

Warsaw, 14 September 2018

TO:

**Secretariat General of the
Council of Europe
Avenue de l'Europe
F-67075 STRASBOURG CEDEX**

FROM:

**Polish Bar Council
ul. Świętojerska 16
00-202 Warszawa**

NRA.015-2.15.2016

Re: P. and S. v. Poland (application no. 57375/08)

**Observations of the Polish Bar Council
on the execution by the Republic of Poland of the judgment of the European Court of
Human Rights in *P. and S. v Poland* (application no. 57375/08)**

1. Introduction

The Polish Bar Council (hereinafter referred to as "Polish Bar Council" or "NRA"), a body which represents the advocates' self-government in Poland, pursuant to 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, presents its observations concerning the execution by Polish authorities of the judgment of the European Court of Human Rights (hereinafter referred to as "ECHR" or the "Court") in the case of *P. and S. v Poland* (application no. 57375/08).

The Polish Bar Council is a body which represents the Polish Bar which is an association of advocates and advocate trainees. Support for the observance of human rights and civic freedoms, as well as for the shaping and application of the law, constitute the most important statutory tasks of the Bar association. Being aware of the problems with the implementation of ECHR judgments by the Polish authorities, the Polish Bar Council presents its observations with hope that the information provided herein will support the Committee of Ministers of the Council of Europe in effective monitoring of the execution by the authorities of the Republic of Poland of their international obligations arising from Poland's membership in the Council of Europe. The observations of the Polish Bar Council were drawn up on the basis of knowledge and practical experience of Polish advocates, especially the advocates being members of the Human Rights Commission of the Polish Bar Council. The observations refer to the execution by Polish authorities of the ECHR judgment in the case of *P. and S. v. Poland* (application no. 57375/08).

2. The execution of the judgment in *P. and S. v Poland* (application no. 57375/08)

The case of *P. and S. v Poland* concerned a fourteen-year old woman who was denied an abortion by a number of doctors, even though the regional public prosecutor determined the existence of circumstances provided for in Article 4a sec. 1 point 3 of the Act on Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination, i.e. a legitimate suspicion that the pregnancy was the result of an illicit act. The Applicant and her mother went to three different hospitals, where they received inaccurate information regarding the formal requirements to be met in order to have the pregnancy lawfully terminated. The doctors refused to carry out the procedure invoking the conscience clause, without indicating a real possibility of having the procedure carried out by another physician or at another healthcare facility, as they were obliged to do under Article 39 of the Act of 5 December 1996 on the Physician's and Dentist's Profession (Journal of Laws [Dz.U.] of 2011, no. 277, item 1634, as amended).

The ECHR held that Poland had violated the applicants' right to respect for private and family life arising from Article 8 of the European Convention of Human Rights (hereinafter referred to as "the Convention") in relation to the determination of the right of access to lawful abortion and the disclosure of applicants' personal data, as well as Article 5 § 1 of the Convention and Article 3 of the Convention with respect to one of the applicants. In particular, the Court emphasized that the State is obliged to organize an internal health service system in such a way as to guarantee that the effective exercise of freedom of conscience by health professionals in a professional context did not prevent patients from obtaining access to services to which they were entitled under the applicable legislation (paragraph 106 of the judgment). The adopted mechanism and procedures of conduct, such as the requirement to refer a patient to another physician competent to carry out the same service, should be respected so that rights and interests of the patient could be appropriately safeguarded (paragraphs 107 to 108 of the judgment).

For years, Poland has been reminded by international human rights protection bodies (Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Human Rights Committee, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Council of Europe Commissioner for Human Rights) of the obligation to organise the health service system in such a manner that the exercise of freedom of conscience by doctors does not prevent patients from obtaining access to health services to which they are entitled.

One of the key guarantees that ensure balance between the freedom of conscience and belief for doctors and the right of equal access to publicly funded health services for patients was the doctor's obligation to indicate a real option of obtaining the service from another physician or at another healthcare facility.

Numerous attempts have been made in Poland for many years to extend the scope of the conscience clause by releasing doctors from their obligation to indicate a real possibility of obtaining the service from another physician or at another medical facility, which consequently resulted in restricting patients' right to health services. The Presidium of the Supreme Medical Council in its statement of 6 December 2013¹ concerning the exercise of the conscience clause in medical practice referred to the Resolution no. 1763 (2010) of the Parliamentary Assembly of the Council of Europe and expressed a view that "*if a doctor refuses to provide a service on*

¹ <https://www.nil.org.pl/aktualnosci/stanowiska-prezydium-nrl-z-dn.-6-grudnia-2013-r>.

grounds that it is contrary to his or her conscience, a potential obligation to indicate legal options of obtaining the service to the patient should be imposed on entities responsible for the organisation of health service system."

