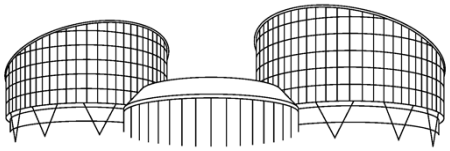

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF JURČIĆ v. CROATIA

(Application no. 54711/15)

JUDGMENT

Art 14 (+ Art 1 P1) • Unjustified, direct sex discrimination by refusing employment-related benefit to pregnant woman who underwent *in vitro* fertilisation shortly before employment • Financial obligations imposed on a State during a woman's pregnancy incapable of justifying difference in treatment on basis of sex • Problematic character of insurance verification measures frequently targeting pregnant women, and women who had concluded an employment contract at an advanced stage of their pregnancies or with close family members • Employment-related protection of women during pregnancy not to be dependent on whether their presence at work during maternity was essential for the proper functioning of their employer or whether they are temporarily prevented from performing their work • Maternity protection measures essential to uphold the principle of equal treatment of men and women in employment • Authorities' conclusion that *in vitro* fertilisation rendered applicant medically unfit to take up employment tantamount to discouraging her from seeking employment due to possible pregnancy and indicative of gender stereotyping, in direct contravention to both domestic and international law

STRASBOURG

4 February 2021

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

In the case of Jurčić v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Alena Poláčková,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application (no. 54711/15) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Ms Kristina Jurčić ("the applicant"), on 28 October 2015;

the decision to give notice of the applicant's discrimination complaint to the Croatian Government ("the Government") and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 16 December 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant entered into an employment contract ten days after she had undergone *in vitro* fertilisation. When she subsequently went on sick leave on account of pregnancy-related complications, the relevant administrative authority re-examined her health insurance status and rejected her application for insurance as an employed person, concluding that her employment had been fictitious. The applicant complained that she had been discriminated against on the basis of her sex and the manner in which she had got pregnant.

THE FACTS

2. The applicant was born in 1975 and lives in Rijeka. She was represented by Ms K. Jajaš, a lawyer practising in Rijeka.

3. The Government were represented by their Agent, Ms Š. Stažnik.

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

5. The applicant had been employed, with short interruptions, since 1993. Her last relevant employment had lasted from 19 August 2006 until 31 October 2009. Since 1 November 2009 she had been unemployed.

6. On 17 November 2009 the applicant underwent *in vitro* fertilisation. The doctor in charge recommended that she take rest (*mirovanje*).

7. On 27 November 2009 the applicant entered into an employment contract with company N. (hereinafter "the company"), which had its headquarters near Split, about 360 kilometres away from the applicant's place of residence. Pursuant to the contract, the applicant was to start full-time work on administrative tasks in Split on that date for a monthly salary of 4,400 Croatian kunas (HRK; approximately 600 euros (EUR)).

8. On 11 December 2009 the applicant's application to register with the compulsory health insurance scheme was filed with the Croatian Health Insurance Fund (*Hrvatski zavod za zdravstveno osiguranje*) and she was registered as an insured employee.

9. On 14 December 2009 the applicant started feeling nauseous. Her doctor established that the *in vitro* fertilisation had been successful, and that the applicant needed rest owing to pregnancy-related complications. A period of sick leave was thus prescribed.

10. On 17 December 2009 an ultrasound confirmed that the applicant was pregnant with twins.

11. On 28 December 2009 the applicant filed a request for payment of salary compensation during her sick leave on account of pregnancy-related complications (see paragraph 26 below).

12. On 5 January 2010 the relevant office of the Croatian Health Insurance Fund (hereinafter "the Fund"), of its own motion, initiated a review of the applicant's health insurance status.

13. On 16 February 2010 the Fund reopened the case concerning the applicant's health insurance and rejected her application for registration as an insured employee, along with her request for salary compensation due to sick leave on account of pregnancy-related complications. It based its decision on an in-house expert report according to which, when the applicant had taken up her employment with the company on 27 November 2009, she had been medically unfit for employment because she had undergone *in vitro* fertilisation ten days earlier. It was therefore considered that her employment was fictitious and aimed solely at obtaining pecuniary advantages related to the status of employed persons, including salary compensation during her absence from work due to pregnancy-related complications.

14. The applicant challenged this decision before the Central Office of the Croatian Health Insurance Fund (hereinafter "the Central Office"). She argued that she had felt well after undergoing the *in vitro* fertilisation and that she had had no way of knowing whether the implantation would be successful. There had therefore been no reason for her to miss out on an opportunity to take up employment on 27 November 2009.

15. According to an expert report by a specialist in gynaecology and obstetrics dated 3 March 2010 and submitted by the applicant, on the date

on which the applicant took up employment with the company she had been healthy and awaiting the results of her *in vitro* fertilisation. The expert also stressed that neither the applicant nor her gynaecologist could have known in advance whether the *in vitro* fertilisation would be successful and how the pregnancy would develop.

16. Following the applicant's appeal, the Central Office carried out a further assessment of the circumstances of the applicant's employment and her medical condition. According to the information obtained from her employer, the applicant was to work at the company headquarters in Split, but a part of her tasks could be performed by teleworking from home. Her employer confirmed that her position in the company required travelling within and outside Croatia. The Central Office also obtained another in-house expert report, the relevant part of which reads as follows:

> "In the case at hand, [the applicant] had been unfit to work on 27 November 2009 because the gynaecologist recommended that she rest following the implantation of two fertilised ova, that is to say, as of 17 November 2009. In other words, rest was recommended ten days prior to [the applicant's] employment.
>
> We would emphasise that, on the date on which she entered into the employment contract, namely 27 November 2009, [the applicant] might not have known whether she was pregnant but in any event she should have rested until a BHCG test could be performed; this was planned for 3 December 2009. It is standard practice for gynaecologists to recommend rest immediately after *in vitro* fertilisation and embryo transfer until the outcome of the procedure can be established (via a BHCG test to determine whether pregnancy has occurred). Rest in these cases entails not only avoiding physical and psychological effort, but in particular avoiding travel owing to its negative mechanical effects (shaking) during the sensitive phase following embryo transfer and its potential implantation. Besides, every journey involves a potentially stressful situation and may negatively impact the outcome of the pregnancy because, in the experience of gynaecologists, psychological stability improves the chances of a favourable outcome of *in vitro* fertilisation."

17. On the basis of the above evidence, the Central Office of the Croatian Health Insurance Fund dismissed the applicant's appeal on 30 March 2010, holding that although pregnancy in itself could not be a reason for not taking up employment, the particular circumstances of the applicant's case suggested that her employment could be considered fictitious and aimed solely at obtaining salary compensation granted to employed persons.

