HELSINKI FOUNDATION FOR HUMAN RIGHTS

A JUDGMENT IN STRASBOURG IS NOT THE END!

Report on the execution of judgments of the European Court of Human Rights

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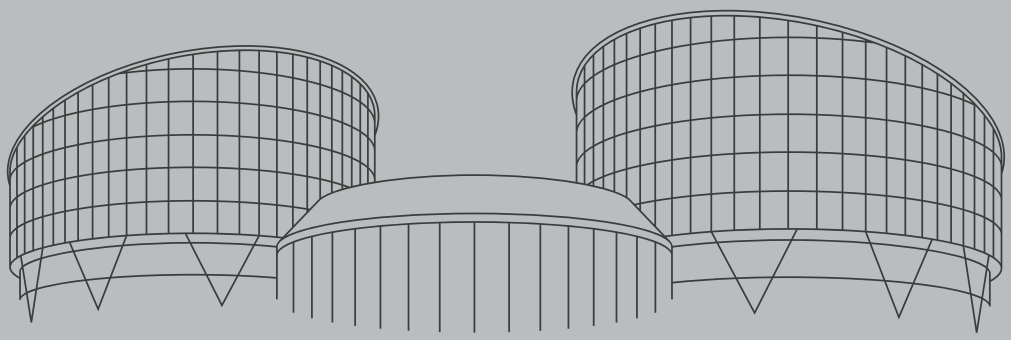
25 years

with the European Convention on Human Rights in Poland



1145 judgments handed down in cases brought against Poland

958 judgments in which the Court found that Poland had breached the Convention

130 proceedings regarding Poland and other Council of Europe Member States in which the HFHR approached the ECtHR

70 applications submitted to the ECtHR by the HFHR in cases involving Poland

31 amicus curiae briefs filed by the HFHR in Polish cases pending before the Court

20 different occasions, on which the HFHR approached the Council of Ministers in matters involving the execution of judgments of the ECtHR by Poland

The status as of 31 December 2017.

Helsinki Foundation for Human Rights

The **Helsinki Foundation for Human Rights** ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

The HFHR has been operating the **Strategic Litigation Programme**, as part of which the Foundation originates or engages in strategically significant court and administrative proceedings. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

Furthermore, the HFHR is a founding member of the international non-governmental organisation **European Implementation Network ("EIN")**, whose goal is to promote the involvement of non-governmental organisations in the execution of judgments at Strasbourg level[1]. This Strasbourg-based organisation was established in 2017. The EIN holds regular training courses for non-governmental organisations and lawyers on the execution of judgments procedures before the Council of Ministers. EIN has developed the first handbook which comprehensively discusses the scope of possible involvement of NGOs in the process of execution of ECtHR judgments and indicates what should be included in NGO communications compiled under Article 9 of the Court's Rules of Procedure[2]. The HFHR is a member of the EIN Board.

1 Home page of the organisation: http://www.einnetwork.org/.

2 The handbook is available at https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5b9a2d1dc2241b0df20e3e54/1536830763149/Handbook-EIN-Web-FINAL-compress.pdf.

Spis treści

Summary

- The judgments of the Strasbourg Court play a pivotal role in the development of human rights standards in Europe.
- On 19 January 2018, 25 years have passed since Poland ratified the European Convention on Human Rights.
- By the end of 2017, the ECtHR handed down 1145 judgments in cases brought against Poland. In 958 judgments the Court found that Poland had breached the Convention.
- However, the delivery of a judgment in a specific case is not the end of the process designed to bring the national law and practices of national authorities in line with the European Convention on Human Rights.
- Many of the Court's rulings issued in Polish cases have forced the national authorities to change the law or judicial practice.
- The Committee of Ministers of the Council of Europe supervises the execution of judgments and organises special sessions our time a year to discuss the progress of the Council's Member States in the implementation of the Strasbourg case law.
- The Committee of Ministers has supervised the execution of judgments in 1652 cases against Poland, acknowledging to date the execution of 1532 cases.
- The Committee currently supervises the execution of the ECtHR rulings in 120 Polish cases.
- Often, the introduction of legislative changes in the wake of the Court's judgment is a lengthy process, which can even take more than five years.
- In *Beller v. Poland*, a case concerning the excessive length of administrative proceedings, which is currently pending before the Council of Europe's Committee of Ministers, the judgment is yet to be considered executed, despite it having been passed 13 years ago!
- An example of the impact of a judgment of the ECtHR on the national legal system is the amendment to the Mental Health Protection Act that became effective on 1 January 2018. The amendment modified the procedures for placing persons with mental disorders in social care homes and the rules governing extensions of such placements. As a result, the Act remains in full compliance with the standards resulting from the ECtHR judgment handed down in October 2012 in the case of *Kędzior v. Poland*.

- A special role in the Committee's proceedings is played by non-governmental organisations, which have the right to submit observations on changes introduced at the national level.
- In Polish cases, the Helsinki Foundation for Human Rights and the Polish Bar Council are the most active NGOs participating in proceedings before the Committee.
- Recently, members of civil society have been actively speaking out on the execution of the judgment in the case *P. and S. v. Poland*, which concerned ensuring effective access to legal abortion in the event of conception being a consequence of a prohibited act.
- A number of judgments issued against Poland, which address important human rights aspects (personal liberty, prohibition of torture, inhuman or degrading treatment or punishment, the freedom of speech or the right to a fair trial), are still considered as non-executed by the Council of Europe's Committee of Ministers.
- It seems appropriate to strengthen the process of execution of ECtHR judgments in Poland at the institutional level. The Foundation believes that the current Parliament's failure to establish a Permanent Subcommittee on the Execution of Judgments of the European Court of Human Rights is by no means conducive to the full implementation of the Court's "Polish" judgements.
- On the other hand, a positive example of the Parliament's involvement in the process of execution of ECtHR judgments is the amendment to the Juvenile Justice Act proposed by the Senate in response to a petition of the HFHR concerning the implementation of the judgment in *Grabowski v. Poland*.

I. Introduction

This year 25 years have passed since coming into force of the Convention for the Protection of Human Rights and Fundamental Freedoms, known also as the European Convention on Human Rights (the "ECHR"). A quarter of a century of submitting applications to the European Court of Human Rights (the "ECtHR") and so much of its jurisprudence involving Polish cases clearly leads to reflections and summaries. During those 25 years, the application to the ECtHR has ceased to be a novel measure and the possibility of submitting it has not only become a permanent feature of the legal system but also has been widely recognised by members of the public. The popularity of this legal route is evidenced mainly by the number of applications submitted to the Court and ECtHR rulings in Polish cases. On the one hand, the use of this legal instrument is something to be glad about, as it shows that Polish society has absorbed the value system of the Council of Europe as defined in the Convention and the Additional Protocols. On the other hand, the number of judgments in Polish cases raises many uncomfortable questions, especially where the ECtHR consistently confirms complaints that involve the same or very similar facts, which lead to violations of the same provisions of the Convention. We have been dealing with such situations for 25 years, in matters such as abuses of pre-trial detention (Article 5), excessively lengthy proceedings (Article 6) or the unreasonable use of violence by the Police (Article 3).

It seems obvious that since a state has signed and ratified the Convention, it has not only declared (in good faith) its willingness to adhere to the values set out in the ECHR but also has surrendered to the jurisdiction of the Court, i.e. it has committed itself to enforce judgments handed down by the ECtHR. Seemingly, Poland, as a Party to the Convention, has no problems with this and timely pays damages to the victims of violations. However, the execution of a judgment cannot be equated solely with the acknowledgement of a fact of violation and the payment of compensation to an individual. Proper execution of the Court's ruling, in addition to the obvious and necessary compensation for a violation, should also (or perhaps, from the social perspective, above all) entail a situation where the State has modified its laws to bring them in line with the standards of the Convention. The payment of compensation by itself, as crucial as it is, will not change the letter of law and the practice of its application. To achieve that, it is necessary to read carefully a judgment's reasons and draw conclusions for the future. By recognising the jurisdiction of the ECtHR, a state agrees to the implementation of Strasbourg jurisprudence into its legislation. Furthermore, the state consents that the status of implementation will periodically be reviewed by the Committee of Ministers of the Council of Europe, which should lead to obtaining improvements in the legal infrastructure for human rights in that State. It should be noted here that the ECtHR's rulings issued in cases involving Poland have many times led to changes in law or judicial practice that were favourable for citizens.

The Polish experience regarding the execution of ECtHR's judgments shows that Polish authorities have an ambivalent attitude toward this matter. Some of the issues that arise in the Court's case-law have more "luck" and are resolved within "a reasonable time", while others are less fortunate and have to wait years before they are addressed. The main reason for this dichotomy is the nature of an issue. There are, for example, cases in which it is surprising that the authorities themselves have not noticed the clear incompatibility of national legislation with Strasbourg standards, and the Court's intervention was necessary for it to be taken care of (e.g. *Grabowski v. Poland*). In such cases, the ECtHR's decisions do not arouse controversy and it is quite easy to implement this standard into Polish law.

