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Völkerrechtsblog
INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

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BOFAXE

Don't Screen Us Out? (Part 1)

Disability-Selective-Abortion Case to Head to European Court of Human Rights

Last month the legal team of Heidi Crowter, an activist with Down's Syndrome who (so far unsuccessfully) challenged the British Abortion law, announced that they will take their case to the European Court of Human Rights (ECtHR). This post will shed light on some of the legal issues related to the case in order to give a first impression of the difficult questions the Court will be facing in the context of disability-selective-abortion.

What Has Happened So Far

Together with two other claimants, Heidi Crowter challenged section 1(1)(d) of the British Abortion Act that exceptionally allows for abortion up to birth if the foetus was "seriously handicapped". The British Human Rights Act allows national courts to revise the compatibility of domestic law with the European Convention on Human Rights (ECHR) and a first judgement was delivered in 2021 by the High Court of Justice and a second one in 2022 by the Court of Appeal. The arguments of the claimants can be broken down into two main lines of argumentation: Firstly, it was argued that the Abortion Act violates the rights of the unborn, precisely the right to life (Art. 2 ECHR, para. 51-60) and the prohibition of torture and inhumane treatment (Art. 3 ECHR, para. 72-78). Secondly, it was argued that Art. 8 ECHR, the right to privacy, of people living with Down's Syndrome was violated because such regulations would convey the message that life with disabilities was less worthy of protection (para. 89-98). While the first line was quite easily dismissed in 2021 on the grounds that the unborn itself is not considered as a "person" under the ECHR and thus does not enjoy any rights of the Convention and was not even accepted for appeal (para. 26), the second line of argumentation required a more in-depth assessment. In this regard, the claimants based their argumentation mainly on the assumption that the right to privacy under Art. 8 ECHR entails a right to a sense of identity and feelings of self-worth and self-confidence that would be incompatible with regulations allowing abortions for a longer time frame on the grounds of disability (para. 45). Although the Chamber of Appeals acknowledged that such law might cause persons with Down's syndrome to feel upset and offended and that they indeed might regard them as implying that their lives are of lesser value, the Court ruled that such perception was by itself not enough to constitute an interference with Art. 8 ECHR (para. 57-58). Even if one were to conclude that the provision in question constituted an interference, the Court found that it would be justified in any event, as Parliament had a wide discretion to balance the rights of women and the rights of persons with disabilities (para.108)

The Jurisprudence of the ECtHR

Let us now briefly place these arguments within the jurisprudence of the ECtHR, starting with the legal personhood of the unborn. In Vo v. France, the Court intensively dealt with the question of the beginning of life under Art. 2 ECHR, the right to life. While the Court referenced the clear position of the former European Commission on Human Rights that had rejected any rights granted to the unborn (Vo v. France, para. 80), the Court itself refrained from taking a clear stance on the issue and relied on its margin of appreciation doctrine (para. 85). This position was repeated in Evans v. the United Kingdom, where the Court held that the question whether embryos would be beneficiaries of the right to life would depend on the position of domestic law on the matter (para. 54-56). Although the Court has not absolutely ruled out the option for prenatal life to be considered a person under the ECHR, it has indeed done so for states that do not grant this right to unborn life under domestic law, as, importantly, the United Kingdom. Consequently, the finding of the Court of Appeal that this line of argumentation was not fruitful, seems convincing. Nevertheless, the claimants placed particular emphasis on the fact that the case of Crowter et al. was precedentially concerned with viable unborn life, leading to the expectation that the claimants will continue to proceed with this line of argumentation. Given the strong reliance of the ECtHR on the margin of appreciation doctrine in the context of abortion (see for an overview here), the probability of the Court adding any substance to its jurisprudence on the beginning of life is relatively low.

This is precisely why the second line of argumentation is the more promising one. The claimants' argument is mainly based on the Court's jurisprudence concerning negative stereotypes that was first established in 2012 in Aksu v. Turkey. Here, the Court ruled that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence" and thus affects the private life of the members of such a group (para. 58). Hence, on the question whether there is an interference with Art. 8 ECHR, the ECtHR relies on a threshold test. Further, to qualify an interference with Art. 8 ECHR as a violation, in Aksu v. Turkey and the following judgements on negative stereotyping, the ECtHR acknowledged the margin of appreciation of states when balancing the right to privacy against competing rights and interests (Aksu v. Turkey para. 62, 65; Király and Dömötör v. Hungary para. 82; Lewit v. Austria para. 82). Whether or not the ECtHR applies this jurisprudence in the context of disability-selective-abortion, remains to be seen. One of the judges at the Court of Appeal has denied the applicability entirely by arguing that an interference with Art. 8 ECHR must derive from something in its terms or its effect which *objectively* conveys a negative stereotyping message (para. 73), while the British Abortion Act would be perceived only by certain groups or individuals as transmitting such a message. The second judge accepted the jurisprudence to apply but argued that the threshold was not met (para. 128f.).