18. The applicant challenged this decision before the High Administrative Court (*Visoki upravni sud Republike Hrvatske*), arguing, in particular, that she had been discriminated against as a woman who had undergone *in vitro* fertilisation. The applicant expressly relied on the Prevention of Discrimination Act and the Convention. She also explained that she had planned to move close to Split, where her husband had his registered residence and that most other employees of the company had residence elsewhere, since the nature of the company's work had been compatible with teleworking, which she did.

19. On 5 December 2012 the High Administrative Court dismissed the applicant's administrative action, upholding the reasoning of the administrative bodies. It stressed that, in view of her *in vitro* fertilisation, on 27 November 2009 the applicant had not been fit to take up employment that was at a distance from her place of residence and also required travelling. The relevant part of that court's judgment reads as follows:

> "The facts established in the proceedings resulting in the impugned decision lead to the conclusion that on the day of entering into the employment contract [the applicant] had been unfit to work and, in that most sensitive phase of a twin pregnancy, had been unfit to fulfil the obligations from her employment within the meaning of section 3(1) of the Labour Act providing that the employee is to personally perform activities for which he concluded an employment contract, in the [applicant's] case administrative tasks in a city rather far from her place of residence, with the obligation of travel within the country and abroad. These facts lead to the conclusion that the employment was not entered into with a view to fulfilment of mutual obligations of the employer and employee but that the present case concerns conclusion of an employment contract exclusively in order to benefit from obligatory social security benefits. In this court's view, such a contract cannot be basis for obtaining the status of an insured person.
>
> The court finds [the applicant's] discrimination complaint ill-founded, since she was not denied, on the basis of either her sex or her pregnancy, the right to take up employment or related rights (and specifically the rights stemming from compulsory health insurance). Pregnancy is not an obstacle to taking up employment, and any restriction of an employment-related right in the case of an employee who has actually entered into an employment contract during pregnancy (if that pregnancy does not affect the pregnant woman's ability to work) would constitute a prohibited interference with her rights. However, in the present case it has been established that [the applicant] had undergone *in vitro* fertilisation ten days prior to the conclusion of the employment contract, as a consequence of which, according to concurring expert opinions (which are not in contradiction with the medical documentation in the case file), at the time of the conclusion of the employment contract [the applicant] had been unfit for work. Therefore, it is this court's opinion that the competent bodies did not deprive [the applicant] of her rights under the compulsory health insurance scheme in breach of the Constitution, [the Convention] or [the applicable legislation] ..."

20. The applicant then lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), reiterating her previous arguments and alleging that she had been discriminated against.

21. Meanwhile, the applicant complained to the Gender Equality Ombudsperson (*Pravobraniteljica za ravnopravnost spolova*) alleging discrimination. On 18 December 2010 the Ombudsperson informed the applicant that she had issued a warning to the Fund that its decision in the applicant's case had violated the prohibition of less favourable treatment on grounds of pregnancy, and that this constituted discrimination based on sex. The Ombudsperson stressed that the relevant authorities' interpretation of the applicant's situation had been based on the premise that every woman who had undergone *in vitro* fertilisation should be considered physically unfit to take up employment, and that a women who was undergoing *in*

vitro fertilisation or pregnant would not in reality be employed by any employer. She also recommended to the Fund that it abandon its interpretation of the relevant guidelines in similar cases, according to which a woman undergoing *in vitro* fertilisation or otherwise liable to have a high-risk pregnancy was unfit to perform any type of work.

22. On 22 April 2015 the Constitutional Court dismissed the applicant's constitutional complaint as unfounded, upholding the findings of the administrative authorities and the High Administrative Court. This decision, which was served on the applicant's representative on 29 April 2015, reads, in so far as relevant, as follows:

> "The Constitutional Court notes that [it has been established in the proceedings that the applicant], who lives in Rijeka, entered into an employment contract on 27 November 2009 with [the company], which has its headquarters in Klis and one employee.
>
> The employment contract stipulated that [the applicant was to perform her duties in Split], and it transpires from the statement made by the employer ... that only part of her contractually established duties could be performed at her place of residence in Rijeka.
>
> The Constitutional Court points out that the distance between Rijeka and Split is ... 360.82 kilometres by road ...
>
> Therefore, the Constitutional Court considers that in the present case the administrative authorities ... were justified in checking whether the employment contract at issue had been entered into solely in order to acquire rights arising out of the compulsory medical insurance scheme, or with a view to establishing an employment relationship."

23. Meanwhile, according to the information provided by the Fund, the applicant's employment insurance with the company had been terminated with effect as of 13 December 2009.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

24. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/90 with subsequent amendments) read as follows:

Article 14

> "All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status."

Article 62

> "The state shall protect maternity...."

Article 64 § 3

"Young people, mothers ... shall be entitled to special protection at work."

25. The relevant provisions of the Labour Act (*Zakon o radu*, Official Gazette no. 38/95 with subsequent amendments) read as follows:

Section 3(2)

"All measures regulated by this law ... and by the employment contract, relating to the special protection of certain categories of employees, and in particular those concerning the protection of ... pregnant women ..., shall not be considered discriminatory, nor can they be the basis for discrimination."

Section 7(1)

"The person providing employment (hereinafter 'the employer') is under an obligation to assign tasks to the employee and to pay his or her salary for the work performed; the employee is under an obligation to personally perform the assigned work, complying with the instructions given by the employer in accordance with the nature and the type of work."

Section 64

"1. The employer may not, on grounds of pregnancy, refuse to employ a woman, dismiss her or transfer her to another position, save in accordance with section 65 of this Act [which provides for temporary transfer at the pregnant woman's own request or following the decision of employer if so required by her health condition].

2. The employer may not request any information concerning a woman's pregnancy or instruct another person to request such information..."

26. The relevant provisions of the Compulsory Health Insurance Act (*Zakon o obveznom zdravstvenom osiguranju*, Official Gazette nos. 150/08, 94/09 and 153/09), in force at the material time, read as follows:

Section 26

"An insured person shall be entitled to salary compensation in relation to the use of health care under compulsory health insurance, or other circumstances provided for in this Act, if he/she is:

...

