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TO:

**The Secretary of the Committee of Ministers
Council of Europe**
Avenue de l'Europe
F-67075 Strasbourg Cedex

COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

CONCERNING

**EXECUTION OF ECtHR JUDGMENT IN CASE *GRABOWSKI AGAINST POLAND*
APPLICATION NO. 57722/12**

EXECUTIVE SUMMARY

- **The Polish authorities have not amended rules concerning placement of the juvenile in the shelter for juveniles, despite nearly 4 years since the judgment in the case *Grabowski against Poland*.**
- **The general measures taken by the Polish authorities are not sufficient to limit possible future violations of the Convention similar to those recognised in the *Grabowski against Poland* judgment.**
- **Polish authorities should introduce mechanisms establishing a duty to issue a separate decision on children detention in shelters for juveniles, as well as guarantee periodical review of such a decision and a possibility to challenge it in appellate procedure.**
- **The above proposals were included in the HFHR's petition to the Senate, which resulted in Senate's draft amendment to the Juvenile Justice Act. It is currently a subject of proceedings of the Polish Parliament Justice and Human Rights Committee.**
- **The HFHR recommends that the Committee continue to supervise the execution of the *Grabowski against Poland* judgment.**

1. Introduction

The Helsinki Foundation for Human Rights with its seat in Warsaw (hereinafter “HFHR”) would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, regarding the execution by the Polish authorities of the European Court of Human Rights (“ECtHR”) judgment in case *Grabowski against Poland* (application no. . 57722/12).

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

The HFHR undertakes legal actions in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, as well as interventions regarding the implementation of human rights standards. The Legal Department of the HFHR consists inter alia of Strategic Litigation Programme. It provides leadership and support in constant advance of the human rights protection standards in Poland through the method of strategic litigation and participation in landmark cases.

In its activity, the HFHR pays particular attention to the execution of ECtHR judgments and monitors the implementation of ECtHR case-law standards by national authorities. For example, in 2018 the HFHR published a report on the implementation of judgments in Polish cases.¹

The HFHR presented an *amicus curiae* opinion to ECtHR in the *Grabowski against Poland* case. In its brief, the HFHR referred, among others, to a number of international and constitutional standards related to the issue of children detention. Additionally, the HFHR pointed out that the placement of a juvenile in the shelter for juveniles have to be considered as an equivalent of pre – trial detention. Despite that fact, the Juvenile Act of 1982 did not provide a juvenile with the same guarantees as the Code of Criminal Procedures did in case of an adult suspect.

In its communication, the HFHR will mostly focus on the results of its petition, asking for implementation of the judgment in case *Grabowski against Poland*, submitted to the Senate at 19th April 2017.

¹ The report is available at: <http://www.hfhr.pl/wp-content/uploads/2018/11/Wykonywanie-wyroku%C3%B3w-ETPC-2018-EN.pdf>

2. Standards established in the case *Grabowski against Poland*

The ECtHR's judgment in case *Grabowski against Poland* played an important role in the discussion on the shape of the Polish juvenile proceedings and procedural guarantees available to children. Especially since it raised questions regarding limits of children's deprivation of liberty and their possibility to challenge it in appellate procedure.

In the judgment of 30 June 2015 the ECtHR held that the practice of Polish courts whereby no separate decision to extend a minor's detention in a juvenile shelter is required in a situation where the juvenile justice proceedings enter into its investigative phase violated the Convention for the Protection of Human Rights and Fundamental Freedoms. Poland was obliged to change the existing law.

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

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

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

3. Actions taken

In order to promote the standards laid down in the judgment, Polish authorities communicated those standards to courts and organised trainings on the rights of juveniles. However, no specific data concerning number of trainings, as well as number of judges participating in them, was presented.

Furthermore, the Common Court's Rules were amended by the Minister of Justice. . The new Common Court's Rules has come into force on 1 January 2016. According to its provisions the judges were obliged to refer a case of juvenile for a hearing to resolve issues indicated in article 27 of the Act on the Procedure in Juvenile Cases. Moreover §

243 of Common Court's Rules obliged the court to send a copy of the decision prolonging the stay of juvenile in a shelter for juveniles early, so that the shelter administration received it at least 3 working days before the deadline specified in the decision regarding application of measure or prolongation.

Moreover, according to the communication of Polish authorities to the Committee of Ministers², the Minister of Justice has established a team for analyzing the existing regulations in the matter of juvenile proceedings. The aforementioned team has prepared a draft Act on the Juvenile Justice, which is currently waiting to be included in the register of legislative activities of the Ministerial Council. The draft law provides, according to Polish authorities, "regulations concerning juveniles' placement and extension of stay in a juvenile shelter"³.

