

## Communication under Rule 9(2) of the Rules of the Committee of Ministers in the case *P. and S. v. Poland* (App. No. 57375/08)

13 September 2017

### 1. 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 Rights<sup>1</sup> and the Federation for Women and Family Planning<sup>2</sup> hereby submit updated information to the Committee of Ministers regarding Poland's implementation of the 2013 judgment of the European Court of Human Rights in the case of *P. and S. v. Poland* (App. No. 57375/08). The judgment was the third against Poland dealing with women's access to legal abortion services and associated reproductive health care and information and followed *Tysiac v. Poland* in 2007 and *R.R. v. Poland* in 2011.

In Poland's Action Report of 29 November 2013 on the implementation of the judgment [Doc. DH-DD(2014)258] and its more recent update to that Action Report of 14 June 2017, Poland argues that it has taken a number of general measures to remedy the violations in *P. and S.* It claims it has taken requisite steps to implement the judgment.

However, on the contrary, thus far Poland has not taken *any* of the general measures necessary to enable implementation of the Court's judgment in *P. and S. v. Poland*. As outlined in our previous submission to the Committee of Ministers on 22 August 2014, **no adequate general measures were** taken by the State party to implement the judgment, prior to that submission.

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<sup>1</sup> The Center for Reproductive Rights is an international non-governmental legal advocacy organization based in New York dedicated to the advancement of reproductive freedom as a fundamental human right that all governments are legally obliged to protect, respect, and fulfill.

<sup>2</sup> 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.

Moreover, since the date of that submission there has been no progress towards implementation and no positive measures have been taken.

First, no clear and effective procedural measures and processes have been established to enable exercise of entitlements to legal abortion services in practice, and ensure that the entitlements to legal abortion set out in law are not merely theoretical. Second, no measures have been taken to ensure that health providers' refusals of care on grounds of conscience do not hinder women's access to legal reproductive health services. Third, no safeguards have been put in place to effectively guarantee the protection of patients' confidential medical information. Fourth, no steps have been taken to ensure that adolescents' decision-making is given due weight and that minors are treated in a respectful manner when seeking reproductive health services.

Furthermore, not only have no positive steps forward been taken towards implementation of the judgment, but in fact, a number of recent negative developments, including a judgment of the Polish Constitutional Tribunal in October 2015, have seriously jeopardized implementation of the judgment, resulted in legal and policy retrogression, and imposed new barriers to women's access to legal abortion services in Poland.

The present submission provides the Committee of Ministers with updated information on the measures that Poland must adopt to implement the judgment and details the manner in which each of these required steps remain outstanding. In light of the serious failures and acute shortcomings outlined below we respectfully request the Committee of Ministers to maintain its enhanced scrutiny of Poland's implementation of the *P. and S.* judgment.

## **2. SUMMARY OF MEASURES POLAND MUST ADOPT TO IMPLEMENT THE *P. AND S.* JUDGMENT**

In *P. and S. v. Poland* the European Court of Human Rights found that Poland violated Article 8 of the Convention as a result of Polish authorities' failures to discharge their positive obligations to ensure an adolescent's ability to access legal abortion services in a timely and effective manner. It considered numerous actions by Polish authorities and health professionals to dissuade and hinder her from obtaining legal abortion services to end a pregnancy that had resulted from sexual violence, and the disclosure of confidential medical information about her to the media and other third parties. It held that Poland had failed to enable the first applicant's access to abortion services to which she was entitled under domestic law and had failed to establish timely, effective and accessible procedures that would have enabled her to exercise her entitlement to legal abortion services. It also held that the disclosure of her medical information to the public was illegal and illegitimate and contravened Article 8. Additionally, the Court held that by separating her from her family and detaining her in a juvenile shelter and subjecting her to harassment and manipulation in order to dissuade her from obtaining a legal abortion Poland

violated her rights to liberty (Article 5) and freedom from inhuman and degrading treatment (Article 3).

