



Teenage girl who was raped should have been given unhindered access to abortion

In today's Chamber judgment in the case of **P. and S. v. Poland** (application no. 57375/08), which is not final¹, the European Court of Human Rights held that there had been:

Two violations of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, as regards the determination of access to lawful abortion in respect of both applicants (by six votes to one) and as regards the disclosure of the applicants' personal data (unanimously).

It further held, unanimously, that there had been:

A violation of Article 5 § 1 (right to liberty and security) in respect of P., and **a violation of Article 3 (prohibition of inhuman or degrading treatment)** in respect of P.

The case concerned the difficulties encountered by a teenage girl, who had become pregnant as a result of rape, in obtaining access to an abortion, in particular due to the lack of a clear legal framework, procrastination of medical staff and also as a result of harassment.

The Court held in particular that: the applicants had been given misleading and contradictory information and had not received objective medical counselling; and, the fact that access to abortion was a subject of heated debate in Poland did not absolve the medical staff from their professional obligations regarding medical secrecy.

Principal facts

The applicants, P. and S., daughter and mother, are Polish nationals who were born in 1993 and 1974 respectively and live in Lublin (Poland). In 2008, at the age of fourteen, P. became pregnant as a result of rape. In order to have an abortion, in accordance with the 1993 Law on Family Planning, she obtained a certificate from the public prosecutor on 20 May 2008 to the effect that her pregnancy had resulted from unlawful sexual intercourse.

The applicants submit that they subsequently encountered considerable difficulties in obtaining access to an abortion. They received contradictory information from two public hospitals in Lublin as to whether they needed a referral from the regional consultant for gynaecology and obstetrics in addition to the certificate from the prosecutor, as to who could perform the abortion, who could make a decision, whether there was any waiting time prescribed by law, and what other conditions, if any, had to be complied with. The head of the gynaecological ward of one of the hospitals took P. to see a Catholic priest,

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

without asking whether she wished to see him. During the conversation, it became clear that the priest had already been informed about the pregnancy and its circumstances. He tried to convince P. to carry the pregnancy to term and asked her to give him her mobile phone number, which she did. S. was requested by the head gynaecologist to sign a consent form to the abortion which warned that the abortion could lead to her daughter's death. Ultimately, after an argument with S., the head gynaecologist refused to allow the abortion to be performed in her ward, relying on her religious views.

The Lublin hospital issued a press release to the effect that it would not perform an abortion in P.'s case. Journalists who contacted the hospital were informed of the circumstances of the case. A number of articles were published by various local and national newspapers and the case was the subject of discussions on the internet.

The applicants subsequently travelled to Warsaw, where P. was admitted to a hospital on 3 June 2008. She was informed there that she could have an abortion on the basis of the certificate issued by the prosecutor and a medical certificate issued by the national consultant in gynaecology, but that she would have to wait three days before it could be performed. In the meantime, a doctor told her that the hospital was facing pressure by various people not to perform the abortion and that it had received numerous e-mails criticising the applicants for their decision. P. also received text messages from the priest and from people unknown to her trying to convince her to change her mind about the abortion.

Feeling manipulated and helpless, the applicants left the hospital on 5 June 2008. They were harassed by anti-abortion activists and were eventually taken to a police station, where they were questioned for several hours. On the same day, the police was informed of a decision by the Lublin Family Court. That court had ordered P.'s placement in a juvenile shelter as an interim measure in proceedings to divest S. of her parental rights, stating in particular that P. was under pressure from her mother to have an abortion, which she did not wish to have herself. Subsequently, the police drove P. to Lublin, where she was placed in a juvenile shelter the same night. Suffering from pain, she was taken to hospital the following day, where she stayed for a week.

Having complained to the Ministry of Health, S. was eventually informed that P. could undergo an abortion in Gdańsk, approximately 500 kilometres from their home in Lublin. According to the applicants, they were driven there in a clandestine manner and the abortion was carried out on 17 June 2008.

The proceedings before the Family Court were discontinued in February 2009, P. having testified that she had not been forced by her mother to have an abortion and the court holding that there were no grounds for divesting her parents of their parental rights. Criminal proceedings against P. on suspicion of sexual intercourse with a minor, instituted in July 2008, were discontinued in November 2008. A criminal investigation against the alleged perpetrator of the rape was equally discontinued.

Complaints, procedure and composition of the Court

The applicants complained that their rights under Article 8 (right to respect for private and family life and the home) had been violated both by the absence of a comprehensive legal framework guaranteeing P.'s timely and unhindered access to abortion under the conditions set out by the applicable laws, and as a result of the disclosure of information about the case to the public. Relying on Article 5 § 1 (right to liberty and security), they complained that P.'s removal from the custody of her mother and placement in a juvenile shelter and later in a hospital was unlawful. They further submitted that the circumstances of the case had given rise to a violation of Article 3 (prohibition of inhuman or degrading treatment).

The application was lodged with the European Court of Human Rights on 18 November 2008. The following organisations were granted leave to make written submissions as third parties: The Polish Helsinki Foundation for Human Rights; the Rule of Law Institute, Lublin, Poland; the Coram Children's Legal Centre, London; European Centre for Law and Justice, Strasbourg; Amnesty International.

Judgment was given by a Chamber of seven judges, composed as follows:

David Thór **Björgvinsson** (Iceland), *President*,
Lech **Garlicki** (Poland),
Päivi **Hirvelä** (Finland),
George **Nicolaou** (Cyprus),
Zdravka **Kalaydjieva** (Bulgaria),
Nebojša **Vučinić** (Montenegro),
Vincent A. **de Gaetano** (Malta),

and also Lawrence **Early**, *Section Registrar*.

