

Warsaw, 4 February 2020

22.2/2020/PSP/JJ

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

To the attention of:

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

EXECUTIVE SUMMARY

- On 14 March 2019, the Committee of Ministers issued a decision in which it urged Polish authorities to ensure effective access to lawful abortion throughout Poland. The Committee underlined the need to safeguard that women seeking lawful abortion are provided with adequate information on the steps they need to take to exercise their rights;
- The Polish Government presented its observations in the report of 20 December 2019. The Government argued that the applicable legal regulations ensure effective access to abortion and information on the availability of the procedure;
- The Helsinki Foundation for Human Rights submitted its communications on the execution of *P. and S. v. Poland* on 1 September 2017 and 9 August 2018. However, given the lack of any positive changes that would ensure effective access to lawful abortion, the Foundation has concluded to reiterate its position on the matter. The Foundation also deems it necessary to comment upon the Government's report of 20 December 2019.
- This communication presents statistical data showing that the procedure for objecting to an opinion or decision of a doctor or the procedure governing the imposition of financial penalties for a breach of contract with the public payer (the National Health Fund) on medical institutions are not effective measures to protect women applying for abortion.
- Polish authorities have not introduced any effective and expedient procedure that would ensure that women can exercise their right to have an abortion which is allowed by domestic law. The existing procedure for objecting to an opinion or decision of a doctor is excessively formalistic and does not guarantee that a pregnancy can be terminated within the legal time-limit. Additionally, medical institutions are currently under no direct legal obligation to inform a woman that abortion can be performed by a different doctor in a situation when a medical practitioner invokes the conscience clause as the basis for the refusal of an abortion.

RECOMMENDATIONS

- The Helsinki Foundation for Human Rights respectfully recommends that the Committee continues its supervision of the execution of the ECtHR judgments in *P. and S. v. Poland*, *R. R. v. Poland*, and *Tysic v. Poland*.
- Polish authorities should guarantee that women may receive reliable and objective information on the grounds for the lawful termination of pregnancy and the condition of the foetus. This information should be provided before the end of the legal period when an abortion is allowed. Polish authorities should introduce an expedient and effective procedure to ensure that women have an opportunity to exercise the right to lawful abortion.
- Mechanisms should be introduced to ensure that the right to abortion is not nullified by the invocation of the conscience clause by doctors.

1. Introduction

The Helsinki Foundation for Human Rights (“HFHR”) of Warsaw respectfully submits this communication to the Committee of Ministers of the Council of Europe (“CoM”) in order to discuss the execution of the judgments made by the European Court of Human Rights (“ECtHR”) in the cases *P. and S. v. Poland* (application No. 57375/08), *R. R. v. Poland* (application No. 2761/04), and *Tysic v. Poland* (application No. 5410/03).

The HFHR is a Polish non-governmental organisation established in 1989. Its principal objectives include the promotion of human rights, the rule of law and the development of an open society in Poland and abroad. The HFHR actively disseminates human rights standards based on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, “ECHR”) and works to ensure the proper execution of ECtHR judgments.

This communication will focus on practical aspects of the accessibility of lawful abortion procedures.

It is important to emphasise at this point that the conclusions presented in the HFHR communications of 1 September 2017¹ and 9 August 2018² on the execution of judgments in *P. and S. v. Poland*, *R. R. v. Poland* and *Tysic v. Poland* remain fully valid and relevant. The present communication is designed to specifically address the issues indicated in the CoM Decision of 14 March 2019 concerning the execution of the ECtHR judgement of *P. and S. v. Poland*³ and the response of the Polish Government of 20 December 2019 which refers to the aforementioned decision⁴.

2. ECtHR judgements

The cases *P. and S. v. Poland*, *R. R. v. Poland* and *Tysic v. Poland* concern access to lawful abortion, which is permitted by the Act on family planning, protection of the human foetus and grounds for the termination of pregnancy (“Family Planning Act”)⁵.