The problem arises when, despite the ECtHR's judgment (or, worse, many judgments), Poland has not changed for years its laws governing the issue in question to comply with the Court's suggestions. Certainly, there are many reasons for this. First, blame can be placed on the inertia of the legal system, which seems to manifest an inherent reluctant to changes (an example of this is the routine-fuelled automatism in the operations of state bodies). A significant factor here can also be the slow pace of the legislative process, especially where national authorities' disagreement with the Court's rulings on a given issue results from substantive or axiological differences (this indeed happens, because of the nature of human rights issues) and, all the more so, if a legislative change is to have financial consequences. Finally, ambition is another factor that plays a part. State authorities are rather unwilling to yield to the pressure of international bodies (even if such bodies are positively inclined towards Poland), especially if they can name other states, in which, according to them, the situation is even worse. Moreover, the elimination of the causes of violations of human rights protected by the Convention and Additional Protocols sometimes requires not only a simple legislative amendment but also serious structural reforms, which additionally discourages state authorities from making any changes.

While one should acknowledge the difficulties faced by state authorities in the process of implementation of the Strasbourg Court's case law, it should be reiterated that by accepting the ECtHR jurisdiction every State has undertaken to execute all the judgments of the Court, and therefore it cannot restrict itself to those which, for various reasons, are easy to execute and omit those whose execution requires overcoming more difficult barriers. Such a practice would have to be considered highly arbitrary and incompatible with both the letter and the spirit of the Convention[3]. What is more, it would be dangerous for the observance of fundamental human rights and freedoms in Poland, as it would allow for the selective protection of our rights depending on the current needs of those in power. It is therefore in the interest of us, the people of Poland, to increase social pressure on public authorities and to effectively call for respect for our freedoms, which inevitably involve the reliable execution of ECtHR judgments.

3 The preamble of the ECHR reads as follows: "Reaffirming their deep faith in those fundamental freedoms which are the foundation of justice and peace in the world and the preservation of which is based principally on the one hand on a genuinely democratic political system and, on the other hand, on a common understanding and common respect for the human rights to which they refer...".

II. An introduction to the institutional system for the execution of judgments in Poland

The responsibility for the execution of ECtHR judgments in Poland lies with the Plenipotentiary of the Minister of Foreign Affairs for Proceedings before the ECtHR (the "Plenipotentiary")[4]. The Plenipotentiary's duties include the preparation of action plans and action reports concerning implemented actions plans. These documents are presented to the Committee of the Council of Ministers of the Council of Europe. An action plan lists the efforts required to implement general measures, such as legislative changes or changes in the practice of individual government bodies. Action reports are submitted when the authorities consider that an action plan has been implemented and the judgment should be considered executed. Based on the Government's report, the Committee of Ministers decides to close the case, or obliges the state to carry out additional activities. When working on the implementation of particular objectives of an action plan, the Plenipotentiary cooperates with relevant ministries.

Since 2012, the Plenipotentiary has been preparing annual reports summarising its activities related to the execution of ECtHR judgments[5]. According to the Report for 2017, the Plenipotentiary presented to the Committee of Ministers 26 action plans and action reports on the execution of judgments, as well as 5 briefs notifying the implementation of individual or general measures in a case[6].

Cooperation between individual ministries and the Plenipotentiary is envisaged in the 2007 Programme of Government Activities for the Execution of ECtHR Judgments[7]. Members of the Interministerial Team, which has been set up as part of the Programme, work together on the execution of judgments. The HFHR joins other representatives of civil society to participate in annual meetings devoted to the execution of judgments. The meetings provide an opportunity for a direct dialogue between civil society representatives and public authorities on the execution of individual judgments.

Another crucial aspect of the mutual cooperation in the execution of judgments is the opportunity of the HFHR's participation in sessions of the Senate's Rule of Law and Petitions Committee devoted to annual reports on the Government's efforts to execute ECtHR judgments.

4 As stipulated in s. 2(1)(4) of Order No. 73 of the President of the Council of Ministers of 19 July 2007 on the establishment of the Team for the European Court of Human Rights.

5 The reports can be accessed at https://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/wykonywanie-wyrokow-europejskiego-trybunalu-praw-czlowieka.

6 Information given on page 4 of the report available at https://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/wykonywanie-wyrokow-europejskiego-trybunalu-praw-czlowieka/.

7 The Programme is available at: https://msz.gov.pl/resource/f8d245b2-1a5f-4e9c-9e37-85b9d15ca613:JCR.

Notably, the HFHR has successfully called for establishing a permanent subcommittee for Poland's execution of judgments of the European Court of Human Rights, which was created at a joint session of the Sejm's Justice and Human Rights Committee and the Foreign Affairs Committee on 5 February 2014. The subcommittee's mandate included the performance of a thorough review of the Council of Ministers' communications on the state of the execution of ECtHR judgments by Poland, the monitoring of the Court's judgments issued in Polish cases and the preparation of draft desiderata or opinions of the Justice and Human Rights Committee and the Foreign Affairs Committee on the Government's implementation of the obligation to execute ECtHR judgements. This was an element of a general trend, promoted by the Parliamentary Assembly of the Council of Europe, to increase the involvement of national parliaments and to strengthen cooperation between the various actors responsible for implementing ECtHR judgments[8]. Poland was one of the first members of the Council of Europe to establish such a subcommittee. Unfortunately, the subcommittee was discontinued at the end of 2015 and, despite appeals from the HFHR[9] and the Polish Ombudsman[10], it since has not been reinstated. The failure to appoint a new subcommittee is a setback to the institutional execution of ECtHR judgments in Poland.

8 Parliamentary Assembly of the Council of Europe: Resolution 1823 (2011), National parliaments: guarantors of human rights in Europe, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18011&lang=enL182.

9 The HFHR call for action is available at http://www.hfhr.pl/wp-content/uploads/2016/02/HFPC_wystapienie_17022016_sejm.pdf.

10 The Ombudsman's statement is available at https://www.rpo.gov.pl/pl/content/do-przewodniczacego-sejmowej-komisji-sprawiedliwosci-i-praw-czlowieka-ws-powolania-podkomisji-ds.

III. The execution of ECtHR judgments before the Committee of Ministers

Non-governmental organisations have an opportunity to submit communications to the Committee of Ministers to express their views on the state of execution of a specific judgment. This opportunity is stipulated in Rule 9 par. 3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (the "Rules")[11]. As a rule, such communications are presented in relation to action plans or action reports submitted by the Government. The HFHR regularly uses the opportunity created by Rule 9 to present communications concerning ECtHR cases. Examples of the HFHR's interventions will be presented later in this report. The purpose of these communications is to inform the Committee of Ministers (or, more precisely, the Council of Europe's Department for the Execution of Judgments of the ECtHR) of the status of implementation of a specific ruling. The communications also provide an opportunity to indicate the directions and content of concrete actions that authorities should take in order to execute a judgment. The Council of Europe's Department for the Execution of Judgments of the ECtHR has itself acknowledged that interventions of non-governmental organisations constitute an important source of knowledge, often counterbalancing viewpoints presented in government documents.

The process of execution of judgments before the Committee of Ministers of the Council of Europe

11 The Rules can be accessed at https://rm.coe.int/16806eebf0.

IV. The execution of judgments finding a violation of the prohibition of torture, inhuman or degrading treatment or punishment

ARTICLE 3
Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ECtHR judgment of 24 July 2014, *Al Nashiri v. Poland* and *Abu Zubaydah v. Poland*, applications nos. 28761/11 and 7511/13

1. Timeline

1. The period covered by the application: **2002-2003**, **after 2008**
2. Date of lodging application to the ECtHR: **6 May 2011**
3. Date of communicating the case to Poland: **10 July 2012**
4. Date of ECtHR judgment: **24 July 2014** (final as of **16 February 2015**)
5. Date of the action plan: **20 August 2015**
6. Date of action reports:
   - **22 June 2018,**
   - **10 October 2017,**
   - **24 March 2017,**
   - **21 October 2016,**
   - **18 May 2016,**
   - **20 November 2015.**

2. Case summary

The judgments in the cases of Al Nashiri and Abu Zubaydah concern the existence of a secret facility in Poland, which was reportedly used to hold individuals detained by US and Coalition forces (e.g. in Afghanistan). The detainees were to be imprisoned at the facility without a court order and were reportedly subjected to interrogation methods that violated the prohibition of degrading and inhuman treatment and the prohibition of torture. They were subsequently transferred to secret facilities in other countries collaborating with the USA. Both applicants are currently imprisoned at the Guantanamo military base. The domestic criminal investigation that has been conducted in this case since 2008 has yet to identify those responsible for the existence of a secret CIA facility in Poland.

3. ECtHR judgment

In 2014, the European Court of Human Rights delivered two rulings in cases brought against Poland and involving the existence of a secret CIA facility in Poland, which had been reportedly used to hold suspected terrorists. The Court found a violation of Article 3 of the Convention, which involved both substantive and procedural aspects. The ECtHR also found violations of the applicants' right to personal liberty and their right to a fair trial, which was a consequence of the applicants having suffered a flagrant denial of justice. In the case of Al Nashiri, an infringement of Article 2 was also found in relation to the applicant's exposure to a real risk of being subjected to the death penalty.

