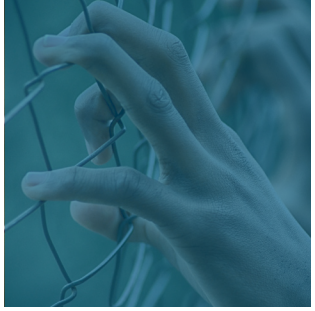
HELSINKI FOUNDATION
FOR HUMAN RIGHTS





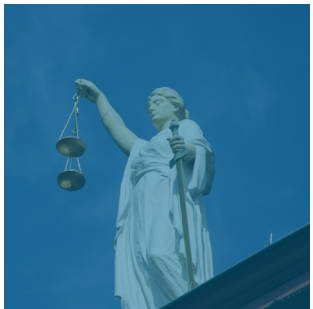



Human Rights in Strategic Litigation

2018 Report






Dear Readers,

The passing of twenty-five years from the day the Convention for the Protection of Human Rights and Fundamental Freedoms became a binding law for Poland invites to reflection. What should be reflected upon is not only how the Council of Europe's human rights system operates in Poland, or how often and effectively Polish nationals submit applications to the European Court of Human Rights seeking a remedy for violations of their rights and freedoms guaranteed by the European Convention on Human Rights and its Additional Protocols, but also how our country executes judgments in cases brought against Poland. A quarter of a century is a time that permits asking a slightly more ambitious question: are Poles only consumers of the (long-awaited) standards of human rights developed abroad or maybe Polish lawyers contribute to the development of the case law of the European Court of Human Rights, both in "Polish" and "non-Polish" cases? The Helsinki Foundation for Human Rights published this report in an attempt to answer this question.

Already in 2004, our Foundation launched the Strategic Litigation Programme, whose activities involve initiating and supporting court and administrative proceedings with a strategic significance for human rights. Strategic litigation as a method of obtaining ground-breaking decisions with a view to changing laws and practices could in no way do without the use of such a measure as the ECtHR application. Today, when the national civil rights authorities are under threat, we resort to this measure more readily than ever. However, our role is beyond merely upholding our own rights and freedoms. We also try to support applications from other countries in the hope of raising the universal standard that may one day serve to protect our national legal system. We are convinced that our legal work, in which we receive pro bono assistance from a large group of lawyers from all over Poland, contributes to the enhancement of the human rights culture at the pan-European level.

However, the European Court of Human Rights is not the only venue for our international activities. Recently, we have been increasingly seeking to use the human rights protection mechanisms provided for in the European Treaties, in particular by advocating preliminary referrals to the Court of Justice of the European Union, as well as by submitting complaints to the relevant UN bodies.

In the report that you are about to read we present only a portion of the activities undertaken by the Strategic Litigation Programme in 2018, trying to describe what we consider the most interesting cases conducted by the Programme. We hope that you will find our report interesting.

Last but not least, we would like to thank all the lawyers who took part in the activities of the Helsinki Foundation for Human Rights and its Strategic Litigation Programme in 2018. We hope that they will continue to work with us to protect the rights of individuals. We also encourage joint efforts of all those committed to the values of the rule of law and human rights and freedoms. We would like our report to provide a powerful impetus for such efforts.

Have an inspiring read.

Katarzyna Wiśniewska
Attorney-at-Law
Coordinator of the Strategic Litigation Programme

Dr Piotr Kładoczny
Head of Legal Department,
Secretary of the Board, HFHR

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.

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Strategic litigation in the area of human rights

About strategic litigation:

One of the types of the Foundation's activities is strategic litigation, understood as participation in court or administrative proceedings before national courts or international bodies with a view to obtaining ground-breaking judgments, which change practices or laws on specific issues that raise serious human rights concerns.

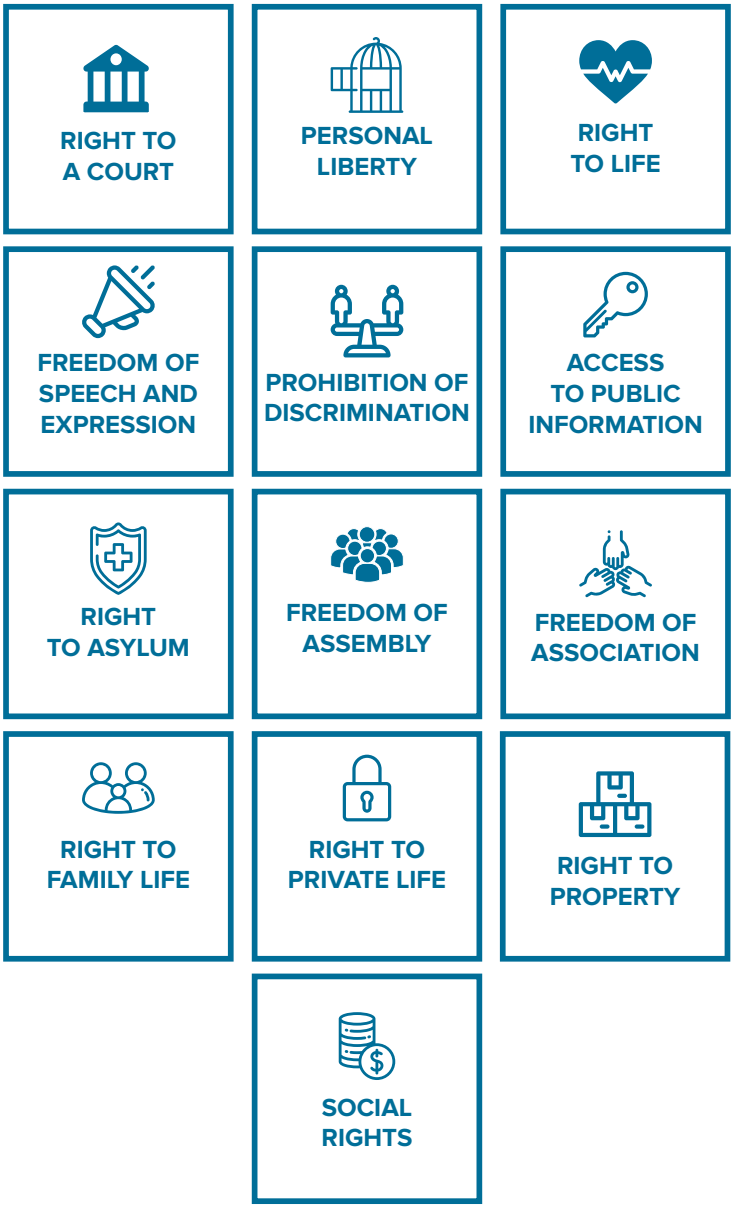
Actions taken:

- taking part in court proceedings as a social organisation;
- ensuring that clients are represented in court and receive legal assistance from Foundation lawyers or outside counsel working pro bono;
- submitting amicus curiae briefs on behalf of the Foundation, in which we present human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- popularising the application of developed standards (through amicus curiae briefs, general statements, opinions on proposed legislation, general interest and academic papers);
- submitting requests for extraordinary complaints in cassation to the Polish Ombudsman, Commissioner for Human Rights.

The main focus of the Strategic Litigation Programme's activity is proceedings before the European Court of Human Rights. Recently, we have also been acting to encourage Polish courts to refer questions for a preliminary ruling to the Court of Justice of the European Union.

HFHR'S Strategic Litigation Programme

The HFHR's Strategic Litigation Programme conducted cases related to:



We litigated cases involving the following thematic areas:

The prohibition of torture and inhuman or degrading treatment and punishment

- The limits of admissibility of extradition;
- Police violence (including cases of the improper use of stun devices);
- The lack of appropriate identification of victims of violence in proceedings for the placement of a foreigner at a guarded immigration centre;

Including that related to access to appropriate medical care:

- Improper conditions at a facility for persons with mental disorders;
- Inadequate psychiatric and psychological care in penitentiary facilities;
- No access to treatment for persons suffering from chronic pain;
- An inadequate system of the coordination of public health care services for persons suffering from ultra-rare diseases;
- No access to treatment at the level consistent with the current medical knowledge in public health care facilities.

Right to liberty and security of a person

- The application of post-release detention;
- Placement at nursing homes;
- Unjustified immigration detention of victims of torture and violence suffered in a country of origin;
- A failure to observe the principle of the best interests of the child in proceedings for the placement of a foreigner at a guarded centre;
- Court-ordered extensions of detention at youth shelters.

Right to an independent court

- The status of a judge and the limits of criticism of judicial action by public authorities;
- Access to courts in the event of an infringement of individual rights and freedoms;
- Right to an effective remedy;
- Right to have a hearing within a reasonable time.

Right to family and private life

- Respect for the memory of a late relative;
- Protection of rights of crime victims;
- Protection of rights of victims of domestic abuse;
- Right to register a civil union concluded abroad;
- Transcriptions of foreign birth certificates of a child, in which same-sex persons are entered as parents;
- Confirmation of Polish citizenship of children born as a result of surrogacy, whose same-sex parents are listed in foreign birth certificates;
- Refusals to issue a Polish residence permit on the grounds of national security.

Freedom of speech and expression

- Dismissal of journalists working for a state-controlled media organisation being a consequence of their criticism of the situation after the "reform" of the public media;
- Prevented or obstructed provision of journalistic coverage of public protests;
- Citizen journalists and bloggers targeted by legal proceedings in retaliation for their watchdog activities;
- Denial of media access to the Parliament during important political events;
- Surveillance of journalists;
- NGO access to public information;
- Freedom of artistic activity.

Freedom of assembly and association

- Right to organise a peaceful assembly;
- Right to appeal against a ban on conducting a demonstration;
- Freedom of activity of non-governmental organisations;
- The right of a non-governmental organisation to take part in court proceedings.

Prohibition of discrimination

- Discrimination in access to goods and services against persons with disabilities;
- Failures to ensure reasonable workplace accommodations for persons with disabilities;
- Discrimination on the grounds of trade union activism;
- Insufficient level of financial support for carers of persons with disabilities;
- Displaying reasons of disability in disability certificates;
- Dismissal of a group of female workers who were pregnant or recently gave birth;
- Various forms of discrimination in education;
- The absence of anti-discrimination education in schools.

