qed tircievi qalet li meta Malta bdiet bl-inkwiet u ċemplu lit-tobba tagħhom ġewwa l-Amerika, ġiet infurmata illi seta’ jkollha a *fatal infection*.

Tgħid li Mater Dei kull ma qalulha li kien infaqgħalha l-ilma, li kellha *placenta partly detached*, ukoll li l-baby ma setax jgħix. Tgħid li dan id-diskors kien qalulha Dr. Vella.

Iżżid illi ġewwa Mater Dei qabla, li ma kienetx taf x’jisimha, qaltilha li kienet se jagħtuha l-antibiotics biex jbegħdu l-infection, u jekk hi tkun antibiotic resistant

¹⁰ Folio 343.

kienet tidhol go sepsis u meta tkun *on the brink of death*, jieħdu azzjoni, cioè' jitterminaw it-tqala.

Tgħid li hi ma riedetx tabortixxi. Għaliha tilfet it-tqala.

Tgħid hekk fuq mistoqsija tal-Qorti-

“Qorti - The issue is really not the treatment itself, it is the lack of the treatment that you thought you should receive.

Xhud- That is correct, they were taking precautions to watch for an infection, which is why they tested my temperature and my blood, visited me often to catch early signs of an infection, and I was grateful for that because I was very scared, but there was no need for me to continue to be at risk for an infection, that accomplished nothing, there was a procedure where, call it what you want, a termination, that would immediately take my life out of risk.”¹¹

Tispjega wkoll li l-biża tagħha giet xprunata minħabba: “...we started researching on the internet premature rupture of membranes, that is just what I had, ... I came across articles....” Tkellmet fuq ċerta Maria Mifsud Mora li ukoll skontdha għaddiet mill-istess esperjenza medika tagħha, damet Mater Dei xi sittax-il gimgħa, spiċċat evakwata b'air ambulance għal Kanada biex tirċievi terminazzjoni. Ukoll fuq ċerta Savita li kienet qed tirċievi trattament minn spjar Irlandiż, għall-istess sitwazzjoni tagħha, pero' spiċċat mietet b'*septicaemia*.

¹¹ Folio 358.

Tgħid li hi kienet imbezza' għaliex go fiha kellha fetu li kien se jmut, u hi bħala omm kienet:

“...at constant risk of potentially fatal infection until the contents of the uterus are passed. That was why I was scared, I was scared of dying.”¹²

Mistoqsija fuq il-vista li għamlitilha Dr. Natalie Psaila, din għax għamlu ricerka u sabuha, din issuggeritilhom li kellhom tramite google isibu minn seta' joffri s-soluzzjoni mixtieqa minnhom, cioè' t-terminazzjoni.

Jay Wheeler¹³ ukoll jispjega t-trauma li hu għadda mal-partner tiegħu r-rikorrenti. Ukoll jikkonferma illi meta Andrea bdiet titlef id-demm spicċaw l-isptar ta' Għawdex fejn kienu fuq vakanza imbagħad meta wara li giet discharged u għaddiet minn perjodu ieħor ta' telf ta' dmija, irrikorrew għand Dr. Vella li kien qalilhom illi li kien hemm *placenta detachment* pero' li t-tarbija kienet tidher għadha sew.

Igħid li eventwalment spicċaw Mater Dei u jilmenta li hemm ma tantx ingħataw informazzjoni hlief li kien hemm *umbilical cord detachment*. Jilmenta wkoll li l-isptar qatt ma raw lil Dr. Vella. Igħid li hemm tgħallmu li Andrea kellha riskju ta' infjammazzjoni, allura tpogġiet fuq IV, kienet qed tigi monitored

¹² Folio 365.

¹³ Folio 252.

kontinwament. Ighid li għalih ma kienx jagħmel sens li kienu qed jipprovaw isalvaw it-tarbija meta din ġia' kienet mitlufa.

Jispjega li:

“...Andrea’s body was still functioning like a womb, there is a heartbeat, there ...was also simultaneously life threatening for her, .it was something not conceivable... It was hard to understand. Andrea was trying to understand what risks were for her.”

Xehed fuq ir-riċerka li għamlu fuq l-internet, skoprew li kien hemm incertezza fuq il-mod kif ġewwa Mater Dei kienet qed tigi ġestita s-sitwazzjoni, fis-sens li vera l-*antibiotics* kienu se jgħinu bl-infezzjoni imma *fin in fondo* t-tarbija xorta kienet se tintilef u li l-proċedura idonea kienet li tigi terminata t-tqala.

jgħid li meta bdew isaqsu lit-tobba u qwiebel x'inhu jġgri, għalih kienu qed jirċievu risposti vagi mingħandhom. jgħid li anke qalulhom li t-tarbija ma setgħetx tissalva, allura għalih il-kura li kienet qed tircievi Andrea, anke ta' injections go l-istonku tagħha¹⁴, kienu ta' uġiġh inutli.

¹⁴ Anti-coagulants

jgħid li hadd ma kien qed jagħtihom informazzjoni sewwa, għax anke jekk il-baby tkompli tiżviluppa, din minħabba nuqqas ta' ilma, kienet se tkun soġġettata għal nuqqas ta' żvilupp tal-pulmun u tal-*limbs*.

Dwar it-trauma ta' Andrea jispjega hekk:

“...her mental state was in a challenge there was a moment of peace but most of the time she was trying to be calm from panic. She was like a trapped animal, the sense of danger that you cannot escape from and no one will help you and there were few as our understanding evolved, Friday and Saturday we came to the realisation that she would die, and the baby is not going to live, Friday night...we were looking into things that can cause a miscarriage ...She put her wrists and pushed them on her abdomen, on her belly button and ...in her stomach and...bulging over and I asked her what are you doing? ...I am trying to get my body to go into labour.

...She told me please punch me in the stomach as hard as you can ...and I said no I will never make this, and she told me I am begging you to save my life, and I told her that I cannot believe we are talking about this. She was desperate and terrified.”¹⁵

Wheeler xehed ukoll fuq il-kumplikazzjonijiet li nqalghu biex jottjenu minn Mater Dei r-records tar-rikorrenti biex ikunu jistghu jivjaggaw għal sptar barrani biex Andrea tirċievi kura minnha mixtieqa dik ta' terminazzjoni.

Jinsisti in kontro-eżami li r-rikorrenti kienet f'riskju ta' *sudden death*. Mistoqsi minn fejn għab din l-informazzjoni, wieġeb li kellu informazzjoni fuq *sepsis*.

¹⁵ Folio 262.

Mistoqsi dwar il-visita ta' Nathalie Psaila, iġid li din ma kellhiex çans tkellimhom, għax kienet *berated* mill-istaff ta' Mater Dei. Innega li dan ġara minħabba li din ma kienetx liebsa maskla.

Mistqosi għal diversi drabi min eżatt mit-tobba kien qalilhom li Prudente kienet fil-perikolu tal-mewt, wieġeb illi għalih la l-baby kienet mitlufa, allura l-ħajja vera fil-perikolu kienet ta' Andrea. Baqa' insistenti li Dr. Vella kien qalilhom li t-tarbija kienet mitlufa.

Iwieġeb li Andrea kienet qed tħossha *trapped* ġewwa Mater Dei, mhux għax ma kienetx qed tirċievi kura imma, għax ma kienetx qed tirċievi l-kura minnha mixtieqa cioè' t-terminazzjoni.

Qal li anke kienu konxji u li kienu nfurmati li minħabba n-nuqqas ta' *amniotic fluid* u l-mod kif dan jaffettwa l-iżvilupp tal-fetu, li huma kienu qegħdin bir-riskju li titwieled tarbija li tmut f'idejhom.

Ovvjament xehdu diversi tobba, fil-maġġior parti kuranti tar-rikorrenti.

Dr Alberto Vella¹⁶ osteriku u ġinekologu jikkonferma li hu kien l-ewwel li ra lir-rikorrenti ġewwa St Thomas Clinic. Qal li minhabba li kien hemm bleeding u kellha infection fil-pipi bdiela l-Augmentin. Żidilha l-bleeding u ħasset l-ilma, baġhatha Mater Dei. Ighid wara eżamijiet li saru ġewwa l-isptar, bil-kura li rċeviet u għax kienet mistrieħa ġo sodda, li ma kellhiex aktar tant telf ta' ilma u lanqas presenza tal-kurdun fil-vagina. Għalih dan gara, li l-kurdun tela' lura, għax issa kellha c-cervix li raġa ngħalaq.

Jixhed li kien hemm presenza ta' *foetal heart*.

Ighid hekk dwar il-pronjosi tagħha:

*“la infaqta’ l-ilma, hemm entry point general mic-cervix, għal utru speċjalment jekk kien hemm il-cord qabel. Għalkemm ingħalaq reġa’ u tlaqqat xi infezzjoni minn isfel. U tiġi sepsis, dik ma tridhiex ovvjament qatt. Ahna komplejna fuq Augmentin to prevent infection, hadna swab habba xi infezzjoni li jista’ ikun hemm, li jkunu resistenti għal augmentin, imma ma kellhiex il-pazjenta. Tista’ tkorri u tista’ ddum ħafna, ġieli kien hemm min dam sa 28 weeks, il-ġisem stess generalment jarmi l-baby waħdu. **Qatt ma kellha problema ta’ sepsis, għax tkun fuq l-anitbiotics diġà.**”¹⁷*

Żid ukoll hekk:

¹⁶ Folio 97.

¹⁷ Folio 99.

“Meta kollok kundizzjoni bħal dawn ma tafx x’s e jġgri. Ġeneralment il-pazjenta tkorri waħida, għalhekk għedtlek sepsis cases qatt ma kellna. Ahna nkunu diġà qed nikkaverjawhom. Biex tara sepsis cases ikun xi hadd mhux multi ġeneralment u ġie minn barra, ġew bl-infezzjonijiet hemm diġà’. Biex tara jekk hemm xi infection li jkun detriment għal omm, trid tara x’ha tagħmel, imma ġeneralment kelli każ simili, li sakemm hriġt mill-ward, il-baby hareġ.”¹⁸

Qal li jekk imut il-fetu il-proċedura hija sempliċi, m’hemmx bżonn raxxkament, tuża intravenous tibda labour u jitwelled il-fetu.

Żied ukoll li ma jġix użat forma ta’ *management* mod ieħor għaliex sakemm it-tarbija għadha vijabbli, dejjem hemm tama.

Qal li Prudente inżammet l-isptar taht superviżjoni kostanti kif jidher mill-file mediku tagħha, anke ċempel mid-dar biex jara l-andament tagħha. Qal li għax ma setgħetx tintbagħat id-dar, ma kienux se jafdawha, anke għax lanqas relatives ma kellha Malta. Għalhekk inżammet taht kura *monitored* l-isptar.

Dwar l-iżvilupp tal-fetu xehed dan:

“l-iżvilupp seta’ kien normali imma jista’ jkun ikollok baby għandu l-utru magħluq fuqu, in-natura hafna drabi tirrangha lilha nnifisha, jista’ jkun li l-ilma jinfaqa’, u l-ilma jerġa jżid waħdu wara xi tlett ġimgħat, mhux kollox ikun ominous daqshekk. Jien lill-istudenti ngħidilhom, il-medicina mhux according to the book, u mhux awtomatika, ikollok sixth sense, bħal pazjenta li ta’ 60 sena, rat id-demm, tagħmillha raxxkament

¹⁸ Folio 100.

*u reġgħet rat ftit, mhux ahjar tneħhi l-utru? Is-sixth sense jibqa' jtik. Heqq anke fit-tqala, kollox miexi normali, kollox ok anke waqt l-visti u jkollok sudden death, johroġ plaċenta normali toħroġ, l-ilma abjad imma sudden death...."*¹⁹

Qal li hu la kien hemm *foetal heart* ma setax jagħmel il-pessaries²⁰ għax il-ligi ma kienetx thallih.

Jgħid li kieku ra li kienet ġejja infection u li l-baby kien miet kien jibda kollox hu. Qal li dan ma kienx neċessarju, hi ma kienetx infettata u lanqas kellha xi uġiġ kbir. Dwar ir-riskju tagħha jixhed li dan kien wieħed minimu hafna. Kienu qed jittieħdulha l-parameters il-ħin kollu. Jgħid la kienet l-isptar ma kienx hemm dan ir-riskju. Jgħid li Mater Dei kien hemm ir-riżorsi kollha bħal tobba, nurses kwalifikati u kura l-ħin kollu. Mod ieħor kieku ntbagħtet id-dar.

Dwar li ġiet riferuta lil Sandra Castillo, *bereavement nurse*, wieġeb li dan kien protokoll u kienet support service normali fejn kien hemm ċans ta' korriment. Jingħata biex jiġu meġġuna l-ġenituri.

Dwar il-management mediku tas-sitwazzjoni u l-kura li kienet qed tirċievi Prudente, jgħid li qatt ma urietu li ma kienetx taqbel mal-kura li kienet qed tirċievi. Qal pero' li mill-ewwel ġurnata hu spjegalha li sakemm kien hemm *feotal*

¹⁹ Folio 103.

²⁰ Biex jinduċi terminazzjoni

heart, ma seta' jagħmel xejn biex teħles mill-baby. Ukoll li jekk jigr xi haġa lilha **"...ma nistax nistenna l-baby jmut, yes I would act then"**²¹ Jgħid li dan il-każ qatt ma mmanifesta ruħu f'hekk. Sakemm baqgħet l-isptar il-White blood cells tagħha qatt ma telgħu, dan ifisser li ma kellha ebda infezzjoni.

Qal li pero' l-pazjenta ma riedetx tistenna, marret barra biex tagħmel *termination*.