4. Actions of national authorities

The applicants were paid the just satisfaction awarded by the ECtHR. The amount awarded to Abu Zubaydah has been paid to a court escrow account due to the fact that the applicant's name appears on a list of suspected terrorists (based on a United Nations resolution adopted in 2001). As part of the ongoing criminal proceedings, requests for legal assistance were sent to other countries. Most of these requests remained unresponded. The latest action plan referred to an opinion of experts in international law, which was attached to the case file. Furthermore, the Government informs that counsel of the aggrieved parties have been accessing the case files on a regular basis. As per the action plan from May 2018, the investigation was extended until August 2018. According to information obtained from the Regional Public Prosecutor's Office in Kraków, one person was designated as the suspect in the case. Some of the case materials were transmitted to separate proceedings, which were later discontinued as time-barred. The media reported that the separate proceedings concerned the failure of the then Prosecutor General to initiate appropriate preliminary proceedings[12].

12 https://www.tvn24.pl/wiadomosci-z-kraju,3/tajne-wiezenia-cia-w-polsce-pierwszy-umorzony-watek,637940.html.

After the ECtHR delivered the judgments, attempts were made to obtain diplomatic assurances from the USA that Al Nashiri would not be subject to the death penalty, which the US administration explicitly denied.

Abu Zubaydah is detained in Guantanamo, although no charges have yet been brought against him.

No general measures (such as an amendment to legislation) have been taken to prevent similar violations in the future.

The Prosecutor's Office does not keep the public informed about the course of the criminal proceedings on CIA secret prisons in Poland.

5. HFHR recommendations

- Polish authorities should conduct an effective investigation to determine key facts related to the existence of a secret CIA facility in Poland and identify those responsible for its establishment.
- The execution of ECtHR judgments in Al Nashiri and Abu Zubaydah also requires the obtaining of effective diplomatic guarantees for the applicants, in particular, the guarantee that there will face the death penalty.
- The prosecution service should regularly and promptly inform the public about the course of the criminal proceedings conducted in the case of the CIA secret prison in Poland.
- At the general level, it also seems necessary to ensure the effective control over the clandestine operations of intelligence services in Poland.

V. The execution of judgments finding a violation of the right to liberty and security of person

ARTICLE 5
Right to liberty and security of person

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ...

A. ECtHR judgment of 16 October 2012, *Kędzior v. Poland*, application no. 45026/07

1. Timeline

1. The period covered by the application: from **11 February 2002** (the applicant's placement at a social care home) to **16 October 2012** (date of judgment).
2. Date of lodging application to the ECtHR: **4 October 2007**
3. Date of communicating the case to Poland: **7 May 2009**
4. Date of ECtHR judgment: **16 October 2012**
5. Date of the action plans:
   - **8 July 2014** (first plan)
   - **2 December 2015** (update)
   - **21 June 2016** (update)
   - **17 March 2017** (update)
6. Dates of decisions of the Council of Europe's Committee of Ministers:
   - **8-10 March 2016**: an invitation to present planned legislative measures aiming to execute the judgment was sent.
   - **7 June 2017**: the invitation was repeated.
   - **7 June 2018**: the supervision procedure was closed.

7 Date of action reports:

- **27 March 2018**
- **24 May 2018**

8 Timeline of legislative implementation:

- HFHR opinion issued on **2 November 2016**
- The law promulgated on **27 December 2017**
- The law became effective on **1 January 2018**

9 Execution closure date: **7 June 2018**

2. Case summary

In 2001, Stanisław Kędzior was completely deprived of legal capacity by virtue of a court's order. Afterwards, brother of Mr Kędzior, acting as his legal guardian, requested Mr Kędzior's admission to a social care home in Ruda Różaniecka. On 8 February 2002, director of the District Family Assistance Centre in Lubaczów issued a decision to place Stanisław Kędzior at the social care home, in accordance with Mr Kędzior guardian's request. The guardian did not seek a guardianship court's approval of Mr Kędzior's placement. In February 2002, Stanisław Kędzior was placed at the social care home. From the very beginning, Stanisław Kędzior opposed the placement, but his protests addressed to a court did not have any effect as the president of the court replied that the placement was lawful.

Since 2002, Stanisław Kędzior repeatedly tried to obtain a judicial revocation of the incapacitation order. Initially, this was impossible due to the wording of the Code of Civil Procedure (CCivP) and the absence of Mr Kędzior's capacity to act in court proceedings, and later, after the judgment of the Constitutional Tribunal of 7 March 2007[13] and the ensuing amendment to Article 559 CCivP, courts dismissed his submissions. In the course of a proceeding conducted in 2009, court-appointed experts drew the court's attention to the fact that, in view of the applicant's state of health, it was completely pointless to notify him of the decisions made in his case. The Court resolved to stop sending letters to the applicant and appointed a guardian ad litem who would represent him in court proceedings.

In these circumstances, Mr Kędzior lodged an application with the ECtHR in 2007.

In 2012, which was before the delivery of the ECtHR's judgment in his case, Mr Kędzior was transferred to a social care home in Sośnica. Mr Kędzior's legal guardian obtained the approval of a guardianship court to transfer his brother to a new facility.

13 Case no. K 28/05.

3. ECtHR judgment

On 16 October 2012, the ECtHR delivered its judgment in the case of Stanisław Kędzior, finding a violation of Articles 5(1), 5(4) and 6(1) of the ECHR.

As regards the violation of art. 5(1) ECHR, the Court noted that Polish law did not contain any procedural guarantees for totally incapacitated persons involuntarily placed in social care homes. In particular, the law did not provide for any periodic reviews of patients' mental health. It was not until 2009, which was 7 years after his institutionalisation, that S. Kędzior was re-evaluated by a psychiatrist.

The Court also found a violation of Article 5(4) of the Convention, which provides that every person deprived of their liberty is entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and a release ordered if the detention is not lawful. Polish law did not provide for an automatic periodic judicial review in such cases, nor did it allow persons totally deprived of their legal capacity to effectively request such a review. The ECtHR highlighted that the relevant Polish legislation clearly failed to fully address this issue.

Finally, Poland's violation of Article 6 ECHR existed only in the period prior to 2009, during which the applicant could not initiate proceedings for the revocation of the incapacitation order: before 2007, this was impossible due to the wording of the Code of Civil Procedure and later – due to the approach of the courts which kept rejecting Mr Kędzior's submissions on procedural grounds.

4. Actions of national authorities

The Act of 24 November 2017 on the amendment to the Mental Health Protection Act and some other acts (Journal of Laws of 2017, item 2439) became effective on 1 January 2018. The 2017 Act changed the procedures for placing persons with mental disorders in social care homes and the rules governing extensions of such placements.

According to the new law, statutory representatives wishing to place their wards (incapacitated persons or minors) in a social care home must obtain an authorisation from a guardianship court. In the case of placements of a minor over 16 years of age or an adult who has been totally deprived of legal capacity but is capable of giving consent, it is also necessary to obtain the consent of these persons. If the statutory representative and the ward give contradictory statements in this respect, the matter of the ward's admission to a social care home is resolved by a guardianship court.

The amended Mental Health Protection Act also stipulates that a person placed in a social care home must undergo periodic mental health evaluations intended to determine whether it is reasonable to extend this person's placement in the facility. Such evaluations should be performed at least once in 6 months.

The amendment also granted legal remedies to persons placed in social care homes. Under the new law, also legally incapacitated persons may apply to a court for amending a decision on the

admission to a social care home. If the placement was ordered on grounds other than a court ruling, a person placed at a social care home (and other entities indicated in the Act) may apply to a guardianship court for a release from the obligation to remain in this institution.

As a result, the Act remains in full compliance with the standards resulting from the ECtHR judgment handed down in the *Kędzior* case. In addition to the above, the amendment introduced a number of other significant improvements in the psychiatric and care placement procedure such as the obligation for the court to appoint an ex officio attorney for the person concerned as well as the rules for the procedure governing transfers between social care homes.

B. ECtHR judgment of 30 June 2015, *Grabowski v. Poland*, application no. 57722/12

1. Timeline

1. A preliminary inquiry into the applicant's case launched on **7 May 2012**
2. Date of lodging application to the ECtHR: **31 August 2012**
3. Date of communicating the case to Poland: **30 January 2013**
4. Date of ECtHR judgment: **30 June 2015**
5. The judgment became final on **30 September 2015**
6. Date of the action plans:
   - **24 June 2016**
   - **18 October 2016** (updated action plan)
   - **18 December 2017**
7. Dates of decisions of the Committee of Ministers:
   - **6-8 December 2016**
   - **15 March 2018**
8. Date of HFHR petition to the Senate: **19 April 2017**[14]
9. Status of the proceedings before the Committee of Ministers: enhanced supervision

14 http://www.hfhr.pl/wp-content/uploads/2017/04/HFPC-petycja-nieletni-04-2017.pdf.