A collective expulsion of foreigners

- Decisions denying entry to Poland issued to foreigners who expressed their intent to apply for international protection in Poland while arriving at the border.

Procedural guarantees concerning the removal of foreign nationals

- The absence of procedural guarantees for foreigners whose stay in Poland was deemed to be a threat to national security and who have no possibility of learning about the factual basis of measures taken against them.

2018 in numbers

In **54** cases professional counsel honoured our courtesy requests to provide pro bono representation to our clients, offering free legal aid and invaluable expertise free of charge

We appeared in **40** proceedings before the European Court of Human Rights seeking to obtain important standards of human rights protection

We appeared in **11** cases as a social organisation, aiming to present a human rights perspective to the court

In **7** proceedings we submitted amicus curiae briefs to the European Court of Human Rights, common and administrative courts, presenting the court with a broader context of the case at hand and its precedential impact on the rights and freedoms of individuals.

Lawyers' perception of pro bono work

Agata Bzdyń

Chambers of Agata Bzdyń
worked in the ECtHR in 2012-2016

The essence of the pro publico bono work is not only to defend the interests of an individual harmed by the actions of public authorities; above all, it is about upholding the interest of the people. It is about ensuring that other individuals do not find themselves in a similar situation in which their rights are violated. My day-to-day human rights practice shows me how meaningful my work is. You feel a great deal of satisfaction in winning a case that will change the practice of state authorities or contribute to a change in the law.

Dr Marcin Ciemiński

Clifford Chance

For me, community activism is a core aspect of the legal profession. One of the ways we get involved for the community is by engaging in pro bono cases, in which can share our expertise with people who might otherwise experience difficulties in obtaining legal aid. Apart from being a source of great professional satisfaction, these cases also give us the opportunity to gain experience unattainable in our everyday work. We believe that our commitment has a positive impact on the protection of human rights and other constitutional values in the Republic of Poland.

Anna Frankowska

partner at Weil, Gotshal & Manges

Nowadays, a certain degree of courage is required to provide pro bono legal assistance to non-governmental organisations. A lawyer involved in cases concerning the protection of human rights and the rule of law in Poland may face criticism or even ostracism. This should make us all the more sensitive to the needs of organisations that count on our help.

Hanna Gajewska-Kraczkowska

attorney at Domański Zakrzewski Palinka

Pro bono cases are something I remember particularly well. While working them, you deal with human helplessness, the oppressive nature of the system, heartless approach of state bodies and legal absurdities. There is often an issue that I find particularly important: the essence of human rights. Sometimes I discuss these cases with my students. I think in this way we are learning together how to be socially sensitive, which is a trait of any lawyer representing people in court.

Piotr Golędzinowski

attorney at Wardyński i Wspólnicy

All attorneys should contribute to the development of the rule of law and civil society. We take on pro bono cases to defend fundamental values that are currently being attacked more and more often. In this way, we help our clients to exercise their rights and we express our opposition to legal nihilism.

Sylwia Gregorczyk-Abram

attorney at Clifford Chance

Non-governmental organisations play a significant role in social life and are a key element of civil society and democracy. They provide structures for collective action, meeting common needs. They create channels for the representation and advocacy of social interests of specific groups. For these reasons, these organisations require multifaceted and comprehensive support, above all from the legal community.

Paulina Kieszkowska-Knapik

attorney at Kieszkowska Rutkowska Kolasiński
an expert in health care law

Patients lost in the maze of medical law should be supported in their unequal struggle with public administration, because their resistance is the only way to force decision-makers to act for the benefit of all patients. We do this on a pro bono basis because, as attorneys with the subject-specific expertise, we recognize we have an obligation to share this knowledge with the most needy.

Robert Krasnodębski

attorney and tax advisor at Weil, Gotshal & Manges

Tax matters are increasingly often the subject of pro bono assistance. Due to the complexity and breadth of tax laws and, perhaps even more importantly, the increasing omnipotence of tax authorities, individuals with no professional legal representation are basically unable to defend themselves against actions of tax administration. The role of legal aid is to ensure that the citizen is a party to, rather than a subject of, tax proceedings.

Agnieszka Lisiecka

partner at Wardyński i Wspólnicy
leads the firm's employment law practice

Pro bono work is multifaceted and multidimensional and can never be overestimated. Its importance is growing steadily, and this is happening in parallel with a change in the way people behave as a society. The reality in which a society is shaped by the unrestricted flow of information and technological development inevitably opens up new areas and creates challenges for pro bono cooperation in the protection of human rights such as dignity, the right to privacy and freedom of speech. In this context, pro bono work teaches you how to be socially sensitive and how to define new risk areas. For a professional attorney, it is an opportunity to influence the proper development and application of law in order to prevent such risks.

Dr Wojciech Marchwicki

attorney at Hogan Lovells

The Helsinki Foundation carries out a certain mission, which means that the legal problems they approach us with are always important and precedential in nature. We feel how important they are for the civil society and the rule of law. It is therefore impossible to say no to Foundation's request, even though these cases always require a formidable commitment and courage in tackling difficult issues. Influencing reality is a great satisfaction associated with working as a lawyer.

Małgorzata Mączka-Pacholak

attorney at Pietrzak Sidor & Wspólnicy

Our law is not perfect. For a variety of reasons, individuals find themselves in situations that are not specifically and properly regulated by law. Lawyers' role is to seek effective mechanisms to protect individual's rights in all situations. The pro bono collaboration with the HFHR and on behalf of its clients is an opportunity to improve our law and practice to prevent such situations from occurring in the future. The work we do together brings enormous satisfaction!

Justyna Metelska

Chairperson of the Human Rights Committee
Polish Bar Council

By providing pro bono legal aid in cooperation with non-governmental organisations, the Bar carries out its mission to defend civil rights and freedoms. By supporting the disadvantaged and the most vulnerable, we are fighting to raise the standards of human rights protection.

Mikołaj Pietrzak

partner at Pietrzak Sidor & Wspólnicy
President of the Warsaw Bar Council

From an attorney's perspective, pro bono work done together with non-governmental organisations is an opportunity to implement the core values that form the axiomatic basis of our profession. As we struggle together to raise the standards of protection of rights and freedoms, we are able to share our knowledge and gain experience that cannot be obtained from the everyday practice of an attorney.

Małgorzata Surdek

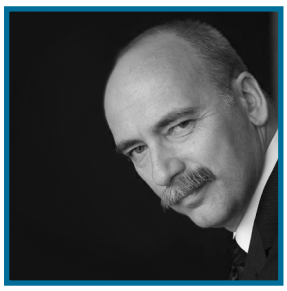
partner at CMS

Pro bono work is a manifestation of the independence and integrity of the legal profession and gives the profession a more profound meaning: by representing the weaker, excluded or persecuted, we not only give them better access to the justice system and effective protection of their rights and freedoms, but we also serve society as a whole in a very practical and concrete way, implementing the ideas of equality, solidarity and justice, which are enshrined in the Constitution and constitute the foundation of civil society.

Maciej Ślusarek

LSW Leśnodorski Ślusarek i Wspólnicy

By defending human rights in specific, often landmark, cases, we help to set standards of proper conduct. This is particularly true in cases where we speak out against abuses of power or defend the right to online anonymity and freedom of speech. This would be impossible without pro bono work, because often violations of rights affect people who cannot afford to pay for professional legal representation. We are convinced that we need to be involved in such matters, simply for the sake of principle. For a better Poland.

