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HELSINKI FOUNDATION for HUMAN RIGHTS**

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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

CONCERNING

**THE EXECUTION OF ECtHR JUDGMENT IN CASE *D.G. AGAINST POLAND*;
APPLICATION NO. 45705/07**

(KAPRYKOWSKI GROUP OF CASES AGAINST POLAND; APPLICATION NO. 23052/05)

EXECUTIVE SUMMARY

- **The Polish authorities did not yet provide adequate environmental and technical accommodations for the detained persons with physical disabilities;**
- **According to the latest National Preventive Mechanism Report, the accommodations for detainees with disabilities introduced so far reveal a number of significant flaws;**
- **The Polish authorities have to improve the training system of Prison Service staff in order to raise the awareness of the special needs of the detained persons with physical disabilities;**
- **The National Preventive Mechanism in Poland should be provided with additional financial means in order to fully realize its tasks under OPCAT;**
- **Further supervision of the execution of *D.G. against Poland* judgment by the Committee of Ministers seems necessary to ensure better situation of persons with disabilities within the Polish penitentiary system.**

1. Introduction

The Helsinki Foundation for Human Rights with its seat in Warsaw (hereinafter “HFHR”) 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 case *D.G. against Poland* (application no. 45705/07)

The HFHR is a Polish non-governmental organization established in 1989 with a principal aim to promote human rights, the rule of law and the development of 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 (“Convention”) and is dedicated to contribute to the proper execution of the judgments of the ECtHR.

The HFHR has also presented, jointly with European Disability Forum and International Disability Alliance, an *amicus curiae* brief to the ECtHR for the purpose of the proceedings in *D.G. against Poland* case. These written comments elaborated upon the international standards and instruments on the rights of persons with disabilities, reasonable accommodations within the context of Article 3 of the Convention and relevant Polish law and penitentiary practice.

The HFHR undertakes legal actions in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, as well as interventions regarding the implementation of human rights standards. The Legal Department of the HFHR consists of, *inter alia* the Strategic Litigation Programme and the Legal Intervention Programme. The Strategic Litigation Programme provides leadership and support in constant advance of the human rights protection standards in Poland through the method of strategic litigation and participation in landmark cases. The Legal Intervention Programme intervenes in cases which might represent a threat to settled human rights standards. A significant number of these cases pertain to the situation of detained persons – many of whom are faced with obstacles resulting from state of their health and overall physical constitution.

2. Undertaken measures

The judgment in case *D.G. against Poland* concerned a prison inmate who was a paraplegic confined to a wheelchair (he also suffered from a number of other health problems, e.g. malfunctions of the urethral and anal sphincters). He complained to the ECtHR that during the terms of his detention, care and assistance provided to him have been incompatible with his medical needs. ECtHR found in this case that the detention of a person who is confined to a wheelchair and suffering from paraplegia and serious malfunctions of the urethral and anal sphincters in conditions where he does not have

an unlimited and continuous supply of incontinence pads and catheters and unrestricted access to a shower, where he is left in the hands of his cellmates for the necessary assistance, and where he is unable to keep clean without the greatest of difficulty, reaches the threshold of severity required under Article 3 of the Convention and constitutes degrading and inhuman treatment contrary to that provision¹. The ECtHR adjudicated that the Polish Government had to pay D.G. an amount of EUR 8 000 in respect of non-pecuniary damage.

The just satisfaction sum awarded by the ECtHR was paid to D.G. on the 15th of July 2015². In addition to that, the Government has submitted a list of other measures taken to fully enact the judgment in the case of D.G.³ The Polish authorities have also stated that “[s]ince the facts of those cases (cases in *Kaprykowski* group) measures have been taken to improve the availability of healthcare and the authorities will continue to take measures in order to further increase available standards in the future.”⁴.

As far as persons with physical disabilities are concerned, the Polish Government claims that according to the Polish law, every inmate is examined by a doctor upon arrival to the penitentiary institution or remand centre – after that the doctors may issue recommendations (taking into account the disability of detained person) regarding further treatment, e.g. placement in a cell adapted to the needs of disabled and provision of further aids which may deviate from ordinary detention conditions defined in relevant Ordinances issued by the Minister of Justice⁵.