2. Case summary

The applicant, a minor at the time, was arrested on suspicion of three counts of robbery and attempted robbery with the use of a dangerous object. Initially, he was detained in a police remand home for children. On 7 May 2012, a district court initiated a preliminary inquiry to determine whether the applicant committed the alleged offences. On the same day, the court decided to place the applicant in a shelter for juveniles for a period of three months. The correctional proceedings in Mr Grabowski's case were initiated on 27 July 2012. On 9 August 2012, Mr Grabowski's attorney requested his immediate release due to the expiry of the placement's period. The attorney argued that the three-month placement period had ended on 7 August 2012 and that no extension had been ordered. On 9 August 2012, a court rejected the attorney's request for the applicant's release from the shelter. By letter dated 16 August 2012, the court notified the attorney that after the commencement of correctional proceedings on 27 July 2012, the court, in accordance with Article 27(3) of the Juvenile Justice Act, is not required to issue a separate decision on the extension of a minor's placement in a shelter for juveniles[15].

3. ECtHR judgment

The ECtHR held that the practice of Polish courts whereby no separate decision to extend a minor's detention in a juvenile shelter is required in a situation where the juvenile justice proceedings enter into its investigative phase violated the Convention for the Protection of Human Rights and Fundamental Freedoms. Poland was obliged to change the existing law.

Consequently, the ECtHR found Poland in violation of Articles 5(1) and 5(4) of the Convention. According to the Court's assessment, the applicant's detention in a shelter for juveniles was based on the practice which developed in the absence of appropriate provisions of the Juvenile Justice Act and not on a concrete legal provision or a judicial decision.

The Court emphasised that the above regulations fell short of the standard of the "quality of the law" under Article 5(1) of the Convention, as well as the principle of "legal certainty", which constitutes a key element of the rule of law. In the Court's view, Article 27(6) of the Juvenile Justice Act constitutes an important guarantee of juveniles' rights, but, in the case in question, this provision did not in any way improve the applicant's situation.

The ECtHR also said that the proceedings commenced with an application for release, which aims at quashing or altering a preventive measure, might not meet the requirements of the judicial review under Convention Article 5(4) in a situation where the applicant's detention was not a consequence of the use of a preventive measure provided for in the Juvenile Justice Act (the placement in a shelter for juveniles), but resulted from the fact that a decision was issued to examine the case in the correctional proceedings pursuant to Article 42(2) of the Act. However, the Court did not take a clear position on this issue.

15 The facts of the case described according to information posted at the ECtHR's website.

4. Measures taken at national level

In order to promote the standards laid down in the judgment, Polish authorities communicated those standards to courts and organised courses on the rights of juveniles. Furthermore, the Rules governing the internal functioning of common courts were amended.

According to the HFHR, such actions are insufficient to execute the Strasbourg judgment. The judgment in *Grabowski v. Poland* should lead to the introduction of statutory guarantees concerning the placement of juveniles in shelters. In view of the above, in April 2017, the HFHR sent a petition to the Senate, requesting the launch of works on new rules governing court-ordered extensions of detention in shelters for juveniles[16]. Senators agreed with the HFHR's opinion and prepared a Senate-sponsored project that implements the Foundation's proposals and ensures the compliance of national legal regulations with Strasbourg standards[17]. The Foundation's petition was endorsed by the Ombudsman, Ombudsman for Children and the Polish Bar Council. The draft was submitted to the Sejm in April 2018, and next month it was presented for first reading in the Justice and Human Rights Committee[18].

The Government also points out that the Ministry of Justice is currently working on a draft law amending the Juvenile Justice Act, which is designed to be another measure of implementing the guidelines set in the ECtHR's judgment.

5. HFHR recommendations

In the opinion of the HFHR, the following actions should be taken in order to fully implement the *Grabowski* judgment:

- A rule should be added to the Juvenile Justice Act, which would oblige courts to periodically review (once in three months) whether a juvenile's detention in a shelter is justified, also after the juvenile's case is referred to the court for trial;
- Courts should also be required to issue a separate decision for each extension of detention in a shelter for juveniles. Such decisions should describe the circumstances that justify the decision in question;
- A procedure for the appellate review of a court's decision to extend the application of the measure should be established;
- The law should specify the maximum total duration of a juvenile's detention in a juvenile shelter (including the period before and after the referral of the case for trial).

The above proposals are included in the Senate's draft amendment to the Juvenile Justice Act.

16 HFHR Petition of 19 April 2017, available at http://www.hfhr.pl/wp-content/uploads/2017/04/HFPC-petycja-nieletni-04-2017.pdf.

17 Senate's proposal of an act amending the Juvenile Justice Act, available at http://orka.sejm.gov.pl/Druki8ka.nsf/0/20AB499B8CDB7AC3C125828700481C08/%24File/2521.pdf.

18 A description of the current stage of the legislative process can be found at http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=3F6228271E1920A7C12582870048A71A.

VI. The execution of judgments finding a violation of the right to a fair trial

ARTICLE 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

A. ECtHR judgment of 7 July 2015, *Rutkowski and Others v. Poland* (applications nos. 72287/10, 13927/11 and 46187/11)

1. Timeline

1 Timeline of cases of individual applicants

- A. *Wiesław Rutkowski v. Poland* (application no. 72287/10):
  - The arrest of the applicant: **18 September 2002**
  - Ruling on a complaint about the excessive length of the proceedings: **1 June 2010**
  - The acquittal of the applicant: **21 July 2010**
  - Lodging application to the ECtHR: **30 November 2010**
- B. *Mariusz Orlikowski v. Poland* (application no. 13927/11):
  - Statement of claims to the Regional Court in Łódź: **4 March 1999**
  - Ruling on a complaint about the excessive length of the proceedings: **2 June 2010**
  - Final judgment: **19 November 2010**
  - Lodging application to the ECtHR: **21 February 2011**

- C. *Aleksandra Grabowska v. Poland* (application no. 46187/11):
  - Motion for declaring the adverse possession of a property: **15 December 1999**
  - Ruling on a complaint about the excessive length of the proceedings: **31 January 2011**
  - Final judgment: **18 June 2013**
  - Lodging application to the ECtHR: **21 July 2011**

2. The case communicated to Poland on **2 October 2012**

3. ECtHR judgment: **7 July 2015**

4. The opinion of the HFHR regarding the proposal of legislative changes[19]: **29 April 2016**

5. Updated action report: **2 October 2017**

6. An amendment to the Excessively Lengthy Proceedings Complaint Act enters into force: **6 January 2017**

7. HFHR communication to the Council of Ministers[20]: **28 November 2017**

8. The decision of the Council of Europe's Committee of Ministers[21]: **7 December 2017**

9. The Government's response to the HFHR communication[22]: **12 December 2017**

10. Updated action plan: **12 October 2018**

2. Summaries of cases covered by the judgment

A. The case of *Rutkowski v. Poland*

The case of Wiesław Rutkowski concerned the excessive length of criminal proceedings. The ECtHR examined whether the proceedings that had lasted for almost 7 years and 10 months could be considered excessively long. The Court found that, despite the extensive objective and subjective scope of the case, the established periods of inactivity and numerous procedural

19 http://legislacja.rcl.gov.pl/docs/2/12284705/12349473/12349476/dokument225306.pdf.

20 http://www.hfhr.pl/wp-content/uploads/2017/12/HFHR_Communication_Rutkowski_Poland.pdf.

21 http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2017)1302/H46-21E.

22 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680772dc9.

mistakes and shortcomings led to an excessive length of the proceedings, which could not be in any way imputed to the applicant. Although a bill of indictment against the applicant was lodged as early as in December 2002, it was not until September 2006 that the first hearing was held. Subsequent procrastination of the proceedings was caused by a jurisdictional dispute and the necessity to restart the proceedings in June 2008. Finally, the applicant was acquitted in July 2010. In the discussed case, it was Mr Rutkowski who filed a complaint about the excessive length of the proceedings to the national court. In June 2010, the court admitted the complaint and awarded the applicant PLN 2,000. In its assessment of the length of the proceedings, the domestic court took into account only the period starting from 17 September 2004, i.e. the date on which the Excessively Lengthy Proceedings Complaint Act entered into force.

B. The case of *Orlikowski v. Poland*

The case of Mariusz Orlikowski involved the excessive length of civil proceedings concerning payment of fees for renovation works performed by a tenant of leased premises. The ECtHR examined whether the period of 11 years and approximately 8 months that was needed to adjudicate in the case at two levels of jurisdiction could be considered a failure to adhere to the requirement of a reasonable duration of proceedings within the meaning of the Convention. The excessive length of the proceedings in this case was caused by the fact that hearings were often held at lengthy intervals and it took a long time for experts to prepare and amend their expert reports. The complaint about the excessive length of the proceedings was dismissed by national courts. In its assessment of the length of the proceedings, a national court took into account only the period after 28 March 2006, namely the date on which the second instance court had partly reversed the first instance court's judgment.