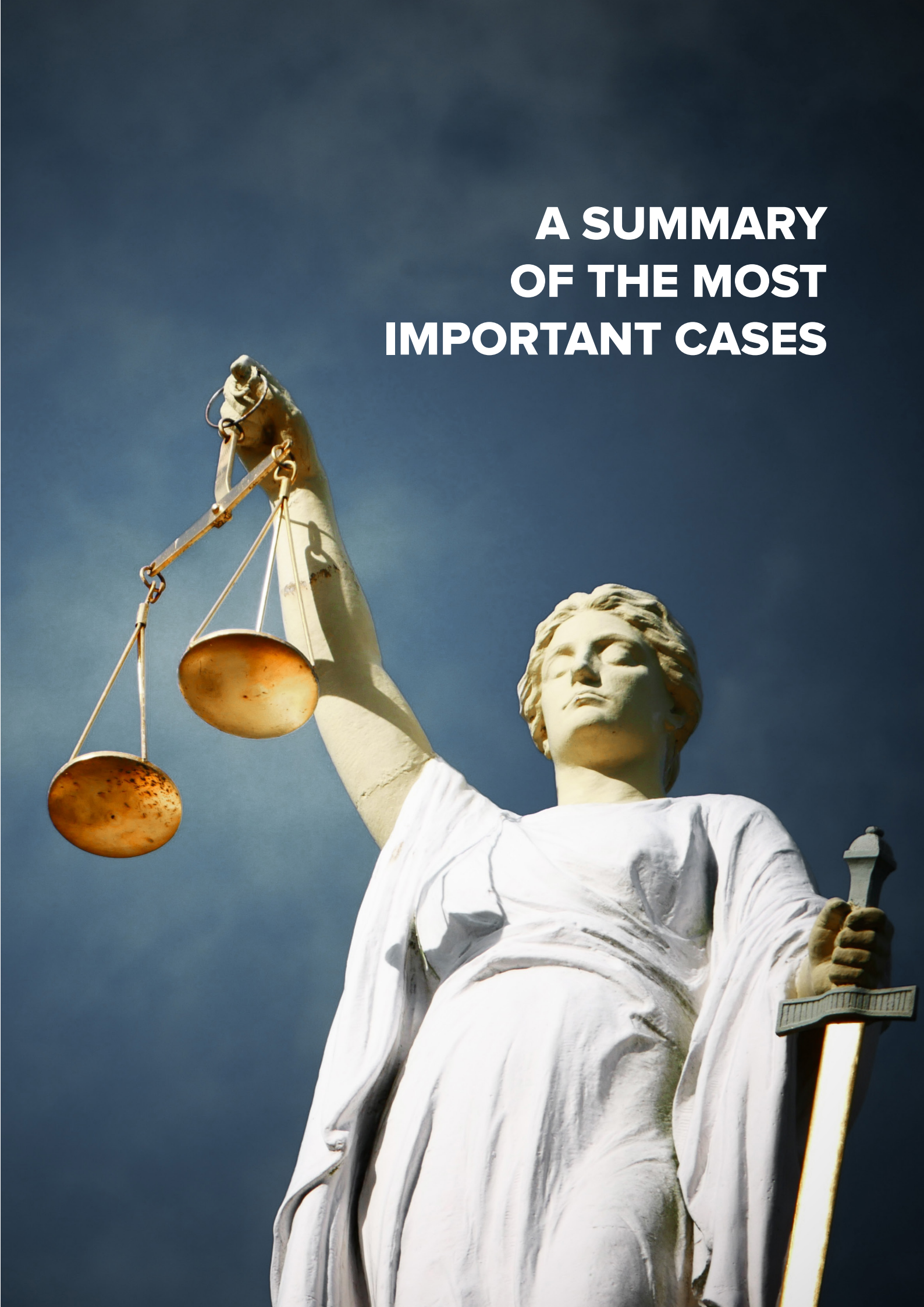


Andrzej Tomaszek

partner at Drzewiecki, Tomaszek i Wspólnicy

An attorney should handle certain pro bono cases if this contributes to the protection of human rights and dignity. Preventing or compensating for human injustice is often more rewarding than a heavy fee. This reward is all the more complete if you work a landmark case that is professionally challenging.

A SUMMARY OF THE MOST IMPORTANT CASES



Prohibition of torture and inhuman or degrading treatment and punishment

Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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

A landmark judgment of the Supreme Administrative Court on the reimbursement of a drug for a patient with chronic pain

The patient's condition causes acute pain in legs, which prevents her from performing activities of daily living and forces her to use crutches. In September 2017, the patient filed a complaint with a Provincial Administrative Court, arguing the Minister of Health had denied her request for the reimbursement of costs of a painkiller despite recommendations of her attending doctors. The Minister approved the importation of the drug, thereby confirming that the medicine is necessary for the complainant, but refused to approve the drug's reimbursement, which – given the patient's financial situation – effectively deprived her of access to the medicine. The monthly cost of treatment with the drug can be as high as PLN 500.

In December 2017, the Provincial Administrative Court dismissed the complaint, holding that the administrative body should ensure that reimbursement is available for those medicinal products that are the most effective, as compared to other products used in the treatment of a given condition. The court also argued that there was no sufficient scientific evidence that the drug in question is more efficient than other treatments designated by the Minister.

The woman submitted a complaint in cassation to the Supreme Administrative Court, alleging that the Provincial Administrative Court had not reviewed the legality of the Minister's decision, and in particular its constitutionality. Another point raised in the complaint was the lower court's failure to take into account the fact that the Minister's decision had been based solely on opinions concerning the risk of marijuana addiction rather than an individual assessment of the patient's situation and medical condition. Furthermore, it was alleged that the Minister had disregarded the research of the complainant's attending physician, who examined the efficacy and safety of long-term administration of opioids in the patient's case.

In the verbal summary of the judgment's holding, SAC stated that evidence had not been exhaustively examined in the case. At the same time, the Court acknowledged that neither party to the dispute had provided convincing evidence in support of their case. SAC reminded that the requirements of reimbursement of drugs did not have to be satisfied cumulatively, upholding the present line of reasoning of administrative courts. The Court also stressed that drug reimbursement decisions are discretionary in nature, which means that reviews of such decision must take into account the interests of the public.

Paulina Kieszkowska-Knapik, of Kieszkowska, Rutkowska, Kolasiński, positively responded to the HFHR's courtesy request and agreed to represent the HFHR client on a pro bono basis.

Judgment of a Provincial Administrative Court (PAC) of 20 December 2017, case no. VI SA/Wa 2114/17.
Judgment of the Supreme Administrative Court (SAC) of 17 July 2018, case no. II GSK 844/18.

Why is this case so important for the protection and rights of the individual?

The refusal of reimbursement of the only drug that can effectively alleviate her suffering actually deprives her of her right to pain management. Such a decision is not only contrary to the constitutional reading of the Reimbursement Act but also violates the recently amended Patient Rights and Ombudsman for Patient Rights Act, which grants the right to receive pain management services to all patients.

Access to proper pain management schemes remains a key element in the state's obligation to safeguard the fundamental rights and freedoms. The absence of an effective pain management system means that the state has failed to perform its constitutional duty to provide health care. This may also constitute a violation of the prohibition of torture, inhuman and degrading treatment.

The problem of ineffective pain management featured in the February 2013 report of the UN Special Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment, which discussed, among other things, human rights violations in health care institutions. A denial of access to effective pain management was given as an example of such violations.

The Special Rapporteur emphasised that effective pain management is systemically hindered by overly restrictive drug control regulations or misinterpretation of otherwise appropriate regulations; lack of prioritization of palliative care and pain management, ingrained prejudices about using strong drugs and the absence of a pain management policy or guidelines for practitioners.

Right to life, liberty and security of a person

Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty. ...

Post-conviction detention challenged before the Strasbourg Court

The HFHR has filed an application with the European Court of Human Rights in a case concerning a person's committal to the National Centre for the Prevention of Dissocial Behaviours (NCPDB).

In 2004, the person concerned was sentenced to a prison term of 10 years for rape. In the course of criminal proceedings, he was not diagnosed with any mental disorders that would have rendered him mentally incompetent to stand trial or serve his sentence. It was not until about 7 months before the end of his sentence that he was transferred to serve the rest of his term (approx. 7 months) in a therapeutic unit; previously, he had not been a subject of any therapeutic intervention. A few months before the end of his prison term, proceedings were instituted in order to place the man at the NCPDB. However, before the proceedings were completed, the convicted man finished his sentence and was released from prison. He was living as a free man for about a year. During that time his behaviour was impeccable – he did not run into conflict with the law, establish a relationship, found a job. Despite his clear record, one year later the man was detained in the NCPDB.

In his application to the ECtHR, the man argues that he is not a person "of unsound mind" within the meaning of Article 5(1)(e) ECHR and that his detention is therefore unfounded. He also argues that his detention in the NCPDB is not a therapeutic measure but constitutes a second punishment for the same offence (see above). The man further claims that the provisions of the Act were applied arbitrarily in his case as he became a subject of therapeutic proceedings shortly before the end of his sentence after the Act came into force, which may suggest that the actual purpose of the proceedings was to enable his detention in the NCPDB. The applicant also complains that his detention in the NCPDB has been unreasonably extended. According to evaluation reports compiled by the NCPDB in June and December 2017, the applicant's further detention is no longer necessary as he no longer constitutes a sufficiently serious threat to the public. Nevertheless, a court denied his release from the NCPDB, relying on an external evaluation. Moreover, the procedure launched to determine if the man's further post-conviction detention was reasonable lasted almost a year, which is an excessively long period. The man's application also alleges a disproportionate restriction of his right to the protection of privacy and family life. In support of that allegation, the applicant points out that the constant presence of a security guard during visits of his wife and daughter prevents him from having a free conversation and contacts with his loved ones.

The application has been registered by the ECtHR but has not yet been communicated to Poland.

Why this is a landmark case?

The Court will have the first opportunity to review the Convention compliance of a controversial law adopted of 22 November 2013. The effects of a ruling acknowledging the allegations raised in the application may be far-reaching, and such a ruling may even force the Polish legislator to reform the system currently in place. The case may also be an opportunity to clarify the existing, apparently not sufficiently precise, case law of the ECtHR on the grounds of the admissibility of application of similar forms of detention.

Protracted pre-trial detention and unlawful extensions of detention

A man was arrested and then detained on remand in April 2003. He spent a total of 3 years and 11 months in detention, until his release on 27 February 2007.

In December 2005, the first instance court sentenced him to a prison term of three years and 10 months. He appealed against the conviction through his defence lawyer. The prosecution did not challenge the ruling. On appeal, a court reversed the first instance judgment and remanded the case for reconsideration in September 2006. Despite the reversal, the appellate court decided to extend man's pre-trial detention.

Later on, the court extended his detention twice. The man's defence lawyer filed an interlocutory appeal against the last detention order dated 19 February 2007, arguing that the court, by extending the defendant's pre-trial detention, violated the prohibition on the *reformatio in peius*, or putting an appellant in a worse position than that would have existed should they had not appealed. On 27 February 2007, the appellate court admitted the defence lawyer's arguments and quashed the detention order. The court noted that if extended, the period of the appellant's pre-trial detention would be longer than the actual prison term the man received by virtue of the reversed conviction. In the event that an appeal is submitted only by the defence, the second instance judgment may not impose a more severe penalty than that ordered in the first instance decision. For this reason, the man's pre-trial detention should have ended by 31 January 2007. The case was finally closed with regard to some of the charges in December 2014, when a court sentenced him to two years in prison. As regards the remainder of charges, the proceedings were finally concluded in January 2018, when a second instance court upheld the sentence of a restriction of liberty for six months.

Proceedings before the European Court of Human Rights

The man decided to file an application to the ECtHR, alleging that the prolonged application of pre-trial detention violated his human rights and that he was unlawfully detained from 31 January to 27 February 2007.

In 2018, the Strasbourg Court accepted the unilateral declaration of the Polish Government, which admitted that the pre-trial detention of the man had been incompatible with the provision of the European Convention on Human Rights which ensures a person's right to stand trial within a reasonable time. The Government further admitted that the man's pre-trial detention from 31 January to 27 February 2007 was unlawful. The Government also agreed to pay the applicant EUR 5 000.

The man was represented before the ECtHR by Justyna Metelska, an attorney who agreed to appear in the case pro bono at the request of the Helsinki Foundation.