Dwar il-vijabbilta' tat-tarbija qal ukoll:

*"dment li hemm qalb thabbat u l-parametri huma tajbin hemm vijabbilta' issa jekk hux se jgħix il-baby, iridu iġhaddu aktar ġimghat. Imma ma tistax dal-każ, jew tista' tkorri jew bħala tqala tibqa' għaddejja sa 30 weeks u hemm tista' teħlisha"*²²

In kontro eżami dwar l-animu tar-rikorrenti fakkar li din kienet barranija, kollox kien qed isir *at a cost*. Li kien se jkollha *a shocking fee* tal-isptar. Igħid ukoll li jekk kien se jkollha wild prematur dan kien jittieħed *special care unit at a huge running cost*.

Jgħid li għażlet *discharge against medical advice*. Ukoll li kieku baqgħet l-isptar kien hemm çans zgħir li t-tqala tkompli.

²¹ Folio 107.

²² Folio 110.

Xehed **Dr. Mark Formosa**.²³ Spjega li l-involviment tiegħu kien li saret konsulta miegħu dwar il-management tal-kura li kienet qed tircievi r-rikorrenti ġewwa Mater Dei. Xehed li kienet prassi tad-dipartiment li jsir dan. Ikkonferma li l-*conservative management approach* li kien ħa Mr. Vella kien dak korrett. Ikkonferma n-notamenti fejn kien hemm imniżżel illi “*..if the patient deteriorates, rising white blood cells count u CRP²⁴, any signs of sepsis, the pregnancy will need to be delivered.*”²⁵

Xehed **Dr Albert Scerri**.²⁶ Anke dan kien konsulent fl-Ostetrija u Ġinekologija.

Qal li hu ġie kkonsultat bit-telfon fuq il-każ ta’ Prudente. Qabel u kkonferma mat-trattament li kienet qed tircievi. Qal li dan kien il-mod kif dejjem kienu jipproċedu.

Xehdet Sandra Castillo.²⁷ Qalet li kienet *a practise midwife*, tagħti għajnuna waqt it-tqala jew meta xi ħaġa tmur żmerċ. Spjegat li r-rikorrenti kellha kundizzjoni ta’ ansjeta’ u beżgħet li jkollha relapse. Tiddeskriviha bħala *distressed*. Ikkonfermat li r-rikorrenti xtaqet li ma tibqax tistenna li tispicċa t-

²³ Folio 113.

²⁴ A **C-reactive protein (CRP)** test is a blood test that measures the level of CRP, a protein produced by the liver. The liver releases this protein into the bloodstream in response to inflammation or tissue damage. It serves as a general marker for inflammation. (Riżultat ta’ Google Search).

²⁵ Folio 115.

²⁶ Folio 116.

²⁷ Folio 121

tqala waħidha. Tikkonferma li l-partner tagħha wkoll kellu *concerns* għas-saħħa tar-rikorrenti. Kienu *concerned* li jistgħu jinqalgħu komplikazzjonijiet. Tgħid li kienet anke qaltilhom li kemm kienet ilha taħdem hemm qatt ma kien inqala' xejn lil hadd.

Xehdet **Dr. Isabelle Stabile**.²⁸ Hija wkoll speċjalista fl-Ostetrija u Ġinekologija.

Tkellem fuq tqala fejn ikun hemm *early rupture of the membranes* u qalet li din it-tqala hija *doomed*. Trid tittiehed deċiżjoni jekk titkomplix it-tqala' jew tigi terminata. Esebit sensiela ta' dokumenti li juru dawn il-*guide lines*. Dok ISB1-
ISB4.²⁹

Kienet ta' l-opinjoni u rreferit għal dan l-istudju li meta jkun hemm *early rupture of the membranes*, qabel it-term ta' l-ewwel trimester, il-*membranes rarely reseal*. Jibqa' għalhekk *open passage* b'riskju kbir ta' infezzjoni. It-tieni haġa li setgħet tmur hażina kienet il-*bleeding* minn wara l-plaċenta. Tgħid li f'dan it-tip ta' xenarju il-fetu jista' jmut waħdu, pero' huwa meta l-omm tkun f'riskju imminenti t-tobba jgħaddu għal-delivery. Tinsisti li mill-istudji riferuti li ebda fetu ta' 17 jew 18-il ġimgha qatt ma għex. Baqgħet tagħmel referenza għal hafna studji xjentifiċi

²⁸ Folio 198.

²⁹ Folio 214-250.

biex turi li fetu ta' żvilupp tal-ġimġhat imsemmija ma kienx se jgħix fis-sitwazzjoni kif preżentata.

Tispjega illi:

“...the earlier the water break, the less likely it reaccumulates, in fact in all these studies this do not happen. When you have very little or no water at all...anhydramniosis it is called, the foetus have no sack to grow, to move, it's arms and legs cannot move....cramped

....

The result is what is what we call contractors in the limbs. The real problem is the lungs. Unless there is enough water around the fetus, the lungs cannot grow. They cannot expand. If the fetus are born alive unfortunately they cannot breathe well, they have pulmonory hypoplasia. This means little growth. They develop complications. They will die.”

B'referenza għal każ ta' Prudente, xehdet illi b'referenza għall-istudji li eżebit, il-*likelihood ta' survival* tat-tarbija kienu *close to zero*. Tgħid li anke l-pronjosi għall-omm ma kenetx healthy, “ *...she already had a urine infection, and was bleeding, and that means the bleeding **may** continue, **may** get heavier, and **may** start to hemmorrhage.*”³⁰

Qablet ukoll li fetu ta' 24 ġimġha kellu *chance ta' survival* tajjeb.

³⁰ Folio 207.

Xehed fit-tul **Yves Muscat Baron**.³¹ Dan kien ic-Chairman tad-Dipartiment tal-Ginekologija.

Mistoqsi dwar il-viabbilta' ta' tarbija jwieġeb hekk:

*"..amniotic fluid, meta jkunu żgħar dak jiġi produced mill-awrina tal-babies. Mela this is very small amount, allura fil-każ meta jkun hemm rupture tal-membrane, u l-ilma jkun hareġ idum hafna biex jerga jifforma, jista' jdumlek anke tlett ġimgħat biex jifforma bil-mod il-mod. Tarbija li għandha bżonn meta (sic) biex ikollha viabilty, ..huwa 24 weeks, kull m'għandu bżonn, 2 centimetri ilma of amniotic fluid, and the baby can survive."*³²

Spjega li l-funzjoni ta' l-amniotic fluid b'dan il-mod:

*"il-baby jibla' l-ilma..awrina tal-baby ma tkunx awrina bħal tagħna, ilma tkun aktar, 90% mill-amniotic fluid, hija proċess ta' term, at the end 90% mill-awrina ta' tarbija ...anke it produces amniotic membrane, go sack dak ikun. Earlier on before the 20 weeks, kemm il-kliwi, u l-pipi tat-tarbija u amniotic membranes jipproduċu l-ilma u jespandu l-pulmun. Il-pulmun importanti li jespandi habba li jrid jieħu n-nifs. Ukoll importanti biex hu jista' jikber ovvjament. Issa at the end of the day, jekk ikun jibqa' mingħajr ilma għal tlett xhur, erba' xhur. Ic-chances huma minimi. Tarbija xi erba' xhur bla ilma.....an adverse outcome. Imma jekk ikollu ftit ilma, kapaci jgħix, u jista' joħroġ intatt."*³³

Jixhed ukoll dwar il-persentaġġ ta' survival rate ta' 10% jekk ikun hemm *rapture* ta' membranes below 20 weeks.

³¹ Folio 68.

³² Folio 70.

³³ Folio 71.

Żid ukoll li llum meta jinfaka' l-ilma jingħataw l-antibiotiċi mal-ewwel biex jipprevjenu infezzjoni.

Xehed li hemm possibbiltà' li l-*membranes* jiġu sealed, dawn huma delikati u jipprezentaw ruħhom f'żewġ saffi. Spjega li l-likwidu jerga jiffirma minħabba li l-kliewi jibqgħu jaħdmu.

Dwar il-każ per se jgħid li hu ġie mitkellem minn Dr. Alberto Vella fil-21 ta' Ġunju, 2022. Dan mar ikellmu għax kienet ċemplitlu Profs Stabile u wissietu biex joqgħod attent u qaltli li l-pazjenta kienet fil-perikolu, qaltli *you know what you should do*.

Għamel *case conference* ma' Mr. Mark Formosa u Mr. Albert Scerri, kif solitament jiġri f'każ ikkumplikat, li qablu mal-management mediku li kien qed jiġi adottat. Żid li f'ħamsa u tletin sena qatt ma kellhom ebda *misadventures*.

Spjega li l-management kien li Prudente ngħatat l-antibiotiċi mal-ewwel, anzi li ġia' minħabba infezzjoni preċedenti fl-awrina, ġia' kellha doża qawwija ta' antibijotiċi. Il-management kien ukoll li l-pazjenta tibqa' mistrieħa taħt osservazzjoni, jaraw il-parametres tagħha, jittieħdilha l-polz, pressjoni, deni, eċċ. Żied li kellhom attenzjoni għac-CPR u *white blood cell count* biex jassiguraw li

ma jkunx hemm infezzjoni. Qal li l-parametri tal-pazjenta baqgħu sew u li ma kellha ebda sinjal ta' infezzjoni *at that stage*.

Dwar il-*prolapse* li sofriet ir-rikorrenti xehed li l-ghada reġa sar eżami ieħor, *ultra sound*, u rriżulta illi l-ghonq ta' l-utru kien magħluq u ma kien hemm ebda *cord presentation*. Jgħid li dan kien riżultat li nżammet mistrieħa fis-sodda.

Baqa' insistenti li l-pazjenta qatt ma wriet ebda sinjal ta' infezzjoni jew kienet f'tali riskju.

Għamel referenza għad-dokument YMB sa YMB2³⁴, li juri li l-ghonq ta' l-utru kien kompletament magħluq.

Jgħid li mar-rikorrenti marru *the extra mile* biex jassiguraw li kienet *super safe*.

Jgħid, u dan b'referenza għad-dokumenti esebiti, li din kellha u ngħatat is-support kollu nkluż *bereavement midwife* għal support psikoloġiku.

Spjega li f'każ ta' infezzjoni kemm il-white blood cells count ukoll ic-CRP jitla' għal livelli ta' 140, 250 u 300 rispettivament.

³⁴ Folio 131-133.

Kien insistenti li minhabba n-nuqqas ta' infezzjoni ma kien hemm ebda indikazzjoni li kellha tiġi tterminata t-tqala. Ighid li f'ebda punt ma nġhalqet in-neċessita ta' l-ghażla bejn l-omm u t-tarbija. Ukoll li l-pazjenta ma kienet qatt fil-perikolu tal-mewt. (enfasi tal-Qorti).

Enfasizza li l-pazjenta kellha vantaġġ għaliex ġia' kienet qed tiehu l-antibiotics minn qabel minhabba li kellha *infection* fl-awrina.

Ikkonferma illi l-perikolu ta' fetu meta jintilef l-ilma amneotiku u ma jergax jiffirma, hu illi t-tarbija ma tkunx tista' tiehu nifs sew u l-limbs tagħha ma jiffirmawx.

Jitkellem u jixhed fuq tarbija li għaddiet mill-istess żvilupp, l-omm inġhatat l-antibiotics, b'hekk rebħet erba' xhur oħra tqala, weldet tarbija li kellha bżonn intervent mediku fuq imsarinha, pero' illum hija baby b'saħħitha.

Meta reġa' ngab jixhed iċċara illi fejn irrefera għal għoxin ġimgħa ikkoreġa għal 23 ġimgħa biex tarbija prematura tghix.

Jixhed ukoll illi Prudente, skont il-file mediku tagħha, kienet ilha titlef demm għal 15-il ġurnata qabel ma ġiet, jgħid li hemm possibbiltà ta' konnessjoni bejn it-telf ta' demm li kienet sofriet ġewwa l-Istat Uniti u dak li ġara go pajjiżna.

Jeskludi li hu kien qed jitkellem fuq l-ipotetiku jew preżunzjoni. jgħid li ma kellux dubbju mediku fuq dak li kien qed jixhed. Ukoll li t-telf ta' demm wara li jkollok x'taqsam matul it-tqala ma kienx normali kif għe indikat lir-rikorrenti. Qal li ma kien xejn normali li mara tara d-demm waqt it-tqala, ukoll li ma kellhiex tingħata pariri li ssiefer minn Seattle għal Għawdex kif tgħid ir-rikorrenti li qalulha l-mediçi amerikani. Jgħid li l-parir tat-tobba lokali ikun, oqgħod mistrieħa fis-sodda d-dar.

Xehed li l-mistrieħ ifejjaq. Spjega wkoll fuq il-pressure li jsir fuq l-utru. Qal li Prudente pprezentat clots minn wara s-seconda, għax din kienet qed tinqala'. Dawn iżidu l-pressure għewwa l-utru. Ukoll illi proċess ta' *detachment* jikkawża *contractions* li minnhom infushom ukoll iżidu l-*pressure*. Kienet sofferenti ukoll minn Urinary Tract Infection li wkoll tikkawża *contractions*, tant li jista' jkollok *premature labour*. Kellha wkoll x'taqsam mal-partner, kollox iżid pressure fl-utru, dan tenut kont tad-delikatezza tal-membrane. Spjega b'hekk il-konnessjoni mar-*rapture* u għaliex il-mistrieħ kien importanti.

Reġa nsista li kien hemm survival rate għal fetu ta' 10% dan mgħejjun mill-fatt li kienet qed tiġi amministrata l-antibiotiçi.

Ippreżenta wkoll id-dokument A³⁵ li jitkellem dwar il-parametri ta' persuna oħra f'sitwazzjoni simili imma mhux identika għal ta' Prudente, li però kien juri u jaqra parametri gravi u allarmanti meta paragunat mar-rikorrenti. Kien għalhekk li l-pronjosi ta' Prudente kienet aktar favorevoli.

Xehed ukoll fuq persuna oħra Mifsud, li kienet f'sitwazzjoni simili ta' Prudente, li qatt ma kienet f'riskju ta' mewt.