In *Tysic v. Poland*, the ECtHR found a violation of Article 8 ECHR resulting from the absence of an adequate legal framework for the exercise of the right to therapeutic abortion. In *R. R. v. Poland*, Poland was found responsible for having failed to safeguard access to prenatal genetic testing (allowed under domestic law), which was required for the applicant’s informed decision about the termination of a pregnancy. The ECtHR decided that that failure was contrary to Articles 3 and 8 ECHR. In *P. and S. v. Poland*, the ECtHR found that Poland violated Articles 3, 5 and 8 ECHR by denying access to abortion to a 14-years-old girl whose pregnancy resulted from rape.

The HFHR appreciates the steps taken by the Government to execute the above ECtHR judgements but nevertheless argues that these steps are not sufficient to fully implement the standards established in the ECtHR decisions concerned.

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

² The Communication is available at [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)785E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)785E).

³ The Decision is available at [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2019\)1340/H46-13E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2019)1340/H46-13E).

⁴ The Communication is available at [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)5E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)5E).

⁵ Act of 7 January 1993 on family planning, protection of the human foetus and grounds for the termination of pregnancy, Journal of Laws no. 17, item 78, as amended.

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

In its communication of 20 December 2019, the Government reiterated that the procedure for lodging objections against a decision or opinion of a doctor (“objection procedure”), which was introduced by the Act on patients’ rights and the Commissioner for Patients’ Rights (“Patients’ Rights Act”), constituted a sufficient procedural safeguard that can be used by women who have been refused a lawful abortion by a doctor.⁶ Being unable to share the above view, the HFHR would like to recall the key criticisms expressed about the objection procedure.

Arguably, the most serious drawbacks of the objection procedure include its excessive formalism; the impossibility of applying the procedure in cases where a doctor refuses to issue an opinion or decision; concerns as to whether the objection procedure may be used to challenge a refusal to refer a patient for medical testing; and the lack of guarantees of the expedient consideration of an objection.

The HFHR explained the above issues in detail in its communications of 1 September 2017 and 9 August 2018. These explanations remain fully valid and relevant.

So far, the Patients’ Rights Act has not been amended in a way that would materially alter the objection procedure and transform the procedure into an effective rights protection mechanism.

Arguably, the objection procedure neither satisfies the criteria for an effective remedy set forth in Article 13 ECHR nor meets the standards established by ECtHR in *P. and S. v. Poland*, *Tysiąc v. Poland* and *R.R. v. Poland*. The procedure is ineffective and does not secure an objecting person’s right to lawful abortion.

4. Access to lawful abortion, in particular in a situation where a doctor invokes the conscience clause

The data obtained by the HFHR from the Commissioner for Patients’ Rights⁷ show that the objection procedure does not safeguard access to abortion in a situation where the conscience clause is invoked by a doctor. According to the Commissioner’s data, in 2019 only one such objection was lodged by a woman who was not admitted to a hospital gynaecology department due to the lack of possibility to perform an abortion. The woman was eligible for lawful abortion under domestic law, which permits the termination of pregnancy in cases of a high probability of foetal defects or an incurable medical condition endangering the foetus’ life (in this case: Edwards’ syndrome). However, all doctors in the hospital, including the one who issued the negative decision, refused to terminate the pregnancy by invoking the conscience clause. Ultimately, the Medical Review Board at the Commissioner for Patients’ Rights found the objection unjustified. The Board underlined that under Polish law a doctor has the right to refrain from performing a procedure on the basis of the conscience clause.

Additionally, the objection procedure in its current form does not guarantee that a woman may receive reliable, exhaustive and objective information on whether she has the right

⁶ Communication from the Government of the Republic of Poland of 20 December 2019, pp. 7-8.

⁷ Commissioner for Patients’ Rights letter to the HFHR of 17 January 2020, ref. RzPP-DPR-WPL.0133.1.2020.

to have a lawful abortion performed. The objection procedure further fails to ensure that a woman will receive information on where the abortion procedure can be performed in a situation where the originally approached doctor invokes the conscience clause.