3. isolated as a carrier or due to an outbreak of contagion in his/her environment, or temporarily incapacitated for work as a result of donating live tissue or organs for transplantation to another insured person of the Fund,

4. designated to accompany the insured person referred for treatment or medical examination provided by an entity contracted with the Fund outside the place of domicile or residence of the insured person being referred,

5. designated to care for a sick child or spouse, under conditions prescribed by this Act,

6. temporarily incapacitated for work due to pregnancy- and childbirth-related illness and complications,

7. temporarily prevented from working on account of taking maternity leave and the right to work half-time, in accordance with section 15(2) and (3) of the Act on maternity and parental allowance,

8. temporarily incapacitated for work on account of using leave for the death of a child, birth of a stillborn child or the death of a child during maternity leave,

..."

Section 28

"1. Salary compensation from section 26, items 3 to 8 of this Act shall be paid to the insured person by the Fund from the first day of the use of that right..."

Section 42

"(2) Salary compensation shall be 100 % of the [calculation] base during:

...

2. sick leave due to pregnancy- and childbirth-related illness and complications,

..."

Section 43

"1. Salary compensation paid by the Fund shall be payable ... provided that, prior to the date of occurrence of the insured event giving rise to the entitlement to salary compensation, the insured person had ...[been] employed or ... pursu[ed] economic activity or a professional activity independently ..., or ... receiv[ed] salary compensation pursuant to this Act after the termination of employment ..., [for] a period of insurance with the Fund of at least 12 months without interruption or 18 months with interruptions in the past two years (prior insurance)..."

Section 104

"1. The status of insured persons shall be determined by the Fund on the basis of applications for compulsory health insurance filed in accordance with the provisions of this Act by persons paying contributions ...

2. Applications to register with the compulsory health insurance scheme or to change or terminate registration shall be filed within 15 days from the date of creation, change or termination of the circumstances giving rise to the status of insured person..."

Section 106

"1. Following receipt of the application to register for compulsory health insurance, and for the entire duration of the insured person's status, the Fund shall have the right and obligation to verify the circumstances on the basis of which the application was made, or on which an individual's status has been recognised.

2. At the request of the Fund, all natural and legal persons who have submitted an application to register for compulsory health insurance ... have to produce all facts and evidence proving the validity of their registration, or the validity of the status of insured person.

3. If the Fund refuses an application for registration, establishes that the insured person is to be insured on a different ground, or disputes the status of a person insured with the compulsory health insurance scheme owing to the absence of a factual basis for such status, it shall issue a decision which will be served on the person who sought registration ..."

27. The relevant provisions of the Regulations on rights, conditions and method of enjoyment of rights from compulsory health insurance (*Pravilnik o pravilima, uvjetima i načinu ostvarivanja prava iz obveznog zdravstvenog osiguranja*, Official Gazette no. 67/09), as in force at the material time, read as follows:

Section 6

"2. Any registration [with the Fund] must be based on true facts and existence of actual circumstances which give the right to obtaining compulsory health insurance, and the Fund is entitled and required to, in line with these Regulations, upon receipt of the registration and throughout the duration of the status of the insured person, to verify the existence of the circumstances under which the application was filed and/or the basis on which the person is recognised the status of an insured person.

3. Should such verification result in establishing that the circumstances required to obtain the status [of an insured person] ... do not exist or... that the registration is based on false information, the Fund shall reject the latter or reopen the proceedings in order to establish the insured person's status ..."

28. The relevant provisions of the Prevention of Discrimination Act (*Zakon o suzbijanju diskriminacije*, Official Gazette no. 85/2008) provide as follows:

Section 1

"(1) This Act ensures the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia; creates conditions for equal opportunities and regulates protection against discrimination on the basis of race or ethnic origin or skin colour, gender, language, religion, political or other conviction, national or social origin, state of wealth, membership of a trade union, education, social status, marital or family status, age, health, disability, genetic inheritance, gender identity, expression or sexual orientation.

(2) Discrimination within the meaning of this Act means putting any person in a disadvantageous position on any of the grounds under subsection (1) of this section, as well as his or her close relatives. ..."

Section 16(1)

"Anyone who considers that, owing to discrimination, any of his or her rights has been violated may seek protection of that right in proceedings in which the determination of that right is the main issue, and may also seek protection in separate proceedings under section 17 of this Act."

Section 17

"(1) A person who claims that he or she has been a victim of discrimination in accordance with the provisions of this Act may bring a claim and seek:

1. a ruling that the defendant has violated the plaintiff's right to equal treatment or that an act or omission by the defendant may lead to the violation of the plaintiff's right to equal treatment (claim for an acknowledgment of discrimination);

2. a ban on [the defendant's] undertaking acts which violate or may violate the plaintiff's right to equal treatment or an order for measures aimed at removing discrimination or its consequences to be taken (claim for a ban or for removal of discrimination);

3. compensation for pecuniary and non-pecuniary damage caused by the violation of the rights protected by this Act (claim for damages);

4. an order for a judgment finding a violation of the right to equal treatment to be published in the media at the defendant's expense."

29. The relevant provisions of the Gender Equality Act (*Zakon o ravnopravnosti spolova*, Official Gazette nos. 82/08 and 69/17) read as follows:

Section 6

"(1) Discrimination on the grounds of sex...: any difference, exclusion or restriction made on the grounds of sex with the effect or purpose to jeopardise or frustrate recognising, benefiting from or exercising human rights and fundamental freedoms in the political, social, cultural, economic, civil or other area on the grounds of equality between men and women, education, economic, social, cultural, civil and any other sphere of life.

(2) ... Less favourable treatment of women for reasons of pregnancy and maternity shall be deemed to be discrimination..."

Section 9

"(3) Measures aimed at protecting women, in particular in relation to pregnancy and maternity, shall not be deemed to be discrimination."

Section 13

(1) There shall be no discrimination in the field of employment and occupation in the public or private sector, including public bodies, in relation to: ...

7. pregnancy, giving birth, parenting and any form of custody..".

