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Meeting: 1324th meeting (September 2018) (DH)

Communication from a NGO (The Helsinki Foundation for Human Rights) (09/08/2018) in the cases of P. and S. v. Poland (57375/08), R. R. v. Poland (27617/04) and Tysiac v. Poland (5410/03) and reply from the Polish authorities (20/08/2018)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

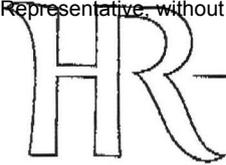
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Réunion : 1324^e réunion (septembre 2018) (DH)

Communication d'une ONG (The Helsinki Foundation for Human Rights) (09/08/2018) dans les affaires P. et S. c. Pologne (57375/08), R. R. c. Pologne (27617/04) et Tysiac c. Pologne (5410/03) et réponse des autorités polonaises (20/08/2018) (**anglais uniquement**)

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



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Warsaw, 9th August 2018

1332/2018/JJ



TO:
The Secretary of the Committee of Ministers
Council of Europe
 Avenue de l'Europe
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**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
 ("HFHR") CONCERNING**

**THE EXECUTION OF ECtHR JUDGMENTS IN CASES:
 P. AND S. AGAINST POLAND (APPLICATION NO. 57375/08),
 R. R. AGAINST POLAND (APPLICATION NO. 2761/04),
 TYSIĄC AGAINST POLAND (APPLICATION NO. 5410/03)**

To the attention of:

1. Mrs. Justyna Chrzanowska
 Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the
 European Court of Human Rights
 Agent of Polish Government
2. Mr. Adam Bodnar
 Commissioner for Human Rights
3. Mr. Bartłomiej Chmielowiec
 Commissioner for Patients' Rights

EXECUTIVE SUMMARY

- On 21 September 2017, the Committee of Ministers issued a decision in which it noted that it was necessary for the Polish government to present information on the guarantees of effective access to legal procedures for pregnancy termination;
- The Polish government presented its observations in the report of 21 June 2018. The Government indicated that, in its opinion, the current regulations ensure effective access both to abortion and to information on the possibility of undergoing such a procedure;
- The HFHR submitted its communication on the execution of the *P. and S. against Poland* judgement on 1 September 2017. However, given the lack of positive changes ensuring access to pregnancy termination, the HFHR arrived at a conclusion that it was advisable to present its stance on the matter yet again. The HFHR also deems it necessary to comment upon the report of the Polish government of 21 June 2018.
- In our opinion, the Polish authorities did not fully and thoroughly address the matters invoked by the Committee of Ministers in its decision of 21 September 2017 on the execution of the judgement in the *P. and S. against Poland* case. In this communication, we will present data to prove that the procedure of imposing financial penalties on medical facilities for non-performance of the contract with the National Health Fund is not an effective measure to protect women applying for abortion. Moreover, we would like to present data on the complaints filed with the Commissioner for Patients' Rights and the National Health Fund concerning refusals to perform an abortion. This data was missing from the report presented by the Polish government on 21 June 2018.
- So far, the Polish authorities have not introduced an effective and swift procedure which would ensure a woman's right to have an abortion when the latter is allowed by national law. The current procedure of objecting to an opinion or decision of a doctor is too formal and does not guarantee that a woman will be able to terminate the pregnancy within the period provided in law. The procedure is not effective if a doctor refuses to issue a written opinion. Additionally, at present no law directly imposes an obligation on any entity to provide a woman with information that abortion can be performed by a different doctor in a situation when medical staff have invoked the conscience clause.
- The information obtained by the HFHR suggests that internal and preliminary analytical works are ongoing in the Ministry of Health on amending the provisions concerning the objection to an opinion or decision of a doctor. However, the Polish government, in its response of 14 September 2017 to the communication of 1 September 2017 sent by the HFHR, admitted that on 16 November 2016, the Permanent Committee of the Council of Ministers decided that matters pertaining to the objection to an opinion or decision of a doctor would not be included in further legislative works on amending the Act on patients' rights and the Commissioner for Patients' Rights.

RECOMMENDATIONS

- We recommend that the Committee continue the supervision over the execution of the judgement in the *P. and S. against Poland* case.
- We recommend that the Committee request the Polish authorities to provide detailed data on proceedings related to penalties imposed on medical facilities in connection with their failure to fulfil contractual obligations towards the National Health Fund on account of a refusal to perform an abortion.
- We recommend that the Committee request the Polish authorities to provide detailed data on all complaints filed with the Commissioner for Patients' Rights, the Ministry of Health and the National Health Fund related to a refusal to perform an abortion, indicating a manner in which the complaints were solved and the actions undertaken by these institutions.
- We recommend that the Committee request the Polish authorities to provide detailed data on all disciplinary proceedings against doctors related to the refusal to perform an abortion, indicating the manner in which they were concluded.
- We recommend that the Committee request the Polish authorities to provide information on the current legislative works concerning the procedure of objecting to a medical opinion or decision, with an indication of the stage of the process, expected time of its conclusion and with a presentation of a detailed rationale for such works.
- The Polish authorities should guarantee that, before the end of the period when abortion is allowed, women receive reliable and objective information on the conditions for termination of pregnancy and the state of the foetus. The Polish authorities should introduce a swift and effective procedure to ensure that women have an opportunity to exercise the right to abortion when the procedure is allowed under national law.
- Mechanisms should be introduced which would ensure that the right to abortion is not nullified by doctors' invocation of the conscience clause.

