

TYSIAĆ v. POLAND

Ensuring Effective Access to Legal Abortion

FACTS OF THE CASE

Alicja Tysić, a Polish woman, was suffering from severe myopia. Pregnant for the third time, she consulted three ophthalmologists who concluded that carrying the pregnancy to term constituted a serious risk to her eyesight. While they all refused to issue a referral for abortion, which is required under Polish law, a general practitioner finally provided Ms. Tysić with such a document. However, the head of gynecology and obstetrics department of a clinic in Warsaw declined to terminate the pregnancy stating that there were no medical grounds for a therapeutic abortion. No procedures were available to review the doctor's decision and to provide Ms. Tysić with a timely abortion.³ Ms. Tysić had no option but to carry her pregnancy to term. After the delivery her eyesight seriously deteriorated, qualifying her as a significantly disabled person under Poland's social welfare system.

Failing to obtain redress in Poland against the doctors, Ms. Tysić subsequently filed a case at the European Court of Human Rights alleging the following violations of the European Convention on Human Rights:

- The State's failure to provide her with a legal therapeutic abortion and to adopt a legal framework that would resolve disputes between a pregnant woman and her doctors on the need to terminate pregnancy amounted to a violation of her right to respect for her private life (Art.8).⁴
- The State's failure to ensure access to legal therapeutic abortion and to establish procedural safeguards amounted to a violation of her right to be free from inhuman and degrading treatment (Art.3).⁵
- The inadequate Polish legal framework regulating abortion violated her right to effective domestic remedies (Art.13).⁶

The European Court of Human Rights in the case of Tysić v. Poland ruled that Poland has an obligation to ensure effective access to legal abortion:¹

Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.²

- The State's failure to reasonably accommodate her disability during the investigation of her case violated her right to be free from discrimination on the ground of disability in the enjoyment of her right to private life (Art.14 + Art.8).⁷ She also claimed a violation of her right to non-discrimination on the ground of sex in the enjoyment of her right to private life.

Context in Poland

Poland is one of the few European countries with a restrictive abortion law, allowing abortion only on limited grounds: when the pregnancy endangers the pregnant woman's life or health; when there is a risk that the fetus suffers from a severe and irreversible impairment; or when the pregnancy is a result of a criminal act.⁸ An abortion performed outside of this legal framework is a criminal offense and the person that performs the abortion risks imprisonment for up to three years.⁹ The pregnant woman is exempt from criminal liability.¹⁰

The consequences of this legal framework are acknowledged by the European Court of Human Rights's decision:

...According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the

absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case. ... The Court also notes that in its fifth periodical report to the ICCPR Committee the Polish Government acknowledged, inter alia, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 49 above). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act. ... The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect.¹¹

RELEVANT HUMAN RIGHTS PROVISIONS

The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the following human rights:

Article 3. Prohibition of torture or inhuman or degrading treatment.

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

Article 8. Right to respect for private and family life

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

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13. Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14. Prohibition of discrimination

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.

DECISION

On 20 March 2007, the European Court of Human Rights determined:

- Article 8 (the right to respect for private life) was the most appropriate provision under which the complaint should be reviewed. The Court reaffirmed that the “legislation regulating interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing fetus.”¹² The Court found Poland in violation of its positive obligations under Article 8 for failing to provide procedural safeguards to ensure that women can access legal abortions.
- As to Articles 13 (the right to an effective remedy) and 14 (the prohibition of discrimination), the Court decided that there was no need to review those provisions as no separate issue arose under these articles that it were not already examined under Article 8.¹³
- No violation of Article 3 (the right to be free from inhuman and degrading treatment).

REMEDIES

Individual measures:

The Court awarded 25,000 Euros in non-pecuniary damages. It rejected Ms. Tysiąg’s claim for just satisfaction for pecuniary damage, considering that it could not speculate as to the correctness of the doctors’ conclusions concerning the future deterioration of her eyesight.

General measures:

The Court held that, in order to comply with its obligations under the Convention, Poland needs to establish an appeals mechanism to review cases where there is a disagreement (either between a woman and her doctors or between two doctors) as to whether the conditions for legal abortion have been met.