Claim for non-pecuniary compensation for unquestionably unfair detention

In June 2015, the man filed a claim for non-pecuniary compensation on account of his unquestionably unfair detention. He sought an award in the total amount of PLN 290,000. In his submission, he pointed out that he had suffered a moral injury related to the period of his pre-trial detention, that had not been included in the prison sentence, as

well as the moral injury related to the period of 27 days of his manifestly unlawful pre-trial detention. The amount requested also included compensation for the suffering caused by the long separation from his family and the unjustified impediments to his contacts with his family and in particular the fact that the claimant was prevented from attending the funeral of his former spouse and was deprived of his custody of and contacts with his son. He also submitted that he had suffered bodily harm.

In August 2018, the Regional Court in Katowice awarded the man PLN 110,000 in compensation. The court justified the amount by pointing out that it reflected the unfair deprivation of liberty for 20 months, the claimant's inability to attend the funeral of his former spouse, as well as the medically harmful hunger strike he started in connection with the unlawful deprivation of liberty for 27 days. The court dismissed the claim on the remaining counts. The court stressed that awarding damages is a discretionary exercise. In the court's view, it was undeniable that the claimant was detained on remand for a period longer than the overall length of his prison sentence. The court also pointed out that this was an unprecedented case, especially because of the mistake made in extending the pre-trial detention period in a situation that involved a violation of the prohibition of the *reformatio in peius*.

Due to its complexity, the case was heard by a three judges panel of the Regional Court in Katowice.

The prosecution appealed against the above judgment, but the Court of Appeals in Katowice dismissed the appeal in its judgment of 22 November 2018. In the verbal reasons for the decision, the court indicated that it was evident from the way the prosecutor phrased the allegations of the appeal that he misunderstood the judgment of the Supreme Court of 8 May 2018 (case no. II KK 452/17). In this judgment, the Supreme Court ruled that pre-trial detention would be unquestionably unfair if, despite the guilt and the perpetration having been attributed to the defendant, they did not receive an unsuspended custodial sentence, but, for example, a more lenient sentence than a custodial sentence. The Court of Appeal emphasised that this was precisely what happened in the case in question. The Court also noted that both the courts and scholarship pointed out that any pre-trial detention lasting longer than the actually imposed prison sentence is unquestionably unfair. Such a situation gives rise to the risk-based liability of the State Treasury, and an award of pecuniary or non-pecuniary compensation is justified on grounds of equity.

Marek Stańko of Stańko i Partnerzy agreed to represent the man in domestic proceedings on a pro bono basis, responding to a courtesy request of the HFHR.

The case has been conducted by the HFHR's Strategic Litigation Programme since February 2007.

Why this is a landmark case?

The case is a landmark one mainly due to the length of the proceedings in question, which started in 2003 and ended only in 2018. Another distinguishing factor is the type of error that was committed during the proceedings. Undoubtedly, the unlawful pre-trial detention of a man for 27 days constituted a major violation of the Convention. The complexity of the case was duly noted by the Regional Court in Katowice, which is why the court decided to hear it in an extended, three-judge panel.

Effective execution of Strasbourg judgments made in cases involving the liberty of the person

In 2015, a client of the Foundation submitted an application to the ECtHR, in which he claimed that his detention in a social care home coupled with deprivation of his access to effective legal remedies was inconsistent with the European Convention on Human Rights. In 2017 The ECtHR discontinued the proceedings in this case in view of the making of a unilateral declaration by the Polish Government. The Government admitted in this declaration that the applicant's committal to a social care home was inconsistent with the Convention and agreed to pay the applicant a non-pecuniary compensation of PLN 20,000, free of tax.

The man received the money, but soon afterwards the local social services centre initiated proceedings to change the amount of the fee payable for his residence at the social care home. At the beginning of 2018, the centre issued an administrative decision setting the new amount of the fee, which exceeded the original amount by 1,200 PLN. The new amount was to apply for a period of 12 months. According to the statement of reasons attached to the decision, the Foundation client's receipt of a one-off income of PLN 20,000 resulted in a change to the basis for the calculation of the fee. This decision, subsequently revoked by a second instance body on procedural grounds, was later followed by another, very similar, measure. The second decision became final as the man did not challenge it on appeal. He did not do that because he was assured by social services that proceedings for the waiver of his fees would soon be started, which eventually happened. The man was represented, on a pro bono basis, by Łukasz Lasek and Piotr Golędzinowski, attorneys of Wardyński i Wspólnicy, who positively responded to the Foundation's courtesy request. On 2 October 2018, a Municipal Social Services Centre issued a decision that waived a part of the Foundation's client's social care home fee, effectively removing the consequences of the earlier increase.

Why this is a landmark case?

An increase in the fee for residence at a social care home that resulted from the fact that the complainant was compensated for a moral loss caused by his involuntary placement at this institution seems to be contrary to the intended purpose of the non-pecuniary compensation. If the applicant was in this way deprived of the whole compensation (or even a significant part of it), we could even speak of a failure to execute the ECtHR judgment, which could even justify a reopening of proceedings before that body. Given the above, the HFHR decided to help the client to defend his rights and noted with satisfaction the successful outcome of the proceedings.

The right to a court

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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 ...

Limits of the freedom to express opinions on judges exercisable by the Minister of Justice

The Helsinki Foundation for Human Rights submitted an amicus curiae brief in civil proceedings concerning an action for the protection of personal interests brought against the Minister of Justice by a judge whose external assignment was revoked by the Minister. The judge – claimant in these proceedings – argued that the media release communicating the revocation of her assignment, which was posted on the Minister's website, violated her personal interests, as its wording called into question her professionalism: the release referred to, among other things, her "extraordinary ineptitude". In the brief, the HFHR argued that the case had a substantial impact on the determination of limits of legally acceptable criticism of judges expressed by an executive body. According to the Foundation, in making such statements about judges, government bodies should not be able to rely on the freedom of speech principle. Moreover, statements of governmental officials, especially those connected with the application of executive measures (such as a revocation of an external assignment of a judge), may constitute a form of exerting politically-motivated pressure on judges. In March 2018, a Regional Court ruled that the judge's personal interests had been violated and ordered the Minister to issue an apology.

HFHR's amicus curiae brief has been posted on the Foundation's website at http://www.hfhr.pl/wp-content/uploads/2017/05/HFPC-amicus-dobra-osobiste-sedzi-05-2017.pdf.

Judgment of the Regional Court in Warszawa of 30 March 2018, case no. C 1115/16).
The judgment is not yet final.

Why can these proceedings be classified as a landmark case in the area of human rights protection?

A ruling expected in this case will help to establish the limits of criticism of judges by the executive. Also, this case may also present an opportunity for the courts to explicitly determine that members of the executive making such statements about the judiciary in connection with the exercise of their official powers cannot rely on the freedom of expression but must act in accordance with the principle of legality. Since such statements of the executive can be seen as a form of political pressure, the notion that ministers and other government bodies can use harsh journalistic expressions about judges may pose a threat to the independence of the judiciary.

Right to the protection of family and private life

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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

The ECtHR has considered for the first time an application concerning an exhumation carried out against the will of the deceased person's family

In October 2016, a prosecutor conducting the proceedings in the case of the Smolensk crash decided to appoint a team of experts who were to perform autopsies of the bodies of victims of the crash. The purpose of the autopsies was to determine the cause of death, and in particular to establish whether the victims' death had been caused by the plane's impact with the ground or by the onboard detonation of an explosive device. The prosecution planned to exhume the bodies of 83 victims; nine bodies had been exhumed earlier, in four cases, the remains had been cremated.

Some families, including the applicants, opposed the decision, arguing that the exhumations would violate their right to respect for the memory of a late relative and the privacy. The applicants asked the Prosecutor General to cease the exhumations and later submitted a formal complaint (interlocutory appeal) against the prosecutor's decision. The prosecution considered the interlocutory appeal inadmissible, but the applicants applied for the judicial review of this decision to the Regional Court in Warsaw. The proceedings in this case are still pending because in April 2017 the Regional Court submitted a question of law to the Constitutional Tribunal, asking whether the Code of Criminal Procedure, "to the extent in which it fails to provide an opportunity to file an interlocutory appeal against an exhumation order", conforms to the Constitution and the ECHR.

The ECtHR applications prepared by the HFHR in this case include complaints of a violation of two provisions of the ECHR: Article 8, which guarantees the right to privacy, and Article 13, which formulates the right to an effective remedy.

In its assessment of the alleged violation of Article 8 ECHR, the Court noted that the Smolensk crash was "an incident of unprecedented gravity, which affected the entire functioning of the State". The right to the protection of life enshrined in Article 2 of the Convention obligates States to conduct an "effective investigation" in such cases. However, such an investigation may not disproportionately violate the right to respect for the private and family life of parties to the proceedings and other persons. It is therefore necessary "to find a due balance" between requirements of a criminal investigation and the obligation to protect the rights of individuals.

The Court held that exhumations carried out against the will of the victims' families undoubtedly constituted an interference with the right to protection of private and family life within the meaning of Article 8 ECHR. The basic requirement stemming from this Article is that national authorities act must act in accordance with the law. "The law" in the case at hand is stated in relevant provisions of the Code of Criminal Procedure. However, the requirement of lawfulness laid down in the Convention entails more than the mere existence of specific national

provisions. These provisions must be of sufficient quality and therefore meet the standards derived from the principle of the rule of law: they must be clear, precise, accessible and provide adequate protection for individuals against the arbitrariness of authorities. The ECtHR ruled that the provisions of the Code of Criminal Procedure did not offer such protection because they did not provide for the possibility of challenging a prosecutor's decision on exhumation before a court or any other independent authority. Nor do they oblige the prosecution service to take into account the rights of relatives of the exhumed victims.

At the same time, the Court awarded each applicant EUR 16,000 as compensation for non-pecuniary damage.

Judgment of 20 September 2018, *Rybicka and Solska v. Poland* (applications nos. 30491/17, 31083/17).

Why this is a landmark judgment?

The judgment entered in *Rybicka and Solska* is clearly a precedential decision. This was the first case in which the ECtHR considered an application concerning an exhumation carried out against the will of the deceased person's family. As the ECtHR rightly concluded, although the Smolensk catastrophe was a great tragedy, the requirements of criminal proceedings cannot justify the objectification of victims' families and a total failure to give proper consideration to their arguments.