Din ix-xhieda kienet torbot u tirrifjuta dak li xehdet ir-rikorrenti fir-rigward tar-riċerka tagħha tramite Google.

In-kontro eżami jixhed³⁶ li spotting (li xehdet fuqu Prudente li esperjenzat fl-Amerika) u bleeding jibqgħu *a matter of amount*. Jgħid li idealment ma jkun hemm ebda bleeding matul it-tqala. Jaf ikun sinjal ta' detachment, polyp, cervical cancer etc.

Qal li anke jekk jikkonċedi li kien hemm perċentaġġ ta' nisa li jaraw *spotting* matul it-tqala (75%), xorta din ma jkunx okkorrenza normali.

³⁵ Folio A.

³⁶ Folio 445.

Baqa' insistenti li għalkemm niesa tqal li jipprezentaw infushom bil-kundizzjoni ta' Prudente jistgħu jkorru bejn jumejn u hamest ijiem, qal li hi għax strahet zammet għal aktar minn sebat ijiem, pero' għażlet li titlaq minn jeddha. Anzi zid li l-perċentaġġ ta' baby survival ta' 10% kien konservattiv u jaf anke jitla' għal 18-20%. Irrefera għal pazjenti f'din il-kundizzjoni li minbarra l-antibiotiċi ngħataw il-Heparin biex tgħin fid-demm u jiġu awmentati *chances of survival* tat-tarbija.

Xehed fuq trabi ta' *16 weeks gestation*, tqala li ġew salvati. Għalhekk jirribatti jekk kien hemm imniżżel fin-notamenti mediċi l-kliem *poor fetal prognosis*, dan dejjem fl-ambitu tal-perċentaġġi li xehed fuqhom.

iii. Eċċezzjonijiet Preliminari.

i. L-ewwel eċċezzjoni tolqot il-prokura, jekk ir-rikorrenti noe għandhiex il-prokura appożita biex tressaq din l-azzjoni. Rat id-dokument esebit fir-rigward, qieset għalhekk kif qalu sew l-intimati fis-sottomissjonijiet tagħhom li din l-eċċezzjoni giet sorvolata.

Konsegwentement tastjeni milli tieħu konjizzjoni ulterjuri tal-istess.

ii. It-tieni eċċezzjoni

Din titratta kull premessa li r-rikorrenti tressaq ai terminu tal-Karta tad-Drittijiet tal-Bniedem tal-Unjoni Ewropea. Jgħidu sew l-intimati illi kull ilment imressaq ai termini ta' dawn id-drittijiet irid bil-fors jiġi avanzat b'rikors ġuramentat. Fejn il-liġi trid mod ieħor, tgħidu, dan fuq saħħa tal-massima *ubi lex volit, dixit*.

In linea ma' hekk insibu illi l-Liġi Sussidjarja 12.09 illum bl-emendi li saru fis-sena 2025 taqra hekk:-

“2.Il-proċedimenti li jsiru dwar ksur tal-jeddijiet imniżżla fil-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea, il-proċedimenti quddiem il-Prim'Awla tal-Qorti Ċivili li jsiru skont l-artikolu 46(1)tal-Kostituzzjoni ta' Malta u skont l-artikolu 4(1) tal-Att dwar il-Konvenzjoni Ewropea u l-proċedimenti quddiem il-Qorti Kostituzzjonali fil-każijiet imsemmija fl-artikolu 95(2) tal-Kostituzzjoni ta' Malta għandhom jinbdew permezz ta' rikors.”

Pero' qabel hekk kien eskluss minn din in-nuqqas ta' formalita' kull lanjanza mressqa taht il-Karta tal-Unjoni Ewropeja. Għalkemm l-emendi tas-sena 2025 iffacilitaw jew aħjar għamlu anqas rigoruża l-proċedura fejn hemm allegazzjoni ta' ksur fundamentali, pero' fiż-żmien li ġie ppreżentat ir-rikors promotur dan ma kienx il-każ sa fejn milquta l-Karta.

Għalhekk l-intimati għandhom raġun sa fejn jolqot it-talbiet mressqa ai terminu tal-Karta msemmija.

Pero, tara u tqies illi għalkemm il-Karta nnifisha hija riferuta fid-9 premessa, meta treqqsu t-talbiet nnifishom din ma ġietx hemm invokata, konsegwentement għalkemm dik l-eċċezzjoni hija tajba m'għandha ebda siwi fil-kuntest in eżami.

iii. it-tielet eċċezzjoni hija marbuta mal-*locus standi* tal-mixli Ministru tas-Saħha u S-Segretarju Parlamentari għar-Riformi u Ugwaljanza. Hawn hu eċċepiet li stante li dawn mhux legittimu kontraditturi għandhom jiġi liberati mill-osservanza ta' ġudizzju.

Tqis illi sew jressqu l-intimati. Mill-ġdid tiġbed l-attenzjoni għal dak li tghid il-kelma tal-liġi u cioè' l-artikolu 181B tal-Kap 12 tal-Liġijiet ta' Malta.

Hu biss min għandu l-*locus standi* u interess ġuridiku li jirrispondi għax-xilja u jista jiġi hekk imħarrek. Ċar li hawn ir-rikorrenti qegħda tattakka liġi kriminali li allegatament qed tilledilha d-drittijiet fundamentali tagħha.

Ċar ukoll li l-artikolu 181B tal-Kap 12 iVESTI fl-Avukat ta' l-Istat rappreżentanza residwali tal-Gvern ta' Malta fejn jirrigwarda ksur u lanjanzi ta' natura Kostituzzjonali u Konvenzjonali.

Konsegwentement isib li din l-eċċezzjoni hija tajba u ż-żewġ intimati msemmija għandhom jiġu liberati mill-osservanza tal-gudizzju.

iv. Ir-Raba eċċezzjoni - Kap 595 tal-Liġijiet ta' Malta.

Anke hawn il-Qorti ssib li l-intimati għandhom raġun, apparti għal dak li ingħad fir-rigward tal-eċċezzjoni preċedenti huwa ċar li l-preċetti tal-Kap indikat jistabilixxi l-parametri kontra min għandha titmexxa l-azzjoni odjerna.

Insibu fid-deċiżjoni fl-ismijiet **L-Avukat Dr. James Scicluna noe et vs Il-Ministru għall-Intern et.**³⁷

“18. Huwa miżmum fil-gurisprudenza, li Ministru jew il-Ministeru tiegħu mhumex il-kap ta' dipartiment li ssemmi l-liġi, u għalhekk skont l-Artikolu 181B, Ministru ma jistax jidher għall-Gvern f'azzjoni quddiem Qorti (ara Paul Demicoli v. Ministru tal-Politika Soċjali et deċiża mill-Qorti tal-Appell fit-2 ta' Lulju, 2019, Hompesch Station Limited v. Korporazzjoni Enemalta et mogħtija fil-21 ta' Ottubru, 2021, u Dr Gabriella Fumia v. Direttur Ġenerali Veterinary and Phytosanitary Regulation Department et deċiża mill-Qorti tal-Appell fis-26 ta' Jannar, 2022).

³⁷ 25 ta' Mejju, 2023 Rikors numru 22/2022/1 GG.

19. Minbarra dan, bil-miġja tal-Att dwar l-Amministrazzjoni Pubblika (Kap 595 tal-Liġijiet ta' Malta), illum għandna mniżżel ukoll fl-Artikolu 17(8), li: “Is-Segretarju Permanenti jkun ir-rappreżentant ġuridiku tal-Gvern f'atti u azzjonijiet ġudizzjarji dwar kull haġa li taqa' taħt il-firxa tal-attività tal-Ministeru li għalih ikun assenjat.”

20. Illi din ir-regola generali mnissla mill-Artikolu 181B tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, li Ministru m'għandux jitharrek f'kawżi kontra l-Gvern, ma tghoddx iżda meta l-attur ikun qiegħed jitlob li tiġi mistħarrġa deċiżjoni amministrattiva li tkun ingħatat mill-Ministru stess”.

Konsegwentement issib li din l-eċċezzjoni hija tajba u għandha tiġi milqugħa.

v. Il-hames eċċezzjoni tal-intimati hija fis-sens illi l-artikolu 32 tal-Kostituzzjoni ta' Malta m'għandu ebda u ma jagħti ebda dritt ta' azzjoni u għalhekk sa fejn it-talba rikorrenti hija mressqa ai terminu ta' dan l-artikolu din hija improponibbli.

Din hija eċċezzjoni siewja. Insibu fid-deċiżjoni fl-ismijiet **Kate Sullivan u Captain Michael Bonello v. L-Onorevoli Prim Ministru;**³⁸

“Il-Qorti tirrileva illi fl-Art 32 mhuwiex qiegħed jigi stabbilit xi dritt li, bil-vjolazzjoni tiegħu, ikun hemm ksur ta' jedd fundamentali tutelat bil-Kostituzzjoni. Dan għaliex l-Art 32 huwa fis-sostanza dikjarazzjoni ta' liema huma d-drittijiet fundamentali tal-bniedem sostantivi li l-Kostituzzjoni qegħda thares bid-disposizzjonijiet ta' wara. Li din hija la chiave di lettura korretta tal-istat tad-dritt isib konferma bl-Art 46

³⁸ Deċiża 27 ta' Jannar 2017: Rikors numru 20/12

tal Kostituzzjoni li espressament jirreferi għall-Art 33 sa l-Art 45, mhux għall-Art 32, tal-Kostituzzjoni.

“Għalhekk fejn it-tielet talba tirrigwarda l-Kostituzzjoni, it-talba qegħda tkun respinta.””

Xejn m'għandha iżjed xi tgħid il-Qorti hlief li tistieden lil kull interessat jaqra l-istess artikolu li huwa ċar fid-diċitura tiegħu u ċioe' li dan huwa wieħed ġenerali u dikjaratorju tad-drittijiet fundamentali li jsegwu.

Konsegwentement tilqa' il-hames eċċezzjoni tal-intimati.

iv. Mertu.

Ir-rikorrenti tressaq l-ilment li b'applikazzjoni tal-artikolu 241 u 243 tal-Kap 9 tal-Liġijiet ta' Malta ġew leżi d-drittijiet tagħha kif sanciti ai terminu ta' l-artikolu 32, 33, 36, u 45 tal-Kostituzzjoni, ukoll l-artikolu 2, 3, 8 u 14 tal-Konvenzjoni Ewropeja u artikolu 41 tal-Kostituzzjoni.

-ilment tagħha in suċċint huwa li l-projbizzjoni fil-liġi kriminali Maltija - senjatament l-Artikoli 241 u 243 tal-Kodiċi Kriminali kif kienu japplikaw fl-2022 — poġġietha f'sitwazzjoni fejn, għax ma setgħetx tikseb intervent mediku li skontha kien meħtieġ biex jiġi evitat riskju serju għal hajjitha u saħħitha, allura dan wassal għal ksur tal-Artikoli 33, 36 u 45 tal-Kostituzzjoni ta' Malta u tal-

Artikoli 2, 3, 8 u 14 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem fil-konfront tagħha. Tressaq għalhekk l-ilment li n-nuqqas ta' aċċess għal terminazzjoni ta' tqala fiċ-ċirkustanzi tagħha wassal għal riskju mediku, għal trattament inuman/degradanti, għal impatt fuq il-ħajja privata, u għal diskriminazzjoni bbażata fuq il-generu.

L-artikoli tal-Kodiċi Kriminli huma:-

“241. (1) Kull min b'ikel, b'xorb, b'mediċini, jew bi vjolenza, jew b'kull mezz ieħor, jikkaguna l-abortion ta' mara tqila, sew bil-kunsens kemm ukoll mingħajr il-kunsens tagħha, jehel, meta jinsab hati, il-piena ta' prigunerija minn tmintax-il xahar sa tliet snin;

(2) L-istess piena tingħata kontra l-mara li tikkaguna l-abortion fuqha nfisha, jew li tkun qagħdet għall-użu tal-mezzi li bihom l-abortion gie ikkagunat.”

“243. Kull tabib, kirurgu, ostettriku jew spiżjar illi xjentement ikun wera jew ta l-mezzi li jkunu ikkagunaw l-abortion, jehel, meta jinsab hati, il-piena ta' prigunerija minn tmintax-il xahar sa erba' snin u l-piena tal-interdizzjoni perpetwa mill-eżerċizzju tal-professjoni tiegħu.””

Għal fini tal-argument tar-rikorrenti gie ukoll citat minnhom l-artikolu 243B tal-

Kap 9, emenda li dahlet bis-saħħa ta' l-Att Nru XXII tal-2023 li jaqra:-

“243B. Ma għandu jkun twettaq l-ebda reat taħt is-subartikolu (2) tal-artikolu 241 jew l-artikolu 243 meta t-tmiem ta' tqala jew ħsara lill-fetu tirriżulta minn intervent mediku magħmul bil-għan li tkun salvata l-ħajja u protetta s-saħħa ta' mara tqila li tkun qiegħda tbat minn

komplikazzjoni medika li tkun tista' tqeghdilha hajjitha f'riskju immedjat jew sahħitha f'periklu gravi li jista' jwassal għall-mewt:

B'dan iżda illi eżenzjoni mir-responsabbiltà kriminali bis-saħħa ta' dan l-artikolu għandha tapplika biss jekk wara li jkun kkonidrati l-prattiċi mediċi kurrenti f'Malta xorta jkun jissussistu ċirkostanzi ta' neċessità li jiddettaw li jsir l-intervent mediku u jekk jitwettqu l-kondizzjonijiet li ġejjin:

(a) fil-każ ta' mara tqila li tkun qiegħda tbat minn komplikazzjoni medika li tkun tista' tqeghdilha hajjitha f'riskju immedjat l-intervent mediku jsir meta fil-fehma raġjonevoli tat-tabib li jwettaq l-intervent il-fetu ma jkunx laħaq iż-żmien ta' vijabilità;

Jew

(b) fil-każ ta' intervent mediku li jsir minhabba komplikazzjoni medika li tqiegħed is-saħħa ta' mara tqila f'periklu gravi li jista' jwassal għall-mewt:

(i) illi fil-fehma raġjonevoli tat-tim mediku l-fetu ma jkunx laħaq iż-żmien ta' vijabilità u ma jkunx jista' jitwelled skont l-istandards tal-professjoni medika;

u

(ii) illi l-intervent mediku jitwettaq biss wara li t-tim mediku jkun ikkonferma n-neċessità tal-intervent;

u

(iii) illi l-intervent mediku jitwettaq fi sptar liċenzjat li jkollu l-faċilitajiet neċessarji biex jitwettaq l-intervent mediku meħtieġ;

(ċ) għall-ghanijiet ta' dan l-artikolu: Kap. 464. "tim mediku" tfisser tliet (3) tobbja reġistrati bħala speċjalisti mal-Kunsill Mediku taħt l-Att dwar il-Professjonijiet tas-Saħħa li tnejn (2) minnhom ikunu ostetriċi jew ġinekologi, li wieħed (1) minnhom ikun l-ostetriku li jwettaq l-intervent, u t-tielet tabib ikun speċjalista fil-kondizzjoni li minnha l-mara tqila tkun qiegħda tbat;

"iż-żmien ta' vijabilità" tfisser dak il-punt matul tqala li fih il-fetu jkun kapaċi li jgħix barra mill-utru skont il-prattiċi mediċi kurrenti."