30. The Government have submitted the following judgments of the (High) Administrative Court, in which pregnant women have been considered to have entered into fictitious employment during their pregnancies:

- Us-4154/2006-4 of 4 February 2009, in which a pregnant woman concluded an employment contract for cleaning services three months before her delivery date;

- Us-9890/2005-6 of 5 February 2009, in which a pregnant woman concluded an employment contract four months before her delivery date and was found unfit to work as a salesperson due to a pre-existing medical condition;

- Us-3136/2003-4 of 11 July 2007, in which a pregnant woman concluded an employment contract, went on pregnancy-related sick leave and only thereafter filed the requisite registration with the Fund;

- Us-10040/2002-4 of 29 November 2006, in which a pregnant woman had first been employed a month before her delivery date;

- Us-2885/2006 of 4 December 2008, in which a pregnant woman had been employed by her mother late in her high-risk pregnancy;

- Us-2953/2006 of 11 December 2008, in which a pregnant woman concluded an employment contract 17 days before her departure on obligatory maternity leave;

- Us-2955/2006-5 of 11 December 2008, in which a pregnant woman concluded an employment contract three days before her departure on maternity leave;

- Us-5531/2006-4 of 12 March 2009, in which a pregnant woman submitted her application for registration as an employed person the day after she had given birth to her third child;

- Us-9223/2002-4 of 28 December 2006, in which a pregnant woman had concluded an employment contract when she was 35 weeks pregnant for a job that required hours of standing, bending over and carrying;

- Us-1464/2006-6 of 20 November 2008, in which a pregnant woman had concluded an employment contract when she was 36 weeks pregnant;

- Us-2958/2006-5 of 11 December 2008, in which a pregnant woman concluded an employment contract with her mother and 20 days later went on pregnancy-related sick leave.

31. The Government have also submitted the following judgments of the (High) Administrative Court, in which the employment entered into by a woman during pregnancy had not been found fictitious.

In judgment Us-6545/2002-9 of 5 October 2006 the court concluded that the administrative authorities had failed to established whether or not a pregnant woman had actually started performing her employment tasks.

In judgment Us-11891/2005-4 of 28 May 2009, the court, insofar as relevant, held as follows:

> "[The competent authority] doubted the claimant's application for insurance based on employment and in such a case it should have primarily established whether the claimant actually worked on the basis of the concluded employment contract. That means that the [competent authority] should have established whether there had been elements of an employment relationship, e.g. working hours and salary, and in particular whether the claimant had started working and how much she had worked. The [competent authority] did not establish any of the foregoing, but instead based its decision on the conclusion that the claimant had been unfit to work on the day of entering into employment, which fact in this court's opinion has not been correctly

established. This is because [the competent authorities] based [their decisions] essentially on the assumption that the claimant had been unfit to work because she had been at an advanced stage of her pregnancy, because it had been her sixth pregnancy and because she was an older pregnant woman. This opinion, however, is not based on any specialist opinion on the basis of which it could have actually been established whether the claimant had been fit to work..."

In judgment Us-6588/2005-5 of 5 June 2008 a pregnant woman concluded an employment contract with her father in law at an advanced stage of pregnancy and the medical expert opinion concluded that she had been medically fit for work.

32. The relevant part of the 2012 Annual report of the Gender Equality Ombudsperson, published in March 2013, read as follows:

"For several years now, the Ombudsperson has been regularly warning about the discriminatory practice developed by the Croatian Health Insurance Fund throughout the last decade, which it consistently applies to pregnant women despite frequent warnings about its unlawfulness. That discriminatory practice is based on the Fund's stereotypical attitude that a woman who had entered employment at an advanced stage of pregnancy... irrefutably concluded a fictitious employment contract aimed at abusing the health insurance system. The Fund in such cases appropriates itself judicial functions and declares such a contract fictitious even when the Croatian Employment Fund considers such an employment contract formally valid... Once it takes the stance that a pregnant woman's employment contract is fictitious, it automatically deprives her of the status of an employed insured person and denies her the right to compensation of salary during sick leave for pregnancy-related complications and the right to birth allowances during maternity leave. This practice, based on the stereotype that women during their pregnancies... enter employment with fraudulent intentions, is contrary to the Gender Equality Act and the Labour Act and is insulting to the dignity of pregnant women. In order to ensure that the Fund changes the said practice, the Ombudsperson did not only send a number of warnings based on discrimination complaints of women, but also decided to act proactively and organised a meeting on 9 October 2012 with the representatives of the Ministry of Health, Ministry of social politics and youth and the Fund. This led to the conclusion that the said practice of the Fund was indeed problematic from the point of view of the protection of social rights of pregnant women, following which the Minister of Health in October requested the Fund to take steps in order to implement the agreement reached and subsequently inform the Ombudsperson about the actions taken. The Ombudsperson wishes to stress in the report that the Fund on 25 March 2013 accepted her recommendations and stated in its letter that 'regional offices [of the Fund] have been instructed that, in proceedings concerning recognition of status in compulsory health insurance on the basis of employment, they may only assess whether the employment relationship at issue has been validly concluded – [i.e. whether formal requirements have been fulfilled] – but not whether the employment relationship is legally valid. In cases of doubt as to the legality of an employment relationship, it is necessary to institute civil proceedings which would establish the validity of the employment'."

II. RELEVANT LAW AND PRACTICE OF THE EUROPEAN UNION

A. Directives of the Council of the European Union

33. The relevant provisions of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, read as follows:

> "Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited;
>
> ...
>
> Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;
>
> ...
>
> **Article 10**
> **Prohibition of dismissal**
>
> In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:
>
> 1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;
>
> 2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
>
> 3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1."

34. The relevant provisions of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (which repealed Directive 76/207/EEC) read as follows:

> "Whereas:
>
> ...
>
> 23. It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on

grounds of sex. Such treatment should therefore be expressly covered by this Directive.

24. The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

25. For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence ..."

Article 29
Gender mainstreaming

"Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive."

B. Case-law of the Court of Justice of the European Union

35. In its case-law, the Court of Justice of the European Union (hereinafter, "the CJEU") established that, as only women could become pregnant, a refusal to employ a pregnant woman based on her pregnancy or her maternity, or the dismissal of a pregnant woman on such grounds, amounted to direct discrimination on grounds of sex, which could not be justified by any other interest.

36. In the *Dekker* judgment (8 November 1990, C-177/88, ECLI:EU:C:1990:383), the CJEU ruled that a refusal to employ a woman who met the conditions for a post because she was pregnant constituted direct discrimination on grounds of sex. The applicant in the *Dekker* case applied for the post, was considered the most suitable candidate, but ultimately was not hired because she was pregnant. The employer argued that, in accordance with the law, she was not eligible to be paid pregnancy benefits by the relevant insurer, and thus the employer would have to pay those benefits during her maternity leave. As a result, the employer would be unable to afford to employ a replacement during her absence, and would thus be short-staffed. The CJEU found as follows.

"12 In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial

> consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave."

37. The CJEU further held that any unfavourable treatment directly or indirectly connected to pregnancy or maternity constituted direct sex discrimination.