Execution of the *Rybicka* judgment will require not only the payment of the compensation awarded by the Court to the applicants but also the making of appropriate legislative changes.

The importance of the ECtHR decision is also visible in the formal and procedural aspects of the case. In the course of the proceedings, the Court did not share the government's argument that the applications were premature due to the fact that proceedings were still pending before the Regional Court in Warsaw, which submitted a question of law to the Constitutional Tribunal. In the ECtHR's view, the applicants did not have to wait for the Tribunal's decision because such a decision would not have afforded them an effective remedy anyway since the exhumations had already been carried out. Domestic measures have therefore proved to be ineffective, held the ECtHR. It is also worth noting that the case was communicated to the Government of Poland *before* the exhumation and despite the absence of a decision of the Constitutional Tribunal. In the light of the ongoing constitutional crisis, the course of the present proceedings may be a guideline for parties and their attorneys in proceedings before the Strasbourg Court.

The first judgment of the Strasbourg Court on immigrant detention in Poland

In 2013, Polish authorities rejected an application for refugee status submitted by a Chechen family and decided to remove the family from Poland. At that time, the family left for Germany. While staying there, they had another child. In January 2014, the mother with her six children was surrendered to Poland and put in immigration detention at the Guarded Centre for Foreigners in Kętrzyn pending deportation. However, the Warmia and Mazury Province Governor issued a decision that the youngest child's presence in Poland was legal, effectively refusing to deport the minor.

During their placement at the guarded centre, the family submitted another application for refugee status. As the applicant's father has received international protection in Poland in separate proceedings based on the evidence similar to that offered by the applicant, the Head of the Office for Foreigners suspended the enforcement of his

earlier deportation decision. It was only at the end of June 2014 when the family was released from the centre.

The ECtHR, in the judgment *Bistieva and Others v. Poland*, found a violation of the right to family life (Article 8 of the Convention). The ECtHR judgment was a consequence of immigration authorities' failure to take into account the best interests of children in making the detention decision, in contravention of the laws such as the UN Convention on the Rights of the Child or EU Charter of Fundamental Rights.

The ECtHR argued that 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 held also 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 ECtHR judgment of 10 April 2018, *Bistieva and Others v. Poland* (application no. 75157/14).

Why is this case particularly important?

This is the first ECtHR judgment on the placement of children at guarded centres. The *Bistieva* judgment also recognises the long raised concerns of non-governmental organisations, according to which the best interests of the child are not really taken into account in decisions on the placement of families at guarded immigration centres. This judgment should have an impact on the practice of Polish authorities by ensuring that they always take into account the best interests of the child when ordering the placement of children in immigration detention centres.

Freedom of speech

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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.

A judgment of the ECtHR on mass surveillance

In 2018, the European Court of Human Rights handed down a landmark judgment in two joined cases concerning the mass surveillance of citizens by state authorities. The cases are the aftermath of Edward Snowden's reports on mass surveillance by the US authorities, conducted in agreement with a number of foreign actors, including the UK Government. In both cases, the HFHR presented amicus curiae briefs in which the Foundation invoked standards of the right to privacy and freedom of speech in the context of threats to the protection of journalistic sources of information.

In the first case, *Big Brother Watch and Others v. the United Kingdom*, the applicants alleged that they might have been put under surveillance by the General Communications Headquarters and that UK secret services might have received from their foreign counterparts information on the applicants' electronic activities. The applicants argued that these actions violated their right to privacy (application no. 58170/13).

The other case results from the application submitted by the Bureau of Investigative Journalism, an independent non-profit organisation working in the area of investigative journalism. According to the BIJ, the government of the United Kingdom has illegally captured and processed electronic data of citizens, including media professionals, which constituted a major violation of not only the right to privacy but also freedom of expression (application no. 62322/14).

In the judgment of 13 September 2018, Strasbourg judges reminded that states should enjoy a margin of appreciation in formulating their security policies. However, the Court noted that the system for the operation of intelligence services and the framework of operational supervision must comply with a number of standards. The UK system allowed (1) the control of communication between selected internet users, the selection of content that was of intelligence interest, the search of information needed by the intelligence services and the evaluation of materials collected by an analyst; (2) the receipt of data from communications service providers; (3) the transfer of data between security services of different countries.

The Court found that there was no evidence of an abuse of powers exercisable by intelligence services. However, it also found that there were no adequate control mechanisms for the selection of intercepted data and for the filtering of data that could be used for purposes such as wiretapping. Moreover, the legislation has not provided sufficient safeguards and mechanisms to prevent the collection of individuals' data, which are often sensitive data relating to an individual's behaviour or contacts. For these reasons, the ECtHR considered that UK legislative framework did not meet the quality of law requirements and that its potential application of this legislation to citizens would result in a violation of Article 8 of the Convention.

Referring to the alleged violation of Convention's Article 10, the ECtHR noted that there were not

adequate mechanisms in domestic law that would protect a journalist's communication with an informant and that would ensure that such communication is not selected to be analysed by security services. In the case of journalists, security services' access to what is known as metadata (phone records, a mobile phone's log-in locations, Internet activity data) can easily lead to the identification of a journalist's informant. For this reason, such access should be subject to strong guarantees. The above means that persons who communicate information important for the public interest to journalists may start to be afraid of contacting the media because of the risk of disclosure of their identities. As regards the collection of data from communications service providers, the Court pointed out that appropriate safeguards existed, but only when it was known that such collection would directly lead to the disclosure of a source of information. However, the safeguards did not cover all situations where a request for the provision of data concerned a journalist and their communication. In addition, there were no special provisions that would place any objective restrictions on the possibility of collecting data from providers through introducing a requirement that such collection is only allowable for the purpose of combating "serious crime". Consequently, the ECtHR found that there had been a violation of Article 10 of the Convention.

ECtHR judgment of 13 September 2018, *Big Brother Watch and Others v. the United Kingdom* (applications nos. 58170/13, 62322/14, 24960/15).

Why this is a landmark case?

Big Brother Watch is clearly a landmark judgment. For the first time in history, the ECtHR has had to address, in a single judgment, the phenomena of mass interception of data, exchange of information between security services of different countries and the services' access to information stored by communications service providers. Moreover, Big Brother Watch is the first judgment in which the ECtHR looked at the impact of mass surveillance (the interception of metadata and the use of wiretapping) on the private life of an ordinary person. Undoubtedly, this judgment should be noted by all countries whose legislation allows for a broad application of covert investigative methods.

A special role of the media that provide coverage of protests

In August 2018, the District Court in Bielsko-Podlaskie acquitted a photojournalist who reported on the protests in the Białowieża Forest in the summer of 2017.

The journalist was charged with unlawful entry to the forest and a failure to leave the area at the request of an authorised person. The judgment is not yet final. In the verbal justification of the verdict, the court indicated that the ban on entering the forest was defective. The forest inspector is only competent to issue temporary bans, whereas the ban imposed in the man's case was introduced "until further notice", or indefinitely. Therefore, the ban was not effectively implemented, which meant that the rule according to which forests are generally accessible was not in fact excluded and that everyone could freely remain in the area supervised by the forest inspectorate.

At the time, the Białowieża Primeval Forest was the scene of a protest against logging, which took the form of a blockade of logging machinery, among other things. The photojournalist arrived at the Forest to cover the actions of eco-activists. This resulted in the necessity to violate the ban on entering the Forest, which was introduced in December 2016 by the Browsk Forest Inspectorate.

Forestry Guard wardens arrived at the protest site and ordered all persons present to leave the forest. Since the request was not complied with, all those present at the site, including the photojournalist, were asked to produce their IDs. The photojournalist informed the wardens that he was there in his professional capacity to report on the blockade. After several months, he was summoned to an interview where he needed to once again explain that his presence at the protest site was purely professional and that he had not actively taken part in the protest himself. Nevertheless, the Forestry Guard decided to press petty offence charges against the photojournalist, accusing him of trespassing in a forest area closed to the public and a failure to comply with a lawful order of an authorised public officer. In February 2018, the Hajnówka-based 7th Local Department of the District Court in Bielsko Podlaskie issued a summary judgment against the photojournalist, giving him an official reprimand and ordering him to pay the costs of the proceedings in the amount of PLN 50. The journalist made a complaint against the judgment, which resulted in its automatic annulment and the allocation of his case to the procedural track of ordinary hearing.

At the request of the HFHR, the photojournalist is represented on a pro bono basis by Monika Górska, Agnieszka Lisiecka and Janusz Tomczak, attorneys with Wardyński i Wspólnicy.

Judgment of the District Court in Bielsko Podlaskie, 7th Local Criminal Department, of 1 August 2018, case no. VII W 188/18.

Why is this case so important?

The case is important from the perspective of guarantees of the freedom of media coverage of protests and demonstrations. The European Court of Human Rights has emphasised that, while the status of journalist does not, in principle, exempt the press from the obligation to comply with law during the collection of information, any official charges against journalists related to their coverage of demonstrations constitute a serious interference with the freedom of expression and should be subject to strict controls. This is because state authorities should take into account the special role of the media, both at the time when a demonstration takes place and at the stage of taking any follow-up action, including any attempts to hold members of the media responsible in connection with their work.

Freedom of assembly and association

Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The ban of the Equality March in Lublin

In October 2018, the HFHR participated in the proceedings challenging the ban on the Equality March in Lublin. The Mayor of Lublin explained his decision to prohibit the March by referring to the threat posed by potential counter-demonstrators who said they would use violence against the March goers. Local Police also pointed to risks to public safety and order.

The Regional Court in Lublin ruled that the Mayor's decision had not been unlawful. The Court denied the Foundation's motion to join the proceedings, pointing to the absence of legal grounds for admitting the motion. However, this ruling was reversed by the Court of Appeals in Lublin, which found that the prohibition had been unlawful. In the statement of grounds for the decision, the Court pointed out that it was impermissible to prohibit a peaceful assembly because of *a risk* of unlawful actions by its opponents and stressed that State authorities have positive obligations to ensure the safety of the assembly's participants. The Court of Appeals emphasised that "freedom of assembly plays an important role in a democratic state ruled by law and is a condition for the existence of a democratic society. Freedom of assembly guarantees that members of a community are able to exert influence on public authorities and is a natural consequence of the sovereignty of the people. Freedom of assembly serves, in particular, the purpose of enabling individuals to have a say on policies pursued by the state by way of presenting opinions, assessments, views and demands. Assemblies are an important instrument of direct democracy."

