



**Communication under Rule 9(2) of the Rules of the Committee of Ministers in the case of
R.R. v. Poland (App. No. 27617/04)**

April 27, 2015

I. Introduction

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, the Center for Reproductive Rights¹ and the Federation for Women and Family Planning² hereby submit information on Poland's implementation of the judgment of the European Court of Human Rights (the Court) in *R.R. v. Poland*.³

We note that at its 1208th meeting in September 2014, the Committee of Ministers discussed the implementation of the *R.R.* case together with the Court's judgment in *Tysiac v. Poland*. As per the Committee's decision at that meeting it is now awaiting information from the Polish government concerning the adoption of planned legislative measures which the government maintains will improve the efficiency of domestic appeal procedures by which women may contest decisions denying them access to prenatal testing or lawful abortion services.

At the outset we respectfully request the Committee to separate its supervision of these two judgments. Although both *R.R.* and *Tysiac* do relate to women's access to lawful abortion services in Poland, they concern a number of distinct legal and factual issues, and the measures the Polish government must take to implement each of the decisions differ significantly and thereby necessitate separate consideration and scrutiny. The *Tysiac* case concerned a woman whose pregnancy posed a risk to her health and the Court's judgment centered on the state's obligation to establish an effective procedure by which women can challenge and resolve disagreements between doctors concerning their health conditions and related entitlement to abortion services.

In contrast the requirement to establish an effective complaints procedure by which to challenge medical opinions or decisions was only one facet of the *R.R.* case. The Court's judgment in *R.R.* also outlined the state's positive obligation to give effect to women's rights to make an informed decision about whether or not to undergo a legal abortion. To this end the Court held that Poland must put in place an effective legal and procedural framework that guarantees that relevant, full and reliable information is available to women, and more specifically that women have timely access to prenatal testing as a prerequisite to exercising their right to lawful abortion. Also in *R.R.* the Court held that Poland must organize its health system in a manner that ensures women's access to legal reproductive health services is no longer jeopardized by conscience-based refusals of care by medical professionals. The Court also considered that the Polish government must take steps to address what it termed a "striking discordance" in Poland between the theoretical legal right of access to abortion services and the reality of women's inability to access abortion in practice. As a result of these differences, and the

broader set of issues at stake in *R.R.*, we urge the Committee to separate the supervision of the *R.R.* case from the *Tysiack* case.

We further note that the status of the government's planned legislative measures, by which it proposes to comply with the *R.R.* judgment, remains unclear at this time as neither the draft proposals or a relevant schedule are currently available. As a result, it is not currently possible to provide the Committee with a detailed assessment of the planned measures. However, in this submission we wish to highlight initial concerns regarding the content of the proposals as they have been described by the government and identify the ways in which, as currently envisaged, they appear unlikely to give full effect and protection to the rights of women in Poland to unhindered access to prenatal testing and legal abortion services.⁴ Once the legislative proposals have been published, we will provide the Committee of Ministers with a further assessment of the proposed measures.

In the following sections we outline a range of concerns relating to the ways in which the envisaged legislative changes, and Poland's current legal and policy framework, fall short of the steps needed to give effect to the Court's judgment in *R.R.* In particular, we address the ways in which the current law and the planned legal measures: 1) fail to establish a sufficiently timely and effective complaint procedure; 2) fail to encompass important procedural guarantees for pregnant women using the complaint procedure; 3) fail to ensure through appropriate oversight and monitoring mechanisms that prenatal testing is available and accessible in practice; 4) fail to effectively regulate and monitor medical professionals' conscience-based refusals of reproductive health care.

II. Current laws and the proposed measures will not ensure that there is a timely and effective mechanism by which pregnant women can challenge a refusal to provide prenatal testing or legal abortion services

In *R.R.* the Court held that Poland is obliged to "ensure unimpeded access to prenatal information and testing"⁵ and that, "the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance."⁶ As a result, the Court held that effective procedures and mechanisms must be put in place to guarantee that women are enabled to take such decisions in a timely manner.