In the Updated Action Report in *Kaprykowski* group of cases, the Government has claimed:

Despite the existence of barriers, resulting from old architectural conditions in penitentiary units, there are separate cells for disabled persons, also on wheelchairs. As part of the adaptation works for the purposes of physically disabled persons, the Prison Service organisational units have undertaken such actions as to remove architectural barriers in the already existing premises. Those included the adaptation of sanitary corners, widening doorways and changing doors, removing doorsteps, levelling of floors (including installation of anti-sliding protection), and adapting of the housing cell with sanitary units. Each modernization of medical units existing within penitentiary institutions takes into consideration the need to adapt the hospital, infirmary and clinic premises for the purposes of disabled persons in accordance with the Minister of Justice Ordinance of 5 July 2012 on specific requirements of medical entity's premises and equipment for inmates (Journal of Law of 2012, pos. 808). The

¹ The ECtHR judgment from 12th February 2013 in case *D.G. against Poland* (application no. 45705/07), par. 177.

² Updated action plan submitted on the 2nd September 2015. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2015]889), p. 4.

³ Updated action report submitted on the 21st June 2016. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2016]790).

⁴ *Ibidem*, p. 7.

⁵ *Ibidem*, p. 10-11.

remaining medical entities, which do not meet the aforementioned requirements, will, depending on the financial possibilities, be accordingly adapted by the end of 2016. It should be stressed that adequate places for disabled persons are always taken into consideration whilst building new penitentiary extensions.⁶

The Polish authorities have also underlined that there are two specialized units within the national penitentiary system, where detainees who require hospital surgeries or prolonged hospitalisation due to general state or disability are directed to⁷.

Although the HFHR appreciates the accommodations that have been introduced by the authorities so far, we do not believe that they have solved the problems persons with disabilities face during the period of their deprivation of liberty.

3. Lack of proper environmental and technical accommodations for detained persons with physical disabilities

The response of the General Director of the Prison Service to the Polish Ombudsman from 5th January 2016, in relation to the forecasted period when adaptation works in the facilities of Prison Service will end, contradicts what the Government has stated in its Updated Action Report from June 2016. The General Director of the Prison Service admitted that the remaining medical premises will be, depending on financial resources, adapted to the needs of persons with disabilities until the end of 2017⁸ (not in 2016 as it was indicated in Updated Action Report).

In HFHR opinion, the phrase “depending on financial resources” strongly indicates that all the necessary architectural adaptations will not be realized within the period of the coming 16 months.

The General Director of Prison Service has also informed, that there were 57 penitentiary units, with 100 cells in total that were accommodated to the needs of persons with physical disabilities (this amounted to 307 places of accommodation)⁹. The Government, in the aforementioned Updated Action Report, provided statistical information concerning persons with disabilities who use crutches or wheelchairs from 2014 and 2013 (although the Government claimed that such information is collected every year). According to the data of 17 September 2014 there were 42 persons with disabilities on wheelchairs (60 in 2013) and 258 persons on crutches (301 in 2013) in

⁶ *Ibidem*, p. 11.

⁷ *Ibidem*, p. 11.

⁸ The response from the 5th January 2016 of the Director General of the Prison Service to the Polish Ombudsman (BDG-070-28/15/929), p. 2. Document available at: https://www.rpo.gov.pl/sites/default/files/Odp_DGSW_wiezniowie_z_niepelnosprawnoscia_fizyczna.pdf (date of access: 31st August 2016).

⁹ *Ibidem*, p. 2. Data relevant for September 2015.

penitentiary institutions¹⁰. There were in total 4283 persons with disabilities (of various nature) in general in Polish penitentiary institutions in October 2014¹¹.

There is also a number of problematic issues when it comes to already existing places of accommodation within the penitentiary premises that in theory meet the needs of persons with physical disabilities. The National Preventive Mechanism has visited 20 penitentiary units in 2015 – in that group 12 units were subject to visits designed to ascertain whether the rights of persons with disabilities (physical, sight-related and hearing impairment-related) are respected¹². The visiting group consisted of, *inter alia* experts from Polish NGO's specializing in promotion and civic-oversight of the introduction of environmental accommodations for persons with disabilities (Foundation *Polska bez barier* and Association *Integracja*)¹³. Ms Justyna Lewandowska, the director of the National Preventive Mechanism team, has stated that none of the visited facilities “have been accommodated to the needs of persons with disabilities”¹⁴.