In the *Webb* judgment (14 July 1994, C-32/93, ECLI:EU:C:1994:300), the CJEU found that the situation of a pregnant woman could not be compared with that of a man who was absent because of illness. The applicant in the *Webb* case found out that she was pregnant a few weeks after being hired to replace a worker who had herself become pregnant. She was dismissed as soon as the employer found out about her pregnancy. The CJEU ruled as follows:

> "24 First, in response to the House of Lords' inquiry, there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.
>
> 25 As Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in the Hertz judgment, cited above, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. As the Court pointed out (in paragraph 16), there is no reason to distinguish such an illness from any other illness.
>
> 26 Furthermore, contrary to the submission of the United Kingdom, dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the directive.
>
> 27 In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged ..."

38. In the *Tele Danmark* judgment (4 October 2001, C-109/00, ECLI:EU:C:2001:513), the CJEU extended the protection for absence due to pregnancy to temporary contracts. The applicant was recruited for a six-month fixed period. She failed to inform the employer that she was pregnant, even though she was aware of this when the contract was concluded. Because of her pregnancy, she was unable to work during a

substantial part of the term of that contract. The relevant parts of the judgment read as follows:

> "29 In paragraph 26 of *Webb*, the Court also held that, while the availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave is essential to the proper functioning of the undertaking in which she is employed. A contrary interpretation would render ineffective the provisions of Directive 76/207.
>
> 30 Such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term.
>
> 31 Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal. In either case the employee's inability to perform her contract of employment is due to pregnancy.
>
> 32 Moreover, the duration of an employment relationship is a particularly uncertain element of the relationship in that, even if the worker is recruited under a fixed term contract, such a relationship may be for a longer or shorter period, and is moreover liable to be renewed or extended."

39. With regard to the possibility of a female worker being dismissed by reason of a pregnancy-related illness which arose prior to her maternity leave, the CJEU has held that, although pregnancy is in no way comparable to a pathological condition, it is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. In *Brown* (Case C-394/96, 30 June 1998, ECLI:EU:C:1998:331) the CJEU found that those disorders and complications, which could cause incapacity for work, formed part of the risks inherent in the condition of pregnancy and were thus a specific feature of that condition.

40. In *McKenna* (Case C-191/03, 8 September 2005, ECLI:EU:C:2005:513) the CJEU concluded that Community law did not require the maintenance of full pay for a female worker who is absent during her pregnancy by reason of an illness related to that pregnancy. During an absence resulting from such an illness, a female worker may thus suffer a reduction in her pay, provided that she is treated in the same way as a male worker who is absent on grounds of illness, and provided that the amount of payment made is not so low as to undermine the objective of protecting pregnant workers.

41. In *Mayr* (28 February 2008, C-506/06, ECLI:EU:C:2008:119), the CJEU held as follows:

> "49 The Court has already held that, given that male and female workers are equally exposed to illness, if a female worker is dismissed on account of absence due

to illness in the same circumstances as a man then there is no direct discrimination on grounds of sex...

50 It is true that workers of both sexes can be temporarily prevented from carrying out their work on account of the medical treatment they must receive. Nevertheless, the treatment in question in the main proceedings – namely a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation – directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of *in vitro* fertilisation treatment constitutes direct discrimination on grounds of sex."

III. RELEVANT INTERNATIONAL MATERIALS

42. The relevant parts of the United Nations Convention on the Elimination of All Forms of Discrimination against Women ("the CEDAW"), which was ratified by the respondent State on 9 September 1992, read as follows:

Article 5

"States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women..."

Article 11

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

...

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of ... maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave ...;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

..."

43. The relevant provisions of the Maternity Protection Convention 2000 (No. 183), adopted by the General Conference of the International Labour Organisation (ILO) on 15 June 2000, read as follows:

Benefits
Article 6

"1. Cash benefits shall be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on leave referred to in Articles 4 or 5 [maternity leave and leave in case of illness or complications].

...

5. Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.

...

8. In order to protect the situation of women in the labour market, benefits in respect of the leave referred to in Articles 4 and 5 shall be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement except where:

(a) such is provided for in national law or practice in a member State prior to the date of adoption of this Convention by the International Labour Conference; or

(b) it is subsequently agreed at the national level by the government and the representative organizations of employers and workers."

Employment protection and non-discrimination
Article 8

"1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.

2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave."

44. Article 12 § 1 of the Convention on Preventing and Combating Violence against Women and Domestic Violence ("the Istanbul Convention"), which entered into force in respect of the respondent State on 1 October 2018, provides as follows:

"Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."

45. The relevant parts of the Appendix to the Council of Europe's Committee of Ministers' Recommendation Rec(2019)1 on preventing and combating sexism, adopted on 27 March 2019, reads as follows:

> "For the purpose of this Recommendation, sexism is:
>
> Any act, gesture, visual representation, spoken or written words, practice or behaviour based upon the idea that a person or a group of persons is inferior because of their sex, which occurs in the public or private sphere, whether online or offline, with the purpose or effect of: ...
>
> v. maintaining and reinforcing gender stereotypes."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

46. The applicant complained that she had been discriminated against, as a pregnant woman who had undergone *in vitro* fertilisation, in the revocation of her status as an insured employee, contrary to Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention. Those provisions read as follows:

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

47. The Government submitted that the applicant had not exhausted domestic remedies in that she had failed to institute separate civil proceedings for damages under the Prevention of Discrimination Act.

48. The applicant disagreed.

49. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014, and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015).

50. Article 35 § 1 also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Vučković and Others*, cited above, § 72).

51. However, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII; and *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010).

52. In previous cases against Croatia, the Court has already established that the Prevention of Discrimination Act provides two alternative avenues through which an individual can seek protection from discrimination: the individual concerned may either raise his or her discrimination complaint in the proceedings concerning the main subject matter of a dispute, or opt for separate civil proceedings, as provided for under section 17 of that Act (see paragraph 28 above). Given that the applicant in the present case explicitly complained of discrimination both before the High Administrative Court and the Constitutional Court (see paragraphs 18 and 20 above), the Court considers that she was therefore not required to pursue another remedy under the Prevention of Discrimination Act with essentially the same objective in order to meet the requirements of Article 35 § 1 of the Convention (see *Guberina v. Croatia*, no. 23682/13, § 50, 22 March 2016).

53. The Court further notes that the parties did not dispute the applicability of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention to the facts of the present case. In view of its case-law on the matter (see, among many other authorities, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 55-56, ECHR 2005-X), the Court considers those provisions applicable to the present case.