C. The case of *Grabowska v. Poland*

The case of Aleksandra Grabowska involved the excessive length of civil proceedings in an action for the acknowledgement of acquisition of joint ownership of a property by adverse possession. The ECtHR examined the duration of the proceedings at two levels of jurisdiction over a period of thirteen years and some two months. In the Court's opinion, the reason for procrastination was the faulty management of the proceedings and a failure to exercise due care in notifying the parties about the course of the proceedings. Also, in this case, the applicant's complaint alleging the excessive length of the proceedings was dismissed by national courts. In assessing the length of the proceedings, the Polish court failed to take into account the period preceding to the entry into force of the Excessively Lengthy Proceedings Complaint Act, taking the view that the Act was applicable from the date of its entry into force.

3. ECtHR judgment

In its judgment, the European Court of Human Rights decided to combine the applications mentioned above and to implement the pilot judgment procedure[23]. The Court held that

23 A pilot judgment is issued by the European Court of Human Rights in a situation where the Court notes that the number of applications brought before it against one of the States is a consequence of a lacunae in national legislation, which affects a large group of victims.

there had been a violation of Article 6(1) of the Convention on account of the unreasonable length of proceedings in the applicants' cases and Article 13 of the Convention on account of the deficient operation of the complaint under the Excessively Lengthy Proceedings Complaint Act. The Court noted that the said violations of Articles of the Convention originated in a practice that was incompatible with the Convention, consisting in the unreasonable length of civil and criminal proceedings in Poland and in the Polish courts' non-compliance with the Court's case-law on the assessment of the reasonableness of the length of proceedings and "appropriate and sufficient redress" for a violation of the right to a hearing within a reasonable time. In that judgment, the Court stressed that the issue of violating those two provisions had already been the subject of earlier ECtHR case law. Both in the case of *Kudła v. Poland* (application no. 30210/96) and *Krawczak v. Poland* (application no. 40387/06), the Court imposed an obligation on Poland to resolve the issue of excessive length of the proceedings. The priority for subsequent violations of Article 6(1) of the Convention and Article 13 of the Convention is for the respondent State to ensure that the national courts apply the relevant rules stemming from the Strasbourg standards. According to the judgment in the present case, the biggest problem is the practice of "fragmentation" of proceedings, whose length is being assessed. The ECtHR analysed court rulings in this respect, pointing out in particular that it was the Supreme Court that led to the consolidation of this practice in Poland. Another important issue raised was the problem of inadequate awards of compensation.

4. Actions of national authorities

On 30 November 2016, the Sejm adopted the Act amending the Courts Act and some other acts, which modified the "Excessively Lengthy Proceedings Complaint Act". The modification of two of the Act's provisions, Article 2(2) and Article 12(4), is relevant for the execution of the *Rutkowski and Others* judgment.

The amendment of Article 2(2) aimed at eradicating the adverse practice of "fragmentation" of proceedings. In that regard, the legislator decided that, in assessing whether proceedings are excessively long, the court adjudicating a case should take into account "*... the total time taken to date from the initiation of proceedings until the time when the complaint was heard, irrespective of the stage at which the complaint was brought, the nature of the case, the degree of complexity in fact and in law, the relevance of the issues to be resolved for the party who made the complaint and the conduct of the parties, in particular the party who complained about the excessive length of the proceedings*". This approach should be assessed favourably.

However, an assessment of the other amended provision, which concerns awards of compensation to the affected party to the proceedings, may only bring the opposite conclusion. This provision states that, as a rule, compensation should amount to PLN 500 for each year of the protracted proceedings, regardless of the number of stages of the proceedings shown to have been excessively lengthy. A higher amount can only be awarded in exceptional circumstances if a case is of particular importance to the complainant and provided that the complainant has not contributed to the excessive length of proceedings by their own action or omission. Moreover, the legislator has maintained the upper limit of the award

(PLN 20,000). According to the HFHR, the new rules will not eliminate the second shortcoming identified by the ECtHR in *Rutkowski and Others*, namely insufficient amounts of compensation. Already at the stage of ministerial works on the discussed amendment, when proposals were made to cap the per-annum amount of compensation at the level of PLN 1,000, the HFHR, referring to the standards resulting, among others, from the ECtHR judgment in *Scordino v. Italy, no.1* (application no. 36813/97)[24] and *Apicella v. Italy* (application no. 64890/01)[25], noted that: "*a proposed change in the amount of awarded compensations as laid down in the draft act only partially satisfies the recommendations of the ECtHR. The amount of PLN 1,000 for a year of the proceedings to date will not lead to bringing the amounts awarded for a violation of the right of a party to have their case heard within a reasonable period of time in line with the reality. In order to ensure full compensation for the moral harm suffered because of the length of the proceedings, consideration should be given not only to increasing this rate but also to abandoning the upper limit of admissible awards laid down in the Excessively Lengthy Proceedings Complaint Act*". This negative assessment should be all the more extended to the final version of the Act that provides for the payment of compensation for every year of the proceedings in the amount twice lower than it was originally proposed. Leaving the upper limit of at the level of PLN 20,000 is inconsistent with the Convention.

5. Recent decisions of the Committee of Ministers

On 7 December 2017, the Committee of Ministers of the Council of Europe adopted a resolution in which it noted with interest the legislative reforms adopted by the authorities, as well as organisational measures aimed at increasing the efficiency of the judicial system. However, the Committee also pointed out that the issue of excessive length of proceedings is a complex one and asked the authorities to provide an analysis regarding the reasons for this situation. The Committee asked also for an indication of the measures to be taken to overcome the difficulties that have arisen. At the same time, the Committee welcomed the

24 In the case of *Scordino v Italy (no. 1)* the Court presented a concept of compensating losses and non-pecuniary damage suffered as a result of an excessive length of the proceedings. The ECtHR argued that the compensation or satisfaction granted for a Convention violation by national authorities should be comparable to the just satisfaction granted by the ECtHR on the basis of Article 41 ECHR and specifically, awarded in similar cases. The ECtHR understands "similar cases" to mean any two proceedings that have been pending for the same number of years, had an identical number of instances that have equal weighting of the interests at stake, where the applicants behaved in a similar manner and which concerned the same country. Moreover, national courts are always in a better position than the ECtHR to assess the property damage, whereas as far as moral loss (injury) is concerned, the ECtHR stresses the existence of a strong but rebuttable presumption that excessively long proceedings cause such an injury. In addition, compensation awarded by national courts will meet the requirement of adequacy where the sum is reconcilable with the legal tradition and standard of living in the country concerned and national decisions on excessive length are properly and efficiently enforced in the legal system concerned (*Scordino* §§ 181, 203-204, 206, 213, 267).

25 In *Apicella*, the Court clarified the criteria to be used when calculating the amount of just satisfaction to be awarded to the applicants in cases where the proceedings were found to be excessively long. The Court stated that the basis for determining the adequate monetary award should be an amount varying between 1,000 and 1,500 euro for each year of the proceedings, and that the outcome of domestic proceedings is irrelevant to the moral loss suffered as a result of the length of the proceedings. The total amount should be increased by EUR 2,000, if the subject matter of the dispute is of exceptional importance, especially in matters involving labour law, civil status or legal capacity, pensions and particularly serious matters relating to the health or life of persons. On the other hand, the basic amount will be reduced after taking into account: 1) the number of instances which decided during the proceedings, 2) the applicant's conduct – in particular the number of months or years which passed because of appeals filed by the applicant, 3) the subject matter of the dispute – e.g. the property case is of lesser importance to the applicant, 4) the standard of living in the country (*Apicella* § 26).

information about the 2017 amendment to the Excessively Lengthy Proceedings Complaint Act aimed to eliminate the problems noted by the European Court of Human Rights. Therefore, the Committee asked the authorities to provide information about the application of this new legal framework by national courts, and in particular about the amount of awarded compensations and their compliance with the Court's case law.

The Committee decided to continue to consider the general measures necessary to address the problem of excessive length of civil and criminal proceedings and ensure the effective application of the measure set out in the Excessively Lengthy Proceedings Complaint Act as part of an examination of the cases of Bąk, Majewski, Rutkowski and Załuska. The detailed examination of the cases was postponed until December 2018.

6. HFHR recommendations

- A further amendment to the Excessively Lengthy Proceedings Complaint Act is necessary.
- Priority should be given to the modification of Article 12(4) of the Act to enable courts to award a sum of PLN 1,000 for every year of excessively lengthy proceedings.
- It would also be reasonable to amend Article 12(4) of the Act by way of abolishing the upper limit of the award, currently set at PLN 20,000.