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Disability-Selective-Abortion Case to Head to European Court of Human Rights

The strong standing of the Council of Europe against sex-selective abortion as a "deeply discriminatory practice" that "reinforces and perpetuates a climate of violence against women" might favour at least the willingness to acknowledge that abortion regulations are indeed relevant under Art. 8 ECHR. However, to venture a first careful outlook, the Court's strong reliance on its margin of appreciation doctrine in the context of abortion and when balancing competing rights will probably decide the case in favour of the UK.

Looking Beyond European Boundaries – Towards Harmonization or Fragmentation?

An aspect that could substantially influence the outcome of the judgement is the extent to which the ECtHR will take into consideration the work of other international treaty bodies, particularly the Convention on the Rights of Persons with Disabilities (CRPD) and its Committee. The Committee has on several occasions clearly condemned regulations allowing for disability-selective abortion, *inter alia* precisely the UK abortion law in its Concluding Observations in 2017, as being in violation of several rights enshrined in the CRPD (including Art. 1-4, 5 and 8 CRPD). Additionally, Art. 8 CRPD entails the explicit obligation of states to reduce negative stereotypes. In line with Art. 31(3)(c) of the Vienna Convention on the Law on Treaties and the principle of evolutive interpretation of the ECHR, the ECtHR might indeed take these findings into consideration when interpreting Art. 8 ECHR. In other instances, the Court has already included the CRPD and the findings of the Committee in the "relevant international material" section of its judgements (e.g. Z.H. v. Hungary, para. 43; Guberina v. Croatia, paras. 34f.) and has *inter alia* ruled that the CRPD shows "a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment" (Glor v. Switzerland, para. 53). Interestingly, in some of these judgements (Glor v. Switzerland, para. 84; Kiyutin v. Russia, para. 64), the Court found that states only enjoyed a considerably reduced margin of appreciation. However, in several cases concerning the legal capacity of persons with disability, the Court has again strongly relied on its margin of appreciation doctrine, so that commentators have noted that this doctrine will probably be "the main reason why the ECtHR may never fully (or even largely) converge with the understanding of disability endorsed by the CRPD" (Ferri/Broderick, p. 293). Further tailwind for the Court's reliance on the margin of appreciation doctrine is the lack of consensus on disability-selective-abortion at the European and international levels. The British courts also noticed that the provisions related to disability-selective-abortion vary significantly within the member states (High Court, paras. 30, 123) and that the international legal landscape is divided on the matter (Appeal judgement paras. 59-68). In contrast to the CRPD-Committee's clear position against disability-selective-abortion, several other Human Rights institutions have required abortion to be legal in case of severe foetal abnormalities in order to protect the rights of the pregnant person (see for an overview here). So even if the ECtHR would decide to significantly refer to other obligations under international law, the question would be whose opinions carry more weight.

A Dangerous Time

The case of *Crowter et al* – assuming that it is found admissible – will challenge the ECtHR with several difficult questions on disability-selective-abortion that require more clarity and legal certainty. Nonetheless, this case reaches the ECtHR at a very dangerous time, in which certain States around the world are returning to restrictive abortion regulations. Thus, the future case of *Crowter et al.* might be instrumentalized by anti-abortion activists and conservative governments to justify such restrictive policies. However, as the CRPD-Committee itself emphasised, the aim is not to restrict women's reproductive rights (para. 13), but to enhance equality. The easiest way to achieve this would be with generally generous abortion regulations up to high gestational limits. The legal situation for example in Germany (that *prima facie* pursues a rather conservative stance on the protection of unborn life by *de-jure* criminalizing abortion), shows that women's rights can be adequately protected through generously formulated socio-medical exceptions without having to explicitly refer to a diagnosed disability (§ 218a German Criminal Code). However, the ECtHR will probably not be particularly interested in the fact that there are indeed possibilities to better balance the rights and interests of pregnant persons and persons with disabilities, as it will certainly find that such alternatives fall within the margin of appreciation of the member states.

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