1. Introduction

The Helsinki Foundation for Human Rights (hereinafter "HFHR") with its seat in Warsaw would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, regarding the execution by the Polish authorities of the European Court of Human Rights' ("ECtHR") judgment in the case *P. and S. against Poland* (application no. 57375/08).

The HFHR is a Polish non-governmental organisation established in 1989 with a principal aim to promote human rights, the rule of law and the development of an open society in Poland and other countries. The HFHR actively disseminates the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "Convention") and is dedicated to contributing to the proper execution of ECtHR judgments.

In its communication, the HFHR will focus in particular on the practical aspects related to the accessibility of legal abortion procedures. At the same time, the circumstances in which abortion is legal are left outside the scope of the current communication, since they were not an issue of concern in the *P. and S. against Poland* case.

At the same time, we would like to emphasize that we still share the conclusions presented in the communication of 1 September 2017 on the execution of judgments in cases *P. and S. against Poland* (application no. 57375/08), *R. R. against Poland* (application no. 2761/04), and *Tysic against Poland* (application no. 5410/03).¹ Currently, we would like to specifically address the issues indicated in the Decision of the Committee of Ministers of 21 September 2017 concerning the execution of the ECtHR's judgement in the *P. and S. against Poland* case² and the response of the Government of the Republic of Poland of 21 June 2018 which refers to this decision.³

2. ECtHR's judgement in the case *P. and S. against Poland*

The *P. and S. against Poland* case concerned a 14 years old girl (the first applicant) who was denied access to an abortion, allowed under Polish law in the circumstances, by consecutive doctors. In accordance with Article 4a (1)(3) of the Act on family planning, protection of the human foetus and conditions which permit termination of pregnancy,⁴ the prosecutor issued a certificate to the applicant that the pregnancy had been a result of a prohibited act. According to the above-mentioned law, in such circumstances the applicant had the right to legally terminate the pregnancy. Despite that fact, medical doctors in three hospitals provided the applicant and her mother (the second applicant) with incorrect information about the conditions for pregnancy termination and, as a result, refused to carry out the procedure. While refusing to perform an abortion, the doctors invoked the "conscience" clause, but without indicating an alternative way to

¹ Available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)991revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)991revE).

² Available at: [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2017\)1294/H46-19E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2017)1294/H46-19E).

³ Available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)659E).

⁴ Act of 7 January 1993 on family planning, protection of the human foetus and conditions which permit termination of pregnancy, Journal of Laws no. 17, position 78 with subsequent changes.

receive this treatment from a different doctor or medical facility. An obligation to refer the patient to a facility where she would be able to undergo the procedure stemmed from Article 39 of the Act on the professions of a doctor and dentist.⁵

In the judgement *P. and S. against Poland*, ECtHR found violations of Articles 3, 5 and 8 of the Convention. While commenting on access to legal abortion, ECtHR emphasised that “[s]tates are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”⁶

Additionally, according to the ECtHR, “effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent (...). The nature of the issues involved in a woman’s decision to terminate a pregnancy or not is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time.”⁷

The HFHR appreciates the steps taken by the government to execute the ECtHR’s judgement in the case *P. and S. against Poland*. However, in our view, they are not sufficient to fully implement the standards established in this ruling.

3. Ineffective procedure for objecting to a decision or opinion of a doctor

In its communication of 21 June 2018, the Polish government again stressed that the procedure for objecting to a decision or opinion of a doctor, which was introduced by the Act on patients’ rights and the Commissioner for Patients’ Rights, constitutes a sufficient procedural safeguard which can be used by women who have been refused a legal abortion by doctors.⁸ The HFHR cannot agree with such a view and, accordingly, wishes to repeat the most important criticism concerning this procedure.

In our view, the most serious drawbacks of the procedure include: excessive formalism; impossibility to employ the procedure in case of a refusal of a doctor to issue an opinion or decision; doubts as to whether the objection concerns the refusal to refer a person for medical testing; lack of guarantees for fast and timely consideration of the objection.

The objection procedure is excessively formal. The patient is required to indicate a specific legal provision establishing those of their rights or duties which are impacted by a given opinion or decision of a doctor. Moreover, a copy of an opinion or decision should be attached to the objection. The statistics concerning patients’ objections show that only a small part of those fulfil the formal requirements and are considered by the

⁵ Act of 5 December 1996 on the professions of a doctor and dentist, Journal of Laws of 2017, position 125 with subsequent changes (unified text).

⁶ Judgement of the ECtHR of 30 October 2012 in the case of *P. and S. against Poland*, § 106.

⁷ Judgement of the ECtHR of 30 October 2012 in the case of *P. and S. against Poland*, § 111.