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

B. Merits

1. The parties' submissions

(a) The applicant

55. The applicant maintained that she had been discriminated against both on the basis of her sex and on the basis of the medical procedure she had had to undergo in order to become pregnant. When she took up her employment, she had had no way of knowing whether the *in vitro* fertilisation had been or would be successful. The fact that the authorities concluded retroactively that she had been unfit to work at that moment was discriminatory because they would never have come to such a conclusion in respect of a woman who had not undergone *in vitro* fertilisation and become pregnant.

56. The applicant stressed that the domestic law expressly provided pregnant women with the possibility of taking up employment and that the Fund had no legal basis on which to question employment contracts entered into freely by private employers and pregnant women. Such practice was in direct opposition to the CJEU's case-law, which considered any unfavourable treatment towards pregnant women to be direct discrimination on the basis of sex. Moreover, the practice was based on the premise that no "reasonable" employer would actually enter into an employment contract with a pregnant woman and that no "honest" pregnant woman would take up employment in such circumstances.

(b) The Government

57. The Government maintained that the applicant had been treated in the same way as all pregnant women who sought to obtain undue pecuniary gain from the State health insurance scheme by entering into fictitious employment contracts and thereby obtaining the status of insured employed persons. The Government explained that, unlike unemployed women, pregnant women who were employed were entitled to compensation of

salary on account of pregnancy-related complications, paid for from the State budget and not by their employer.

58. In support of their claim, the Government submitted a number of judgments by the High Administrative Court showing that the State Health Insurance Fund regularly performed factual checks in all cases it deemed suspicious (see paragraphs 30 and 31 above). If it established that a person's insurance status had been obtained on the basis of a fictitious transaction, as in the applicant's case, it revoked that insurance. The applicant could therefore not be compared to other women who became pregnant by means of *in vitro* fertilisation or to pregnant women who were employed, but only to those pregnant women (regardless of the method they had used to become pregnant) who had entered into an employment contract immediately before claiming salary compensation on account of pregnancy-related complications or precisely in order to do so.

59. The Government further argued that the conduct of the national authorities in the applicant's case had had the legitimate aim of preventing individuals from "cheating the system". The authorities had a duty to implement the applicable regulations and verify all the facts of relevance to the enjoyment of particular rights. Failure to perform such checks with a view to revoking the rights of individuals not entitled to them would jeopardise not only the rights of persons who were actually entitled to such rights, but also the entire healthcare system.

60. The applicant had entered into an employment contract despite the fact that she had been advised to rest following her *in vitro* fertilisation. Although at that time her pregnancy might not have been confirmed, she could have at least assumed that she would get pregnant after the procedure, and she would probably have become aware of that fact as early as 3 December 2009, when the relevant blood test was to be performed. However, the applicant had nonetheless entered into an employment contract with a company whose headquarters were located in Split, about 360 km away from her place of residence. Given that the applicant had never registered her residence in Split, the Government took the view that she had never actually intended to work there.

61. Finally, the Government pointed out that the applicant had not been left without healthcare protection during her pregnancy despite the Fund's revocation of her employed person's status. The applicant had continued to enjoy the healthcare protection afforded to all pregnant women in the respondent State, except for salary compensation during sick leave due to pregnancy-related complications, which was granted exclusively to employed persons.

1. The Court's assessment

(a) General principles

62. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not mean that the comparator groups be identical. For the purposes of Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see *Molla Sali v. Greece* ([GC], no. 20452/14, §§ 133 and 135, 19 December 2018).

63. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017).

64. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy, for example (see *Fábián*, cited above, § 115). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010). Any measures taken on such grounds, including the reduction of the amount of pension normally payable to the qualifying population, must nevertheless be implemented in a non-discriminatory manner and comply with the requirements of proportionality (see *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06 and 3 others, § 59, 13 December 2011, and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2006-VI). In any case, irrespective of the scope of the State's margin of appreciation, the final decision as to the observance of the Convention's requirements rests with the Court (see, among other authorities, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012 (extracts)).

65. The Court has also stressed on many occasions that the advancement of the equality of the sexes is a major goal in the member States of the Council of Europe. This means that, outside the context of transitional measures designed to correct historic inequalities (see *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, § 89, 24 October 2019), very weighty reasons would have to be advanced before a difference in treatment on the grounds of sex could be regarded as being compatible

with the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94, and *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 46, 25 July 2017). Consequently, where a difference in treatment is based on sex, the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances (see *Emel Boyraz v. Turkey*, no. 61960/08, § 51, 2 December 2014).

66. The Court has acknowledged in its case-law, albeit indirectly, the need for the protection of pregnancy and motherhood (see, *mutatis mutandis*, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 82, 24 January 2017; *Konstantin Markin*, cited above, § 132; *Alexandru Enache v. Romania*, no. 16986/12, §§ 68 and 76-77, 3 October 2017; and *Petrovic v. Austria*, 27 March 1998, § 36, *Reports of Judgments and Decisions* 1998-II).

67. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once an applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 177, ECHR 2007-IV; and *Guberina v. Croatia*, no. 23682/13, § 74, 22 March 2016).

(b) Application of those principles to the facts of the present case

(i) Whether there has been a difference in treatment

68. The Court notes that the applicant complained that she had been treated differently both on the basis of her sex and on account of the manner in which she became pregnant.

69. The Court observes that only women can be treated differently on grounds of pregnancy, and for this reason, such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified (see *Napotnik v. Romania*, no. 33139/13, § 77, 20 October 2020). The Court further notes that a similar approach was also taken by the CJEU in its case-law (see paragraphs 35-41 above) and that it is consistent with domestic law (see paragraph 29 above).

70. In the present case, the applicant was refused the status of an insured employee and, in that context, an employment-related benefit (compensation of salary during sick leave), on grounds of employment which had been declared fictitious due to her pregnancy. The Court notes that such a decision could only be adopted in respect of women, since only women could become pregnant. It therefore finds that in the applicant's case such a decision constituted a difference in treatment on grounds of sex.

71. Furthermore, in its below analysis the Court will also consider the fact that the applicant had become pregnant by way of *in vitro* fertilisation (compare *Topčić-Rosenberg v. Croatia*, no. 19391/11, § 40, 14 November 2013).

(ii) Whether the difference in treatment was justified

72. It remains to be assessed whether the difference in treatment of the applicant had an objective and reasonable justification.