Such procedural safeguards must include: (1) an independent body of review (2) a guarantee that the woman's views will be considered, (3) decisions issued in writing, and (4) decision-making within a time period that is reasonable under the circumstances.

IMPACT AND HUMAN RIGHTS IMPLICATIONS

The situation faced by Ms. Tysiąg is not uncommon in Poland. Many women who are lawfully entitled to undergo abortions in Poland face formidable barriers in accessing such services, leading to violations of their human rights. Most countries in Europe guarantee access to abortion when a woman's health is threatened and have mechanisms in place to ensure such access when a health care provider denies a request to terminate a pregnancy.¹⁴

The judgment in this case joins a series of recent decisions by international human rights bodies that recognize that denying women abortion in certain circumstances is a violation of their human rights.¹⁵

With respect to Article 8 (the right to respect for the private life) Ms. Tysiąg claimed a violation of Poland's negative and positive obligations under Article 8.¹⁶ The Court decided to review this case by examining the state's positive obligations alone.¹⁷

The Court reaffirmed or established the following principles with respect to Article 8:

- Abortion laws fall within the scope of the right to private life, which was previously interpreted by the Court as covering various aspects of private life including a person's physical and psychological integrity.¹⁸
- The state has a positive obligation to effectively secure the physical integrity of a pregnant woman, including by adopting a comprehensive legal framework regulating the termination of pregnancy that takes into account the woman's views and it is not structured "in a way which would limit real possibilities to obtain [legal abortion]."¹⁹
- The Court stressed that the provisions regulating legal abortion should be formulated in such a way as to lessen the "chilling effect on doctors" willing to perform abortions

because of the uncertainty of the applicability of the criminal provision punishing doctors for providing illegal abortions.²⁰

- Securing procedural safeguards to ensure access to legal abortion is particularly important "in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves."²¹
- The Court acknowledged that other state parties to the Convention have established procedural and institutional mechanisms in order to effectively implement the legal provisions regulating access to a lawful abortion.²²
- The State is thus required to ensure that measures affecting fundamental human rights of pregnant women are subject to some form of preventive procedure at the national level that should meet the following minimum requirements:
 - (1) the procedure is performed by an independent and competent body,
 - (2) a pregnant woman is heard in person and her views are considered,
 - (3) the independent body issues the grounds for its decision in writing, and
 - (4) the decision is timely.²³
- Recognizing the important role time plays in accessing a legal abortion the Court has noted that "[t]he procedures in place should ... ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion."²⁴
- The Court underlined that retrospective remedies are not effective remedies in the case of abortion: "[p]rocedures in which decisions concerning the availability of lawful abortion are reviewed post factum cannot fulfill ... a function"²⁵ of preventing pregnant women from potential harm to their health.

RECENT DEVELOPMENTS

The Center for Reproductive Rights and the Federation for Women and Family Planning in

Poland, in addition to submitting their third-party interventions in this case, are pursuing implementation of this judgment at the Committee of Ministers, the institution within the Council of Europe which supervises the execution of judgments issued by the Court. Advocacy efforts are focused on the adoption by Poland of general measures to ensure procedural safeguards for effective access to a lawful abortion.

The State has compensated Ms. Tysiac for non-pecuniary, or moral, damages awarded by the Court. With regards to general measures, in 2009, the State adopted legislation establishing a patient's right to file "an objection" to a doctor's decision to a medical board operating under the Patient Rights Ombudsman.²⁶ The Center for Reproductive Rights and the Federation for Women and Family Planning in Poland submitted a memorandum to the Committee arguing that this law is not in accordance with the requirements set forth by the European Court of Human Rights. Specifically, that the law does not provide for a timely procedure, the woman's considerations are not taken into account, the medical board is not an independent body and its decisions are not required to be in writing and are final; moreover, they cannot be appealed to a higher administrative institution or directly to courts, and hence the law is not adapted to the needs of women seeking lawful abortions.²⁷ Accordingly, The Committee of Ministers raised concerns regarding these issues during the dialogue with the Polish Government on the implementation of the judgment. They also asked Poland for information on "...any other possible measures taken or envisaged to avoid similar violations in the future, and in particular on those meant to ensure the application of the new law in accordance with the requirements stemming from the European Court's judgment."²⁸

ENDNOTES

¹ This standard was recently developed further at the level of the Council of Europe. See Parliamentary Assembly of the Council of Europe, *Resolution 1607 (2008) Access to safe and legal abortion in Europe*, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08?ERES1607.htm> (last visit September 3, 2009).