⁸ Communication of the Government of the Republic of Poland of 21st June 2018, p. 2, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)659E).

Medical Commission by the Commissioner for Patients' Rights.⁹ The Polish government, in its response of 14 September 2017 to HFHR's communication of 1 September 2017, claimed that, in cases concerning abortion, women prefer an informal path for filing complaints with the Commissioner for Patients' Rights, i.e. through the hotline or by personally coming to the Commissioner's Office.¹⁰ However, it should not be overlooked that the situation may result not so much from women's expression of their free choice, as precisely from the excessive formalism of the objection procedure, which discourages women from entering the legal path.

The law does not specify whether the objection can be filed when a doctor refuses to issue an opinion or decision, or when he or she does it only orally. Particularly in situations involving abortion, doctors may be more inclined to refuse to issue a negative decision in writing or to delay issuing such a decision, which may effectively annul a woman's right to terminate a pregnancy within the period prescribed by law.

In the communication of 21 June 2018,¹¹ the government clearly stated that the right to object also applies to refusals to refer a person for medical examination, including prenatal testing. It should be stressed that this raised concerns which were expressed, for example, by the Commissioner for Patients' Rights. The Commissioner pointed to the need for a clear regulation which would foresee that the objection procedure applies to refusals to refer a person for medical testing.¹² The results of such testing can play a crucial role in making an assessment as to whether the state of the foetus justifies termination of pregnancy and, as a consequence, can be indispensable for a woman to make a decision on continuing her pregnancy (compare with the case *R.R. against Poland*).¹³

No legal provisions guarantee that the objection will be considered by the Medical Commission before the expiry of the deadline within which abortion is legal. Pursuant to the Act on patient's rights and the Commissioner for Patients' Rights, the Medical Commission has 30 days to consider the objection.

Furthermore, it merit emphasising that the objection procedure applies solely to medical decisions or opinions, but does not concern cases when a prosecutor issues or refuses to issue a certificate confirming a justified suspicion that the pregnancy resulted from a prohibited act (e.g. rape). Under the Act of 7 January 1993 on family planning,

⁹ In 2016, the Commissioner registered 24 objections, but only one fulfilled formal criteria. In 2015 also only one objection was considered on the merits. In 2014, five objections were considered on the merits out of 34 filed. In 2013, only two out of 28 filed objections fulfilled formal criteria. See, Report on the observance of patients' rights in the territory of the Republic of Poland in the period between 1 January 2016 and 31 December 2016, p. 46, available at: <https://bit.ly/2Kue543>; Report on the observance of patients' rights in the territory of the Republic of Poland in the period between 1 January 2015 and 31 December 2015, p. 43, available at: <https://bit.ly/2OGvoSG>; Report on the observance of patients' rights in the territory of the Republic of Poland in the period between 1 January 2014 and 31 December 2014, p. 38, available at: <https://bit.ly/2nfv5BW>.

¹⁰ Response of the Government of the Republic of Poland of 14 September 2017 to the communication by the HFHR of 1 September 2017, p. 3, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)991revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)991revE).

¹¹ Communication of the Government of the Republic of Poland of 21st June 2018, p. 2, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)659E).

¹² Information published on the official website of the Commissioner for Patients' Rights, available at: www.bpp.gov.pl/prawo-do-zgloszenia-sprzeciwu.

¹³ Judgement of ECtHR of 26 May 2011, application no. 2761/04.

protection of the human foetus and conditions which permit termination of pregnancy, issuance of such a certificate conditions termination of pregnancy on this ground.

One cannot agree with the government's claim that the competence of the Commissioner for Patients' Rights to initiate explanatory proceedings (not resulting from a filed objection) constitutes an effective tool to protect the rights of women who seek termination of pregnancy.¹⁴ Such proceedings can e.g. confirm that there has been a violation of the patient's right to receive a medical service, but cannot directly lead to the cancellation of the refusal to perform a procedure.

Until today, no amendments have been introduced into the Act on patients' rights and the Commissioner for Patients' Rights which would significantly alter the objection procedure and make it a real mechanism for protection of rights. The Commissioner for Patients' Rights has noted a need to introduce changes in the procedure.¹⁵ According to the response of the government to the communication presented by the Polish Bar Association concerning the execution of two judgements in cases *Tysic against Poland* and *R.R. against Poland*,¹⁶ the works on amendments were moved to the Council of Ministers in 2016. The Polish government, in its response of 14 September 2017 to HFHR's communication of 1 September 2017, admitted that on 16 November 2016, the Permanent Committee of the Council of Ministers decided to exclude the matters pertaining to the procedure of objecting to an opinion or decision of a doctor from further legislative works on the Act on patients' rights and the Commissioner for Patients' Rights.¹⁷ Moreover, the information provided to the HFHR by the Ministry of Health in February 2018¹⁸ suggests that the latter was conducting analytical works to verify the justifiability and scope of possible changes to the objection procedure. While in the letter of 20 July 2018,¹⁹ the Ministry stated that preliminary internal works were ongoing on the amendments to the Act on patients' rights and the Commissioner for Patients' Rights concerning the right of the patient to object to an opinion or decision of a doctor.