Ir-rikorrenti fin-nota ta' sottomissjonijiet tagħha taqsa l-argument legali tagħha fuq l-artikolu 2, 3 u 8 tal-Konvenzjoni.

Għal fini ta' dan l-eżercizzju l-Qorti se titratta kemm l-artikolu tal-Kostituzzjoni u dak li jqarrbu mill-lat Konvenzjonali flimkien.

i. L-artikolu 33 tal-Kostituzzjoni u l-artikolu 2 tal-Konvenzjoni

Ir-rikorrenti sew tressaq li l-artikolu 2 tal-Konvenzjoni qiegħed fuq l-Istat kemm obbligu negattiv, cioè' li ma joqtolx, ukoll wieħed pożittiv u cioè' dak li jipprotegi l-ħajja ta' l-individwu anke b'miżuri preventivi.

In suċċint Prudente tgħid illi minħabba dak li għaddiet minnu, li tħalliet tistenna il-mewt tal-fetu li kienet qed iġġorr qabel ma jsir intervent fuqha biex jitneħħa dan, meta setgħet kienet f'perikolu għal ħajjitha minħabba *sepsis*, l-Istat b'hekk naqas mill-obbligu pożittiv tiegħu illi jpoġġi leġislazzjoni apposta li tinnewtralizza l-projbizzjoni misjuba fl-artikoli 241 u 243 tal-Kap 9. Għalhekk naqas li jonora dak l-obbligu pożittiv lejha li qiegħed mekkaniżmu leġislattiv li jipprevenilha perikolu għal ħajjitha.

L-Avukat ta' l-Istat minn naħa tiegħu jagħmel distinzjoni bejn l-artikolu 33 tal-Kostituzzjoni u l-artikolu 2 tal-Konvenzjoni.

Jgħid li dan l-artikolu tal-Kostituzzjoni huwa aktar ta' interpretazzjoni u applikazzjoni ristretta minn dak fuq l-istess binarju tal-Konvenzjoni.

Tara li l-Qorti Kostituzzjonali fid-deċizzjoni fl-ismijiet **Maria Assunta Pulis et. v. Tabib Principali tal-Gvern (Sahha Pubblika) et.**³⁹ fejn irriproduċit dak li qalet l-ewwel Qorti, għalkemm l-appell kien fuq id-dannu likwidat, qalet dan:-

“Illi l-ewwel kawżali tal-azzjoni tar-rikorrenti hija li huma garrbu ksur tal-jedd ta' harsien tad-dritt għall-ħajja (l-ewwel talba attriċi). Huma jibnu dan l-ilment kemm fuq dak li jipprovdi l-artikolu 33 tal-Kostituzzjoni u kif ukoll l-artikolu 2 tal-Konvenzjoni;

Illi għal dan l-ilment, l-intimati jilqgħu billi jgħidu li huma ma għamlu l-ebda haġa bi ħsieb li jgħibu l-mewt ta' Pulis, ladarba qatt ma kien impjegat magħhom, u lanqas kienu b'xi mod jahtu għal dik il-mewt. Iżidu jgħidu wkoll li jaqa' fuq ir-rikorrenti li juru b'mod tajjeb biżżejjed li l-qarib tagħhom tassew ħadem fl-Isptar San Luqa f'ambjent li fih kien jiġi f'kontatt ma' u jmiss l-asbestos u li l-marda li ħakmitu u l-mewt tiegħu graw minħabba dak il-kontatt fuq dak il-post tax-xogħol u li ma sehħewx b'xi kawża oħra;

Illi, safejn rilevanti għall-każ tallum, l-artikolu 33 tal-Kostituzzjoni jipprovdi li “(1) Hadd ma jista' jiġi pprivat mill-ħajja tiegħu intenzjonalment hlief fl-esekuzzjoni tas-sentenza ta' qorti dwar reat kriminali skond il-liġi ta' Malta li tiegħu jkun gie misjub hati.

L-artikolu 2 tal-Konvenzjoni jipprovdi li “(1) Id-dritt għall-ħajja ta' kulhadd għandu jiġi protett b'liġi. Hadd ma għandu jiġi privat mill-ħajja tiegħu intenzjonalment hlief fl-esekuzzjoni tas-sentenza ta' qorti wara li jiġi misjub hati ta' delitt li dwaru tkun provduta mil-liġi din il-piena;

Illi għalkemm mad-daqqa t'għajn jidher li t-termini tal-artikolu tal-Konvenzjoni huma usa' minn dawk tal-Kostituzzjoni, ma għandux ikun

³⁹ Deciża 12 ta' Lulju 2019: Rikors numru 69/15 JRM.

*hemm dubju li t-tnejn li huma ndaqs iharsu l-jedd għall-ħajja u jistgħu u għandhom jitfissru l-istess*⁴⁰.

Għalhekk, il-Qorti sejra tqis l-ilment tar-rikorrenti taħt iż-żewġ dispożizzjonijiet flimkien;

Illi l-artikoli msemmija taħt din il-kawża li jikkellmu dwar il-ħarsien tal-persuna fil-ħajja tiegħu, li huwa meqjus bħala l-oghla jedd għaliex jolqot il-qalba tat-tgawdija tal-jeddijiet li persuna jista' jkollha u li tista' tgawdihom biss u sakemm għadha ħajja. Huma artikoli li joħolqu kemm obligazzjoni 'passiva' fuq l-Istat (fis-sens li ma għandu jagħmel xejn biex iġarrab il-ħajja ta' persuna) u kif ukoll obligazzjoni 'pożittiva' li jwettaq miżuri ta' fejda li jharsu l-ħajjiet tal-persuni u jinkorporaw ir-regola tal-proporzjonalità stretta⁴¹ li tfisser li jaqa' fuq l-Istat dmir qawwi li jhars b'mod effettiv dak il-jedd u li l-eċċezzjonijiet għalih iridu jkunu eċċezzjonali u preskritti mil-ligi b'mod ċar. Huwa stabbilit li dawn l-obbligazzjonijiet 'pożittivi' jgħoddu wkoll fil-qasam tas-saħħa pubblika u tas-sigurtà pubblika, bl-Istat iwieġeb kemm għal għemejjel jew kif ukoll għal nuqqasijiet (omissjonijiet) ta' miżuri f'waqthom u ta' fejda f'dan ir-rigward⁴². Minħabba f'hekk, jidhol fis-seħh l-aspett 'proċedurali' tal-obbligu tal-Istat li jhars ħajjet in-nies u li dan l-obbligu huwa maqtugħ għalih u awtonomu mill-obbligazzjoni sostantiva li taqa' fuq l-Istat f'każ ta' ksur tal-artikolu;

Illi huwa aċċettat ukoll li l-imsemmi artikolu tal-Konvenzjoni jgħodd ukoll fejn, għalkemm ma jkunx hemm telf tal-ħajja, jirriżultaw ċirkostanzi fejn ħajjet il-persuna tkun f'periklu imminenti jew inevitabli⁴³;

Illi f'din il-kawża l-intimati jishqu r-rikorrenti ma garrbu l-ebda ksur tal-jedd tagħhom taħt dawn l-artikoli minħabba li huma (l-intimati) ma għamlu xejn b'rieda ("xjentement") biex Anthony Pulis għalu li għalu. Il-Qorti ma taqbilx li dan l-argument jissarraff'nuqqas ta' htija jew ksur tal-obbligu tal-Istat Malti taħt l-artikoli taħt eżami. Mit-tifsir li ngħata hawn fuq tal-firxa ta' responsabbiltà li l-artikoli relattivi jittfegħu fuq l-Istat, johroġ ċar li ksur tal-jedd għall-ħarsien tal-ħajja jista' jigri wkoll fejn l-istess Stat jonqos li jieħu miżuri ta' ħarsien

⁴⁰ Ara P.A. Kost. LSO 15.1.2015 fil-kawża fl-ismijiet Jane Aġius vs Avukat Ġenerali et (riformata mill-Qorti Kostituzzjonali, imma mhux f'dan ir-rigward, b'sentenza mogħtija fl-14.12.2015)

⁴¹ Ara. Q.E.D.B. (GC) 24.3.2011 fil-kawża fl-ismijiet Giuliani & Gaggio vs Italja (Applik. Nru. 23458/02) §§ 176 u 209

⁴² Q.E.D.B. 13.9.2011 fil-kawża fl-ismijiet Trezpalko vs Polonja (Applik. Nru. 25124/09) § 23

⁴³ Q.E.D.B. 9.11.2010 fil-kawża fl-ismijiet Krivova vs Ukrajna (Applik. Nru. 25732/05) § 45

xierqa u f'waqthom li jkunu ta' gid għal dak il-harsien⁴⁴. Dan mela jfisser li t-thaddim tal-artikoli msemija jghodd ukoll meta jkun hemm nuqqasijiet min-naħa tal-awtorità pubblika li ma humiex tabilfors għemejjel pre-meditati jew bil-ħsieb speċifiku li jeqirdu l-ħajja jew is-saħħa ta' dak li jkun. Dan għe mfisser li jghodd ukoll fejn l-Istat messu kien jafl li tenħtieġ miżura ta' harsien u naqas li jagħmel dan f'waqt jew b'mod xieraq⁴⁵; (tipa grassa enfasi ta' din il-Qorti).

Illi għalhekk, filwaqt li bħala regola l-prova li seħħ ksur tal-artikoli msemija taqa' fuq min jallegaha u li dan jagħmlu fi grad xieraq ta' ċertezza, jista' jiġri li jkun jaqa' fuq l-Istat li juri li kien ħa l-miżuri xierqa biex jevita li jseħħ tali ksur ladarba l-persuna mgarrba jseħħilha turi li sabet lilha nnifisha f'qagħda li tinkixef jew tkun esposta għal xi periklu għal ħajjitha jew saħħitha⁴⁶;

Tqis illi huwa vera kif stqarret ir-rikorrenti li l-każ tagħha xpruna diskussjoni pubblika u wassal anke biex jiġi introdott fil-ligi Kriminali Maltija l-artikolu 243B li l-Qorti qed terġa tirriproduċi *for ease of reference* u biex turi ċar u tond li dan huwa **wiehed eċċezzjonali għal projbizzjoni assoluta ta' l-abortion volut u mhux medikament neċessarju.**

“Ma għandu jkun twettaq l-ebda reat taħt is-subartikolu (2) tal-artikolu 241 jew l-artikolu 243 meta t-tmiem ta' tqala jew ħsara lill-fetu tirriżulta minn intervent mediku magħmul bil-għan li tkun salvata l-ħajja u protetta s-saħħa ta' mara tqila li tkun qiegħda tbat minn komplikazzjoni medika li tkun tista' tqegħdilha ħajjitha f'riskju immedjat jew saħħitha f'periklu gravi li jista' jwassal għall-mewt:

B'dan iżda illi eżenzjoni mir-responsabilità kriminali bis-saħħa ta' dan l-artikolu għandha tapplika biss jekk wara li jkunu kkonsidrati l-prattiċi mediċi kurrenti f'Malta xorta jkunu jissussistu ċirkostanzi ta' neċessità

⁴⁴ P.A. Kost. JZM 31.1.2017 fil-kawża fl-ismijiet M'Grace Farrugia et vs Tabib Principali tal-Gvern (Saħħa Pubblika) et (mhix appellata)

⁴⁵ Ara P.A. Kost. MH 23.11.2016 fil-kawża fl-ismijiet George Spiteri et vs Policy Manager tal-Malta Shipyards et (mhix appellata)

⁴⁶ W A Schabas The European Convention on Human Rights: A Commentary (OUP 2015) pg. 123

li jiddettaw li jsir l-intervent mediku u jekk jitwettqu l-kondizzjonijiet li ġejjin:

(a) fil-każ ta' mara tqila li tkun qiegħda tbat minn komplikazzjoni medika li tkun tista' tqegħdilha ħajjitha f'riskju immedjat l-intervent mediku jsir meta fil-fehma raġjonevoli tat-tabib li jwettaq l-intervent il-fetu ma jkunx laħaq iż-żmien ta' vijabilità;

Jew

(b) fil-każ ta' intervent mediku li jsir minħabba komplikazzjoni medika li tqiegħed is-saħħa ta' mara tqila f'periklu gravi li jista' jwassal għall-mewt:

(i) illi fil-fehma raġjonevoli tat-tim mediku l-fetu ma jkunx laħaq iż-żmien ta' vijabilità u ma jkunx jista' jitwelled skont l-istandards tal-professjoni medika;

U

(ii) illi l-intervent mediku jitwettaq biss wara li t-tim mediku jkun ikkonferma n-neċessità tal-intervent;

u

(iii) illi l-intervent mediku jitwettaq fi sptar liċenzjat li jkollu l-faċilitajiet neċessarji biex jitwettaq l-intervent mediku meħtieġ;

(ċ) għall-għanijiet ta' dan l-artikolu: Kap. 464. "tim mediku" tfisser tliet (3) tobbja reġistrati bħala speċjalisti mal-Kunsill Mediku taħt l-Att dwar il-Professjonijiet tas-Saħħa li tnejn (2) minnhom ikunu ostetriċi jew ginekologi, li wieħed (1) minnhom ikun l-ostetriku li jwettaq l-intervent, u t-tielet tabib ikun speċjalista fil-kondizzjoni li minnha l-mara tqila tkun qiegħda tbat;

"iż-żmien ta' vijabilità" tfisser dak il-punt matul tqala li fih il-fetu jkun kapaċi li jgħix barra mill-utru skont il-prattiċi mediċi kurrenti."