The Court of Appeal also allowed the Foundation's third party intervention in the matter. The Foundation argued during the appellate proceedings that the ban imposed by the Mayor of Lublin was discriminatory and incompatible with standards stemming from the ECHR. The HFHR drew the Court's attention, inter alia, to the ECtHR judgment of 3 May 2007 in *Bączkowski and Others v. Poland* (application no. 1543/06), in which the ECtHR found an infringement of Article 14 ECHR read in conjunction with Article 11 ECHR (the prohibition of discrimination in the exercise of freedom of assembly). On the facts, *Bączkowski* involved the ban on the organisation of the Equality Parade planned for June 2005 in Warsaw issued by the Mayor of Warsaw, which was based on, among other things, security considerations. The Foundation also indicated that the obligation to ensure the safety of participants in assemblies is of particular importance for demonstrations organised by members of minorities, including sexual minorities, which was clearly indicated by the ECtHR in its judgment of 12 May 2015 in the case of *Identoba and Others v. Georgia* (application no. 73235/12).

The HFHR's position statement on this case can be viewed at http://www.hfhr.pl/wp-content/uploads/2018/10/Marsz-Rownosci-Lublin-pismo-SA-Lublin-stanowisko-11.10_ost_anonim_PDF.pdf.

Decision of the Court of Appeals in Lublin of 12 October 2018, case no. I ACz 1145/18.

Why is this case important?

The case of the prohibition of the Lublin Equality March shows that any restrictions on freedom of assembly should be an absolute exception and their admissibility should be assessed in the light of the principle of proportionality. The grounds for the most extreme restriction on the freedom of assembly (a ban), as set out in the Assemblies Act, cannot be interpreted extensively, and the existence of these grounds should be proven in a convincing manner. The ruling of the Court of Appeals in Lublin should be a clear indication for local authorities that may resolve similar matters in the future.

Proceedings in the case of a Russian law restricting the sources of NGO funding

The Helsinki Foundation for Human Rights submitted an amicus curiae brief with the European Court of Human Rights in *Levada v. Russia*, a case concerning a Russian law on non-governmental organisations. According to this law, all non-governmental organisations that "engage in political activities" and receive foreign funding must register as "foreign agents". Moreover, all materials published by such organisations must be identified as originating from a "foreign agent". The organisations in question also need to fulfil many other additional administrative obligations.

In its amicus curiae brief, the HFHR emphasises that such laws interfere with the intertwined freedoms of association and speech guaranteed under international law. For this reason, laws restricting NGOs' ability to raise funds have been subject to extensive criticism by a number of international bodies. Such critical opinions pointed out in particular that it was unacceptable to discriminate against NGOs on the basis of their sources of funding and to conduct campaigns aimed at discrediting such organisations in the eyes of the general public.

Regrettably, similar restrictions were introduced in several other countries including Hungary, where they also caused controversy. The HFHR noted that proponents of limiting NGO access to foreign funding often invoke the example of US Foreign Agents Registration Act. In practice, however, the narrow interpretation given to the Act prevents it from being applied against NGOs engaged in human rights advocacy or the promotion of the rule of law; instead, FARA is used to regulate organisations, often of a commercial nature, engaged in political lobbying to promote interests of foreign countries.

The HFHR's position statement on this case can be viewed at http://www.hfhr.pl/wp-content/uploads/2018/11/Amicus-skan.pdf.

The case of *Levada and Others v. Russia*, application no. 16094/17 and others.

What will be the impact of this judgment on the current situation of civil society organisations in Europe?

The ECtHR's judgment anticipated in this case may be significant not only for Russia but also for entire Europe. This is because many international bodies have recently noted a worrying and widespread trend of expanding national restrictions on the freedom of NGOs' activities. The ruling that the Strasburg Court is to make in *Levada* may contribute to the strengthening of standards on the protection of freedom of association and, consequently, discourage other countries from enacting similar laws. In this respect, the HFHR referred to the example of Poland, where an equivalent law on foreign agents has not yet been adopted, but NGOs receiving funding from abroad have been targeted by a smear campaign conducted by the state-owned television and subjected to certain measures by public authorities that adversely affect the freedom of NGO activity.

Prohibition of discrimination

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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

Right to the nursing allowance for carers of persons with disabilities

The HFHR presented an amicus curiae brief in the proceedings pending before the European Court of Human Rights in the case of *Łuczkiewicz and Others v. Poland* (application no. 1464/14 and others). The case concerns a group of carers of people with disabilities who in 2013 were deprived of their entitlement to the nursing allowance as a result of a legislative amendment. In 2013, the right to the nursing allowance was made dependent on when the disability of a person in care arose. The applicants cannot apply for this allowance because the disability of the persons under their care arose after these persons attained the age of 18 or 25. It is estimated that a group of about 150,000 people – the "carers of adults with disabilities" – have found themselves in a similar situation. In 2014, the Constitutional Tribunal ruled that the differentiation of eligibility for the nursing allowance for carers of persons with disabilities based on the grounds of the time when the disability arose, violated the constitutional principle of equal treatment. Polish authorities have yet not implemented the judgment of the Constitutional Tribunal and have not adopted measures to ensure equal treatment of all carers of persons with disabilities.

In the submitted brief, the HFHR pointed to the divergent practice of the authorities and administrative courts dealing with the cases of such carers and to the fact that favourable decisions issued in individual cases did not solve the systemic problem. Ultimately, the courts took the view that the nursing allowance should be granted to carers regardless of when the persons they care for became disabled. However, administrative bodies (mayors of urban or rural municipalities) still generally refuse to grant nursing allowances to carers of adults with disabilities. This approach is a consequence of, among other things, the position taken by the Ministry of Family, Labour and Social Policy, which categorically excludes the possibility of granting nursing allowances to carers of adults with disabilities under the applicable law.

In the brief, the Foundation pointed out that an appropriate level of financial support provided to persons with disabilities or their families is one of the guarantees of respect for the right to the dignity and autonomy of persons with disabilities, which is referred to in instruments such as the UN Convention on the Rights of Persons with Disabilities. In the view of the UN Committee on the Rights of Persons with Disabilities, cash-based disability allowances are a form of support that facilitates the full inclusion of persons with disabilities in the society. At the same time statistics show that the disability of one of the family members significantly increases a person's risk of falling into poverty, which makes even a stronger case for providing financial assistance to families with a disability.

The HFHR's amicus curiae brief can be accessed on the Foundation's website at http://www.hfhr.pl/wp-content/uploads/2018/09/%C5%81uczkiewicz-p.-Polsce-amicus_PL_FINAL.pdf.

The case of *Łuczkiewicz and Others v. Poland* (application no. 1464/14 and others).

Why are the proceedings before the Strasbourg Court important?

In *Łuczkiewicz*, the European Court of Human Rights has the opportunity to develop standards concerning the protection of social rights of persons with disabilities and their families in the context of access to social benefits. So far, the ECtHR has ruled that it is unacceptable for legal regulations to be drawn up in a discriminatory manner to exclude the acquisition of certain social benefits. The upcoming judgment of the Court will be of profound importance not only for the applicants but also for the entire group of carers of persons with disabilities who have found themselves in a similar situation.

Prohibition of discrimination against children of same-sex unions with regard to transcription of birth certificates and confirmation of nationality

Two cases concerning children whose parents are persons of the same sex according to foreign birth certificates were concluded with major success in 2018.

The first case concerned transcription of a British birth certificate, in which two women were entered as the child's parents. The authorities, as well as a Provincial Administrative Court, held that transcription of the content of a foreign birth certificate, which, apart from the mother of the child, lists a woman as the other parent, to Polish vital statistics records would be a violation of the basic principles of the Polish legal order. In the judgment of 10 October 2018, the Supreme Administrative Court held that transcription of such a foreign child's birth certificate may not violate the public order of the Republic of Poland. In the court's opinion, a refusal to transcribe the birth certificate discriminated against the child and made it impossible for the child to obtain Polish identity documents to which it was entitled as a Polish citizen. According to SAC, such a refusal would also violate European Union law and the resulting right to free movement of citizens of the Member States. The court also took into account the need to protect the child's private life and the bond between parents and children, which is laid down, among other things, in the European Convention on Human Rights.

The Supreme Administrative Court entered a similar ruling in the other case, which involved confirmation of Polish citizenship of four children requested by a citizen of Poland and Australia who, according to foreign birth certificates, is one of their parents. The children were born in the result of surrogacy, which is legal in the place where the procedure was conducted, and were raised by a single-sex couple, married outside Poland. The Provincial Administrative Court in Warsaw agreed with the Governor of Mazowieckie Province and Minister of the Interior, who refused to issue a positive decision. Ultimately, in a judgment of 30 October 2018, the Supreme Administrative Court held that all children have a legal right to receive citizenship. For this reason, went on SAC's argument, a confirmation of Polish citizenship may not be refused to children whose father has Polish citizenship. The court stated that children cannot be discriminated against on the grounds of birth (e.g. as a result of surrogacy) or the nature of ties between parents with regard to acquiring citizenship, as stipulated, inter alia, in the Convention on the Rights of the Child. The Court found that the public order clause cannot be invoked as an impediment to confirmation of citizenship.

The HFHR participated in the proceedings on transcribing the birth certificate and joined the case pending before the Supreme Administrative Court. At the request of the HFHR, in the transcription case the clients were represented pro bono by Dr Paweł Marcisz, an attorney of Łaszczuk i Wspólnicy.

The case concerning transcription of a foreign birth certificate: the judgment of the Supreme Administrative Court of 10 October 2018, case no. II OSK 2552/16.

The case concerning confirmation of Polish citizenship: the judgment of the Supreme Administrative Court of 30 October 2018, case nos. II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16.

Why are these judgments landmark?