There is currently no provision of Polish law that would oblige a doctor or other medical practitioner to inform the patient about an effective way of obtaining a healthcare service (here, undergoing abortion) from a different healthcare provider (medical institution) in the case where the doctor or other practitioner refuses to perform the said service by invoking the conscience clause. This state of affairs is a consequence of the judgement of the Constitutional Tribunal ("CT") delivered on 7 October 2015⁸, in which the CT found the provisions introducing such an obligation unconstitutional. According to the CT, if a doctor invoking the conscience clause was legally obliged to refer the patient to a different medical facility, such an obligation would disproportionately interfere with the doctor's freedom of conscience protected under Article 53 (1) of the Constitution. The current legal situation, created after the relevant provisions lost their legal force in consequence of the CT's decision, leads to a significant disparity in the protection of doctors' freedom of conscience and patients' right to obtain medical services.

In its communication of 20 December 2019, the Government underlined that according to the Act of 15 April 2011 on healthcare institutions, medical institutions are obliged to provide publicly accessible information about the scope and type of the healthcare services offered⁹. At a patient's request, the medical institution must also provide detailed information on the healthcare services offered, in particular on the applied testing and treatment methods, as well as the quality and safety of those methods. Appropriate information about medical institutions can also be received from regional branches of the National Health Fund ("NHF").

In HFHR's opinion, the above options of accessing information fail to ensure that women may effectively receive information on the available options of pregnancy termination. Above all, under the applicable law, the burden of searching for a proper facility and reviewing its services falls onto women. Such a search can be time-consuming, which is a substantial consideration given the strict period during which a pregnancy may be terminated under the law.

In this context, the Government also mentioned that legislative works were carried out on an amendment to Article 39 of the Act of 5 December 1996 on the medical and dental profession. As it was stressed in the explanatory note on the draft amendment, the changes sought to execute the CT judgement of 7 October 2015. It was proposed that the obligation to inform a patient about an alternative option for obtaining a medical service from another doctor or a different medical institution and to notify the patient of the possibility to obtain such a service should be imposed on the healthcare provider which employed the doctor who refused to perform a procedure that they considered irreconcilable with their conscience.

⁸ Case No. K 12/14.

⁹ Communication of the Government of the Republic of Poland of 20 December 2019, pp. 2-3.

Importantly, the discussed amendment is far from being enacted as the Council of Ministers (Government) sent the draft to the Parliament only on 16 January 2010.¹⁰ It is uncertain whether the draft will be adopted by the Polish Parliament and the change will come into effect.

Also, the proposed regulation arguably fails to ensure that a woman denied access to a medical procedure by a doctor invoking the conscience clause may *always* receive information on where else the procedure can be performed. First of all, according to the draft version of the amendment, a doctor has no obligation to refer the patient to the administration/management department of the doctor's medical institution or to inform the patient about their rights. What is more, the proposed amendment makes no guarantee that the medical institution is informed about each and every case in which its doctors invoke the conscience clause and has the possibility to address such a situation. The draft amendment stipulates that only a doctor employed on the basis of an employment contract (or performing their duties as a service member) is required to notify their supervisor in writing before invoking the conscience clause. Notably, the proposed regulation does not refer to doctors contracted to work for medical institutions on any other basis, such as a contract falling outside the aegis of employment law.

Moreover, the above issues have not properly been addressed in the May 2019 Recommendations of the National Consultants in the field of obstetrics and gynaecology and perinatology in respect of the care of patients who decide to have their pregnancy terminated in circumstances indicated in the Act of 7 January 1993 on family planning, protection of the human foetus and grounds for the termination of pregnancy. Apart from being a not binding instrument, the Recommendations do not explain who is responsible for informing women about the steps that should be taken when a doctor refuses to perform an abortion in order to obtain a referral to another medical institution. Furthermore, the Recommendations suggest that whenever a medical service is denied by a medical institution, the patient should receive a reasoned decision in writing. The above may suggest that conscience clause can also be invoked by the medical *institution* (rather than exclusively by an individual doctor), what is contrary to the Polish law.