Given the above, in HFHR's assessment, the procedure of objecting to a decision or opinion of a doctor does not fulfil the criteria of an effective remedy set forth in Article 13 of the Convention and does not meet the standards established by ECtHR in the case *P. and S. against Poland* (as well as cases *Tysic against Poland*²⁰ and *R.R. against Poland*). The procedure is ineffective and does not secure the right to legal termination of pregnancy.

¹⁴ Communication of the Government of the Republic of Poland of 21st June 2018, p. 3, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)659E).

¹⁵ Information published on the official website of the Commissioner for Patients' Rights, available at: www.bpp.gov.pl/prawo-do-zgloszenia-sprzeciwu.

¹⁶ Communication from the authorities (13/05/2016) in reply to the communication of an association (DH-DD(2016)549) concerning the cases of *Tysic* and *R.R. against Poland*, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2016\)628E](http://hudoc.exec.coe.int/eng?i=DH-DD(2016)628E).

¹⁷ Response of the Government of the Republic of Poland of 14th September 2017 to the communication by the HFHR of 1st September 2017, p. 3, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)991revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)991revE).

¹⁸ Letter from the Minister of Health to the HFHR of 8 February 2018, no. OZO.024.30.2018/MG.

¹⁹ Letter no. PRL.079.11.2018.AK.

²⁰ Judgement of ECtHR of 20 March 2007, application no. 5410/03.

4. Access to information on the possibility of terminating the pregnancy, in particular in situations when a doctor invokes the conscience clause

As noted by ECtHR in the case *P. and S. against Poland*, it is the role of the state to organise its healthcare system in such a way so as, on the one hand, not to force doctors to perform services that conflict with their conscience, but on the other to ensure respect for patients' right to receive services which they are entitled to under the law.

At this point, it should be noted that the Constitutional Tribunal in its judgement of 7 October 2015²¹ pronounced the Act on the professions of a doctor and dentist (Article 39 of the Act) to be in violation of the Polish Constitution²² insofar as it obliged a physician, refraining from performing a healthcare service contradicting his or her conscience, to indicate an alternative way of obtaining such a service from another doctor or a different medical facility. The Constitutional Tribunal ruled that imposing such an obligation on a doctor disproportionately interferes with their freedom of conscience protected under Article 53 (1) of the Constitution. The judgement means that, at the moment, in Poland there is no legal provision which would oblige a physician or another member of the medical personnel in a given facility to present the patient with an effective way of obtaining a healthcare service in a different facility in case of a refusal to perform said service on account of the conscience clause.

The current legal situation, created after the provisions questioned by the Constitutional Tribunal lost their legal force, involves a significant disproportion between the protection of doctors' freedom of conscience and patients' right to receive medical services. Such a situation can particularly endanger the rights of women who are refused access to a lawful abortion for ideological reasons. In such a case, their right to obtain this service may have a purely illusory character. This state of affairs can force women to search for illegal methods of terminating pregnancies, which could endanger their health or, even, life.

The HFHR has asked the Ministry of Health whether any legislative works are being conducted to impose an obligation on any entity to inform the patient about a possibility of obtaining a medical service from a different doctor or medical facility when a doctor invokes a conscience clause. In its response of 20 July 2018,²³ the Ministry did not indicate any legislative works towards this end. It explained that "according to Article 14 of the Act of 15 April 2011 on medical activity (Journal of Laws of 2018, item 160 with amendments), an entity conducting medical activity provides publicly information about the scope and kind of healthcare services offered. The entity conducting medical activity, upon a patient's motion, additionally provides detailed information on the offered healthcare services, in particular concerning the applied testing or therapeutic methods, as well as the quality and safety of those methods."²⁴ In HFHR's assessment, a medical facility's duty to provide information on the scope of its services does not constitute a solution which would effectively ensure women's access to information on the possibilities of terminating a pregnancy. Above all, such a solution shifts the burden for searching for a proper facility and analyzing its services onto a woman. Looking for the

²¹ Case no. K 12/14.

²² The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, position 483 with subsequent changes.

²³ Letter no. PRL.079.11.2018.AK

²⁴ Ibidem.

right facility can be time-consuming which is of particular relevance, since the law prescribes a specific deadline for pregnancy termination.

Additionally, the objection procedure in its current shape does not guarantee that a woman will receive reliable, full and objective information on whether she has the right to obtain a lawful abortion. Nor does it ensure that a woman will receive information on where the procedure could be performed when the contacted doctor invokes a conscience clause. The objection procedure cannot address a situation when doctors deliberately hide certain facts, or present incomplete and misleading information to a woman as to the potential abortion in order to thus make termination of pregnancy impossible. It should be stressed that provision of reliable and complete information on the existing procedures can hold particular importance for women who are victims of crime and whose pregnancy is a result of said crime.