The statement was issued by the Presidium in response to the statement of the Bioethics Committee at the Presidium of the Polish Academy of Sciences dated 12 November 2013². According to the Bioethics Committee, the responsibility of performing this obligation remains both with individual health professionals and with the managers employing them in healthcare facilities. The latter are responsible for the provision of services contracted by the National Health Fund (NFZ) through employed professionals, for the selection of employees and for the organisation of work in the facility that they manage.

On 14 February 2014 further statements were made also by the Expert Team for Bioethics of the Polish Bishops' Conference³. According to the Expert Team: *"A situation in which a physician who refuses to carry out a service on grounds of conscientious objection would be obliged to ensure the performance of the same service by another, specifically indicated, physician or healthcare facility where such service is provided would effectively lead to the denial of the very essence of the conscience clause. Any requirement of this kind would force the physician to search actively for a place where the patient will obtain the service. The exercise of the conscience clause cannot be contingent upon whether a physician who decides to refuse the service will ensure its provision by another person or facility"*.

In response to the claims raised by the Expert Team for Bioethics of the Polish Bishops' Conference, the Bioethics Committee at the Presidium of the Polish Academy of Sciences in its statement of 31 July 2014⁴ reiterated that the doctor was required to indicate real options of obtaining the service from another physician or at another healthcare facility.

Finally, the position expressed by the Presidium of the Supreme Medical Council and the Expert Team for Bioethics of the Polish Bishops' Conference has been reflected in the Constitutional Tribunal's judgment of 7 October 2015 (case no K 12/14). The Constitutional Tribunal declared that the first sentence of Article 39 of the Act of 5 December 1996 on the Physician's and Dentist's Profession was not in line with the Constitution of the Republic of Poland. Since the ruling of the Constitutional Tribunal became effective, i.e. 16 October 2015, in the Polish legal system there has been no clearly specified entity required to indicate to a patient who was denied a specific service by a physician on grounds of the conscience clause the real options of obtaining such service from another physician or at another healthcare facility.

Having regard to the judgment of the Constitutional Tribunal, the Polish Commissioner for Human Rights in his addresses to the Minister of Health⁵, the President of the National Health Fund⁶ and the President of the Supreme Medical Board⁷ raised that it was necessary to take urgent steps aimed at establishing mechanisms that would enable a patient to be provided with

² <http://www.bioetyka.pan.pl/images/stories/Pliki/Stnowisko%20KB%20nr%204-2013.pdf>

³ <https://episkopat.pl/stanowisko-zespolu-ekspertow-kep-ds-bioetycznych-w-sprawie-klauczulismienia/>

⁴ <http://www.bioetyka.pan.pl/images/stories/Pliki/opinia%20kb%20nr%201-2014.pdf>

⁵ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=544636&sygnatura=VII.812.5.2014>

⁶ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=664940&sygnatura=VII.812.5.2014>

⁷ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=664957&sygnatura=VII.812.5.2014>

information about where such patient may actually obtain the service when the conscience clause was exercised by a doctor.

According to the Minister of Health the provision may be still applied in its applicable form after 16 October 2015, and therefore taking other actions by executive or legislative authorities does not arise from the operative part of the judgment (reply of 7 January 2016⁸). The President of the National Health Fund urged the Minister of Health to consider actions aimed at modifying the provisions of universally applicable legal acts to execute the aforementioned judgment of the Constitutional Tribunal (reply of 25 April 2016⁹). It seems, therefore, that the President of the National Health Fund sees the need to adjust the provisions to ensure that the patients' rights to health services are exercised. The President of the Supreme Medical Council informed that the National Assembly of Physicians in its Resolution No. 1 of 13 May 2016 set up a team of experts to carry out a comprehensive analysis of the provisions of the Code of Medical Ethics with a view to potential amendments thereof¹⁰.

Currently, it is difficult to assess how the patients' right to health services is exercised in practice when a doctor exercises the conscience clause. No changes were made to the Code of Medical Ethics nor the provisions of the Act on Physician's or Dentist's Profession were amended. In 2016, both the Committee on Economic, Social and Cultural Rights¹¹ and Human Rights Committee¹² expressed their concern in relation to the judgment of the Constitutional Tribunal. Both Committees recommended that Poland put in place an effective mechanism ensuring that patients have access to legal abortion in case of their being denied the service on grounds of the conscience clause.

The exercise of the conscience clause by doctors without specifying in legal regulations who is responsible for referring a patient to another physician or providing the medical service leads to disproportional restrictions of the patient's right to health services, and occasionally to the actual prevention of being provided with the service.

As it may be concluded from the statements of the Polish government consistently furnished to the Committee, it is of the opinion that the effective remedy available to women who were denied lawful abortion is their right to file an objection with the Medical Committee at the Polish Commissioner for Patient's Rights.