The above landmark judgments of the Supreme Administrative Court show a departure from a long-standing line of the jurisprudence of administrative courts, which until now ruled out the possibility of recognising birth certificates in which persons of the same sex were named as parents. The judgments also indicate that such birth certificates may not be assessed on the grounds of the public order clause. SAC made it clear that the best interests of the child should be a paramount consideration in such matters.

Procedural guarantees concerning the removal of foreign nationals

Article 1 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
   a) to submit reasons against his expulsion;
   b) to have his case reviewed, and
   c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Expulsion of a foreign national based on secret documents

HFHR lawyers filed an application to the ECtHR in relation to the expulsion of a foreign national whose stay in Poland was considered a threat to national security. The foreigner had a family life in Poland. During the proceedings, he was not informed in any way about the reasons for the conclusion of him being a national security risk. He had no access to confidential materials of the case and the expulsion decision did not contain any factual justification. The ECtHR application stated that in such a situation the foreigner was deprived of a possibility to defend himself by responding to the allegations made by the authorities. Thus, according to the applicant, his procedural rights under Article 8 of the Convention and Article 1 of Protocol 7 to the Convention have been infringed. On 18 January 2018, the ECtHR communicated the case to Poland.

The case of *Orujov v. Poland*, application no. 15114/17.

Why this is a landmark case?

This case concerns a growing problem observed by the HFHR, namely the fact that in proceedings (compulsory returns, refusals to grant international protection, etc.) affecting foreign nationals who have been recognised as a national security risk, decisions are issued on the basis of national law. Under Polish law, a foreign national may be deprived of all information on the evidence that forms the basis for the decision issues in their case. On the other hand, a Convention standard and EU law guarantee a foreign national the right to a defence, which may be exercised e.g. when the foreign national is given access to key aspects of the decision or when a "special advocate" of the foreign national is provided access to the evidence gathered. It seems that only an international court can find that Polish law does not meet an international standard and bring about necessary changes.

A collective expulsion of foreigners

The Supreme Administrative Court delivered judgments in the cases of HFHR clients, refugees from Chechnya and Tajikistan, who told HFHR staff that they had tried to file applications for international protection at the border. The Border Guard did not accept the applications and issued decisions that refused the refugees entry to Poland. The decisions were based only on official memos made by a Border Guard officers. According to the memos, the foreigners declared they wanted to enter Poland for economic reasons.

SAC ruled that the Border Guard could not lawfully rely on the memos in the refusal of entry proceedings as the memos were drafted and signed only by Border Guard officers and were not in any way authorised by the foreigners. Moreover, SAC stated that the Border Guard had violated the law by failing to provide an attorney with access to procedures conducted with respect to a foreigner at the border.

Judgment of SAC of 2 June 2018, case no. II OSK 3021/16.

Judgments of SAC of 20 September 2018, case nos. II OSK 345/18, II OSK 445/18, II OSK 890/18.

Why this is a landmark case?

These are the first judgments in which a court found that the Border Guard had acted unlawfully in refusing entry to foreigners declaring their intent to apply for international protection. In these judgements, SAC stated that the Border Guard had no grounds to conclude that the foreigners were economic migrants. The court also pointed to the necessity to provide foreigners seeking to cross the border with procedural guarantees, such as the making of appropriate records of their statements and providing their attorney with an opportunity to be present during refusal of entry procedures.

UPCOMING DECISIONS

In 2019, we are awaiting further landmark human rights decisions:

UN Committee on the Elimination of Discrimination against Women will decide its first Polish case

In 2019, we anticipate the first ruling of the UN Committee on the Elimination of Discrimination against Women (CEDAW) in a case against Poland. Last year, the Committee communicated a complaint to the Polish Government. The complaint concerns a case involving the use of domestic violence against a woman (known as "S.") and Poland's failure to provide her with adequate protection. This is a landmark case because the Committee has not yet heard any case brought against Poland. The complaint was prepared by the Helsinki Foundation for Human Rights as part of its Strategic Litigation Programme.

In 2003-2006 the Foundation's client repeatedly notified the police and a prosecutor's office that her husband mistreated her and her children and threatened to set fire to their house. However, the law enforcement authorities did not believe the woman and most proceedings commenced by her notifications were discontinued. Only one notification resulted in an indictment having been lodged by the prosecutor's office against the victim's husband. However, not only were the proceedings very slow, but also the accused was never separated from his wife in any way whatsoever at any stage of the proceedings. Finally, in 2006 a tragedy occurred – the man carried out his threats and set fire to his family house, dying at the site. Following the event, our client attempted to seek compensation form the State Treasury for unlawful inaction of law enforcement authorities, but her action was dismissed in its entirety.

In our communication, we argue, among other things, that at the time when S. was unsuccessfully seeking justice there were no effective laws protecting victims of domestic violence. In recent years, there have been some legislative changes, but nevertheless, not all legal lacunae have been eliminated. Moreover, the complaint reminded that in 2014 the UN Committee pointed out that Poland did not have appropriate regulations and recommended that separate provisions on counteracting domestic violence be introduced to the Criminal Code and effective measures to separate a perpetrator from a victim be imposed.

The HFHR also alleged that by disregarding the victim's reports proving the threat she was facing the state authorities had failed to perform their positive obligation to protect victims of domestic violence. According to the statistics quoted in our report, the case of our client is not an isolated incident. There are still many criminal cases of domestic violence that end in discontinuation, and even if a perpetrator is convicted, sentences are most often lenient and inadequate. What is more, in most cases the perpetrator is not separated from the victim for the duration of the proceedings.

In mid-April 2018, the Committee communicated the complaint to the Polish Government. Authorities had six months for presenting a response to the allegations made in the complaint.

Unlike the European Court of Human Rights, the UN Committee is not authorised to enter binding judgments that oblige states to pay compensation to a complainant. The Committee may still issue recommendations to a state, which may include a call for ensuring that a victim is properly compensated.

Discrimination against a group of female teachers who were dismissed from work in, or directly after, the period of pregnancy

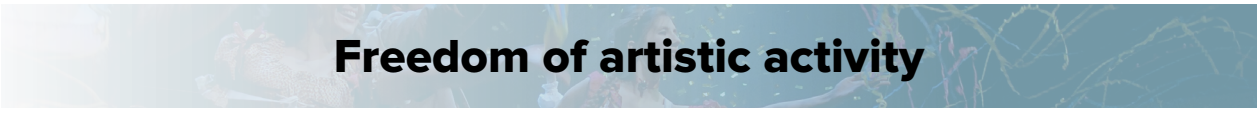
Another case to be resolved in 2019 concerns a very important social problem of discrimination in the workplace on the grounds of the performance of parental roles. The case concerns a group of female teachers who lost their jobs in 2016, during or directly after pregnancy.

During the summer holiday between the school years 2015/2016 and 2016/2017, our clients either expected their children to be born and, as a result, were on sick leave, or were on a maternity or parental leave.

Some of them received an e-mail with information about the termination of cooperation between different companies affiliated with the school (which, formally speaking, employed the teachers). As of 1 September 2016, the other teachers working at the school amicably terminated their employment contracts with their former employees and signed new contracts with other companies. The new contracts named the same school as the place where their work was to be performed. None of the clients has received a proposal to change their employer in this way. In mid-October, all but one client received by post a certificate of employment, which named amicable settlement as the grounds for termination of employment. However, the women deny that they concluded such settlements with their employers. Teachers filed a lawsuit seeking a court decision determining the existence of a valid employment relationship between them and their employers.

The clients, as women during or directly after pregnancy, were the only group that was not offered a contract of employment with a new employer (other teachers entered into such contracts). Such a situation should be assessed from the perspective of gender discrimination, as the only criterion for the different treatment of the clients was the fact that they performed parental roles. Notably, according to the case law of the Court of Justice of the European Union, unfavourable treatment of a woman related to her pregnancy or maternity constitutes direct discrimination on grounds of sex. The CJEU also ruled that it is impermissible to refuse to employ a pregnant woman who is fully qualified to perform the work in question. Moreover, some of the clients are currently in a particularly difficult situation: since they have lost their jobs, they do not receive social security benefits that are eligible for employed women during or directly after pregnancy.

The Foundation joined the clients as parties to the proceedings pending before the District Court in X. In this case, the HFHR is represented pro bono by Grzegorz Nowaczek, Joanna Kamińska and Sylwia Gregorczyk-Abram, attorneys of Clifford Chance, Janicka, Krużewski, Namiotkiewicz i Wspólnicy.



Freedom of artistic activity

The year 2019 may also bring a decision in a case concerning the freedom of artistic activity.

In 2016, the Malta Foundation made a three-year contract for the organisation of the Malta Festival Poznań, which obliged the Ministry of Culture and National Heritage to pay a special purpose subsidy in the annual amount of PLN 300,000 for the organisation of the festival. In 2017, the subsidy was denied in the response to the appointment of Olivier Frljić, author of the controversial play The Curse, as one of the Festival's Curators. The denial was confirmed in a press release of the Ministry issued on 9 June 2017. According to the release, Mr Frljić "*provides no guarantee that the audience will be engaged in a dialogue and persuaded to open themselves to the artistic experience; rather, he is likely to pit a significant portion of the audience against the theatre and discourage them from taking part in the event*".

The HFHR decided to support the Malta Foundation by retaining pro bono counsel. According to the Foundation, this is a landmark case. The matter is one of the first examples of domestic subsidies denied due to the personal involvement of a particular artist. Notably, the Constitution of the Republic of Poland guarantees that everyone can enjoy the freedom of artistic expression and may freely use cultural goods. Since culture in Poland is financed mainly from the national budget, a decision denying a subsidy can be considered a measure of "soft censorship". Soft censorship consists of pressurising artists to refrain from certain activities such as the production of a play.

In June 2018, the Malta Foundation, which organises the Poznań Malta Festival, brought a court action against the Ministry of Culture and National Heritage, seeking payment of PLN 300,000.