In the National Preventive Mechanism Report from 2015, it can be read that although certain prisons and remand centers are labeled as fit for persons with physical disabilities, the architectural solutions in these penitentiary units do not wholly abolish the architectural barriers for such persons¹⁵. The identified by the experts weaknesses usually pertained to the sphere of living conditions¹⁶. In the penitentiary units where cells suited for persons moving on wheelchairs were situated, a number of construction or assembly faults have been identified. Several architectural issues resulted also from the fact that the needs and limits of persons with disabilities have not been properly understood. Noticed drawbacks, together with recommendations on how to amend them, have been afterwards presented to prison staff¹⁷.

The Report of the National Preventive Mechanism from 2015 is also annexed with several pictures. Pictures taken in prison in Sieraków Śląski¹⁸ show that certain issues which have been noticed in the ECtHR judgment in case *D.G. against Poland* might recur

¹⁰ Updated action report submitted on the 21st June 2016. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2016]790), p. 11.

¹¹ *Niepełnosprawni też siedzą* article in *Forum Penitencjarne* (Prison Service Journal) from November 2014. Article available at: <http://sw.gov.pl/Data/Files/kunickim/forumpenitencjarne/pelne/listopad-2014.pdf> (date of access: 31st August 2016).

¹² The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015, p. 12. Document available at: <https://www.rpo.gov.pl/sites/default/files/Raport%20RPO%20KMP%202015.pdf> (date of access: 31st August 2016)

¹³ *Ibidem*, p. 136.

¹⁴ *Polish prisons are not adapted to persons with disabilities*, LEX press release from 15th July 2016; available at: <http://www.lex.pl/czytaj/-/artykul/polskie-wiezienia-nie-sa-przystosowane-dla-niepelnosprawnych?refererPlid=5267565> (date of access: 31st August 2016).

¹⁵ The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015, p. 14.

¹⁶ *Ibidem*, p. 29.

¹⁷ *Ibidem*, p. 29.

¹⁸ *Ibidem*, p. 183.

in the future (e.g. issues concerning lack of handrails and other accommodations in prison baths – see. par. 148 of the *D.G.* judgment).

The experts of the National Preventive Mechanism have also concluded that in order for the persons with disabilities to enjoy their right thoroughly, also the space outside cells has to be accommodated¹⁹ (e.g. by installing telephones and benches on a height accessible also to persons with disabilities).

It has been also noted, that in 5 out of the visited penitentiary units, the premises of the medical wards have not been accommodated for persons with disabilities²⁰.

In HFHR's opinion, arguments presented above should be sufficient to conclude that in the field of architectural accommodations in prison environment, there is still a lot of space for further improvements. Activities undertaken by the authorities in this sphere should be thus intensified.

4. Issues related to lack of proper training of prison's and other detention facilities staff

In the aforementioned response of the Director General of the Prison Service to the Polish Ombudsman, the Director stated that the educational activities concerning raising awareness of the Prison Service officers in the area of the needs of persons with disabilities and human rights in general are realized in the course of continuous vocational training for the officers²¹. Also, according to the Updated Action Report, when it comes to the training of Prison Service:

A unit of the Central Board of Prison Service, competent in the matters of preparing the position of the Prison Service with regards to the applications filed to the Court, organizes briefings during which the main issues in the Court's case law, including judgements and methods of their execution, are presented to other Prison Service units. Moreover, the vocational training programme includes the issues of the right to appropriate health care of inmates and a discussion on the provisions on access to medical care of the European Prison Regulations. During situational workshops and within discussions on psycho-social aspects of the penalty of imprisonment a number of difficult situations is mentioned, e.g. the symptoms of an illness or procedures of conduct in a case of self-aggression of inmates. Standards of prison life, including medical care, as set forth in the Minimal Rules and European Prison Rules, are discussed within the subject "International standards of procedure with persons deprived of liberty", organized for the students of the first-level officer school²².

¹⁹ *Ibidem*, p. 30.

²⁰ *Ibidem*, p. 29. These issues have been identified Remand Centers in Starogard Gdański, Opole, Grójec, Radom and Gębarzewo.