The objection procedure has been, for years, described as superficial and ineffective by the Polish Commissioner for Human Rights, Human Rights Committee at the Polish Bar Council, and NGOs. The procedure is hardly used by pregnant women who meet the requirements for legal abortion but did not receive a certification confirming the existence of circumstances enabling them to have the pregnancy terminated under the Act on Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination. This is proven by data available.

⁸ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=604589&sygnatura=VII.812.5.2014>

⁹ <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=664940&sygnatura=VII.812.5.2014>

¹⁰ <https://www.rpo.gov.pl/pl/content/naczelnarada-lekarska-odpowiada-w-sprawie-klauzuli-sumienia-lekarzy>

¹¹ https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPOL%2fCO%2f6&Lang=en

¹² https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en

In 2011, the Polish Commissioner for Patient's Rights received 17 objections, out of which 1 was related to the possibility of terminating pregnancy, but none of them, in the opinion of the Commissioner, satisfied formal requirements to convene the Medical Committee in order to consider the objection. In 2012, none out of 22 objections lodged satisfied formal requirements. In 2013, out of 28 objections lodged, 2 satisfied formal requirements; in 2014, 5 out of 34 objections satisfied formal requirements; in 2015, out of 35 objections only 1 satisfied formal requirements; in 2016 out of 24 objections only 1 satisfied formal requirements; in 2017 – out of 15 objections only 1 satisfied formal requirements. Out of 175 objections lodged in years 2011–2017, only 10 satisfied formal requirements, 5 out of 175 objections related to the possibility of terminating pregnancy lawfully and none of them was considered reasonable. To be precise, the objection of 2013 concerned the opinion of a province-level consultant in the field of ophthalmology. Both objections submitted in 2014 concerned the opinion on the lack of indications to terminate the pregnancy due to a threat to life or health of a pregnant woman. The objection considered in 2015 related to the lack of indications to terminate the pregnancy due to serious, irreversible damage to the foetus. All of the objections were considered within the statutory time-limit (from 9 to 23 days).

Some of the reservations to the objection procedure were supposed to be removed. The governmental draft Act of 16 November 2016 on Patients' Rights and Commissioner for Patients' Rights and certain other acts provided, among others, for the simplification of the objection procedure by: (1) eliminating the requirement of specifying in the objection the legal provisions from which rights or obligations of the patient arise, (2) clarifying that the objection may be lodged also when an opinion or decision is denied or a referral to a diagnostic test is denied, (3) shortening the time-limit for the Medical Committee to issue a decision from 30 days to 10 days and making it possible to lodge an objection in an electronic form. Due to the reservations of the Minister of Justice Article 31 of the Act on Patients' Rights and Commissioner for Patients' Rights was not amended. Additionally, the Minister of Justice expressed the opinion that not only the provision should not be amended, but in fact it should be repealed¹³.

On 24 February 2017, the Sejm of the Republic of Poland adopted the Amendment to the Act on Patients' Rights and Commissioner for Patients' Rights and certain other acts which does not include the simplification of the objection procedure. Failure to amend Article 31 of the Act restricts the actual exercise of the right to have the pregnancy terminated in the cases specified in the Act on Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination, and, thus, of the rights guaranteed under the Convention for the Protection of Human Rights and Fundamental Freedoms (cf. Resolution No. 2/2017 of 20 March 2017 of the Human Rights Committee at the Polish Bar Council¹⁴).

3. Conclusions

The presented observations of representatives of the Polish Bar on the actions taken by Polish authorities to execute the ECHR judgment in *P. and S. v Poland* indicate that despite some legislative changes and modified practices aiming to implement the standards set by ECHR jurisprudence, there is still a need to intensify activities in order to respect the standards of protecting individual rights in the areas outlined herein.

¹³ <https://legislacja.rcl.gov.pl/docs//2/12287853/12367938/12367940/dokument272416.pdf>

¹⁴ <http://www.adwokatura.pl/z-zycia-nra/kpcz-trzeba-zapewnic-polkom-europejskie-standardy-ochrony-ich-praw/>

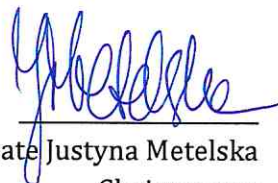
The Polish Bar Council hopes that the presented comments and observations of practising Polish advocates outlined herein will be helpful for the Committee of Ministers of the Council of Europe in the process of monitoring the execution of the Court's judgments in Polish cases.

The Polish Bar Council will be pleased to cooperate with the Committee of Ministers of the Council of Europe in monitoring the effectiveness of execution of ECHR judgments by national authorities in order to protect civic rights and freedoms, which is one of the statutory duties of the Polish Bar.

On behalf of the Polish Bar Council,



Advocate Jacek Trela
President
of the Polish Bar Council



Advocate Justyna Metelska
Chairwoman
of the Human Rights Commission
of the Polish Bar Council