The Polish government submits that it has implemented the Court's judgment through the adoption of the Act on Patient's Rights and Ombudsman for Patient's Rights (2008). This Act provides for a general right for all patients to file an objection against a medical opinion or certificate if it affects their rights as patients provided by the law. The Act and the complaint procedure apply to all medical situations and not only those related to pregnancy, prenatal testing or abortion. As a result, although in principle the complaint procedure can be used by women seeking to challenge a refusal to provide prenatal testing or abortion services, it is not tailored to that purpose. In fact in practice the complaint procedure has only been used to a very limited extent by women in such instances. Since its establishment the complaint procedure has been used only three times by pregnant women seeking prenatal testing or abortion services.

A particularly serious deficiency of the procedure is that it does not guarantee a timely decision on complaints. This has severe adverse impacts on pregnant women who may want to access abortion services.

Currently the 2008 law allows up to 30 days to pass from the time a patient files an objection to when the Medical Board will issue its decision. It appears that in order to address the fact that such a long

deadline does not ensure a decision “in good time,” as explicitly required by the Court’s ruling in *R.R.*, the government has stated that it will enact an amendment requiring the Medical Board to issue its decision within 10 days. However, unfortunately, in making this proposal, the government has not followed expert civil society suggestions to introduce (a) a specific procedure for situations concerning pregnant women and, (b) an even shorter deadline still for decisions in such circumstances.

A 10 day time-limit remains too long a delay to ensure the procedure does not jeopardize pregnant women’s access to legal abortion in Poland where the time-limits to obtain legal abortion services are relatively short and very strict. More particularly, for many women in *R.R.*’s circumstances, in reality the delay may be much longer than 10 days. For example, pregnant women may need to first challenge a refusal to provide prenatal testing and then subsequently, if testing confirms the presence of a serious fetal impairment, initiate a new challenge to a refusal to provide legal abortion services. In total this may regularly give rise to a delay of more than 20 days, thereby seriously jeopardizing their timely access to services.

By way of comparison Slovakia and the Czech Republic have imposed time limits of two to four days for appeal decisions on medical findings concerning abortion, thereby guaranteeing that decisions are taken as soon as possible and within a very short time-frame. This can be considered good comparative practice for complaint procedures concerning pregnant women’s access to reproductive health services

III. Current laws and the proposed measures will not provide important procedural safeguards for pregnant women who wish to challenge a doctor’s refusal to provide prenatal testing or legal abortion services

In order to ensure that a complaint procedure offers pregnant women in Poland an effective mechanism by which to establish their rights to prenatal testing or to legal abortion services certain procedural guarantees are critical.

First, relevant legislative provisions should explicitly enshrine the obligation of a doctor to provide a *written* opinion or refusal of care, and to inform women of their right of appeal. However, under the 2008 Act there is no such obligation and it does not appear from its submissions that the government plans to introduce into law an entitlement to receive a doctor’s opinion or refusal in writing.

In practice in Poland, such refusals are often made orally. This can cause serious problems for women who seek to challenge a refusal because women must submit these complaints, together with supporting medical documentation, in writing. Although the government maintains that in principle it may be possible to lodge a complaint against an oral refusal, it acknowledges that this would necessitate the Medical Board’s initiation of a preliminary investigation before being able to consider the complaint, thereby prolonging the process and undermining timeliness.⁷

Second, the law does not establish an effective procedure that would guarantee that women can be heard or that their views will be taken into account as part of the complaints process. Under the current law the Medical Board is not required to inform women of their right to attend the hearing. This places the onus entirely on women to attempt to have their views heard by the Medical Board, without clear procedures to follow or guarantees of success.