73. The Government argued that the decision to revoke the applicant's insurance status had pursued the legitimate aim of the protection of public resources from fraudulent use, and the overall stability of the healthcare system (see paragraph 59 above). The Court would stress at the outset that a woman's pregnancy as such cannot be considered fraudulent behaviour. Furthermore, the Court considers that the financial obligations imposed on the State during a woman's pregnancy by themselves cannot constitute sufficiently weighty reasons to justify difference in treatment on the basis of sex (see paragraph 65 above; see also CJEU's case-law in relation to employment of pregnant women cited at paragraphs 35-41 above and the relevant ILO standards cited at paragraph 43 above). Even assuming that the Court was generally prepared to accept the protection of public funds as a legitimate aim, it must establish whether in the context of the present case the impugned measure was necessary to achieve that aim, taking into consideration the narrow margin of appreciation afforded to States in cases where difference in treatment is based on sex (see paragraphs 65 and 69 above).

74. In the present case, a short time after taking up new employment, the applicant requested certain benefits, notably the payment of salary compensation during her sick leave due to pregnancy-related complications. The Court notes that, as admitted by the Government, precisely because of the fact that she had entered into new employment such a short time before seeking the employment-related benefit in question, the relevant administrative authority of its own motion initiated review of the applicant's health insurance status under the suspicion that her employment agreement had been concluded only for her to be able to claim the said benefit (see paragraphs 12 and 58 above).

75. The Court acknowledges that under the applicable legislation the relevant authorities were at all times entitled to verify whether the facts on which an individual based his or her health insurance status were still valid (see paragraphs 26 and 27 above). At the same time the Court observes that it would appear from the Administrative Court's case-law, on which the Government relied, that such review in practice frequently targeted pregnant women and that women who concluded an employment contract at an advanced stage of their pregnancies or with close family members, were automatically put in the "suspicious" category of employees whose

employment merited verification (see paragraphs 30 and 31 above), although under domestic law no employer is allowed to refuse to employ a pregnant woman because of her condition (see paragraph 25 above). The Court finds such an approach of the competent Croatian authorities generally problematic (see in that respect the conclusions of the Gender Equality Ombudsperson cited at paragraph 32 above).

76. Turning to the applicant's case, the Court notes the authorities' conclusion that the applicant had been unfit to work on the date of concluding her employment contract because her doctor had recommended her rest following her *in vitro* fertilisation ten days before. In particular, the authorities relied on the fact that the applicant was expected to work at the employer's headquarters over 350 km away from her place of residence and that travel in her condition might reduce her chances of a favourable outcome of the fertilisation (see paragraphs 16 and 19 above). In that connection, the Court considers that, as a matter of principle, even where the availability of an employee is a precondition for the proper performance of an employment contract, the protection afforded to a woman during pregnancy cannot be dependent on whether her presence at work during maternity is essential for the proper functioning of her employer or by the fact that she is temporarily prevented from performing the work for which she has been hired. Moreover, the Court is of the view that introducing maternity protection measures is essential in order to uphold the principle of equal treatment of men and women in employment (see, *mutatis mutandis*, the CJEU case-law cited at paragraphs 35-41 above). This is equally reflected in the Croatian legislation, including the Constitution (see paragraphs 24 and 25 above).

77. The Court notes that, in deciding the applicant's case, the domestic authorities limited themselves to concluding that, due to the *in vitro* fertilisation, she had been medically unfit to take up the employment in question thereby implying that she had to refrain from doing so until her pregnancy was confirmed. The Court observes that this conclusion was in direct contravention to both domestic and international law (see paragraphs 25, 35-41 and 43 in connection with paragraph 75 above). Moreover, it was tantamount to discouraging the applicant from seeking employment due to her possible prospective pregnancy.

78. The foregoing alone is sufficient for the Court to conclude that the applicant had been discriminated on the basis of her sex. However, it considers it necessary to point out some additional factors, which made the difference in treatment suffered by the applicant even more striking.

79. In this connection, the Court observes that, prior to taking up the impugned employment, the applicant had had some fourteen years of work experience, during which she had regularly paid contributions to the compulsory health insurance scheme (see paragraph 5 above). It can thus not be argued that she had failed to contribute to the insurance fund from

which she subsequently requested certain benefits, notably the payment of salary compensation during sick leave due to pregnancy-related complications.

80. The Court further observes that, when entering into her employment, the applicant had been well aware of the fact that she had undergone *in vitro* fertilisation, but at the same time had no way of knowing whether the procedure had been successful or whether it would result in her becoming pregnant. Moreover, at the material time she could not have known that her future pregnancy, if any, would have resulted in complications which would have required her to be issued sick leave for a prolonged period of time.

81. However, the Court notes that, in reviewing the applicant's case, the competent Croatian authorities failed to provide any explanation of how the applicant could have consciously concluded a fraudulent employment contract, without even knowing whether or not she would actually become pregnant, in particular bearing in mind that she had not been under any legal obligation to report the fact that she had undergone *in vitro* fertilisation or that she might be pregnant at the moment of concluding her employment contract and that the domestic law prohibits the employer to request any information concerning a woman's pregnancy or instruct another person to request such information (see section 64 of the Labour Act, cited at paragraph 25 above, see also paragraphs 35-41 and 43 above). Indeed, the Court is of the view that asking a woman information about her possible pregnancy or planning thereof or obliging her to report such fact at the moment of recruitment would also amount to direct discrimination based on sex.

82. What is more, the Court observes that the authorities had reached their conclusion in the applicant's case without assessing whether or not she had ever actually taken up her duties and started performing her work assignments for the employer (see paragraphs 31 and 32 above). Had the authorities had any evidence of fraud or invalidity of the applicant's employment relationship, nothing prevented them from instituting relevant proceedings in that respect (see paragraph 32 above). The authorities also never sought to establish whether the *in vitro* fertilisation she had undergone had necessitated her absence from work due to health reasons. Furthermore, there is nothing to show that women who had undergone *in vitro* fertilisation would generally be unable to work during their fertility treatment or pregnancy.

83. Lastly, the Court cannot but express concern about the overtones of the domestic authorities' conclusion, which implied that women should not work or seek employment during pregnancy or mere possibility thereof (see in this sense also the conclusions of Gender Equality Ombudsperson cited at paragraph 21 above). In the Court's view, gender stereotyping of this sort presents a serious obstacle to the achievement of real substantive gender equality, which, as already stated, is one of the major goals in the member

States of the Council of Europe (see paragraph 65 above; see also *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, §§ 48-54, 25 July 2017). Moreover, such considerations by the domestic authorities have not only been found in breach of the domestic law (see paragraph 32 above) but also appear to have been at odds with relevant international gender equality standards (see the CEDAW, the Istanbul Convention, ILO and the relevant Committee of Ministers Recommendation all cited at paragraphs 42-45 above).