Tqis, li r-rikorrenti fit-trattazzjoni tagħha ta' dan l-allegat ksur tirriproduċi siltiet mill-case summary mediku li juri li hi "...suffered from ruptured membranes, foetal cardiac activity with slight foetal movement, poor foetal prognosis,

umbilical cord coming out of os, l-għoli tal-white blood cells count, leaking liquor brownish discharge”⁴⁷.

Il-Qorti tagħraf illi din kienet l-ewwel pronjosi tar-rikorrenti. Fil-fatt kif rajna hija dahlet l-isptar ta' Ghawdex *bleeding*, anzi giet u vjaġġat lejn Malta meta ġia' kienet esperjenzat spotting. Terga tgħid wara li harget mill-isptar marret timxi, **minflok strahet**, tant li matul il-lejl reggħet esperjenzat *bleeding* qawwi. L-ewwel rat lil Dr. Vella ġewwa St. Thomas imbagħad spiccat Mater Dei fejn bla tlaqliq mill-ħarsa tal-file mediku tagħha huwa ċar lampanti li hi ngħatat attenzjoni u kura medika *par excellance* imma mhux dik mixtieqa minnha.

Tasal hawn għad-domanda li torbot ma' din il-lanjanza mressqa, u ċioe' jekk ir-rikorrenti kenetx fil-periklu tal-mewt u dan minħabba n-nuqqas ta' intervent mediku, illum sanċit bl-emenda fil-liġi riprodotta. Allura jekk il-management tas-sitwazzjoni medika tagħha mit-team mediku f'Mater Dei kienx tali, li seta' jwassal għal mewt tagħha jew li titqiegħed ħajjitha fil-periklu tal-mewt dan riżultat tal-fatt li ma kienx konċess it-terminazzjoni li għaliha kienet neċessarja. Huwa dan li jista' jixhet dawl jekk fil-fatt l-Istat Malti bil-leġislazzjoni in vigenti fiż-żmien ta' l-akkadut, naqqas mill-obbligi li kellu lejn ir-rikorrenti.

⁴⁷ Folio 444.

Ikkunsidrat:

Jibda biex jingħad li l-fatt waħdu li sar intervent legġislattiv bl-emenda imsemmija li jqarreb lejn dak li kienet is-soluzzjoni tar-rikorrenti u l-partner tagħha, mhux xi ammissjoni minn naħa ta' l-Istat li kien in-vjolazzjoni ta' l-artikoli Kostituzzjonali u Konvenzjonali in-eżami. Huwa ċert li tali intervent legġislattiv qiegħed is-sitwazzjoni medika f'aktar serħan tal-mohħ minn implikazzjonijiet u reazzjonijiet emottivi u ta' danni li magħhom jistgħu jkunu marbuta kawżi ta' natura tant delikata.

Ġie allegat li kien hemm imwiet f'pajjiżna marbuta ma' dan in-nuqqas legġislattiv, allura dan waħdu jwassal għal falliment ta' l-Istat f'din il-protezzjoni. Pero' bir-rispett kollu tali allegazzjoni ma hija xejn hlief raġunament ipotetiku għaliex qatt ma ġie ppreżentat xi każ li wassal għal dawn l-allegati mwiet u l-unika persuni msemmija li kellhom diffikultajiet fit-tqala tagħhom, kellhom kif rajna parametri fiżiċi u mediċi differenti mir-rikorrenti. Il-ġisem uman għalkemm jimrad u jiddeterjora, ma jiffunzjonax b'mod identiku u għandu parametri u suppożizzjonijiet varji. Oltre jippreżenta ruħu f'diversi sitwazzjonijiet, xi kultant minuskuli, li jagħmlu differenza kbira bejn storja medika oħra.

Il-Qorti terġa tagħmel ampja referenza għal file mediku tar-rikorrenti. Huwa vera li dak kollu estratt minnu mir-rikorrenti huwa vera, però daqstant ieħor huwa vera

li t-tobba, kif xehed l-istess Profs Y. Baron Muscat kienu lesti li jintervjenu kieku kien hemm *onset of sepsis*, ħaġa li r-rikorrenti ma kellhiex. Għal dan ir-rigward il-Qorti tagħmel referenza għal entry tal-istess professur fl-istess file datat 22 ta' Ġunju, 2022.

Mhux talli hekk, talli mogħtija kull assistenza medika meħtieġa u neċessarja, tara li r-rikorrenti darba mistrieħa, ma kellhiex deni, ma kellhiex infezzjoni, ma kellhiex *bleeding*, ma kellhiex *presentation* tal-kurdun, kellha *minimal clear discharge not foul smelling*, kienet *well supported* anke minn *bearvement nurse* għal kull għelt emottiv. Tant marret tajjeb bil-kura li rċeviet li kienet tajba biżżejjed biex taqbad *air ambulance* u tasal bla problemi ġewwa Mallorca, tiġi hemm rikoverata go sptar fejn imbagħad itterminat kif xtaqet it-tqala tagħha. Altro che li kienet f'sitwazzjoni imminenti li titlef ħajjitha! Kieku kien hekk qajla kienet se tagħmel dan it-traġitt fls-ajru fejn anke *cabin pressure* seta' jkun ta' dannu għaliha.

Mela bilfors il-Qorti trid terġa ddu għal dak li qalet fil-bidu ta' dan l-analizi. Hawn qegħdin preżenatati bis-sitwazzjoni fejn omm kienet fiċ-ċans kbir li titlef it-tarbija tagħha. Il-fatti juru li meta strahet marret sew. Għalkemm il-prognosi tat-twelid vijabbli kien wieħed baxx, **pero' ma kienx eskluz**. Dan per se ma jwassalx li qiegħed l-omm fil-perikolu tal-mewt għax kif rajna kienet ġia' fit-triq tajba bl-antibiotiċi li kienet ġia' minn qabel qed tircievi.

Tqis li l-fatt waħdu li *ex admissis* ir-rikorrenti u l-partner tagħha tramite riċerka *on line*, sabu s-sokkors ta' min hu favur l-abortion, u kompla jallarma lill-kopja, ċertament ma kienx għal għid tagħhom, u żgur ma għenx l-istat fragli u emottiv u iva mbeżza tar-rikorrenti, li saħansitra stiednet lil partner tagħha biex jagħtiha bil-ponn fl-istonku tagħha biex tkorri. Tant il-biża' u disprament tagħha. Fatt dan li żgur m'għandux la jiġi redikolat u lanqas trattat b'mod legger. Din il-kopja 'l bogħod minn darhom, fi żmien pandemija jew ftit wara, sabet ruħha f'diffikultà' medika li tiswa' flejjes kbar. Is-soluzzjoni għalihom kienet terminazzjoni għax emmnu u beżgħu li r-rikorrenti se tmut. Il-fatt waħdu li dan kien volut minnhom ma jfissirx li l-Istat falla. Dan il-Qorti tgħidu għaliex it-tobba kuranti tagħha kienu ċerti mil-lat mediku li dan ma kienx il-każ u li kienu *on top of things* la ma kellhiex infezzjoni.

Terga tirritjeni li l-biża' waħida tar-rikorrenti ma qiegħeduhix f'ebda riskju immedjat għal hajjitha, għalkemm mill-gdid tirritjeni li hadd m'għandu jiminimizza l-impatt psikoloġiku li sitwazzjoni tali jkollha fuq omm. Pero' tali impatt waħdu ma jqiegħedx lill-Istat fil-ħażin fejn jolqot l-obbligi tiegħu.

Għalhekk, għalkemm hu żgur li llum is-sitwazzjoni leġislattiva tista' sserraħ l-imħuħ ta' kull team mediku, ma jirriżultalha qatt li dawn tilfu omm tqila għaliex l-intervent abortiv/terminazzjoni ma kienx permissibbli biex issalva hajjet mara.

Il-fatt li t-tobba kienu lesti jagħtu ċans lit-tarbija, anke jekk kien wiehed minimu, sakemm il-hajja tal-omm ma kenetx f'perikolu imminenti ma jwassalx għal ksur ta' l-artikoli kostituzzjonali u konvenzjonali in eżami. Anke jekk ma kenetx statutorjament miktuba, it-tobba ta' Mater Dei kienu ċari, u xehdu li hekk isir, li meta omm tkun f'periklu vera, huma jintervjenu.

Konsegwentement issib li din l-ewwel lanjanza mhux tajba.

ii. L-artikolu 36 tal-Kostituzzjoni u l-artikolu 3 tal-Konvenzjoni.

Dawn iż-żewġ artikoli jirrigwardaw salvagwardja kontra tortura, piena u trattament inuman.

Ir-rikorrenti tqis li hi kellha tali trattament, għalkemm ma tiddistingwix liema minnhom b'mod ċar, għaliex gie nnegat lilha aċċess għal abort. Dan huwa bbażat fuq l-ipoteżi ta' studji internazzjonali li nisa hekk negati jistgħu jsofru minn uġiġh qawwi, u tbatija mentali, dan l-argument aktar marbut ma' tqala mhux vijabbli.

Ta' dan tagħti diversi deċiżjonijiet tal-Qorti Ewropeja għad-Drittijiet tal-Bniedem kif jidher fin-nota ta' sottomissjonijiet tagħha.⁴⁸ Tagħmel referenza ukoll għal fatt

⁴⁸ Folio 470.

li kif jirrizulta mix-xhieda hawn fuq esposta, ir-rikorrenti kienet fi stat ta' anzjetá u biża' minhabba l-istennija li tiddeterjora t-tqala biex isir intervent neċessarju, għax fil-ħsieb tagħha din l-istennija setgħet tqiegħed ħajjitha fil-periklu.

Tqis li verament id-dibattitu hawn mhux wieħed faċli. Ma jistax jiġi injorat li r-rikorrenti żgur kellha ansjetá kbira u iva anke biża jekk kienet persważa li hi setgħet tiflew ħajjitha. Dan kif ġia' ingħad ġie xprunat u mgħejjun mir-riċerki *on line* li sar mill-ġenituri u l-intervent tal-elementi *pro life* li ssodaw il-biża' tal-istess rikorrenti.

Għal l-iskop ta' dan l-analizi l-Qorti se tagħmel referenza għal varji deċiżjonijiet li se tiċċita fit-tul għax il-fatti u r-raġunament tal-partijiet juru għala l-Qorti Ewropeja waslet għal dik id-deċiżjoni tagħha.

Fid-deċiżjoni citatat mill-Avukat ta' l-Istat mogħtija mill-Grand Chamber fl-ismijiet **CASE OFA, B AND C v. IRELAND**⁴⁹ intqal-

“(b) The third applicant

154. The third applicant feared her pregnancy constituted a risk to her life and complained under Article 8 about the lack of legislation implementing the constitutional right to an abortion in the case of such a risk. She argued that she therefore had no effective procedure by

⁴⁹ Application no. [25579/05](#) 16 December 2010

which to establish her eligibility for a lawful abortion in Ireland and that she should not be required to litigate to do so.

D. Article 3 of the Convention

160. All three applicants complained that the restrictions on abortion in Ireland constituted treatment which breached Article 3 of the Convention.

161. The Government reiterated that relevant medical care and counselling were available to the applicants and, largely because of their failure to exhaust domestic remedies, they had not demonstrated any good reason for not availing themselves of these services. No act of the State prevented consultation and any perceived taboo or stigma causing the applicants' hesitation to consult did not flow from the impugned legal provisions. Even accepting a perceived stigma or taboo, the applicants had not demonstrated "beyond all reasonable doubt" treatment falling within the scope of Article 3 of the Convention.

162. The applicants complained of a violation of the positive and negative obligations in Article 3 of the Convention given the impact on them of the restrictions on abortion and of travelling abroad for an abortion. They maintained that the criminalisation of abortion was discriminatory (crude stereotyping and prejudice against women), caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety. The applicants argued that the two options open to women – overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations – were degrading and a deliberate affront to their dignity. While the stigma and taboo effect of the criminalisation of abortion was denied by the Government, the applicants submitted that there was much evidence confirming this effect on women. Indeed, the applicants contended that the State was under a positive obligation to protect them from such hardship and degrading treatment.

163. The Court considers it evident, for the reasons set out at paragraphs 124-27 above, that travelling abroad for an abortion was both psychologically and physically arduous for each of the applicants. It was also financially burdensome for the first applicant (see paragraph 128 above).

*164. However, the Court reiterates its case-law to the effect that ill-treatment **must attain a minimum level of severity if it is to fall***

within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25, and, more recently, Lotarev v. Ukraine, no. [29447/04](#), § 79, 8 April 2010). In the above-described factual circumstances (see paragraphs 124-29 above) and whether or not such treatment would be entirely attributable to the State, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of Article 3 of the Convention.

165. In such circumstances, the Court rejects the applicants' complaints under Article 3 of the Convention as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention."