5. Performance of contracts with the National Health Fund by medical facilities with relation to services involving pregnancy termination

In its communication of 21 June 2018, the government only cursorily and generally presented the actions taken in relation to entities offering medical services which did not fulfil contractual obligations towards the National Health Fund with respect to serviced involving pregnancy termination.²⁵ The government indicated that a refusal to perform a legal abortion constitutes a violation by the medical facility of the contract with the National Health Fund, and it should result in the initiation of explanatory proceedings.²⁶ The government observed that the National Health Fund did not receive any complaints from patients about refusals to perform an abortion and it noted that if such a situation has taken place, the related data will be transferred by directors of regional branches of the Fund to the National Health Fund and the Ministry of Health.²⁷

The data obtained by the HFHR from the National Health Fund²⁸ show that between 2008 and 2017, the Fund conducted only four proceedings related to the imposition of contractual penalties on medical facilities for non-performance or breach of the medical services contract, consisting in a refusal to perform an abortion. One proceeding ended in the imposition of a contractual penalty (in 2014, a facility from the Mazovian voivodeship). The remaining proceedings did not result in the imposition of penalties (in 2015, a facility from the Mazovian voivodeship; in 2016 two proceedings, an entity from the Opolskie voivodeship).

The above-presented data should be juxtaposed with the statistics concerning the refusals to perform an abortion dealt with by the National Health Fund and the Commissioner for Patients' Rights.

The data of the National Health Fund²⁹ show that the Fund registered several cases concerning a refusal to perform an abortion. As a side note, it should be observed that the government in its communication of 21 June 2018 stated that no complaints had

²⁵ Communication of the Government of the Republica of Poland of 21st June 2018, p. 4-5, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)659E).

²⁶ Ibidem.

²⁷ Ibidem.

²⁸ Letter of the National Health Fund of 6 March 2018, no. DSOZ.0123.7.2018.GKU.

²⁹ Letter of the National Health Fund of 6 March 2018, no. DSOZ.0123.7.2018.GKU.

been filed with the Fund about refusals to perform the procedure. The National Health Fund dealt with the following cases:

- One case in 2011 concerning a refusal by a psychiatrist to issue a certificate which would enable the patient to have an abortion (entity from the Silesian voivodeship);
- Two cases in 2015. In the first case, explanatory proceedings conducted by the Fund showed that there were no medical bases for abortion. In the second case, the refusal was related to the doctor's invocation of the conscience clause (entity from the Podkarpackie voivodeship);
- One case in 2016 concerning a refusal to perform an abortion by an entity which had a contract with for such medical services (entity from the Silesian voivodeship).

It is visible that the above-listed cases did not translate into initiation of proceedings for imposition of contractual penalties by the National Health Fund in relation to non-performance of the contract.

The information obtained by the HFHR from the Commissioner for Patients' Rights³⁰ show that between 2008 and 2017, the Commissioner considered 20 complaints (other than an objection to the decision or opinion of a doctor) concerning a refusal to perform an abortion. In five cases, the Commissioner concluded that there had been a violation of patient's rights (including the right to a medical service) and in four the proceedings are pending. Also in four cases, the Commissioner informed the patient about available remedies, and in two discontinued proceedings upon the patient's motion.

The situations in which the Commissioner for Patients' Rights noted irregularities:

- A refusal to perform an abortion when the pregnancy endangers the life or health of the woman – violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights), to medical documentation and to file an objection to the medical opinion or decision – case from 2014, entity from the Warmińsko-Mazurskie voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus – violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights), to medical documentation and to file an objection to the medical opinion or decision – case from 2014, entity from the Mazovian voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to information, but no violation of the right to have a medical service performed (Article 6 of the Act on

³⁰ Letter of 6 April 2018, np. RzPP-ODO.0133.3.2018.

patient's rights and the Commissioner for Patients' Rights) – case from 2015, entity from the Wielkopolskie voivodeship;

- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to have a medical service performed, to healthcare services provided with due diligence (Articles 6 and 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to medical documentation – case from 2015, entity from the Mazovian voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to have a medical service performed, to healthcare services provided with due diligence (Articles 6 and 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to medical documentation – case from 2015, entity from the Podkarpackie voivodship.

The analysis of this data shows no correspondence to proceedings conducted by the National Health Fund concerning the imposition of contractual penalties for breach of contract with respect to termination of pregnancy procedures. It is thus evident that contractual relations between medical facilities and the National Health Fund do not automatically translate onto guarantees of effective access to legal abortion procedures for women. And the system for imposing contractual penalties for breach of contract with the National Health Fun cannot be treated as an effective tool ensuring access to abortion either. Despite violations being found by the Commissioner for Patients' Rights, the National Health Fund did not conduct proceedings in these cases with the view to imposing contractual penalties.

At the same time, it should be stressed that explanatory proceedings, or proceedings for imposition of contractual penalties, will only be conducted after possible irregularities in a refusal to perform a medical service such as abortion materialise. No provision foresees that they should end within a certain period so as to enable a woman to still benefit from a legal abortion. Also for this reason, the procedures should be considered ineffective and not useful in protecting the rights of women seeking abortion.