Decision of the Court

Article 8

As regards the complaint concerning the lack of unhindered access to abortion, the Court observed that the Polish Government had referred to the right of physicians under Article 9 of the Convention (freedom of thought, conscience and religion) to refuse certain services on grounds of conscience. However, States were obliged to organise their health system in a way that the exercise of that right did not prevent patients from obtaining access to services to which they were entitled by law.

Polish law in principle provided for mechanisms to reconcile doctors' right to conscientious objection with patients' interests, in particular by obliging the doctor to refer the patient to another physician carrying out the same service. However, it had not been shown that those requirements had been complied with in P.'s case. The medical staff had not considered themselves obliged to carry out the abortion expressly requested by the applicants. The applicants had been given misleading and contradictory information and had not received objective medical counselling. No set procedure had been available to them under which they could have had their views heard.

Furthermore, it had not been shown that the legal setting in Poland allowed for S.'s concerns to be properly addressed in a way that would respect her views and attitudes and to balance them in a fair and respectful manner against the interests of her pregnant daughter. While legal guardianship could not be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor's reproductive choices, it could not be overlooked that the interests and life prospects of the mother of a pregnant minor girl were also involved in the decision whether to carry the pregnancy to term or not.

The Court had already held in another case² that the provisions of civil law as applied by the Polish courts did not make available a procedural instrument by which a pregnant woman seeking an abortion could fully vindicate her right to respect for her private life. There were no grounds on which to reach a different conclusion in P.'s case.

The Court was of the view that effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, was directly relevant for the exercise of personal autonomy. The time factor was of critical

² *Tysiąc v. Poland* (5410/03), Chamber judgment of 20 March 2007

importance in a woman's decision to terminate a pregnancy or not. The uncertainty faced by P. despite circumstances under which she had a right to lawful abortion under the 1993 Family Planning Act, resulted in a striking discrepancy between the theoretical right and the reality of its implementation. In view of those circumstances, the Court concluded that there had been a violation of Article 8.

As regards the complaint concerning the disclosure of the applicants' personal data, the Court noted that it was undisputed that the Lublin hospital had issued a press release concerning P.'s case and that the journalists who had contacted the hospital had been given information about its circumstances. The Government had argued that the press release had not contained the applicants' names or other details making it possible to establish their identity. However, the information made available to the public had to have been detailed enough to make it possible for third parties to establish the applicants' whereabouts and to contact them, given that following publication of the press release, P. had been contacted by various people urging her to abandon the abortion. The fact that P. had disclosed her situation to a friend via text messages could moreover not be equated with the intention to disclose that information to the public. There had accordingly been an interference with her right to respect to private life under Article 8.

The Court did not find that that interference had pursued a legitimate aim. The fact that the issue of the availability of legal abortion in Poland was a subject of heated debate did not absolve the medical staff from their professional obligations regarding medical secrecy. It had not been argued or shown that there had been any exceptional circumstances to justify public interest in P.'s health. Moreover, no legal provision had been cited on the basis of which information about individual patients' health issues could be disclosed to the general public by way of a press release. There had accordingly been a violation of Article 8 in that regard as well.

Article 5 § 1

The Court further found a violation of Article 5 § 1. It held in particular that the essential purpose of P.'s placement in the juvenile shelter had been to separate her from her parents and to prevent the abortion. In that light, her placement could not be justified as detention of a minor for the purpose of educational supervision within the meaning of Article 5 § 1 (d). Had the authorities been concerned that an abortion would be carried out against P.'s will, less drastic measures than locking up a fourteen-year-old girl should have - but had not - been considered by the courts.

Article 3

P. had only been fourteen years old at the relevant time and according to the medical certificate issued after the rape, she had had bruises on her body, indicating that physical force had been used to overcome her resistance. The Court concluded that she had been in a situation of great vulnerability when admitted to the hospital. However, pressure had been exerted on her by the chief doctor who had tried to impose her own views on her and P. had been obliged to talk to a priest without being asked whether she in fact wished to see one. Considerable pressure had been put on her and on her mother. In particular, the latter had been requested to sign a consent form warning that the abortion could lead to her daughter's death, without any cogent reasons having been advanced to show that an abortion in her case could entail such danger.

Furthermore, when P. had been harassed, instead of being protected by the police, she had instead been placed in a juvenile shelter in execution of the family court's judgment. The Court was particularly struck by the fact that the authorities had instituted criminal proceedings on charges of unlawful intercourse against her who, according to the prosecutor's certificate and the forensic findings, should have been considered to be a

victim of sexual abuse. That approach fell short of the State's obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse.

Having regard to the cumulative effects of those circumstances, combined with the procrastination and lack of objective counselling, and P.'s separation from her mother, the Court concluded that she had been subjected to treatment in violation of Article 3.

Just satisfaction (Article 41)

The court held that Poland was to pay P. 30,000 euros (EUR) and S. EUR 15,000 in respect of non-pecuniary damage and EUR 16,000 to both applicants in respect of costs and expenses.

Separate opinion

Judge De Gaetano expressed a partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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Press contacts

echrpres@echr.coe.int | tel: +33 3 90 21 42 08

Nina Salomon (tel: + 33 3 90 21 49 79)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Céline Menu-Lange (tel: + 33 3 90 21 58 77)

Denis Lambert (tel: + 33 3 90 21 41 09)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.