B. ECtHR judgment of 1 February 2005, *Beller v. Poland*, application no. 51837/99

1. Timeline

1. The period covered by the application: from **1 May 1993** (date of Poland's recognition of the jurisdiction of the ECtHR) to **1 February 2005**.
2. Date of lodging application to the ECtHR: **11 March 1999**
3. Date of communicating the case to Poland: **no information available**
4. Date of ECtHR judgment: **1 February 2005**
5. Date of the action plans:
   - **23 November 2011** (for the *Fuchs* group)
   - **2 January 2014** (updated)
   - **27 April 2015**
   - **20 October 2016**

6 Dates of decisions of the Council of Europe's Committee of Ministers:

- **2 December 2011**: actions taken by national authorities were noted and the monitoring of the judgment's execution was extended.
- **26 January 2013**: no regular communication from the Government, an invitation to submit an updated action plan was sent.
- **8 December 2016**: a reform of the judicial and administrative procedure was noted, an invitation to submit further information was sent.

7 Date of action report: **23 November 2011**

8 Date of the act introducing the required changes: **none**

9 Execution closure date: in a resolution of **8 December 2016** the Committee of Ministers closed the supervision over the execution of the judgment in the case *Fuchs v. Poland* and 33 other cases from this group. However, the execution of the judgment in *Beller v. Poland* is still supervised.

2. Case summary

A piece of real property of the applicant's father was nationalised in 1945 on the basis of the Decree of 26 October 1945 on the ownership and use of land in the capital city of Warsaw (the so-called "Bierut Decree"). In 1948, the applicant's father lodged a request to be granted the right of temporary ownership of the property. In 1949, authorities issued a decision denying the request, but it was not served on the owner. The applicant's father died in 1951. In 1955, another decision refusing the request was issued. This decision was not properly served, either.

In March 1990, the applicant filed with the Warsaw Śródmieście District Office a petition for the return of the property. This petition initiated the administrative proceedings in this matter that took many years to complete. In 1997, the Head of the Warsaw District Office granted the applicant the perpetual use of the property in question. However, this decision has never been enforced and over the years authorities were taking action to undermine its legality.

3. ECtHR judgment

The ECtHR found a violation of Article 6 of the ECHR in this case. Although the applicant's case was complicated, the proceedings were conducted in an unreasonably protracted manner. In particular, public bodies repeatedly remained completely inactive for very long periods of time.

At the same time, the Court did not consider the complaint of an alleged infringement of Article 1 of the Additional Protocol to the ECHR, considering that the application in this respect was premature.

4. Actions of national authorities

Administrative and judicial and administrative proceedings continued after the pronouncement of the ECtHR's judgment, and the Governor of Mazowieckie Province repeatedly acted to quash the 1997 decision. The applicant was unable to recover her father's property.

Joanna Beller died on 30 November 2012. After the conclusion of the inheritance proceedings, the proceedings in the case of the property were conducted by her heirs.

In a decision of 30 November 2016, the Governor of the Mazowieckie Province once again declared the decision establishing perpetual usufruct for J. Beller invalid. On 30 March 2018, the Minister of Investments and Development upheld the Governor's decision. In May 2018, R. Beller filed a complaint against the Minister's decision with the Provincial Administrative Court in Warsaw.

On 14 January 2011 Joanna Beller filed a new application with the ECtHR, in which she alleged a violation of Article 6(1) ECHR and Article 1 of the Additional Protocol caused by the excessive length of the proceedings and the non-implementation of the 1997 decision. After the applicant's death, one of her heirs, R. Beller, entered the proceedings as her successor in title. The application was communicated to the Government on 14 December 2017.

VII. The execution of judgments finding a violation of the right to respect for private and family life

ARTICLE 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

A. ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, application no. 5410/03

1. Timeline

1. The period covered by the application: from **February 2000** (beginning of the applicant's pregnancy) to **November 2000** (the birth of the applicant's child)
2. Date of the application's submission to the ECtHR: **15 January 2003**
3. Date of the hearing: **7 February 2006**
4. Date of ECtHR judgment: **20 March 2007**
5. Date of action plans:
   - **24 March 2011**
   - **26 November 2013** (update)
6. Date of the Government's action reports: **4 August 2016**
7. Dates of decisions of the Committee of Ministers:
   - **8 June 2011:** an invitation to submit additional information on the execution of the judgment was sent
   - **25 September 2014:** authorities were invited to adopt measures implementing the judgment

8 Dates of the HFHR's communications to the Committee of Ministers concerning Poland's failure to execute the judgment:

- **1 September 2017**
- **9 August 2018**

2. Case summary

The case of *Tysiąc v. Poland* concerned access to procedures enabling an abortion for medical reasons. For many years, the applicant has suffered from severe myopia. After the applicant became pregnant for the third time in February 2000, several ophthalmologists stated that another pregnancy could pose a serious risk of her losing her eyesight. However, they refused to issue certificates that would allow her to terminate her pregnancy on the grounds that the pregnancy threatened her life or health (which is a ground for terminating a pregnancy in accordance with the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy). Such a certificate was issued by a general practitioner but a public hospital refused to terminate Ms Tysiąc's pregnancy. It was noted that the threat to Alicja Tysiąc's health was not sufficiently severe to justify an abortion. In November 2000, the applicant gave birth to her child. Since then, Alicja Tysiąc's vision has deteriorated significantly: she is unable to see farther than 1.5 m. Ms Tysiąc has been awarded a certificate of the most severe degree of disability and receives a disability pension.

3. ECtHR judgment

The ECtHR found a violation of Article 8 ECHR (the right to respect for private life) resulting from the absence of adequate legal measures that would allow the exercise of the right to abortion on medical grounds in a situation where medical personnel refuse to perform the procedure.

The ECtHR underlined that the applicant had not had access to any procedure that would enable her to officially contest the medical decision refusing an abortion and to establish whether the grounds for an abortion were in fact present.

B. ECtHR judgment of 26 March 2011, *R.R. v. Poland*, application no. 2761/04

1. Timeline

1 The period covered by the application: from **20 February 2002** (an ultrasound scan indicating foetal defects) to **11 July 2002** (the applicant's birth of a child)

2 Date of lodging the application: **30 July 2004**

3 Date of ECtHR judgment: **26 May 2011**

4 Date of the Government's action plan: **26 November 2013**

5 Date of the Government's action report: **4 August 2016**

6 Date of the decision of the Committee of Ministers: authorities were invited to adopt measures implementing the judgment on **25 September 2014**.

7 Dates of the HFHR's communications to the Committee of Ministers concerning Poland's failure to execute the judgment:

- **18 March 2014**
- **1 September 2017**
- **9 August 2018**

2. Case summary

On 20 February 2002, the applicant, who was at the time 18 weeks pregnant, had an ultrasound scan carried out by a gynaecologist, which revealed a possibility of foetal defects. R.R. stated that if the defects are confirmed, she will be willing to terminate the pregnancy. Subsequent ultrasound scans confirmed the suspicions of foetal defects, but other doctors approached by the applicant refused to refer her for prenatal tests (amniocentesis), which she could perform as part of publicly funded health care services. The doctors either criticised her decision to undergo an abortion or pointed to a number of duties or formalities that must be completed before she undergoes further testing or the abortion procedure. Eventually, on 29 March 2002, in the 23rd week of the applicant's pregnancy, prenatal tests were carried out, for the results of which the applicant needed to wait for 2 more weeks. The applicant consistently expressed her willingness to have an abortion, while pointing out that the procedure is usually carried out before the 24th week of pregnancy, which is the time when the foetus becomes capable of surviving outside the mother's body. The results of the tests, which the applicant received on 9 April 2002, confirmed that Turner syndrome was present in the foetus. R.R. declared that she wanted to terminate the pregnancy, but the doctors refused to perform the procedure, stating that the period in which abortion could be performed has already passed. On 11 July 2002, the applicant gave birth to a child with Turner syndrome. Her husband left the family after the delivery.

3. ECtHR judgment

The ECtHR found a violation of Article 3 ECHR (freedom from torture and degrading treatment) and Article 8 ECHR (right to respect for private life), which resulted from the absence of effective access to prenatal tests (allowed under national law) that were necessary to decide to have an abortion within the legally admissible timeframe. The ECtHR emphasised the particularly adverse treatment afforded to the applicant by medical personnel.