It should further be noted that difficulties in accessing legal abortion were also indicated by the Commissioner for Human Rights in the information on the activity of the Commissioner for Human Rights and the observance of human and civil rights and freedoms in the Republic of Poland in 2017.³¹

6. Plans for restricting abortion laws

As was indicated in the communication of 1 September 2017, in HFHR's assessment, it may be useful to take into account a wider context of the current public debate on restricting the conditions for legal abortion. Since the submission of that communication, the situations has also changed in this respect. We would like to note that in the current communication we only address matters of a procedural nature. We

³¹ Information on the activity of the Commissioner for Human Rights and the observance of human and civil rights and freedoms in the Republic of Poland in 2017, p. 121, 489-490, available at: www.rpo.gov.pl/sites/default/files/Informacja%20roczna%20RPO%20za%20rok%202017.pdf

leave the existing model of the Act on family planning, protection of the human foetus and the conditions which permit termination of pregnancy.

Even though on 6 October 2016 the Sejm rejected the citizen initiative draft law which would completely prohibit abortion (the draft was prepared by the 'Stop abortion' Committee),³² it is now working on another draft law which is going to restrict conditions of abortion's permissibility. The draft law prohibiting abortion provoked a wave of protests and criticism in the society (the demonstrations were called the 'Black Protest'). The draft law currently under debate in the Sejm was prepared by the Committee 'Halt abortion.' Its aim is to remove from the Act on family planning, protection of the human foetus and the conditions which permit termination of pregnancy the premise allowing abortion when there is a high probability of defects in the foetus or an incurable disease endangering its life.³³ After the first reading in the Sejm, which took place on 10 January 2018, the draft was directed for further works in the Sejm's Commission for Social Policy and Family. On 19 March 2018, the Sejm's Commission on Justice and Human Rights gave it a positive opinion and on 2 July 2018 the Commission for Social Policy and Family set up an extraordinary sub-commission which will further deal with the draft.

It should also be noted that in 2017 a group of MPs filed a motion with the Constitutional Tribunal to examine the constitutionality of abortion in situations when prenatal testing or other medical circumstances point to a high probability of a severe and irreversible defect of the foetus or an incurable disease endangering its life.³⁴ The date when the Constitutional Tribunal will pass the ruling is not yet known.

The information presented above shows that the Committee's decision as to closing the execution of the judgement in the *P. and S. against Poland* case will have great importance for the ongoing debate and its boundaries.

7. Conclusions and recommendations

Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers continue its supervision of the execution of the *P. and S. against Poland* judgement. In our opinion, the general measures taken by the Polish authorities are not sufficient to prevent further violations of the Convention similar to those found in the *P. and S. against Poland* judgement.

We would like to emphasise that the Polish authorities did not fully and thoroughly address the matters presented by the Committee of Ministers in the decision of 21 September 2017 on the execution of the judgement in the *P. and S. against Poland* case.

³² Citizen draft law on the amendments to the Act of 7 January 1993 on family planning, protection of the human fetus and the conditions for admissibility of termination of pregnancy and the Act of 6 June 1997 – Criminal code. Information about the draft law and the legislative process are available here: www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6EDFF98AE25263E5C125801400298427.

³³ Citizen draft law on the amendments to the Act of 7 January 1993 on family planning, protection of the human fetus and the conditions for admissibility of termination of pregnancy. Information about the draft law and the legislative process are available here: www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=CDD22B469F73D121C125820B0057A399.

³⁴ Case no. K 13/17, available at: <http://trybunal.gov.pl/sprawy-w-trybunale/art/9923-ochrona-plodu-ludzkiego-warunki-dopuszczalnosci-przerwywania-ciazy-praktyki-eugeniczne-planowa/>.

For this reason, we recommend that:

- the Committee request the Polish authorities to provide detailed data on proceedings related to penalties imposed on medical facilities in connection with their failure to fulfil contractual obligations towards the National Health Fund on account of refusals to perform an abortion;
- the Committee request the Polish authorities to provide detailed data on all complaints filed with the Commissioner for Patients' Rights, Ministry of Health and the National Health Fund related to refusals to perform an abortion, indicating a manner in which the complaints were solved and the actions undertaken by these institutions.

Additionally, we recommend that:

- the Committee request the Polish authorities to provide detailed data on all disciplinary proceedings against doctors related to refusals to perform an abortion, indicating the manner in which they were concluded;
- the Committee request the Polish authorities to provide information on the current legislative works concerning the procedure of objecting to a medical opinion or decision, with an indication of the stage of the process, expected time of its conclusion and with a presentation of a detailed rationale for such works.

According to the HFHR, in order to fully implement the judgement in the *P. and S. against Poland* case, Polish authorities should:

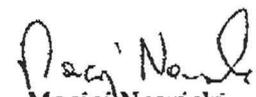
- guarantee that women receive reliable and objective information on conditions for termination of pregnancy and on the state of the foetus within the period when abortion is allowed;
- introduce an effective and swift procedure which would ensure women's right to have an abortion when it is allowed under national law;
- introduce mechanisms which would ensure that the right to abortion is not nullified by doctors' invocation of the conscience clause.

We believe that this written communication proves to be useful for the Committee of Ministers in performing the task defined in Article 46(2) of the Convention.