Third, the status of the Medical Board’s decisions is unclear. Although the government has submitted that the Medical Board’s decision will replace that of the doctor whose decision is challenged, this is not set out in law or regulations.⁸ As a result, even after a positive decision of the Medical Board,

women may often not be able to obtain the relevant services because currently the Medical Board's decisions do not constitute orders to perform the health services concerned and as such do not guarantee women's access to services.

IV. Current laws and the proposed measures will not establish effective oversight and monitoring mechanisms to guarantee that prenatal testing is available and accessible in practice

The government, in its Action Report and subsequent replies to communications regarding the case, has submitted that access to prenatal diagnostic services is now secured in Poland and points to an increase in the number of women who have received prenatal testing.⁹ However, while there may have been some increase in the number of women that have received prenatal tests, the proportion of women that benefit from prenatal testing remains relatively very low in Poland, when compared with other Council of Europe jurisdictions. Data suggests that in 2012 only 14% of pregnant women in Poland underwent such tests.

It is worth noting that in practice many women are not informed of their entitlement to prenatal testing and do not receive comprehensive, accurate, and unbiased information from their doctors. There are no regulations in place requiring doctors to provide such information on prenatal testing to their patients. Furthermore, there continues to be a limited number of facilities providing prenatal testing, which hampers women's access to these services in practice, in particular in certain regions/areas.

The government has not established systems by which to collect regular and comprehensive information on the availability of prenatal testing across the country and women's use of those services. Current laws or planned amendments do not envisage effective oversight or monitoring mechanisms that would enable authorities to assess women's access to prenatal testing in practice, identify where and why there are deficits in the provision of testing and take targeted measures to address the problems identified.

V. Current laws and the proposed measures will not establish effective procedures by which to regulate conscience-based refusals of reproductive health care and ensure they do not impede women's access to lawful services

In *R.R.* the Court also held that Poland is obliged, "to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation."¹⁰

However in Poland, refusals of reproductive health care services continue to be very widespread and women are often unable to find a health care provider willing to deliver these services, and in particular one willing to perform a legal abortion. This results from a series of legal and regulatory shortcomings and enforcement failures that combine to prevent women from accessing lawful reproductive health services.

Legislative shortcomings: Poland's laws do not require doctors to provide abortion services where the procedure is urgently required as a matter of medical emergency. This seriously endangers women's health and lives. Nor does the law impose a duty on doctors to provide abortion services where a referral is not possible. Nor does the law prohibit conscience-based refusals on the part of health care

institutions. This has resulted in several hospitals refusing to perform legal abortions as a matter of policy in all circumstances.

Enforcement deficits: There are no effective mechanisms in place to ensure that provisions regulating conscience-based refusals are enforced properly. In fact the government has failed to hold health care providers and health care institutions accountable for complying with the law.

For example the Polish government has argued that it has taken steps to ensure proper implementation of “the conscience clause,” by clarifying in a non-binding document that the clause does not apply to referral and provision of diagnostic services. However noting this in a non-binding document is not a sufficient step by which to address the prevailing practice of conscience-based refusals by health care providers in Poland of prenatal testing and diagnostic services.

Lack of complaint procedure: There is no effective procedure in place by which women can challenge abusive conscience-based refusals of care. Although, as noted above, the Act on Patient’s Rights and Ombudsman for Patient’s Rights (2008) provides that a patient may file an objection against a medical opinion or certificate, this procedure does not apply to conscience-based refusals of care. Under Polish law refusing to provide a medical service because it conflicts with a doctor’s personal beliefs does not constitute a “medical opinion or certificate,” as defined by the law. Instead the legal definition of a medical opinion or certificate refers to documents that address the facts or circumstances of a patient’s health. A doctor’s conscience-based refusal to provide of a health service does not fall within the scope of this definition.