Ukoll intqal dan fid-deċiżjoni **CASE OF M.L. v. POLAND**⁵⁰

"The circumstances of the present case

18. The applicant became pregnant in 2020. On 12 January and 20 January 2021, when she was fourteen and fifteen weeks pregnant respectively, the applicant underwent medical tests which determined that the child she was carrying had a genetic disorder, trisomy 21.

19. On 25 January 2021 Dr L.K., a professor in medical genetics, gave an opinion and confirmed that the foetus had trisomy 21.

20. On 26 January 2021 the applicant was examined by three medical practitioners from Bielański Hospital in Warsaw who stated that the foetus's condition meant that the applicant qualified for an abortion under section 4a(1)(2) of the 1993 Act. The procedure was to be carried out in the same hospital, and the applicant obtained a referral for an appointment on 28 January 2021.

21. However, on 27 January 2021 the Constitutional Court's judgment of 22 October 2020 took effect (see paragraph 39 below), finding section 4a(1)(2) of the 1993 Act unconstitutional and repealing it.

⁵⁰ 14 December 2023

22. According to the applicant, on 28 January 2021, shortly after midnight, she sent a text message to her doctor, A.P., asking whether she should still come for her appointment on that day. The doctor replied that the applicant should wait until she had consulted the hospital management. Subsequently, the doctor informed the applicant that, given the amendments to the domestic law, she could not have an abortion in Bielański Hospital or in any other medical institution in Poland. In support of her submissions, the applicant provided copies of her telephone records, screen shots of text messages and a written statement from Dr A.P.

23. Immediately afterwards, the applicant travelled to the Netherlands, where the pregnancy was terminated in a private clinic on 29 January 2021. The applicant was seventeen weeks pregnant on that date.

24. The applicant submitted that her travel costs and medical fees relating to the treatment in the private clinic had amounted to 1,220 euros (EUR).

B. Access to legal abortion

1. The 1993 Act

26. The Law of 7 January 1993 on family planning, protection of the human foetus and conditions permitting the termination of pregnancy (*Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży* – “the 1993 Act”), sets out the conditions for access to legal abortion.

27. Initially, the 1993 Act provided that legal abortion was possible until the twelfth week of pregnancy where the pregnancy endangered the mother’s life or health; prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable life-threatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

28. On 4 January 1997 the 1993 Act was amended – in particular, section 4a was added, which provided, in so far as relevant, as follows:

“(1) Abortion may be carried out only by a physician where

1. pregnancy endangers the mother’s life or health;

2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;

3. there are strong grounds for believing that the pregnancy is a result of a criminal act; [or]

4. the pregnant woman is suffering material hardship or is in a difficult personal situation.”

29. However, in December 1997 further amendments were made to the text of the 1993 Act, following a judgment of the Constitutional Court given on 28 May 1997 (case no. K [26/96](#)). In that judgment, the Constitutional Court held that section 4a(1)(4) of the 1993 Act, legalising abortion on the grounds of material or personal hardship, was incompatible with the Constitution as it stood at that time. The court held, in particular, that this provision legalised termination of pregnancy without providing sufficient justification for the need to protect another value, right or constitutional freedom and used unspecified criteria, thus violating the constitutional guarantees for [the protection of] human life.

30. On 22 October 2020 the Constitutional Court declared that section 4a(1)(2), allowing for legal abortion in the event of foetal abnormalities, was also incompatible with the Constitution (case no. K1/20). The judgment took effect on 27 January 2021 (see paragraph 39 below).

31. Section 4a of the 1993 Act, as it stands at present, reads as follows, in so far as relevant:

“(1) Abortion may be carried out only by a physician where

1. pregnancy endangers the mother’s life or health;

2. (ceased to have effect);

3. there are strong grounds for believing that the pregnancy is a result of a criminal act;

4. (ceased to have effect).

(2) In situations listed above under point 2 of subsection 1, abortion may be performed until such time as the foetus is capable of surviving outside the mother's body; in situations listed under points 3 or 4 above, [abortion may be performed] until the end of the twelfth week of pregnancy.

(3) In situations listed under points 1 and 2 of subsection 1 above, abortion shall be carried out by a physician working in a hospital....”

C. Criminal offence of abortion performed in contravention of the 1993 Act

38. The termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 of the Criminal Code. Anyone who terminates a pregnancy in violation of the 1993 Act or assists in such a termination may be sentenced to up to three years' imprisonment. However, the pregnant woman herself does not incur any criminal liability for an abortion performed in contravention of the 1993 Act.

1. Article 3

(a) The parties

(i) The Government

*77. The Government maintained that the facts of the present case did not disclose a level of severity sufficient to fall within the scope of Article 3 of the Convention. In their view, the case should be distinguished from *R.R v. Poland* (no. [27617/04](#), §§ 159-160, ECHR 2011 (extracts)), in which the Court found that the applicant's suffering, caused by the doctors' intentional failure to provide timely prenatal examination that would have allowed her to take a decision as to whether to continue or terminate her pregnancy, had reached the minimum threshold of severity under Article 3 of the Convention. They noted that in the present case there had been no procrastination, undue delay or confusion in the applicant's diagnosis and treatment, and she had not been treated in a humiliating manner.*

78. The Government admitted that a situation where a woman discovered that her unborn child had severe defects was extremely difficult. A diagnosis confirming foetal abnormalities must have a significant emotional effect on any woman and her family. However, while such a critical diagnosis caused distress, subsequent events,

including a woman's inability to terminate the pregnancy, should not be analysed in isolation. It was thus impossible to separate different facts which affected a woman's emotional state in such a complex and distressing situation.

79. *For the above reasons, the Government submitted that the applicant had not been subjected to inhuman and degrading treatment in breach of Article 3 of the Convention.*

(ii) The applicant

80. *The applicant argued that the restrictions introduced by the Constitutional Court had caused her direct harm. She referred to the fact that her hospital appointment had been cancelled at the last minute and that she had been forced to travel abroad for an abortion. This had caused her serious and real emotional suffering. She stressed that the fear and anguish she had felt at that time had been unimaginable.*

81. *The applicant referred to the Human Rights Committee's decisions in *Mellet v. Ireland* and *Whelan v. Ireland* (see paragraphs 49-51 above), in which the Committee had stated that by prohibiting and criminalising abortion, the State in question had subjected the applicants to severe emotional and mental pain and suffering. She submitted that her situation was similar to that of the applicants in those cases, and that there had been a breach of Article 3 of the Convention.*

(b) The Court's assessment

82. *The Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Bouyid v. Belgium* [GC], no. [23380/09](#), § 86, ECHR 2015).*

83. *The Court takes note of the views expressed by the Human Rights Committee in two decisions concerning fatal foetal abnormalities (see paragraphs 49-51 above), in which the Committee found that criminalising access to abortion in situations of fatal foetal abnormality constituted a breach of Article 7 of the International Covenant on Civil and Political Rights (the right to be free from torture and cruel, inhuman or degrading treatment or punishment). It further notes that the Committee recognised the financial, social and health-related*

burdens and hardships that were placed on women when laws forced them to choose between continuing a non-viable pregnancy and travelling to another country to access abortion care.

84. *The Court accepts that in the present case, travelling abroad for an abortion was psychologically arduous. However, notwithstanding the fact that the applicant suffered emotional and mental pain, in the particular circumstances of the case, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of Article 3 of the Convention (compare Tysiąc v. Poland, no. 5410/03, § 66, ECHR 2007 I, and A, B and C v. Ireland [GC], no. 25579/05, § 164, ECHR 2010).*

85. *The Court therefore has no sufficient basis to conclude that the applicant's treatment was such as to reach the threshold of Article 3 of the Convention, and accordingly it upholds the Government's objection.*

Ukoll fuq l-istess livell ta' argument id-deċizjoni fl-ismijiet **CASE OF A.R. v.**

POLAND⁵¹

“The circumstances of the present case

15. *The applicant submitted the pre-filled application form, to which she added some details about her personal situation. She stated that she had one preschool-age child. At the time of the delivery of the Constitutional Court's judgment (see paragraph 10 above) she had been fifteen weeks pregnant. The pregnancy was intentional. However, the results of medical tests taken on 5 November 2020 confirmed that the foetus she had been carrying suffered from a genetic disorder called trisomy 18. She had not wanted to risk that the judgment would be published before she would have completed the various steps required to qualify for a legal abortion (as provided by sections 4a(1)(2), 4a(3) and 4a(5) of the 1993 Act). She further submitted that she had been worried about the risk of borders closing because of COVID-19 restrictions and about the approach of some hospitals with respect to abortions even before the publication of the Constitutional Court's judgment. She also referred to the trauma she could have experienced*

⁵¹ (Application no. [6030/21](#)); deċiża 13 November 2025

in those hospitals on account of the use of the conscientious objection clause by medical practitioners there. For all those reasons, she had travelled to the Netherlands where the pregnancy was terminated in a private clinic on 12 November 2020. The applicant had been seventeen weeks pregnant on that date. The applicant submitted bills relating to the transport costs (1,235.36 Polish zlotys (PLN) (approximately 300 euros (EUR)), accommodation (EUR 320) and medical fees (EUR 875)).

16. The applicant contended that she had suffered stress on account of the physical and psychological impact of her travelling abroad for an abortion, in addition to the financial burden the situation had entailed. She also submitted that she had had difficulties confirming her rights to a special shortened maternity leave because she had undergone the termination abroad. She had submitted the relevant documents in November 2020, yet her case had still been pending in January 2021.

...

A. Article 3

1. The parties

a. The Government

*30. The Government maintained that the complaint under Article 3 of the Convention was incompatible *ratione personae*, manifestly ill-founded and should be declared inadmissible for abuse of the right of petition. They further maintained that the present case did not disclose a level of severity sufficient to fall within the scope of Article 3 of the Convention. In their view, the case should be distinguished from *R.R. v. Poland* (no. [27617/04](#), §§ 159-60, ECHR 2011 (extracts)), in which the Court found that the applicant's suffering, caused by the doctors' intentional failure to provide timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy, had reached the minimum threshold of severity under Article 3 of the Convention. They noted that in the present case the applicant had not been refused termination of pregnancy or prenatal testing, had not experienced procrastination, undue delay or confusion in her diagnosis and treatment, and had not been treated in a humiliating manner.*

31. The Government conceded that a situation where a woman discovered that her unborn child had severe defects was extremely difficult. A diagnosis confirming foetal abnormalities must have a significant emotional effect on any woman and her family. However,

while such a critical diagnosis caused distress, subsequent events, including a woman's inability to terminate the pregnancy, should not be analysed in isolation. It was thus impossible to separate different facts which affected a woman's emotional state in such a complex and distressing situation.

b. The applicant

32. *The applicant argued that the restrictions introduced by the Constitutional Court had caused her serious and real emotional suffering. She submitted that they had caused her uncertainty and left her feeling concerned for her future. She also submitted that following the abortion that she had had to undergo abroad, she had started psychological therapy in order to deal with the trauma that she had suffered.*

33. *The applicant referred to the United Nations (UN) Human Rights Committee's findings in Mellet v. Ireland (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013, 17 November 2016, UN Doc. CCPR/C/116/D/2324/2013) and Whelan v. Ireland (Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2425/2014, 11 July 2017, UN Doc. CCPR/C/119/D/2425/2014), in which the Committee had stated that by prohibiting and criminalising abortion, the State in question had subjected the applicants to severe emotional and mental pain and suffering. She submitted that her situation was similar to that of the applicants in those cases and that she had experienced similar suffering and burdens.*

2. The Court's assessment

34. *The Court does not consider it necessary to address all the arguments advanced by the Government, since it finds that this complaint is inadmissible for the following reasons.*

35. *The Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, Bouyid v. Belgium [GC], no. [23380/09](#), § 86, ECHR 2015).*

36. *The Court observes that the applicant's complaint was formulated in generic terms with reference to the views expressed by the UN Human Rights Committee in two decisions concerning fatal foetal abnormalities. It further accepts that in the present case, travelling abroad for an abortion must have been psychologically arduous. However, having regard to the material before it, the Court considers that the applicant failed to substantiate her claim that the restrictions introduced by the Constitutional Court resulted in treatment contrary to Article 3 of the Convention (compare *Tysic v. Poland*, no. [5410/03](#), § 66, ECHR 2007-I; *A, B and C v. Ireland [GC]*, no. [25579/05](#), §164, ECHR 2010 and *M.L. v. Poland*, cited above, §§ 83-84, the latter relating to a complaint expressed in very similar terms).*"

Minn-naħa l-oħra u bħala studju komparattiv, u biex anke jiġi muri l-livell ta' **severita'** li hi meħtieġa biex jiġi invokat dan l-artikolu l-Qorti se tirriproduċi parti mid-deċiżjoni fl-ismijiet **CASE OF S.F.K. v. RUSSIA**⁵²

"60. *The applicant maintained that her pregnancy had been aborted against her will and she had been forced by her parents to undergo the procedure. She asserted that the health professionals involved had been aware of those circumstances but rather than providing her with protection and informing the law-enforcement agencies, they had performed the abortion as requested by her parents. She argued that she had therefore been subjected to treatment falling within the scope of Article 3 of the Convention. She referred to somatic and psychological after-effects which she had suffered in connection with the incident in question (see paragraph 12 above).*

61. *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, *Solomakhin v. Ukraine*, no. [24429/03](#), § 33, 15 March 2012; *Csoma v. Romania*, no. [8759/05](#), § 45, 15 January 2013; and *L.F. v. Ireland (dec.)*, no. [62007/17](#), § 95, 10 November 2020,*

⁵² Deċiża 11.01.2023; (Application no. [5578/12](#))

with further references). In a number of cases the Court has nonetheless accepted that under certain conditions medical interventions can reach the threshold of severity to fall within the scope of Article 3 of the Convention.