The communication was prepared by Jarosław Jagura, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights under the supervision of Katarzyna Wiśniewska, the coordinator of the Strategic Litigation Programme.

On behalf of the Helsinki Foundation for Human Rights,


Piotr Kładoczny, Ph.D.
Secretary of the Board


Maciej Nowicki
Vice-President of the Board





Republic of Poland
Ministry
of Foreign Affairs

Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPOPC.432.91.2017 / 21



Warsaw, 20 August 2018

Mr Fredrik Sundberg
Head of the Department
for the Execution of Judgments
of the European Court of Human Rights
Council of Europe
Strasbourg

Dear Sir,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 9 August 2018 by the Helsinki Foundation For Human Rights (hereinafter HFHR) concerning execution of the European Court of Human Rights' (hereinafter the Court) judgments in the cases of *P. and S. v. Poland* (application no. 57375/08), *R.R. v. Poland* (application no. 27617/04) and *Tysic v. Poland* (application no. 5410/03), I would like to submit the following comments prepared on the basis of information submitted by the Ministry of Health.

In respect of point 3 of the HFHR's communication, concerning the procedure for objecting the physician's opinion or certificate, it should be noted that the patient's right to object to a doctor's opinion or ruling remains an efficient measure of legal protection, inter alia for women who were refused pregnancy termination (under any circumstance stipulated by the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993) or prenatal examination referral, and/or in the event a prenatal examination is not performed despite a proper referral having been issued. The patient's right to object to a physician's opinion or ruling was introduced into the Polish legal system under provisions of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008, primarily for the purpose of implementing the judgment of the European Court of Human Rights in the case of *Tysic v. Poland*. However, the law is general in nature, i.e. it has not been narrowed down to the case of pregnancy termination refusal under the circumstances stipulated under the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993. Making the aforementioned norm general in nature was a purposeful action with the intention of protecting the rights of all patients whose rights or duties as stipulated by the law are affected by a physician's opinion or ruling (and under circumstances where no other legal remedies are provided for). In accordance with the Law of 6 November 2008 on the *Patient Rights and Patient Rights Ombudsman*, any patient or his or her legal representative may object to the opinion or certificate referred to in Article 2 paragraph 1

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of the *Law on the Physician and Dental Surgeon Professions* of 5 December 1996, if the opinion or certificate affects the patient's rights or obligations prescribed in the law. This right to object can be invoked by a woman who was refused the termination of pregnancy in a situation, where the conditions stipulated under the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993 were fulfilled. Moreover, this right can also be used by a woman who was refused referral for the prenatal tests despite the existence of premises justifying such examination (defined in the Minister's of Health ordinance of 6 November 2013 *on guaranteed services under hospital treatment*). It is so, because a refusal of prenatal examination referral in a situation where a woman is entitled to them by the provisions of the law affects the patient's rights just like a physician's refusal to terminate a pregnancy – regardless of the premise conditioning the performance of the procedure in a given case, and of the reason for refusal. This question does not raise any interpretative doubts.

Having regard to the issue of a physician's refusal to issue an opinion or certificate, it should be noted that Article 41 paragraph 1 of the *Law on the Physician and Dental Surgeon Professions* provides for an obligation to keep the patient's individual medical records. The rules concerning the scope and the way of keeping of these records are determined by provisions of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008. According to Article 25 paragraph 2, the medical record shall include information about issuing an opinion or certificate referred to in Article 31 paragraph 1. The refusal to issue such an opinion should also be noted in the records.

Moving on to the issue of a swift examination of the patient's objection, one should note that in accordance with Article 31 paragraph 5 of the *Patient Rights and Patient Rights Ombudsman Law*, the Medical Board issues the decision immediately and no later than 30 days after the objection was filed. The time limit of 30 days is thus a maximum end date of the examination by the Medical Board. The employees of the Office of the Patient Rights Ombudsman are sensitive towards the situation where swift action is needed, which is confirmed by the schedules of the proceedings examined within the Office. In addition, in order to facilitate quick contact with the Patient Rights Ombudsman, a nationwide toll-free helpline is in place: 800-190-590. Staff on duty provide daily and current information concerning patient rights and action recommended under specific circumstances, listing legal measures available to patients. As the helpline is active Monday to Friday from 09:00 a.m. until 09:00 p.m., it can also be contacted in the afternoons and evenings.

Lastly, it is worth noting that currently the Ministry of Health is again undertaking works aimed at amending the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 and the institution of objection to a physician's opinion or certificate in particular. It is planned to take on board the concerns and doubts expressed *i.a.* by the HFHR in its communication. The draft amendment should be submitted for public consultations in September 2018.

In respect of point 4 of the HFHR communication, concerning the issue of access to information on the possibility of terminating pregnancy, in particular in situations when a doctor invokes the conscience clause, it should be noted that under Article 39 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996, a physician has the right to refer to the principle of conscientious objection when refraining from performing specific medical services, subject

to the provisions of Article 30 of said Law (within the scope in which it provides for a physician's obligation to provide medical assistance whenever a delay in providing the same may result in danger to life or a risk of serious bodily injury or a grievous health disorder). In such cases, the physician is obliged to justify and record such decision in the relevant medical documentation. Furthermore, a physician performing his/her professional duties as an employee shall also duly notify his/her superior in writing prior to exercising the conscience clause.