²¹ The response from the 5th January 2016 of the Director General of the Prison Service to the Polish Ombudsman (BDG-070-28/15/929), p. 2.

²² Updated action report submitted on the 21st June 2016. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2016]790), p. 17.

The representatives of the Prison Service have also participated in external events (scientific conferences *etc.*) related to the issues of, *e.g.* the promotion of physical activity of persons with disabilities²³.

Despite the aforementioned information, the experts of the National Preventive Mechanism have concluded that the staff of the penitentiary units does not have sufficient knowledge on the specialized needs of persons with disabilities. The Polish Ombudsman has on the 21st May 2015 postulated that gaining of such knowledge should happen by the means of special trainings provided for the members of the Prison Service²⁴.

The Prison Service has organized on the 23rd September 2015 in Remand Centre Warszawa-Białołęka a pilot-training "Overcoming barriers in contacts with persons with disabilities in the context of penitentiary detention" (pol. *Przełamywanie barier w postępowaniu z osobami niepełnosprawnymi przebywającymi w warunkach izolacji penitencjarnej*). It was conducted by the Foundation *Polska bez barier* employee. There were 10 training-session of that kind organised in whole of Poland²⁵.

Due to the fact that the training conducted on 23rd September 2015 was a "pilot-training", in the opinion of HFHR, one should with cautious reserve assess the statements made by the authorities that awareness of the Prison Service officers in the area of the needs of persons with disabilities is raised in the course of continuous vocational training within the Prison Service staff.

Lack of awareness and sensitivity of the Prison Service staff is also, in our opinion, clearly visible in cases brought to the attention of HFHR by individual complaints of inmates. Selected cases have been described in section below.

5. Complaints and letters directed by detained persons to the HFHR

It is worth noting that detainees in Poland issue a significant number of motions and complaints. According to the Updated Action Report, number of claims examined in 2012-2014 by the organs of the Prison Service on medical care alone amounted to 22 259. From this number, only 167 were considered to be justified (in 3 278 cases explanation and information was provided)²⁶.

²³ See, *e.g.* information on participation of Prison Service representatives in a conference on persons with disabilities organised by the Technical University in Opole in May 2016: <http://www.sw.gov.pl/pl/aktualnosci-z-jednostek/news,40094,sluzba-wiezienna-podczas.html> (date of access: 31st August 2016).

²⁴ The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015, p. 14.

²⁵ The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015, p. 29-30.

²⁶ Updated action report submitted on the 21st June 2016. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2016]790), p. 14.

Letters received from inmates often result in HFHR's interventions with the penitentiary unit authorities.

The HFHR has in 2015 intervened in an individual case of Mr. X.Y. who is a person with disability, bound to a wheelchair (he has a paralysis from waist below and is also suffering from several other health-related issues, including post-traumatic epilepsy and diabetes). Due to his condition, he required assistance in almost all everyday activities: showering, using the toilet *etc.* The only assistance provided by the prison authorities to Mr. X.Y. was the training of another detainee to provide help to persons with disabilities. This situation alone raised concerns in light of the ECtHR case-law. Mr. X.Y. was nonetheless deprived of even this limited assistance due to the fact that the aforementioned detainee was hospitalized. Mr. X.Y. was for numerous hours bereft of any help or assistance – this was particularly problematic for him due to the fact that he was unable to maintain proper hygiene (due to sphincter paralysis).

Another HFHR's intervention concerned the case of Mr. A.K. – an inmate after leg amputation. He was on 24th September 2015 informed that he should pick up from the prison warehouse a package containing a TV. In order to pick up the package from the warehouse, Mr. A.K. has requested the ward to provide him with a wheelchair. The ward denied him his request without providing any reasoning for his denial. Due to this fact, Mr. A.K. required help from other co-prisoners to transport the package. The HFHR requested the prison authorities to explain the situation. The Director of the remand center found the ward's behavior complied with the requirements of the law. He argued that the wards are not, under the domestic law²⁷, allowed to distribute orthopaedic equipment to inmates. He also stated that Mr A.K. artificial limb functioned properly, and there was no indication that he needed crutches or a wheelchair.

In HFHR's opinion, such situations are yet another proof that persons with physical disabilities may face unnecessary burdens in everyday functioning in penitentiary units in Poland.