62. *In particular, the Court has held that a medical intervention to which a person was subjected against his or her will may be regarded as treatment prohibited by Article 3 of the Convention (see, for instance, Akopyan v. Ukraine, no. [12317/06](#), § 102, 5 June 2014, and the cases cited therein). Thus, the Court considered that forced gynaecological examinations (virginity tests) to which two applicants, then aged 16 and 19, had been subjected while in police custody constituted severe ill-treatment. It reached that conclusion taking into account the circumstances of the case as a whole, in particular the virginity tests carried out without any medical or legal necessity at the start of the applicants' detention in custody and the post-traumatic stress disorders from which both applicants had subsequently suffered, as well as the serious depressive disorder experienced by the second applicant (see Salmanoğlu and Polattaş v. Turkey, no. [15828/03](#), § 96, 17 March 2009).*

63. *The Court has also found that the sterilisation of mentally competent adults without their full and informed consent, when there was no immediate threat to their lives, amounted to treatment contrary to Article 3 of the Convention. It reached that conclusion taking into account the particular circumstances of the cases concerned, in particular, their young age and the fact that they were at an early stage of their reproductive life; and the serious medical and psychological after-effects of the sterilisation procedure (see V.C. v. Slovakia, no. [18968/07](#), §§ 116-19, ECHR 2011 (extracts); 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).*

64. *In this connection, the Court reaffirms that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is relative; it 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. 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, for instance, V.C. v.*

*Slovakia, cited above, § 101). The Court has confirmed the applicability of the “threshold of severity” test to ill-treatment inflicted by private individuals (see *Ćwik v. Poland*, no. [31454/10](#), § 66, 5 November 2020). 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*, cited above, § 103).*

65. *In the present case, it was established at the domestic level that the applicant’s pregnancy had been aborted and that this medical intervention had been performed by the medical personnel of a public hospital (see paragraphs 17, 34 and 38 above). It was furthermore established at the national level that that medical intervention had been carried out in breach of the applicable medical standards, as well as of the rules and safeguards envisaged in the domestic law. In particular, the procedure in question remained unrecorded and was performed in the absence of the applicant’s express, free and informed consent; moreover, she was not provided with the necessary medical supervision and care either before or after the intervention, which put her health at risk (see paragraphs 26, 36 and 40 above).*

66. *The Court further observes that the applicant, consistently and with perseverance, complained to various domestic authorities that her pregnancy had been aborted against her will; that she had been forced by her parents to undergo that procedure; and that she had informed the relevant medical personnel of the situation (see paragraphs 16, 25, 28 and 30 above). Her version of events was confirmed by her brother, and her parents confirmed that on the relevant date they had taken her to the Tuymazy Central Hospital maternity department to undergo an abortion (see paragraphs 15 and 33 above). The latter fact was accepted by the law-enforcement agencies, as well as by the national courts (see paragraphs 18, 22, 34 and 38 above). Moreover, the first-instance court accepted that the applicant had let the abortion be performed because she had feared her father’s threats – a situation which that court strikingly considered to have demonstrated that the applicant had given her free consent to the medical intervention in question (see paragraph 35 above).*

67. *Against this background, the Court finds that the applicant has submitted sufficient evidence enabling it to conclude that she underwent that procedure against her will. It further notes the applicant’s vulnerability at the relevant time, given her apparent dependence on*

her parents, her young age and the fact that it was her first pregnancy. Furthermore, whilst there is insufficient evidence to conclude that the relevant health professionals exercised coercion, as alleged by the applicant, the Court notes that, at the very least, they displayed both indifference and negligence towards her situation, having failed to obtain her free consent and to ensure the necessary medical care (see paragraph 65 above). She must have suffered distress, anxiety and humiliation on account of the circumstances surrounding the interruption of her pregnancy. The Court also takes note of the medical evidence attesting to the presence of psychological and physical after-effects of the medical intervention in question (see paragraph 12 above).

68. Therefore, taking into account the circumstances of the case as a whole, the Court finds that the applicant's forced abortion, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity required to fall within the scope of Article 3 of the Convention and thus make this provision applicable in the present case.”(kull fejn hemm tipa grassa hija enfasi tal-Qorti.)

Għal komplettezza rigwardanti dan l-iskrutinju l-Qorti tagħmel referenza għal

Facts Sheet pubblikati mill-Kunsill Ewropew dwar dan l-artikolu datat 31 ta’

Awwissu, 2025.

“I. General considerations Interpretation of Article 3

- 1. The Court's approach to the interpretation of Article 3 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. Any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideas and values of a democratic society (Soering v. the United Kingdom, 1989, § 87).*
- 2. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Indeed, the prohibition of torture and*

inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity (Bouyid v. Belgium [GC], 2015, § 81). The prohibition in question is absolute, no derogation from it being permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime or influx of migrants and asylum-seekers, irrespective of the conduct of the person concerned (A. and Others v. the United Kingdom [GC], 2009, § 126; Mocanu and Others v. Romania [GC], 2014, § 315; El-Masri v. the former Yugoslav Republic of Macedonia [GC], 2012, § 195 and Z.A. and Others v. Russia [GC], 2009, §§ 187-188) or the nature of the alleged offence committed by him or her (Ramirez Sanchez v. France [GC], 2006, § 116 and Gäfgen v. Germany [GC], 2010, § 8.

State obligations under Article 3

3. *Article 3 has been commonly applied in contexts in which the proscribed form of treatment has emanated from intentionally inflicted acts of State agents or public authorities. It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction (Hristozov and Others v. Bulgaria, 2012, § 111).*
4. *However, the Court has also considered that States have positive obligations under Article 3 of the Convention, which comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally, speaking, the first two aspects of these positive obligations are classified as “substantive”, while the third aspect corresponds to the State’s procedural obligation (X and Others v. Bulgaria [GC], 2021, § 178.*

Scope of Article 3

5. *The prohibition under Article 3 of the Convention does not relate to all instances of ill-treatment (Savran v. Denmark, [GC], 2021, § 122). According to Court’s well-established case-law, in general, ill-*

treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that level is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (Muršić v. Croatia [GC], 2016, § 97).

6. *In order to determine whether the threshold of severity has been reached, other factors may be taken into consideration, in particular: (a) the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 of the Convention; (b) the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and (c) whether the victim is in a vulnerable situation (Khlaifia and Others v. Italy [GC], 2016, § 160).*
7. *When assessing whether a person has been subjected to ill-treatment attaining the minimum level of severity, in particular those inflicted by private individuals, the Court takes into account an array of factors, each of which are capable of carrying significant weight. All these factors presuppose that the treatment to which the victim was “subjected” was the consequence of an intentional act. Therefore, bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct cannot be considered as the consequence of “treatment” to which that individual has been “subjected” within the meaning of Article 3 (Nicolae Virgiliu Tănase v. Romania [GC], 2019, §§ 121 and 123).”*

Dana kollu jwassal lill-Qorti għal konklużżjoni waħda biss, aċċettat il-fatt li r-rikorrenti kienet anzjuża, anke imbeżża, tqis li dana ma jwassalx għal dak il-livell ta' severita' li trid il-Konvenzjoni biex jinstab dan il-ksur. Id-distress li kellha r-rikorrenti fiċ-ċirkostanzi li kienet fihom kienu normali u inevitabbli, speċjalment jekk hi ma kellhiex fiduċja fil-mangement mediku tas-sitwazzjoni tagħha jew giet indotta temmen li t-triq għas-soluzzjoni kienet terminazzjoni. Ma hemm ebda

prova li r-rikorrenti sofriet distress tant qawwi u sever, jew ta' attitudni umiljanti lejha jew ta' xi kattiverja wzata fuqha. Anzi jirrizulta illi hi kienet qed tinghata kura u attenzjoni medika aktar milli adekwata fiċ-ċirkostanzi, anke jekk il-partner u hi jitkellmu u jqiesu l-kamra individwali li kienet fiha ġewwa Mater Dei bħala ħabs għax għas-sigurta t-twieqi ma jinfethux. Tfakkar hawn ukoll li r-rikorrenti kienet posittiva għal COVID u d-dinja kienet għada qed tirkupra minn din it-tragedja ta' pandemija, għalhekk allura staff mediku bil-maskla u mhux biex jitqiegħed aktar stress fuq il-pazjenta jew tinheba l-identita' tal-istaff.

Għalkemm huwa vera li r-rikorrenti kienet għaddejja minn żmien ferm diffiċli li kkagunalha ansjetá, din kienet xi naqra *self inflicted* għaliex ma kienetx taqbel mal-protokoll użat mit-tobba Maltin u dan nonostante li fl-isptar kienet sejra sew. Din is-severita' ta' emozzjoni kienet waħda li akkumulat fiha għax id-deċiżjoni tal-mangement tas-sitwazzjoni medika tagħha ma kienetx dak li riedet u xtaqet hi.

Konsegwentement l-ilment mressaq ai fini ta' l-artikoli in eżami qed jiġi miċhud għax ma jwassalx għal dawk l-elementi meħtieġa biex jissussiti u ma ssibx illi l-Istat kien mankanti mill-obbligu lejha kif spjegat.

iii. L-Artikolu 8 tal-Konvenzjoni.

Dan jaqra:-

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

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Mela ġia’ mad-daqqa t’għajn huwa ċar illi dak misjub fis-subinċiż wiehed ta’ dan l-article li jistabilixxi d-dritt fundamentali protett, jista’ jkun soġġett għal limitazzjonijiet imnizzla fis-sub-inċiż tnejn. Għalhekk il-prinċipju stabbilit mhux dritt assolut u jaf ikollu l-limitazzjonijiet fl-ambitu ta’ dak imsemmi fit-tieni sub-inċiż.

Ir-rikorrenti tressaq l-argument li hi tħossha aggravata in vista tal-projbizzjoni leġislattiva li ma kienetx tippermetti l-abortion fiċ-ċirkostanzi mediċi tagħha. Għalhekk l-artikoli tal-Kap 9 ikkonċernati jilledu d-drittijiet tal-awtonomija riproduttiva tagħha, tqis ukoll li għet imnaqqsa d-dinjita’ u l-integrità’ fiżika u psikoloġika tagħha. Tabbina dan man-nuqqas ta’ raguni leġittima għal din il-projbizzjoni. Tqis ukoll li tali projbizzjoni hija diskriminatorja a bażi tal-ġeneru.⁵³

⁵³ Punt li se jiġi trattat aktar l-isfel.

Minn naħa tiegħu l-Avukat ta' l-Istat korrettament jfakkar li l-artikolu 8 ma jagħti ebda dritt awtomatiku għal abort, li din l-interpretazzjoni hija waħda mhaddna u miżmuma anke mill-Qorti ġewwa Strasburgu.

Tqis hekk:

Illi Andrea Prudente tissottometti li hi ressqet il-lanjanzi tagħha għal opinjoni u skrutinu pubbliku, ħasset li ma kellha ebda triq oħra. Għal kull boun fini l-Qorti tirritjeni li kien x'kien l-impatt pubbliku ta' dak li ssuċċeda, ma jincidi xejn fuq dak li se tiddeċiedi din il-Qorti. **Il-ġustizzja ma jsirx la tramite u lanqas fuq il-media speċjalment il-midja soċjali.**

Għandu jkun ċar ukoll illi għalkemm ir-rikorrenti tattakka wkoll in-nuqqas leġislattiv ta' abort in ġenerali, l-ilment tagħha hu verament u aktar marbut ma' abort għan-neċesita' medika. Il-Qorti dana tgħidu għax kemm ir-rikorrenti wkoll il-partner tagħha jixhdu fuq il-fatt li huma riedu lil din it-tifla, dan il-wild, tant li kienu għażlu anke isem għaliha.

Dana tgħidu l-Qorti għaliex hemm distinzjoni netta u baħar jaqsam bejn it-tnejn, aktar u aktar meta kif ingħad l-artikolu 8 ma jankrax dan id-dritt fil-Konvenzjoni. Dak ċar kristallin.

Hawn il-Qorti terġa tagħmel referenza għad-deċiżjoni tal-Qorti Ewropeja għad-deċiżjoni fl-ismijiet **A, B, and C v Ireland**.⁵⁴

Il-każ hawn kien jitratta tlett applikanti. Il-Qorti se tagħmel referenza biss għal dak konkluss fir-rigward ta' applikant A. Din il mara li harget tqila bla ma din it-tqala kienet ippjanata, kienet tgħix f'poverta' assoluta, tant li anke kellha ulied go foster care, avvanzat li minhabba s-sitwazzjoni soċjali tagħha, tarbija oħra, twelid ieħor kien se jkun ta' detriment għas-saħħa tagħha wkoll, għal benesseru tagħha.

Il-fatti tagħha huma riprodotti hekk fid-deċiżjoni-

“13. On 28 February 2005 the first applicant travelled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was nine and a half weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children. The youngest was disabled and all four children were in foster care as a result of problems she had experienced as an alcoholic. She had a history of depression during her first four pregnancies, and was battling depression at the time of her fifth pregnancy. During the year preceding her fifth pregnancy, she had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at that moment of her life (with its attendant risk of post-natal depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

⁵⁴Application no. [25579/05](#) GC 16.12.2010.

15. *Delaying the abortion for three weeks, the first applicant borrowed the minimum amount of money for treatment in a private clinic and travel from a money-lender (650 euros (EUR)) at a high interest rate. She felt she had to travel to England alone and in secrecy, without alerting the social workers and without missing a contact visit with her children.*

16. *She travelled back to Ireland by plane the day after the abortion for her contact visit with her youngest child. While she had initially submitted that she was afraid to seek medical advice on her return to Ireland, she subsequently clarified that on the train returning from Dublin she began to bleed profusely and an ambulance met the train. At a nearby hospital she underwent a dilation and curettage. She claims she experienced pain, nausea and bleeding for weeks thereafter but did not seek further medical advice.*

17. *Following the introduction of the present application, the first applicant became pregnant again and gave birth to her fifth child. She is struggling with depression and has custody of three of her children whilst two (including the disabled child) remain in care. She maintained that an abortion was the correct decision for her in 2005”*

II-Qorti kkunsidrat dan:-

“2. The first and second applicants

(a) Positive or negative obligations under Article 8 of the Convention?