The National Consultants further recommend that medical care over women who decided to have their pregnancy terminated should be provided (1) in the hospital where the woman has so far received medical attention, (2) in the local gynaecological hospital, or (3) in the institution that has performed the prenatal diagnosis. However, under Polish law, the patient, as a rule, has the right to choose the provider of medical service. In consequence, in the HFHR's opinion, the Recommendations may be construed as a basis for the refusal of the provision of a medical procedure by the institutions that are not included in the three groups mentioned. Alternatively, those institutions may require a negative decision in writing from the hospital previously approached by the patient concerned.

¹⁰ Government-sponsored bill amending the Act of 5 December 1996 on the medical and dental profession, Sejm paper No. 172, <http://www.sejm.gov.pl/sejm9.nsf/agent.xsp?symbol=RPL&Id=RM-10-1-20>.

5. Medical services related to abortion and the performance of contracts with the NHF by medical institutions

In its communication of 20 December 2019, the Government emphasised that the NHF supervises the compliance of medical institutions with their contractual obligations. Also, a notification of a service provider's (alleged) violation of a contract for the provision of medical services constitutes a basis for commencement of the clarification proceedings. The Government reported that no such notification had been submitted in 2018, whereas according to the NHF records¹¹ obtained by the HFHR **the NHF has registered two cases of unjustified refusal to perform a lawful abortion in 2018. Also, the NHF reported that 11 such cases were registered in 2019. What is more, in 2018-2019, the Head Office and Regional Branches of the NHF did not pursue any clarification proceedings related to a refusal to perform an abortion.**

The irregularities recorded by the NHF clearly did not lead to the commencement of any proceedings for the imposition of contractual penalties for the breach of contract by medical institutions. It is worth recalling that the data provided by the HFHR in its communication of 9 August 2018¹² demonstrated that the violations of patients' rights connected with lawful abortion recorded by the Commissioner for Patients' Rights did not give rise to any clarification proceedings launched by the NHF.

It is thus evident that the existing framework of regulatory measures, including contractual penalties for the breach of contracts with the NHF, cannot be considered an effective mechanism ensuring access to lawful abortion. It should be stressed that clarification proceedings (and contractual penalty proceedings) are only pursued (conducted) after a suspected irregularity involving a refusal to perform a medical procedure (e.g. an abortion) appears. No legal provision stipulates that such proceedings should end within a certain time-limit so to enable a woman to exercise her right to a lawful abortion before this right becomes unenforceable. This is yet another reason for considering the existing measures ineffective and devoid of practical applicability as remedies protecting the rights of women seeking an abortion.

6. Conclusions and recommendations

In view of the above-mentioned reasoning, the HFHR respectfully argues that the Committee of Ministers should continue its supervision of the execution of the judgments *P. and S. v. Poland*, *R. R. v. Poland* and *Tysic v. Poland*. As pointed out above, the general measures taken by Polish authorities are not sufficient to prevent further Convention violations similar to those found in the above cases.

According to the HFHR, in order to fully implement the *P. and S.*, *R. R.* and *Tysic* judgements, Polish authorities should:

- Guarantee that women may receive reliable and objective information on the grounds for the lawful termination of pregnancy and the condition of the foetus. This information should be provided before the end of the legal period when an abortion is allowed;

¹¹ Letter from the NHF to the HFHR of 29 January 2020, ref. DSOZ-DRS.0123.4.2020 2020.5548.CPKO.

¹² The communication may be read at [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)785E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)785E).

- Introduce an effective and expedient procedure to ensure that women have an opportunity to exercise the right to lawful abortion;
- Introduce mechanisms that would ensure that the right to abortion is not nullified by the invocation of the conscience clause by doctors.

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

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

On behalf of the Helsinki Foundation for Human Rights,



Piotr Kładoczny, Ph.D.
Secretary of the Board



Danuta Przywara
President of the Board