Indeed, rather than decreasing it appears the practice of conscience-based refusals is intensifying in Poland. Recently, almost 4,000 Polish doctors signed a “Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility,”¹¹ expressing their commitment to following “divine law” in their professional work. However, even in this context the Polish government has failed to collect official data on the number of health care providers refusing to perform reproductive health services with reference to conscience. It is difficult to understand how, without this data, the government can take effective steps to identify where in Poland access to prenatal testing and legal abortion services is problematic as a result of conscience-based refusals, and adopt responsive and effective measures.

VI. Conclusion

In *R.R.* the Court held that “once the State . . . adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion.”¹² The Court expressed concern regarding what it termed a “striking discordance” in Poland between the theoretical legal right of access to abortion services and the reality of women’s inability to access abortion in practice. As a result it directed Poland to formulate its laws and regulations in such a way as to alleviate the chilling effect that the current restrictive legal framework and broad criminalization of abortion have engendered.

However, instead of adopting comprehensive and effective measures that would facilitate women’s access to legal abortion in practice as directed by the Court, Poland has taken a minimalist approach and the legislative measures that have been adopted, as well as those now being considered, do very little to guarantee women’s access to legal abortion in practice. Instead a lack of political will combined

with inadequate law reform and enforcement deficits prevail. Indeed it is notable that the 2008 Patients' Rights Act, and the planned amendments to that legislation, are wholly general in nature, applicable to all patients in all circumstances, and contain no legal provisions specifically intended to address the particular needs of pregnant women or to give effect to pregnant women's entitlements to prenatal testing and legal abortion services.

Without sincere and concrete efforts to reduce and eventually overcome the chilling effect, which the Court underlined is at play in the country, minimalist and less robust measures will remain superficial, and ultimately ineffective, in guaranteeing that Polish women can enjoy their rights under Polish law to prenatal testing and legal abortion.

¹ The Center for Reproductive Rights is an international non-governmental legal advocacy organization dedicated to the advancement of reproductive freedom as a fundamental human right that all governments are legally obliged to protect, respect, and fulfill. Lawyers from the Federation for Women and Family Planning and Center for Reproductive Rights represented the applicant in the case.

² The Federation for Women and Family Planning is a non-governmental organization based in Poland that works locally, regionally and internationally on advancement of women's reproductive rights through monitoring, advocacy and educational activities as well as strategic litigation before domestic and international courts.

³ R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011). The Court issued its judgment in R.R. v. Poland on May 26, 2011 and the judgment became final on November 28, 2011. For the first time, the Court held that a state's failure to enable a woman to obtain timely access to prenatal genetic testing and information, in order to allow her to make an informed decision about her pregnancy, amounted to inhuman and degrading treatment, in violation of Article 3 of the European Convention on Human Rights. The Court also found that a state's failure to establish effective procedures enabling women's access to legal abortion services violates the right to respect for private life as enshrined in Article 8 of the Convention. The Court also considered that the legal restrictions on abortion in Poland and the risk of criminal prosecution has a "chilling effect" on doctors, and held that the legal framework should be formulated in a manner to alleviate this effect.

⁴ See DH-DD(2014)141, reply of Poland dated January 15, 2014; DH-DD(2014)103 Action report dated 26 November 2013; and DH-DD(2014)606, reply of Poland dated May 5, 2014.

⁵ R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011), para. 156.

⁶ R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011), para. 203.

⁷ See DH-DD(2014)605), response by Poland, dated 5 May 2014, p. 11. Currently where the doctor's opinion cannot be obtained in writing by the woman, the Office of the Patients' Rights Ombudsman may at times be asked by the Medical Board to intervene to obtain the necessary documents. However, as the government acknowledges, this further complicates and prolongs the complaint procedure for pregnant women.

⁸ See DH-DD(2014)605), response by Poland, dated 5 May 2014, p. 9.

⁹ See DH-DD(2014)141 and DH-DD(2014)605.

¹⁰ R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011), para. 206.

¹¹ http://www.deklaracja-wiary.pl/img/lista_pod_.pdf

¹² R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011), para. 200.