6. Insufficient financial resources for the National Preventive Mechanism activities

In the Updated Action Report delivered by the Polish authorities on 21st June 2016, there is a separate section dedicated to the Polish Ombudsman Office:

The Polish Ombudsman's Office has a special section that concerns itself with detainees and prisoners. It also operates as the National Preventative Mechanism (NPM) in terms of the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This means that it is actively involved in inspecting prisons. It appears that in 2010 18% of the

²⁷ The Ordinance of the Minister of Justice from 13th November 2003 concerning conditions and means of providing detainees in prison and remand centers in prostheses, orthopaedic equipment and other aids (Official Journal from 2003 pos. 1986).

cases in which this section was asked to act had to do with prison conditions and 11% with medical care. On these matters the Ombudsman cannot make binding decisions that overrule the prison and medical authorities.²⁸

The importance of the Ombudsman's Office activities in the capacity of the National Preventive Mechanism is, in HFHR's opinion, paramount and indubitable.

Taking the abovementioned into account, we would like to raise the Committee of Ministers attention to the fact, that despite the growing needs, the Ombudsman's Office budget has been limited. According to annual financial report, there were PLN 3 049 507, 00 spent on the functioning of the National Preventive Mechanism in 2015. The Ombudsman's Office forecasted that the needs of the Office will be more the 7 million PLN higher than in 2015 and yet, the overall budget of the institution has been reduced²⁹. This is particularly problematic due to the fact, that the staff of the National Preventive Mechanism in 2015 effectively consisted of 8-9 persons (some of the team's members were on long-term leave).

The HFHR strongly believes that the reduction of Ombudsman's Office budget might seriously undermine the effectiveness of the functioning of the National Preventive Mechanism in Poland. This might in turn result in the emergence of issues similar as those identified in *D.G. against Poland* judgment.

7. Conclusions and recommendations

Having regard to the abovementioned argumentation, the HFHR requests that the Committee of Ministers continues its scrupulous supervision in *Kaprykowski* group of cases, including the supervision of the execution of *D.G.* judgment. In our opinion, the general measures taken by the Polish authorities (described, *inter alia* in the Updated Action Report) are promising but not sufficient to limit the possibilities of further violations of the Convention similar as those found in the *D.G.* judgment.

The Polish State should provide to the detained persons with physical disabilities, on the basis of the principles of nondiscrimination, human dignity and the prohibition of inhumane treatment, basic accommodations, including unrestricted access to sanitary facilities, adequate healthcare, necessarily rehabilitation, the ability to move around and leave the cell without seeking assistance from inmates. It is worth underlining that the issues identified above can be also perceived from the perspective of realisation of

²⁸ Updated action report submitted on the 21st June 2016. Communication from Polish authorities concerning the *Kaprykowski* group of cases. (DH-DD[2016]790), p. 15.

²⁹ The Ombudsman's statement from 28th January 2016 concerning the reduction of the Ombudsman's Office budget: <https://www.rpo.gov.pl/pl/content/oswiadczenie-rpo-zmniejszenie-budzetu-rzecznika-praw-obywatelskich-dotknie-obywateli> (date of access: 31st August 2016).

obligations arising from Article 15 of the Convention on the Rights of Persons with Disabilities³⁰.

In HFHR's opinion, the Polish authorities, in order to fully implement the judgment in case *D.G. against Poland*, should:

- intensify the endeavors to ensure proper environmental accommodations for persons with physical disabilities in all penitentiary facilities;
- organize dedicated trainings for the whole staff of Prison Service that would be aimed at raising awareness of the needs of persons with disabilities;
- provide adequate funding for the National Preventive Mechanism.

We hope that this written communication will prove to be useful for the Committee of Ministers in realizing the task defined in Article 46(2) of the Convention.

The communication was prepared by Michał Kopczyński, lawyer of the Helsinki Foundation for Human Rights with the support of Katarzyna Wiśniewska, the coordinator of the Strategic Litigation Program.

On behalf of the Helsinki Foundation for Human Rights,



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President of the Board

³⁰ The Ombudsman's Report from years 2012-2014 on the realization by Poland of the Convention on the Rights of Persons with Disabilities, pp. 39-43. Document available at: <https://www.rpo.gov.pl/sites/default/files/Sprawozdanie%20KPON%202015.pdf> (date of access: 31st August 2016).