*216. While there are positive obligations inherent in effective respect for private life (see paragraphs 244-46 below), the Court considers it appropriate to analyse the first and second applicants’ complaints as concerning negative obligations, their core argument being that the prohibition in Ireland of abortion where sought for health and/or well-being reasons disproportionately restricted their right to respect for their private lives. The Court has previously noted, citing with approval the case-law of the former Commission in *Brüggemann and Scheuten v. Germany* (no. [6959/75](#), Commission decision of 19 May 1976, Decisions and Reports 5, p. 103), that not every regulation of the termination of pregnancy constitutes an interference with the right to*

*respect for the private life of the mother (see also Vo, cited above, § 76). Nevertheless, having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity (see paragraphs 212-14 above), the Court finds that the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and/or well-being amounted to an interference with their right to respect for their private lives. **The essential question which must be determined is whether the prohibition is an unjustified interference with their rights under Article 8 of the Convention.***

217. *As noted at paragraph 145 above, the impugned interference stemmed from sections 58 and 59 of the 1861 Act, as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in the X case.*

218. *To determine whether this interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article namely, whether the interference was “in accordance with the law” and “necessary in a democratic society” for one of the “legitimate aims” specified in Article 8 of the Convention.*

(b) Was the interference “in accordance with the law”?

219. *The applicants accepted that the restriction was in accordance with the law and the Government stated that the Court had found Article 40.3.3 to be “prescribed by law” in the above-cited Open Door case.*

220. *The Court notes that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his conduct, he or she being able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see for example, Silver and Others v. the United Kingdom, 25 March 1983, §§ 86-88, Series A no. 61).*

221. *The Court considers that the domestic legal provisions constituting the interference were clearly accessible. Having regard to paragraphs 147-49 above, the Court also considers that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.*

c) Did the interference pursue a legitimate aim?

222. *The Court points out that, in the above-cited Open Door case, it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. This was confirmed by the Court's finding in the above-cited Vo case that it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of Article 2 of the Convention, so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life.*

...

226. *In light of the above, the Court does not consider that the limited opinion polls on which the first and second applicants relied (see paragraphs 82-88 and 170 above) are sufficiently indicative of a change in the views of the Irish people concerning the grounds for lawful abortion in Ireland, as to displace the State's opinion to the Court on the exact content of the requirements of morals in Ireland (see Handyside and further references cited at paragraph 223 above). Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the Open Door case, were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have changed significantly since then.*

227. *The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.*

228. *The Court does not therefore consider it necessary to determine whether these are moral views stemming from religious or other beliefs or whether the term "others" in Article 8 § 2 extends to the unborn (see the Open Door case, cited above, § 63, and Vo, cited above, § 85). The first and second applicants' submissions to the effect that the abortion restrictions in pursuance of that aim are ineffective and their reliance*

on the moral viewpoint of international bodies fall to be examined below under the necessity of the interference (see the Open Door case, cited above, § 76

233. *There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.*

234. *However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.*

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with Tyrer v. the United Kingdom (25 April 1978, § 31, Series A no. 26), the Convention being considered a “living instrument” to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention (see Marckx v. Belgium, 13 June 1979, § 41, Series A no. 31; Dudgeon, cited above, § 60; Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; L. And V. v. Austria, nos. [39392/98](#) and [39829/98](#), § 50, ECHR 2003-I; and Christine Goodwin, cited above, § 85).

...

236. *However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.*

237. *Of central importance is the finding in the above-cited Vo case that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case-law at paragraphs 75-80 in the above-cited Vo judgment), the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it*

balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (see Tyrer, § 31, and Vo, § 82, both cited above).

238. It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a State's Convention obligations and, given the Court's responsibility under Article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved (see the Open Door case, cited above, § 68). A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations (see paragraph 187 above). However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

...

241. Accordingly, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (see paragraphs 222-27 above) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn."

Tqis:

Li kif ġia' ingħad l-emenda li llum thalli t-terminazzjoni tat-tqala *inter alia* meta jkun hemm riskju serju u imminenti għal hajja ta' l-omm ma kienetx in vigore fiż-żmien tal-akkadut.

Dan per se jqiegħed aktar inkombenza fuq l-artikoli 241 u 243 hawn attakkati.

Mill-ġurisprudenza citatat hu sew miżmum mill-Qorti Ewropeja għad-Drittijiet tal-Bniedem li in ġenerali jaf ikun li l-projbizzjoni għal rikors ta' abort jikkostitwixxu interferenza għal-hajja privata tal-omm, b'mod partikolari iżda mhux biss għad-drittijiet riproduttivi tagħha, dan rifless fl-artikolu 8(1).

Pero' stabbilit dan il-prinċipju ġenerali, irid ukoll isir eżami ai terminu ta' l-artikolu 8(2) ta' l-istess Konvenzjoni u jiġi meqjus jekk din il-projbizzjoni kienetx-

-Skont il-liġi;

-Bi skop ta' għan legittimu;

-U neċessarja f'soċjeta demokratika.

Kif rajna Stat membru jgawdi margin ta' diskrezzjoni sa fejn jirrigwarda dan id-dritt daqstant diviżiv. Ċar li m'hemmx konsensus bejn l-Istati membri la għal dak li jirrigwarda d-drittijiet tal-fetu u lanqas meta dan jiġi kkunsidrat bħala tarbija; bniedem.

Ċar ukoll li għal pajjiżna dan huwa dibattitu ta' ċerta sensittività marbut sfiq mal-morali sew ankrati fina ta' twemmin kattoliku.

Daqstant hu fatt u tfakkar li l-artikolu 8 ma jistabilixxi ebda dritt ġenerali għal abort.

Temmen ukoll il-Qorti, u llum dan hu statutorjament protett, illi mod ieħor kien ikun il-każ kieku r-rikorrenti kienet vera fil-perikolu tal-mewt. Dan ma ġiex pruvat. L-unika prova li kellha l-Qorti fir-rigward hija l-biża' ġustifikata tagħha xprunata minn informazzjoni mhux korretta li rċeviet jew fittxet. Il-fatt waħdu li ġew esebiti lilha sensiela ta' dokumenti li juri l-perċentaġġ baxx ta' vijabbilta' ta' fetu fil-kundizzjoni li pprezentat Prudente, la huma l-aħjar prova, la huma konklussivi ta' dak hemm inniżżel u ma jxejjnu xejn id-dritt ta' l-*unborn child* li hu protett go pajjiżna, **li huwa l-ghan legittimu għal liġijiet impunjati.** Dan jaqa' sew f'dik il-margni ta' diskrezzjoni mħollija lil kull Stat, **dak li tolqot is-saħha u l-morali pubblika u dan kif rifless fl-artikolu 8(2) imsemmi.**

Tqis ukoll li l-ligi nostrali kienet ukoll ċara f'din il-projbizzjoni u dan qabel ir-rikorrenti ivvjagġat lejn pajjiżna, għalhekk kien hemm dik iċ-ċertezza legali li ma kienet tħalli ebda lok ta' dubbju jew interpretazzjoni. Nonostante għal din il-projbizzjoni, it-tobba xehdu li ma esperjenzaw ebda imwiet f'każi li setgħu kienu simili.

Għalhekk issib li l-ilment tar-rikorrenti marbut ma' l-artikolu 8 ukoll m'għandu ebda suċċess.

iv. L-artikolu 45 tal-Kostituzzjoni u 14 tal-Konvenzjoni Ewropeja.

Ir-rikorrenti tressaq dan l-ilment fuq il-bażi ta' diskriminazzjoni tal-ġeneru.

Minn-naħa tagħhom l-intimati jagħmlu distinzjoni dovuta bejn l-artikolu 45 tal-Kostituzzjoni u 14 tal-Konvenzjoni. Dak sanċit fil-Kostituzzjoni li jitqies bħala wiehed *stand alone* mid-drittijiet fundamentali oħra misjuba. Menti kif sew hu miżmum l-artikolu 14 tal-Konvenzjoni jista' biss jiġi nvokat jekk marbut ma' xi dritt fundamentali ieħor sanċit fil-Konvenzjoni.

L-artikolu 45(3) jelenka sew kif u taħt liema kappa tista' tiġi mfittxija d-diskriminazzjoni allegata. Jekk allura b'diskriminazzjoni tal-ġeneru r-rikorrenti trid tfisser kwalunkwe distinzjoni, esklużjoni jew restrizzjoni magħmula abbażi

tas-sess li għandha l-effett jew l-iskop li ddgħajjef jew tannulla r-rikonoxximent, it-tgawdija jew l-eżerċitar ta' xi dritt fundamentali minn mara komparata ma' mara oħra, f'sitwazzjoni simili, ġia' l-Qorti ma ssibx li hawn jista' jinstab is-suċċess meħtieġ.

Taħt l-artikolu tal-Kostituzzjoni din id-diskriminazzjoni teżisti biss jekk jkun hemm trattament differenti li l-persuni attribwibbli għal kollox jew prinċipalment għad-deskrizzjoni tagħhom skont is-sess tagħhom, mara fil-każ tagħna, b'dan li b'hekk ikun hemm assoġġettazzjoni ta' kapaċità u jew restrizzjoni minhabba s-sess femminili tagħhom, mentri li persuni oħra femminili ma jkunux hekk assoġġettati.

Dan ċertament mhux il-każ. Il-projbizzjoni tal-abortion f'Malta huwa *across the board* għal kull mara li tinsab ġol-gzejjer tagħna. Hekk kien il-każ fiż-żmien tal-akkadut in eżami. Kien reat kriminali għal kull min kien jikser il-preċetti tal-liġi penali hawn attakkati. Il-liġi ma kinetx tippermetti ebda distinzjoni tal-ġeneru f'dak li aħna insisbu bħala *like with like*, ma nsibu ebda distinzjoni sfavorevoli ta' trattament fejn tidhol xelta ta' terminazzjoni ta' tqala. Għalhekk din id-diskriminazzjoni vantata ma teżistix taħt il-Kostituzzjoni Maltija.

Mill-lat konvenzjonali sew ingħad li l-artikolu 14 mhux wiehed *stand alone*, jista' jiġi nvokat biss meta marbut ma' xi dritt fundamentali protett taħt l-istess

Konvenzjoni. Għal darb'oħra l-Qorti ma ssibx li sakemm ir-rikorrenti kienet ġo pajjiżna hi rċeviet xi trattament differenti, bażat fuq il-ġeneru tagħha, allura mara tqila bil-problemi li rriskontrat fl-istess tqala, ma' nisa oħra fl-istess sitwazzjoni tagħha. Minn imkien ma irriżulta lill-Qorti li ġie permess abort, jew terminazzjoni tat-tqala a volontà tal-mara għax it-tqala kienet fil-perikolu, sakemm l-istess omm ma kienetx fil-perikolu imminenti għal hajjitha. Imkien ma jirriżulta li ġie mogħti l-fakolta' li ebda mara tqila li kienet għaddejja minn diffikultajiet, saħansitra anke jekk konsapevoli ta' malformazzjoni tal-fetu, jew nuqqas ta' vijabbilità tal-istess, li tittermina l-gravidanza tagħha.

Din il-leżjoni trid bil-fors biex tirnexxi tinhtiegħ paragun *like with like*. Fatt li ma jirriżultax.

Dik kienet il-liġi Maltija li kienet u għada tipprevali llum fl-ordinament ġuridiku tagħna, salv l-emenda msemija. Il-fatt waħdu li r-rikorrenti xtaqet mod ieħor u ma ħaditx dak li xtaqet ma jfissirx li sofriet leżjoni tad-drittijiet fundamentali tagħha.

Tfakkar del resto l-Qorti fir-restrizzjonijiet li jolqtu dan l-allegat dritt fundamentali vantat mir-rikorrenti li ssib r-restrizzjonijiet tiegħu anke ġo pajjiżna stess wara li l-Qorti Suprema dawret dak id-dritt qabel sanċit fid-deċizjoni **Roe vs Wade**.

Il-Qorti tiġbed l-attenzjoni wkoll illi anke sa fejn jirrigwarda l-Karta ta' l-Unjoni Ewropeja jibqa' għaddej l-istess dibattitu u konflitt ta' interessi varji ta' l-Istati membri fuq soġġett daqstant delikat u iva kif ingħad diviżiv, tiċċita hekk:-

*“First, the human rights guarantees under the Charter generally go further in substance than the guarantees under the much older Convention, even when the evolution of the Convention via the case law of the ECtHR is taken into account. Thus, it is certainly not impossible but still quite unlikely that Convention oversight of the EU would provide substantially better human rights protection in any given case. **The main situations where differences would play out are likely to be the highly contentious and open ended debates in modern societies, such as the conflict between pro-life and pro-choice proponents in the debate over abortion or the conflict between those who want to prioritize security over privacy in the war on terror and those who seek to safeguard a larger measure of privacy even if it comes at a cost to security. In the end, the differences would be the (personal) judgment of a group of judges in Strasbourg versus the (personal) judgment of a group of judges in Luxembourg in a case that does not have clear legal guidelines one way or another.**”⁵⁵*

Konsegwentement issib illi t-talbiet attriċi tenut kont tal-fatti li rriżultawliha u dak kollu hawn premiss ma jwasslux għal leżjoni minnha mressqa u għalhekk tiċhad it-talbiet tar-rikorrenti.

Fil-konfront tal-eċċezzjonijiet imressqa tidisponi minn dawk preliminari kif ingħad u tilqa' l-kumplament fil-mertu.

⁵⁵ THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS VS. THE COUNCIL OF EUROPE CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS – A COMPARISON Frank Emmert* & Chandler Piché Carney.

Spejjeż għar-rikorrenti.

Onor. Miriam Hayman, LL.D.

Imħallef

Larisa-Mirela Agius Bonello

Dep. Reġ.