84. In sum, the Court would reiterate that a refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy, amounts to direct discrimination on grounds of sex, which cannot be justified by the financial interests of the State (see paragraph 73 above; see also, for a similar approach CJEU's case-law in relation to employment of pregnant women cited at paragraphs 35-41 above and the relevant ILO standards cited at paragraph 43 above). On the basis of the foregoing, the Court considers that the difference in treatment to which the applicant, as a woman who had become pregnant by means of *in vitro* insemination, had been subjected had not been objectively justified or necessary in the circumstances.

85. There has accordingly been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 12 TO THE CONVENTION

86. The applicant complained that she had been discriminated against, in breach of the general prohibition of discrimination contained in Article 1 of Protocol No. 12 to the Convention, which reads as follows:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

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

88. Bearing in mind the above conclusion as regards Article 14 read in conjunction with Article 1 of Protocol No. 1, the Court considers that it is not necessary to examine separately the present complaint.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. Article 41 of the Convention provides:

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

A. Damage

90. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage, corresponding to the salary compensation which she had been denied. She also claimed EUR 15,000 in respect of non-pecuniary damage.

91. The Government contested those claims.

92. The Court notes that the applicant did not substantiate any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

93. The applicant also claimed EUR 1,150 for the costs and expenses incurred before the domestic courts and the Court.

94. The Government contested that claim.

95. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum claimed in full, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 read in conjunction with Article 1 of Protocol No.1 to the Convention;

3. *Holds* that it is not necessary to examine separately the complaint under Article 1 of Protocol No. 12 to the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,150 (one thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Krzysztof Wojtyczek
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.W.O.
R.D.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I have reservations concerning the way the Court conceptualises discrimination in the instant case, and also with regard to paragraph 83 of the judgment.

2. In my view, the parts of the reasoning which present the nature of discrimination are confused. The Court states *inter alia* the following in paragraph 84:

> "In sum, the Court would reiterate that a refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy, amounts to direct discrimination on grounds of sex, which cannot be justified by the financial interests of the State … Based on the foregoing, the Court considers that the difference in treatment to which the applicant, as a woman who had become pregnant by means of *in vitro* insemination, had been subjected had not been objectively justified or necessary in the circumstances."

The case-law under Article 14 of the Convention has developed a precise methodology for apprehending discrimination cases. As explained by the Court (see *Guberina v. Croatia*, no. 23682/13, § 69, 22 March 2016):

> "Generally, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013). However, not every difference in treatment will amount to a violation of Article 14. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013; *Weller v. Hungary*, no. 44399/05, § 27, 31 March 2009; and *Topčić-Rosenberg v. Croatia*, no. 19391/11, § 36, 14 November 2013)."

In order to establish a discrimination, it is therefore necessary to identify the class of persons who are in a similar situation and the class of persons who are affected by the difference in treatment. In the instant case, neither of the two classes of persons has been defined with precision. The reasoning does not correctly apply the methodology explained in the established case-law.

In cases concerning discrimination, there is not necessarily one possible way of identifying the class of persons in a similar situation but, in any event, the reasoning should be carried out with precision. In my view, in the instant case, the class of persons who are in a relevantly similar situation encompasses all employees. All these persons receive an employment-related income – either a salary or a benefit compensating for the loss of the salary if they are unable to work.

The difference in treatment does not concern an isolated person but a whole class of persons which can be defined – in general terms – as follows:

(i) women who enter employment during pregnancy; and

(ii) who are unable to work during pregnancy; and

(iii) who are deprived of their allowance compensating for the loss of salary; even though

(iv) no fraud whatsoever on the part of person concerned has been established.

The authorities introduced an unjustified differentiation between this class of persons and the class consisting of all other employees, by refusing to grant a work-related benefit. This refusal was neither based upon sex as such nor upon the pregnancy as such, but upon alleged fraud, presumed from the time when the employment contract was signed. I would add – *en-passant* – that fraud can occur, in particular, if a person who claims the benefit in question is actually able to work.

Moreover, the class of the persons discriminated against encompasses not only women who underwent *in vitro* fertilisation but also other pregnant women (see the information provided in paragraphs 31 and 32, referring to cases of discrimination of pregnant women who did not undergo *in vitro* fertilisation). This conclusion is not affected by the fact that the opinion of the Gender Equality Ombudsperson cited in paragraph 21 refers more specifically to the situation of persons who underwent *in vitro* fertilisation. The way in which a woman became pregnant is irrelevant for defining the class of persons who are unduly differentiated by the authorities. The reference to *in vitro* fertilisation in the conclusions of the reasoning may give the false impression that the benefit could have been withdrawn had the fertilisation taken place differently.

3. In paragraph 83 the Court formulates the following view:

> "Lastly, the Court cannot but express concern about the overtones of the domestic authorities' conclusion, which implied that women should not work or seek employment during pregnancy or mere possibility thereof (see in this sense also the conclusions of Gender Equality Ombudsperson cited at paragraph 21 above)."

This view triggers certain objections. Firstly, the Court does not specify which statements of the Croatian authorities it has in mind. It may refer to the standard recommendations of gynaecologists who perform *in vitro* fertilisation, presented in the expert opinion summarised in paragraph 16. From the description of the facts (paragraphs 2 to 23) and from the submissions of the parties (paragraphs 55 to 61), it does not appear that the public authorities issued statements with such broad "overtones" as suggested in paragraph 83. Moreover, as mentioned above, the conclusions of the Gender Equality Ombudsperson (cited in paragraph 21 and mentioned again in paragraph 83) refer to the specific situation of women who underwent *in vitro* fertilisation, not to pregnant women in general. Similarly, the Annual Report (referred to in paragraph 32) presents a problem which is not identical to the one mentioned in paragraph 83 but concerns women who have signed employment contracts during pregnancy. Against this backdrop, there are no sufficient grounds to impute to the Croatian authorities the specific "overtones" mentioned above.

Secondly, all general rules are necessarily based on certain assumptions concerning the typical characteristics of the class of their addressees. The benefit unduly denied is based upon the underlying general assumption that a woman may not be able to work during pregnancy. One may add that the Court's judgment – which rightly finds a discrimination in the instant case – is itself based upon the implicit assumption that the applicant (as well as other persons in a similar situation) should not have worked during pregnancy.

4. In conclusion, I would like to stress that Article 14 of the Convention leaves a broad discretion to the Court (see for instance the joint partly dissenting opinion of Judges Wojtyczek and Pejchal appended to the judgment in the case of case of *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, 24 October 2019). It is therefore necessary to circumscribe this discretion by a particular methodological discipline and precision of reasoning.