This case has also been brought to the attention of Karima Bennoune, United Nations Special Rapporteur in the field of cultural rights, who wrote in a report after her visit to Poland: "*For the Malta theatre festival in Poznań, disapproval of a curating choice translated into denying its organisers previously agreed funding. The role of the Ministry must clearly remain one of ensuring diversity of offerings and programming and the exercise of the right to scientific and artistic freedom as guarantees for a rich cultural life, not molding the political orientation of cultural programming so as to achieve a monoculture.*" To view the report, use this link.

The Malta Foundation is represented by Przemysław Tacij and Dr Wojciech Marchwicki of Hogan Lovells, who agreed to provide pro bono representation responding to a courtesy request of the HFHR.

Non-pecuniary compensation for refusal of treatment with medical marijuana

Another clear landmark case is a matter related to refusal of treatment with medical marijuana.

The claimant's daughter was diagnosed with drug-resistant epilepsy just a few months after her birth in 2012. There were days when the girl had dozens of epileptic seizures. Traditional drug therapies and even treatment in a specialized centre abroad did not bring any improvement. The woman started giving her daughter a preparation that contained medical marijuana, legally marketed in Poland. The preparation proved more efficient and limited the number of seizures, but it did not stop the girl's suffering.

In 2014, the woman learned that one of the medical institutions in Warsaw employs a doctor who offers treatment with the use of stronger preparations, containing not only CBD, but also THC – a psychoactive substance which, in appropriate doses, may have therapeutic effects. This treatment was very effective in other children with drug-resistant epilepsy, leading to a significant decrease in the number of seizures. In 2015, the doctor recommended that the claimant's daughter should use THC-based preparations. These were not available in Poland and had to be imported from the Netherlands within the framework of the "targeted import procedure", which required a doctor-issued requisition approved by the Minister of Health. However, before the doctor had the opportunity to issue a requisition document, the hospital had initially revoked his ability to treat epileptic patients and then dismissed him (unlawfully, as it was later established in employment court proceedings).

A new doctor refused to treat the claimant's daughter with THC medicines, stating that the hospital generally did not provide such a treatment, which was contradicted by the fact that other patients were treated in this way. Despite the difficulties created by the hospital, the claimant, assisted by doctors from another institution, finally managed to initiate the procedure of targeted import. Unfortunately, before the medicines were delivered, her daughter died of a violent epileptic seizure in 2016.

In the statement of claim, the woman argues that the hospital and the doctor violated her personal right, namely the right to maintain and sustain family and emotional ties with her daughter. The unjustified refusal to provide effective treatment for her daughter exposed her to serious psychological suffering, which deteriorated after the child's death.

The therapy denied to the claimant's daughter may have led to a decrease in the number of seizures. This is a conclusion based on the outcomes of treatment with medical marijuana in other patients to date and backed by the improvement of the daughter's state of health following the inception of her treatment with the preparations. This, in turn, would allow the woman to maintain more complete contact with her daughter and would save her from the necessity of watching the girl's distress.

The statement of claims also alleges that the denial of treatment with medical marijuana was inconsistent with the indications of current medical knowledge and therefore unlawful under the Patients' Rights Act. The claimant also alleges that her daughter's right to die and dignity was violated. As compensation for her moral injury, the Foundation's client seeks an award of PLN 150,000 for a charitable purpose, namely a foundation dedicated to the promotion of treatment with medical marijuana, which she founded after her daughter's death.

The action brought by the mother led to a landmark case. According to the Foundation, a denial of potentially effective drug treatment, which is based on vague and unconvincing arguments constitutes, among other things, a violation of the right to the protection of one's life and health. Such a violation occurs in particular where, as in this case, all other available remedies have proved ineffective. Recently, the problem of inaccessibility of medical marijuana has been partially solved by the adoption of a law that enables physicians to use CBD and THC preparations without the necessity to carry out the targeted import procedure. However, practical access to such medicines remains severely restricted.

The claimant is represented on a pro bono basis by Clifford Chance attorneys Marcin Ciemiński, Monika Diehl, Sylwia Gregorczyk-Abram and Michał Magdziak.

Unreasonable detention in a guarded immigration centre

The case concerns a family from Tajikistan (parents with two infants). While asking for international protection, the applicant stated she was a victim of violence in her country of origin. However, the entire family was detained at the Guarded Centre for Foreigners in Przemyśl.

While in immigration detention, the applicant was diagnosed with a psychological condition resulting from the violence she had been subject to in the country of origin and the placement at a closed facility in Poland. The placement at the centre had also a negative impact on the condition of the children. However, neither the Border Guard nor courts considered the medical documentation presented by the woman. At first, the courts did not appoint an expert who would assess how detention impacted on the woman's health.

After about 10 months, she attempted suicide, which led to her transfer to a psychiatric hospital. Even then, the Border Guard once again asked a court for an extension of the woman's detention in a guarded centre.

Having examined the woman's medical and psychological documentation, the District Court in Przemyśl ordered the release of the family from the immigration detention centre. In the proceedings before the Przemyśl court, the foreigner was represented pro bono by Michał Jabłoński of Dentons Europe Dąbrowski i Wspólnicy. The firm also submitted on the family's behalf a claim for non-pecuniary compensation for unreasonable immigration detention to a national court.

The application listed complaints of violations of Convention Articles 3, 5(1), and 8, which, as it was alleged, took form the unlawful detention of the applicant, a victim of violence, in a guarded centre. It was also alleged that in their assessment of the decision to detain the family, national authorities had failed to take proper account of the best interests of the applicant's minor children.

The case of *M.Z. and Others v. Poland* (application no. 79752/16).

The current composition of the Team of the Strategic Litigation Programme:

Coordinator

Katarzyna Wiśniewska – an attorney-at-law (adwokat), a graduate of the Faculty of Law and Administration of the Jagiellonian University of Kraków. Katarzyna Wiśniewska has extensive experience in managing EU and international projects. She is the author and a co-author of a wide range of publications on substantive criminal law, criminal enforcement law and human rights. She takes part in the works of the Legal Experts Advisory Panel. In 2015, Ms Wiśniewska won the lawyers ranking Risings Stars – Leaders of Tomorrow compiled by national daily newspaper *Dziennik Gazeta Prawna*. She was appointed by the Ombudsman to the Committee of Experts of the National Mechanism for the Prevention of Torture. Katarzyna Wiśniewska is an expert on juvenile justice, proceedings before the European Court of Human Rights and human rights strategic litigation.

Lawyers

Jacek Białas – legal adviser (radca prawny), a graduate of the Faculty of Law and Administration at the Maria Curie-Sklodowska University in Lublin, the author of publications on refugees and migration. He is involved in human rights advocacy and the strategic litigation of cases related to the rights of refugees and migrants before national and international courts. Jacek Białas participates in works on legislative proposals concerning migrants and refugees. He is a member of the Expert Committee on Migrants advising the Polish Ombudsman.

Julia Gerlich – a fifth-year student of law at the Faculty of Law and Administration of the University of Silesia. She has been working with the Foundation since August 2017 and is currently involved in the works of the Strategic Litigation Programme and the Legal Intervention Programme.

Jarosław Jagura – a Magna Cum Laude graduate of the Faculty of Law and Administration of the University of Warsaw and a trainee attorney completing his pupillage in the Warsaw Bar Association. He started working with the Helsinki Foundation for Human Rights in 2013. Before joining the SLP team, he has been involved in, among other things, Article 32 Anti-discrimination Programme and the project Raising Sensitivity of Judges and Prosecutors to Equal Treatment. Mr Jagura is an anti-discrimination expert.

Adam Klepczyński – a trainee attorney, joined the legal team of Strategic Litigation Programme in July 2017. Previously, as part of his work at the Foundation, he was a collaborator of Article 32 Anti-discrimination Programme, Legal Intervention Programme and the project Monitoring of the Legislative Process in the Area of Justice System. Adam Klepczyński graduated from the Faculty of Law and Administration of the University of Warsaw.

Marcin Szwed PhD – a graduate of the Faculty of Law and Administration of the University of Warsaw, he completed a programme in American law at the Center for American Law Studies, a joint undertaking of the Faculty of Law and the University of Florida Levin College of Law. He also finished an LLM programme in comparative constitutional law at the Central European University in Budapest. Mr Szwed is academically affiliated with the Department of Constitutional Law of the Faculty of Law at the University of Warsaw. He has written many publications on human rights and constitutional law and was many times a prizewinner and finalist in national contests for law students. He is an expert in constitutional law and international mechanisms for human rights protection.

Experts

Dominika Bychawska-Siniarska – a member of the Helsinki Foundation's Board, lawyer, and a graduate of the College of Europe at Natolin. Ms Bychawska-Siniarska worked at the Registry of the European Court of Human Rights. Her professional achievements in the field of freedom of speech in Poland were recognised with the Article 54 of the Constitution Journalistic Award. She is the author of weekly columns published in *Dziennik Gazeta Prawna* devoted to the case law of the European Court of Human Rights. She also serves as the Secretary of the Board of the European Implementation Network, an alliance of organisations working for the implementation of ECtHR judgments.

Prof. Ireneusz Kamiński PhD – an Associate Professor at the Institute of Legal Sciences of the Polish Academy of Science and a lecturer at the Jagiellonian University of Kraków, Professor Kamiński is an expert in public international law and human rights law with extensive expertise in the European Convention on Human Rights and the rules of procedure of the European Court of Human Rights; he is an expert of the Council of Europe. An ad hoc judge of the European Court of Human Rights from July 2014 to June 2015.

Programme's content supervisor

Piotr Kładoczny PhD – Secretary of the Board and Head of the Legal Department of the Helsinki Foundation for Human Rights, responsible for supervising the Foundation's legal and intervention programmes. A lecturer at the Institute of Criminal Law of the University of Warsaw, author and a co-author of dozens of publications on substantive criminal law and criminal procedure, criminal enforcement law, human rights and drug policy; a frequent speaker at conferences and expert seminars. Dr Kładoczny has been involved in many EU projects in the field of criminal law and human rights. He is a member of the Legal Experts Team at the Batory Foundation.

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If you are a lawyer and would like to get involved in pro bono work, please contact **the Strategic Litigation Programme's Coordinator Katarzyna Wiśniewska at k.wisniewska@hfhr.org.pl**.

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