The HFHR would like to emphasize that the draft Act on Juvenile Justice has not been made public yet. Therefore it is particularly difficult to assess, whether it will provide an adequate response to the requirements set by the ECtHR in the case *Grabowski against Poland*. Moreover, bearing in mind that the aforementioned draft will establish major changes in the shape of juvenile proceedings, it cannot be excluded that it will trigger public discussion on this issue, delaying the adoption of a new law or even forcing the Minister of Justice to refrain from their introduction.

Meanwhile, the judgment in *Grabowski against Poland* should lead to the introduction of statutory guarantees concerning the placement of juveniles in shelters.

In view of the above, in April 2017, the HFHR sent a petition to the Senate, requesting the launch of works on new rules governing court-ordered extensions of detention in shelters for juveniles⁴. The HFHR's petition was endorsed by the Ombudsman, Ombudsman for Children, Polish Bar Council and Ministry of Justice. Senators agreed with the HFHR's opinion and prepared a Senate-sponsored project that implements the HFHR's proposals and ensures the compliance of national legal regulations with the Council of Europe, UN and Polish Constitution standards⁵. Therefore, it can be easily considered as an example of good practice in the area of ECtHR judgments' implementation at the national level.

The project prepared by the Senate aimed to amend art. 27 and art. 29 of Juvenile Justice Act by adding a duty for a court to periodically review children's detention in a shelter for juveniles. It also imposed an obligation for a court to issue each time a separate decision concerning the extension of children detention in a shelter for juveniles. Last,

² Communication from the authorities of Poland (21/12/2018) in the case of GRABOWSKI v. Poland (Application No. 57722/12), available at: <https://rm.coe.int/native/0900001680905d6f>

³ Communication from the authorities of Poland (21/12/2018) in the case of GRABOWSKI v. Poland (Application No. 57722/12), available at: <https://rm.coe.int/native/0900001680905d6f>

⁴ HFHR Petition of 19 April 2017, available at <http://www.hfhr.pl/wp-content/uploads/2017/04/HFPC-petycja-nieletni-04-2017.pdf>

⁵ Senate's proposal of an act amending the Juvenile Justice Act, available at <http://orka.sejm.gov.pl/Druki8ka.nsf/0/20AB499B8CDB7AC3C125828700481C08/%24File/2521.pdf>.

but not least it guaranteed the possibility to challenge a court's decision concerning children detention, irrelevantly of the stage of the proceedings, in which such decision was taken.

The draft was submitted to the Sejm in April 2018, the following month it was sent to the Justice and Human Rights Committee for the first reading. The Justice and Human Rights Committee has asked the Ministerial Council of the Republic of Poland about its opinion about the Senate's project. In response to that inquiry, the Prime Minister of Poland indicated that the Government positively assess the Senate's initiative and recommends it for further legislative work⁶. It recognized that, despite the Minister of Justice amendment of Rules governing the internal functioning of common courts, and its attempts to disseminate judgment in case of *Grabowski against Poland* among judges, there is still a need to amend the Juvenile Justice Act⁷.

Since that moment, the legislative process concerning project prepared by the Senate, has stopped. No specific actions were taken since August 2018, when the Justice and Human Rights Committee of the Sejm has been provided with Government's opinion. The HFHR has been informed lastly, that the first reading of Senate project will take place in March 2019. No specific dates were mentioned yet.

4. HFHR's recommendations

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

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

⁶ Opinion of the Republic of Poland Council of Ministers on Senate's draft amendment to Act on Juvenile Justice, available at:

<http://orka.sejm.gov.pl/Druki8ka.nsf/0/F326E64036D3237BC12582E20037CF14/%24File/2521-s.pdf>

⁷ Opinion of the Republic of Poland Council of Ministers on Senate's draft amendment to Act on Juvenile Justice, available at:

<http://orka.sejm.gov.pl/Druki8ka.nsf/0/F326E64036D3237BC12582E20037CF14/%24File/2521-s.pdf>

It is vital to underline, that the above proposals are included in the Senate's draft amendment to the Juvenile Justice Act. The HFHR recommends to the Committee to continue the supervision of Grabowski against Poland judgment, at least until the adoption of the aforementioned Senate's amendments to Act on Juvenile Justice.

On behalf of the Helsinki Foundation for Human Rights,

Maciej Nowicki

Vice President of the Board