C. ECtHR judgment of 30 October 2013, *P. and S. v. Poland*, application no. 57375/08

1. Timeline

1. The events covered by the application: The commission of an offence against the first applicant – **8 April 2008**, discontinuation of the criminal proceedings against the first applicant – **20 November 2008**
2. Date of lodging the application: **18 November 2008**
3. Date of communicating the case to Poland: **29 September 2011**
4. Date of HFHR amicus curiae brief submitted in the proceedings: **7 February 2012**
5. Date of judgment: **30 October 2012**
6. Date of the Government's action plan: **29 November 2013**
7. Date of the Government's action reports:
   - **3 October 2014**
   - **14 June 2017**
   - **21 June 2018**
8. Dates of decisions of the Committee of Ministers:
   - **21 September 2017**: the Committee invites Poland to provide data on the availability of abortion and the consequences of breaches of contracts concerning this procedure that are concluded by health care providers and the National Health Fund.
   - **20 September 2018**: the Committee urgently calls for ensuring effective access to legal abortion.
9. Dates of the HFHR's communications concerning the execution of the judgment:
   - **1 September 2017**
   - **9 August 2018**

2. Case summary

The case of *P. and S. v. Poland* concerned a 14-year-old girl (the first applicant) who was denied access to a legal abortion by a number of doctors despite having been entitled to request the procedure under Polish law. In accordance with the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy, a prosecutor provided the applicant with a certificate which showed that her pregnancy was the result of a criminal offence. Pursuant to the aforementioned Act, in such a situation the applicant was entitled to undergo a legal abortion procedure. However, doctors from three hospitals gave misleading information to the applicant and her mother (the second applicant) about the prerequisites for terminating a pregnancy and, hence, refused to perform the procedure. While refusing to perform the abortion, the doctors invoked the conscience clause and failed to inform the applicants of their actual options to have this procedure performed by another doctor or at another medical facility. At that time, the obligation to refer a patient to another medical institution where the patient would have an opportunity to receive a medical service resulted from the Doctor and Dentist Professions Act. The girl was also placed for 10 days in a juvenile shelter, which involved separating her from her family. Eventually, the abortion was performed in a hospital located several hundred kilometres away from the applicants' family home. In the process, the applicant's personal data were unlawfully disclosed to the public by one of the hospitals. At the same time, criminal proceedings under Article 200 (1) of the Criminal Code, a provision that prohibits a sexual intercourse with a person under 15 years of age, were instituted against the applicant. Ultimately, the proceedings were discontinued and the applicant was declared to be a victim of a criminal offence and not its perpetrator.

3. ECtHR judgment

In the judgment, the ECtHR found the following violations of the Convention:

- a violation of Article 8 ECHR (the right to respect for private life), which resulted from a failure to ensure effective access to reliable information on the conditions for the admissibility of abortion and from a failure to ensure access to lawful abortion;
- a violation of Article 8 ECHR, which resulted from a disclosure of the applicant's personal data by a public hospital;
- a violation of Article 5 ECHR (right to liberty), which resulted from the unjustified applicant's detention in a shelter for juveniles, the purpose of which was to separate the applicant from her parents and to prevent her from having an abortion;
- a violation of Article 3 ECHR (freedom from torture and degrading treatment), which related to the way in which hospital staff interacted with the applicant, her detention in a juvenile shelter and the initiation of criminal proceedings against her.

4. Actions of national authorities

In order to execute the above-mentioned ECtHR judgments, Polish Parliament adopted the Patients Rights and the Ombudsman for Patient Rights Act of 6 November 2008 (consolidated text in J.L. of 2017, item 1318, as amended). In accordance with Article 31(1) of the Act, a patient has the right to object to a medical opinion or certificate, if the opinion or decision has an impact on the legal rights or obligations of the patient. The objection is filed with the Medical Board established by the Ombudsman for Patient Rights, through the Ombudsman for Patient Rights, within 30 days from the date of the doctor's opinion or certificate on the patient's state of health. The objection must be substantiated, and such substantiation must indicate a provision of law that confers the rights or obligations infringed by a medical certificate or opinion. The Medical Board is obliged to resolve the objection immediately, and in no case later than after the expiry of 30 days from the date when the objection is lodged.

According to the Government, the procedure for objecting to a medical decision or certificate is an appropriate procedural guarantee that can be used by women who are refused a legal abortion by doctors.

5. An assessment of execution of the judgments and the HFHR's recommendations

In the view of the HFHR, Polish authorities have not fully executed the ECtHR's judgments concerning access to legal abortion. There are still no procedural guarantees that would ensure effective access to the procedure in situations where a woman can lawfully undergo an abortion.

The procedure for objecting to a doctor's opinion or certificate is not a measure that would effectively protect women's right to have an abortion.

According to the HFHR, the key drawbacks of this procedure are its excessive formalism, the inability to apply the procedure in the event of a doctor's refusal to issue an opinion or a certificate and the lack of a guarantee of a prompt and timely processing of an objection. It is also unclear whether an objection may be submitted against the refusal of a referral for medical tests.

In a judgment of 7 October 2015 (case no. K 12.14), the Constitutional Tribunal ruled that Article 39 of the Doctor and Dentist Professions Act was unconstitutional to the extent that it obliged a doctor who refrains from providing a medical service that they consider to be incompatible with their conscience to indicate an actual possibility of obtaining such a service from another doctor or at another medical facility. This judgment of the Constitutional Tribunal means that at present there is no provision of Polish law that would require a doctor or other medical professional working in a health care institution to indicate to a patient an actual possibility of obtaining a medical service elsewhere in the case that such a doctor or other medical professional refuses to perform a service by invoking the conscience clause.

The objection procedure in its present form does not guarantee that a woman is able to receive accurate, complete and objective information as to whether she is entitled to a legal termination of pregnancy, or obtain access to information on where she may have abortion performed in the event that the conscience clause is invoked by a doctor. Furthermore, the objection procedure offers no remedy in situations where doctors deliberately conceal certain facts or give incomplete and misleading information to a woman about her abortion options in order to prevent her from terminating her pregnancy.

In a decision from 20 September 2018 on the execution of the judgment handed down in *P. and S. v. Poland*, the Committee of Ministers urged the Polish Government to promptly take action to ensure effective access to legal abortion procedures.

Polish authorities should ensure that women are provided with accurate and objective information about the abortion admissibility criteria and the condition of the foetus before the expiry of the period during which an abortion can lawfully be performed.

Polish authorities should introduce an effective and expeditious procedure that enables women to exercise their right to have an abortion whenever it is permitted by national law.

Mechanisms should be put in place to prevent the right to have an abortion being suppressed in consequence of the conscience clause being invoked by doctors.

D. ECtHR judgment of 10 April 2018, *Bistieva and Others v. Poland*, application no. 75157/14

1. Timeline

1. The decision to detain the applicants in the Guarded Centre for Foreigners in Kętrzyn was issued on **9 January 2014**.
2. The applicants were released from the Guarded Centre for Foreigners in Kętrzyn on **29 June 2014**.
3. Date of lodging the application: **26 November 2014**
4. Date of communicating the case to Poland: **28 September 2015**
5. Date of ECtHR judgment: **10 April 2018**
6. The judgment became final on **10 July 2018**

2. Case summary

The case concerns a Chechen family, parents with children, who filed an application for the award of refugee status with the Office for Foreigners in 2013. The family was refused international protection by Polish authorities, who ordered their removal from Poland. At that point, the family left for Germany and another child was born during their stay abroad. In January 2014, the mother and children were surrendered to Poland and detained in the Guarded Centre for Foreigners (an immigration detention centre) in Kętrzyn. One of the purposes of detention was to ensure the proper execution of the expulsion decision. However, the Governor of the Warmia and Mazury Province decided that the youngest child resided in Poland legally and refused to issue a decision ordering the child's expulsion.

In their complaints against the decisions ordering and extending their detention in the guarded centre, the applicants referred, inter alia, to the fact that Polish authorities failed to evaluate how detention affects the applicant's children. They also argued that since a decision refusing to expel the youngest child was issued, there was no justification for the child's detention in the guarded centre, which was ordered for the purpose of securing the expulsion.

During their detention in the guarded centre, the family submitted two subsequent applications for the award of refugee status. When submitting the third application, the family indicated that the applicant's father had been granted refugee status based on reasons similar to those asserted by the applicant. For this reason, the Head of the Office for Foreigners suspended the execution of his earlier expulsion decision.

The family was released from the centre only at the end of June 2014.

3. ECtHR judgment

The Court found a violation of the right to family life in this case. The violation, the judgment explains, took the form of Polish authorities' failure to take into account the best interests of the three children in making the detention decision, contrary to legal obligations imposed on the authorities (e.g. by the Convention on the Rights of the Child or the EU Charter of Fundamental Rights). The very fact that children were placed at a guarded centre together with parents cannot be reconciled with the best interests of those children, the Court ruled. The Court further held that Polish authorities should have considered the application of non-custodial measures and that detention should be only the last resort solution.

The ECtHR also made note that the period of detention (5 months and 20 days) was too long and that administrative proceedings involving children should be conducted faster and with a higher degree of care.

The Court stated in the judgment that the Convention had been violated regardless of the adequate living conditions at the Guarded Centre for Foreigners in Kętrzyn and despite the fact that the family could have been expected to have the intention to leave for Germany again.

At the same time, the Court ruled that in respect of the violation of the right to personal liberty and security (article 5(1) of the Convention) domestic remedies had not been exhausted. The applicants, the ECtHR argued, should have first submitted a motion for compensation for moral injuries suffered due to the placement at a guarded immigration centre.

4. Actions of national authorities

The Polish authorities paid to the applicants the sum of damages awarded by the Court.

A plan of execution of the judgment has not yet been prepared. The deadline for the preparation of the plan is 10 January 2019.

5. HFHR recommendations

- It must be ensured that cases that involve detention of foreign families with children must include a thorough assessment of whether detention of children does not go against their best interests.
- It must be guaranteed that detention of foreign families with children in a guarded centre is only applied as a measure of last resort and for the shortest possible time.