It is also important that under the legal provisions in force, and in particular under the Regulation of the Minister of Health of 8 September 2015 *concerning the general conditions of healthcare service provision contracts*, all medical facilities (hospitals) entering into a contract with the National Health Fund shall be obliged to provide all services specified thereunder – within their full scope and in conformity to the letter of law. Making use of the conscience clause shall not breach this obligation. By entering into a healthcare service provision contract, the service provider undertakes to provide all services guaranteed under implementing regulations relevant to the act, within the scope and inclusive of all service types specified by the contract. It should be noted here that the regulation of the Minister of Health of 22 November 2013 *guaranteed services under hospital treatment* provides for pregnancy termination procedures. The inability to provide specific services constitutes a case of undue performance of the contract. Therefore, the issue of ensuring due and proper service provision and exercising the patient's rights to information are duly regulated under the Polish legal system. Liability in this regard lies with the service provider – the medical entity.

At the same time, as a result of the judgment of the Constitutional Court of 7 October 2015, Ref. no. K12/15, an analysis of the legal provisions, as amended by the Court's ruling, was undertaken in order to assess whether they guarantee both, the physician's right to refrain from performing a medical procedure against his or her conscience and the patient's right to obtain a medical procedure she is entitled to (as well as the patient's right to obtain information in such case). In this regard, the provisions of the *Healthcare Institutions Law* of 15 April 2011 should be referenced. Under Article 14 of the Law, any entity engaging in medical treatment activities shall make information concerning the scope and types of medical services publicly available. Furthermore, any entity engaging in medical treatment activities shall, at the patient's request, issue detailed information concerning the medical services provided, especially information concerning the diagnostic and/or therapeutic methods applied, including information on the quality and safety of said methods. Consequently, changes arising from the enactment of the aforementioned Constitutional Court judgment have caused no legal loophole in the form of an absence of authorities obliged to provide information concerning the location where specific medical services are provided.

In respect of point 5 of the HFHR communication on the performance of contracts with the National Health Fund by medical facilities in relation to services involving pregnancy termination, the Government wish to point to the information provided by the National Health Fund, according to which the refusal of the medical service provider, who is contracted in the field of obstetrics and gynecology, to perform the termination of the pregnancy in the cases provided for in the *Law on Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* with a simultaneous failure to indicate a medical facility where a woman could obtain the said healthcare service, counts as a faulty realisation of the contract. All complaints or other

information about such a faulty realisation by a medical service provider of its contract with the National Health Fund constitute a basis for institution of the clarification proceedings. In the Government's information of 21 June 2018, referred to by the HFHR, it was indicated that as of the date of preparing that information, the National Health Fund did not receive any complaints from the patients regarding the refusal of performing such a healthcare service, the patients did not request information on the possibilities of carrying out the said service either.

Notwithstanding the above, the National Health Fund send a letter to all of the directors of the regional branches of the Fund requesting the information whether in the given region any refusal of the pregnancy termination to a person entitled to such a service on the basis of the relevant law has been recorded. In reply to the aforementioned letter, so far the information received by the National Health Fund included, *e.g.*:

- the Opole Regional Branch of the Fund informed that in 2016 it conducted an internal audit in this respect in two medical facilities, in response to the Patients Rights Ombudsman request. The audit showed that in both hospitals the procedures provided for in the *Law on the Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* were followed. One of these cases concerned a situation, where the physicians refused to perform an abortion by invoking conscience clause, following which the patient was referred to another hospital. The other case concerned a situation, where the geneticist issued a positive opinion in respect of the termination of pregnancy, however, with a reservation that in his opinion another in-depth examination is needed before the termination is performed. The audit showed that this procedure was adequate to the state of health of the patient and the foetus and that the termination of pregnancy was preceded by an ultrasound examination, genetic consultation and the medical consilium. The abortion was performed immediately after the medical consilium. The patient was provided with all the information in connection with her hospitalization as soon as the medical personnel became aware of it;
- the Dolnośląskie Regional Branch of the Fund informed about one case in 2018 in which the patient was informed about the facility where it is possible to obtain the termination of pregnancy procedure in the situations stipulated by the law;
- most of the remaining regional branches of the National Health Fund indicated that recently no instances of refusal to perform the termination of pregnancy in situations provided by the law, no complaints from patients in this respect, nor the requests to provide information on the facilities where it is possible to obtain such a procedure, were noted.

Lastly, with regard to point 6 of the HFHR communication, concerning the plans for restricting abortion laws in Poland, it should be underlined that the draft legal acts referred to by the HFHR were submitted as civic legislative initiatives and they were not prepared by the Government. They were or still are examined in accordance with the relevant legal provisions. It should be emphasised that the Government is not working on any amendment to the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* Law of 7 January 1993.

Yours sincerely,

Justyna Chrzanowska
Government Agent