

## Briefing for representatives of the Committee of Ministers on Poland's implementation of the judgment in *P. and S. v. Poland* (App. No. 57375/08)

25 February 2019

### Overview of key issues and concerns

- The *P. and S.* case concerned an adolescent girl whose **legal entitlement to an abortion in Poland after she was sexually assaulted was established by a prosecutor** as required by the law. However, the girl and her mother encountered repeated arbitrary and harmful behavior by medical professionals and other state authorities which severely hampered their ability to secure the first applicant's entitlement to a legal abortion.
- In its **judgment from 2013** the Court found that the applicant's rights under **ECHR Articles 3, 5(1) and 8 had been violated**. It held that the applicant's access to legal abortion was "marred by procrastination and confusion" and the applicants were given "misleading and contradictory information." It held that there was a "striking discordance" between the right to an abortion under the law in Poland "and the reality of its practical implementation." It found that the medical staff "did not consider themselves obliged to carry out" the care sought by the applicant, "on the strength of the certificate issued by the prosecutor."
- More than **six years after the judgment** Polish authorities have failed to implement the judgment and take necessary measures to ensure effective access to legal abortion care for women and girls who have suffered sexual assault.
- As a result, in its September 2018 decision, the **Committee of Ministers expressed serious concern** about Poland's continuing failure to adopt effective procedures for access to lawful abortion and called on the authorities to without further delay effectively implement a "viable system" for effective access to legal abortion and related information.
- However, the **authorities' communications dated January 2019** have not provided information on any measures towards establishing such a "viable system" for effective access to legal abortion care and thus comply with the Court's judgment and the Committee of Ministers' recent decision. The authorities continue to claim that existing legal provisions and mechanisms are adequate.
- Yet according to official statistics **only between 0 and 3 legal abortions** are performed each year in Poland on grounds of a pregnancy resulting from sexual assault. Polish authorities have **failed to establish effective enforcement policies and procedures** to ensure that health facilities and providers are held accountable for failures to comply with legal obligations to provide abortion care.
- **Conscience-based refusals** of abortion care remain **widespread**. The authorities have failed to adopt effective measures to enforce existing applicable regulations or sanction abusive refusals. Instead

retrogressive measures have resulted in **removal of the critical referral obligation** on doctors who invoke the conscience clause. The authorities have provided no information on measures taken to ensure that those seeking legal abortion care, especially after sexual assault, receive appropriate and adequate information on how to exercise rights to legal abortion care and where care is available.

- The authorities' suggestion that the **complaints procedure** under the Patient Rights Act can adequately discharge its obligations flowing from the *P. and S.* judgement is mistaken. The complaint procedure is **wholly inapplicable to the circumstances** of this case which does not involve a doctor's medical opinion as to a woman's legal qualification for abortion care on medical grounds. The procedure is also **ineffective** due to its **lengthy timeline**, the **absence of legally enforcement mechanisms** mandating provision of abortion care, and lack of judicial appeal possibilities.
- The authorities' suggestion that women and adolescent girls who are seeking legal abortion care can enforce their entitlements through the "clarification procedures" to address **breaches of National Health Fund contracts** in our view is both inaccurate and inappropriate. It is not reasonable to place the burden for enforcing public contracts on women and adolescents. Moreover, the procedure is discretionary and *post facto* and therefore ineffective as a remedial or enforcement mechanism.

## **Recommendations**

**We recommend that the Committee of Ministers continue its enhanced scrutiny of the *P. and S.* judgment** until effective access to lawful abortion is guaranteed for women and adolescents in Poland who have suffered sexual assault.

**We recommend that the Committee of Ministers request the authorities to:**

- Enact legally binding measures requiring the timely referral of women and adolescent girls who are refused abortion services on grounds of conscience or religion to alternative health care professionals willing and able to perform the abortion.
- Actively enforce legal provisions on abortion and refusals of care, including by ensuring appropriate sanctions and disciplinary actions are pursued for all breaches of relevant obligations by health care facilities and providers.
- Establish an effective urgent procedural mechanism by which women can enforce their legal entitlements to abortion care. This mechanism must ensure: a decision within no more than 3 days; the right of judicial appeal; the issuance of enforceable orders mandating a particular health care facility or medical provider to provide the care sought.
- Effectively monitor compliance by all health care facilities with their contractual obligations to the National Health Fund and actively enforce these contracts, including by ensuring breaches by health care institutions and medical providers are sanctioned.

**We recommend that the Committee of Ministers request information from the authorities on:**

- Measures to promulgate and disseminate regulations and guidelines for health facilities and providers regarding their duties to provide legal abortion services and related information to patients.
- The number of complaints and cases of disciplinary action that have been taken against health care professionals or institutions for failure to comply with the 1993 Act or the Medical Profession Act.
- The number and distribution of doctors willing to provide legal abortion care and the number of providers who refuse to provide this care on grounds of conscience or religion.