To this end, Polish authorities should:

- educate judges and Border Guard officers on the application of the principle of the best interests of the child and on the ECtHR case law in this area;
- provide practical guidance on the specific activities that the Border Guard and the courts should carry out as part of an examination of the best interests of the child;
- make sure that the decisions ordering detention of families in guarded centres contain detailed and case-specific justification relating to the situation of the children concerned;
- provide ex officio legal aid in all cases concerning detention of families with children in guarded centres.

VIII. The execution of judgments finding a violation of the freedom of speech

ARTICLE 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The ECtHR judgment of 5 July 2011 in the case of *Wizerkaniuk v. Poland* (application no. 18990/05)

1. Timeline

1. Publication of a journalistic text: **7 May 2003**
2. Conviction of the applicant: **30 April 2004**
3. A final decision by domestic courts – Constitutional Tribunal's judgment in case no. SK 52/05: **29 September 2008**
4. Date of lodging application to the ECtHR: **14 May 2005**
5. Date of communicating the case to Poland: **24 January 2007**

6 The ECtHR judgment in the case: **5 July 2011**

7 First communication of the HFHR to the Committee of Ministers: **6 June 2012**

8 The opinion of the HFHR regarding the proposal of legislative changes: **27 February 2017**

9 An amendment to the Press Law Act enters into force: **12 December 2017**

10 Date of the Government's action report: **27 March 2018**

11 The second HFHR's communication to the Council of Ministers: **10 September 2018**

12 The current status of the case before the Committee of Ministers of the Council of Europe: the case is processed in the standard supervision procedure

2. Case summary

Proceedings against Jerzwy Wizerkaniuk, editor-in-chief of *Gazeta Kościańska*, were initiated under Article 49 of the Press Law Act in connection with Article 14 of the Press Law Act, due to the absence of a pre-publication approval ("authorisation") for the publication of an interview. The journalist prepared a subsequently published interview with a Member of Polish Parliament, accompanied by the MP's photo, without the explicit and unambiguous consent of the interviewee. The proceedings against the applicant were conditionally discontinued for the duration of a probation period of one year and the applicant was obliged to pay PLN 1,000 to a charity. The journalist lodged a constitutional complaint with the Constitutional Tribunal (case no. SK 52/05) and submitted an application to the European Court of Human Rights (application no. 18990/05). He argued that the legal rule that establishes the requirement of authorisation violates the freedom of speech in respect of verbatim-quoted statements, without indicating a value that it seeks to protect. Moreover, the requirement in question aims to protect individuals (especially politicians) who are substantially aware of the responsibility for one's word. According to the journalist, authorisation may be used by journalists' sources to exert pressure on journalists and editors. For the above reasons, Mr Wizerkaniuk argued that the authorisation requirement is inconsistent with Article 14 (freedom of the press and other means of social communication), Article 54 (freedom to express opinions) and Article 31(3) (restrictions on the exercise of constitutional rights) of the Constitution, and with Article 10 of the European Convention on Human Rights.

In the judgment of 29 September 2008, the Constitutional Tribunal held that the requirement of authorisation and the related criminal sanctions were constitutional. In its ruling, the Tribunal stressed that freedom of speech is the foundation of a democratic society. Article 14 of the Constitution imposes a negative obligation on the state to refrain from interfering in the

matters of the press and other mass media. However, the Constitutional Tribunal reasoned that this prohibition does not apply to the state's ability to influence the press through legal measures to ensure the exercise of other constitutional rights and freedoms. Moreover, the Tribunal also recalled that Article 54 of the Constitution did not create an absolute right and that this right may be limited in order to protect personal interests of journalistic sources, the violation of which is often very difficult to rectify. In the judgment, the Constitutional Tribunal referred to the relevant criminal sanctions, stating that they are proportionate to the objective they aim to achieve, which is the protection of personal interests and personal safety of sources of information. The threat of a criminal sanction is one of a preventive nature, which is intended to deter infringements. The Constitutional Tribunal further reasoned that, in recent years, a publication of an unauthorised piece has led to the launch of criminal proceedings against a journalist just in one case, which, according to the Tribunal, contradicts the allegations of abuse of this institution.

3. ECtHR judgment

The European Court of Human Rights found that criminal proceedings and sanctions imposed on a journalist constituted a disproportionate interference with the right to freedom of expression. The ECtHR stressed that Polish courts ignored two factors crucial for a proper assessment of the case. First, national courts did not have any regard to the substance of the interview and did not examine whether or not the publication actually distorted the original statements of the politician and presented them in a false or manipulated context. Moreover, the courts did not attempt to establish if the publication actually damaged the good name of the politician.

Second, Polish courts completely disregarded the status of the interviewee, who at the time was an active politician, a Member of the Polish Parliament. Given the above, the interviewee was clearly a public figure who may reasonably be expected to anticipate a particular public interest in his activities. "This approach alone does not appear compatible with the established case law of the Court, which consistently emphasises that protection granted to politicians against criticism is much narrower than that applicable to all other persons", the ECtHR underscored in its assessment of the merits of the case.

The Court also criticised the provisions of the Polish Press Law Act that oblige journalists to seek authorisation and provide for a criminal sanction for a failure to comply with this obligation. The Court observed that these provisions provided the interviewee with an easy tool to block any publication of their statements if they consider such statements inconvenient after a time, even if the text of the interview fully reflects the words spoken earlier. The applicable provisions do not require justification for refusing an authorisation, nor do they specify the time frame for granting an authorisation, so that interviewers can freely postpone publication. In the Court's view, this obligation may unreasonably slow down the flow of information from the press to the public and cause news reported by journalists to lose its value as outdated.

The Court also pointed out that the applicable laws may encourage journalists to avoid quoting their interlocutors verbatim in fear of having a publication blocked by a refusal

of authorisation. This is because journalists are not obliged to seek authorisation for non-verbatim summaries of interviewees' statements despite the fact that this type of reporting is associated with a greater risk of distortion of the conveyed message. Moreover, the ECtHR has pointed to other civil remedies available under Polish national law (e.g. an action for the protection of personal interests). Such alternative remedies, on the one hand, are not as severe as criminal proceedings, allowed by the Court only in extreme cases of abuses of the freedom of speech, such as hate speech, and, on the other hand, sufficiently protect the interests of persons interviewed by journalists who have breached professional integrity rules.

4. Actions of national authorities

On 12 December 2017, an amendment to the Press Law Act entered into force (J.L. of 1984, item 5, no. 24). The amendment introduced (in Article 14a) statutory time-limits for the grant of authorisation (24 hours for texts to be published in daily newspapers and 3 days for magazine articles). If a person whose statement is to be published fails to respond to a request for authorisation within the above time frames, they are deemed to have approved the publication of the statement in the form presented by the article's author.

Moreover, a lack of authorisation for a statement quoted verbatim was qualified as a petty offence carrying a penalty of a fine. Before the amendment, a failure to obtain authorisation constituted an offence punishable by imprisonment for up to one year.

In the Government's action report to the Council of Ministers of 27 March 2018, the Government requested that the case be closed in connection with the full execution of the sentence.

5. HFHR recommendations

Amendments to the Press Law Act were necessary in order to ensure the proper execution of the ECtHR's judgment. In the HFHR's opinion the proposed regulation does not solve the crucial problem, i.e. it does not remove the possibility of attributing criminal liability to a journalist even in the case where they have failed to obtain an authorisation for the published statement but published the same with due care, in the form corresponding to the true words of the interviewee, without any manipulation or misrepresentation. Moreover, the introduction of time-limits for granting authorisation provides a journalist with no remedy in a situation where an interviewee explicitly refuses authorisation. In consequence, the proposed rule may still be used as a measure freezing the publication of statements that an interviewee later considers inconvenient.

The proposed less strict liability under the Petty Offences Code is still a repressive sanction and as such raises concerns as it may be irreconcilable with the principle of proportionality. The HFHR assesses that shifting to the regime of civil liability would be a better option, especially given the fact that selecting that option would not require a separate set of legal rules applicable to authorisation. In such a case, the requirement of authorisation may become

a part of the obligation to exercise the utmost degree of care and integrity in collecting and utilising press materials, which is already imposed on journalists under Article 12(1) of the Press Law Act. Under such an arrangement, the requisite degree of care would be assessed in a trial initiated by a claim for a remedy for a breach of personal interests. Additionally, an interviewee would be able to seek protection of their interests through a request for the publication of a rectification.

In consequence of the above, the enacted modification of the authorisation regime may still result in journalists applying self-censorship in interviews. They may avoid asking uncomfortable and inquisitive questions or raise sensitive themes in fear of difficulties being made by their interlocutors at the authorisation stage of the news publishing process. This means that the newly-introduced provisions on authorisation may still cause the "chilling effect" on the exercise of basic rights and duties of a journalist.

Before the matter is closed by the Committee of Ministers, it seems necessary to assess judicial practice in proceedings relating to the amended procedure.

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