² *Tysiac v. Poland* (2007), ECtHR, Appl. No. 5410/03, ¶ 116

[hereinafter *Tysiac v. Poland*].

³ See *Tysiac v. Poland*, *supra* note 2, ¶¶ 7-18.

⁴ See *Tysiac v. Poland*, *supra* note 2, ¶¶ 67, 76, 80.

⁵ See *Tysiac v. Poland*, *supra* note 2, ¶ 65.

⁶ See *Tysiac v. Poland*, *supra* note 2, ¶ 133.

⁷ See *Tysiac v. Poland*, *supra* note 2, ¶ 139.

⁸ See Section 4(a) of the Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act [hereinafter 1993 Act].

⁹ See Article 152.(1) of the Criminal Code.

¹⁰ *Id.*

¹¹ *Tysiac v. Poland*, *supra* note 2, ¶¶ 114-116. See also ASTRA - Central and Eastern European Women's Network for Sexual and Reproductive Health and Rights, Reproductive Health and Rights in Central and Eastern Europe. Country reports – Reproductive Health Services in Poland. Country Report, available at <http://www.astra.org.pl/articles.php?id=66> (last visit September 3, 2009).

¹² Eur. Comm. HR, *Bruggeman and Scheuten v. Germany* cited in *Tysiac v. Poland*, *supra* note 2, ¶ 106.

¹³ See *Tysiac v. Poland*, *supra* note 2, ¶¶ 135, 144.

¹⁴ See *Tysiac v. Poland*, *supra* note 2, ¶¶ 123-124.

¹⁵ See e.g. in 2005, the Human Rights Committee decided that state failure to enable a woman to benefit from a therapeutic abortion caused the depression and emotional distress she experienced, and thus constituted a violation of Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment). See Human Rights Committee, Communication No. 1153/2003, *K.L. v Peru*, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

¹⁶ The Court has interpreted Article 8 as including a negative as well as a positive obligation. Under the negative obligation the state is required to refrain from an arbitrary interference into the person's private life, whereas the positive obligation requires the state to adopt measures that ensure effective respect for the person's private life. The Court determined that the circumstances and the nature of this complaint are "more appropriately examined from the standpoint of the respondent State's above-mentioned positive obligations alone." See *Tysiac v. Poland*, *supra* note 2, ¶¶ 109-110.

¹⁷ *Tysiac v. Poland*, *supra* note 2, ¶ 108.

¹⁸ Eur. Comm. HR, *Bruggeman and Scheuten v. Germany* cited in *Tysiac v. Poland*, ¶ 106.

¹⁹ *Tysiac v. Poland*, *supra* note 2, ¶ 116 (emphasis added).

²⁰ *Id.*

²¹ *Id.*

²² The Court relied on the CRR's amicus brief in the case presenting comparative standards from various state parties of the Council of Europe. See *Tysiac v. Poland*, *supra* note 2, ¶ 123.

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²³ See *Tysiāc v. Poland*, *supra* note 2, ¶¶ 117, 118.

²⁴ *Tysiāc v. Poland*, *supra* note 2, ¶ 118.

²⁵ *Id.*

²⁶ See Act of November 6, 2008 on Patient Rights and the Patient Rights Ombudsman, Chapter 8 - The Patient's Right to File an Objection to a Doctor's Opinion or Ruling, Articles 31 and 32.

²⁷ The Center for Reproductive Rights (CRR) and the Federation for Women and Family Planning in Poland (FFWFP) based their communications on Rule No.9 paragraph 2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

²⁸ The Department for the Execution of Judgments of the European Court of Human Rights (Executions Secretariat), serving the Committee of Ministers, periodically updates information about the status of implementation of the judgment. More information on the supervision of the execution of judgments by the Committee of Ministers is available at http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (last visit October 21, 2009). See also http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Poland_en.pdf (last visit October 20, 2009).