The Court's judgment outlined the manner in which multiple and multi layered human rights violations resulted from the behavior of medical professionals when the first applicant, a minor, sought legal abortion services. Implementation of the judgment requires Poland's adoption of a comprehensive set of general measures to ensure women and adolescents' effective and unhindered access to legal abortion services in Poland. At a minimum, and as outlined below, the following steps are critical:

- Establishing an effective procedure for enforcing the entitlement to access legal abortion services that allows women to be heard and for prompt resolution and removal of any barriers women encounter in access to legal abortion services
- Amending the Medical Profession Act to ensure that doctors who refuse abortion services on grounds of conscience refer the woman seeking care to an alternative health care provider willing and able to perform an abortion and to establish a legal duty on health professionals who refuse care on grounds of conscience to provide women with information on when and in what circumstances abortion is legal and on where services are available.
- Guaranteeing the availability and distribution of an adequate number of health care providers willing and able to perform lawful abortion services throughout the country.
- Adopting regulatory measures to ensure effective respect for confidential medical data and enhanced accountability for breaches of medical confidentiality.
- Adopting effective measures that empower minors to make independent and informed reproductive choices and give due regard to their role as decision-makers and ensure that they are treated with respect and dignity when seeking reproductive health services.

As the Committee of Ministers has previously acknowledged this case involves "structural and/or complex issues" and for that reason the implementation of the judgment is subject to enhanced supervision.<sup>3</sup>

### **3. ADOPTION OF EFFECTIVE MEASURES TO ENSURE THE TIMELY AND EFFECTIVE ACCESSIBILITY OF LEGAL ABORTION SERVICES**

In *P. and S.*, the Court reiterated that it "has already found in the context of similar cases against Poland 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 an abortion."<sup>4</sup> The Court held that uncertainty about the procedural requirements to obtain a lawful

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<sup>3</sup> 8th Annual Report of the Committee of Ministers (2014), Appendix 2, p. 59, available at <https://rm.coe.int/1680592ae9>.

<sup>4</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 99.

abortion in Poland “resulted in a striking discordance between the theoretical right to [ ] abortion [in Poland]... and the reality of its practical implementation.”<sup>5</sup> In addition, the Court found that “[n]o set procedure was available to [P. and S.] under which they could have their views heard and properly taken into consideration with a modicum of procedural fairness.”<sup>6</sup>

In its 2013 Action Report and June 2017 update, Poland asserts that the right to file an objection against a doctor’s opinion or statement that a woman does not qualify for legal abortion services, has been effectively and adequately established by the Act on Patient Rights and the Patient Rights’ Ombudsman (2008). It argues that this procedure discharges its obligations to implement the Court’s judgment in *P. and S.*

However, the relevant procedure, which was established prior to the Court’s judgment in *P. and S.*, cannot be used in situations similar to the first applicant’s. Indeed, the Polish Government’s reliance on this procedure is misleading since the relevant process does not provide an effective and timely process that is applicable in circumstances such as the ones in *P. and S.*

The relevant complaint procedure is applicable to the opinions of medical professionals, and thus to the review of a medical opinion that conditions qualifying a woman for a legal abortion are not met. However, in *P. and S.*, the facts did not involve a medical opinion from medical professionals regarding the first applicant’s eligibility for legal abortion. As a victim of sexual assault, her qualification for legal abortion services was established by a prosecutor, as required by the Act on Family Planning, Human Fetus Protection and Acceptable Conditions of Pregnancy Termination (1993 Act).<sup>7</sup>

As a result, the relevant complaint procedure is not relevant to circumstances such as those present in *P. and S.*, where the applicant had obtained a prosecutor’s written attestation of her right to a legal abortion, but where willful obstruction and procrastination by health care providers and abuse of the ‘conscience clause’ undermined her access to services in practice.<sup>8</sup>

Moreover, even were the relevant complaint mechanism deemed relevant to implementation of the general measures required by *P. and S.*, the mechanism wholly fails to meet the requirements of effectiveness, accessibility and timeliness:

- First, the mechanism applies to all patients and all medical procedures and is not tailored to the specific needs of women seeking legal abortion services.
- Second, the 2008 law establishing the relevant complaint mechanism provides that the Medical Board has 30 days to issue a decision on complaints. This lengthy timeline is

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<sup>5</sup> P. and S. v. Poland, App. No. 57375/08, para. 111.

<sup>6</sup> P. and S. v. Poland, App. No. 57375/08, para. 108.

<sup>7</sup> P. and S. v. Poland, App. No. 57375/08, paras. 10, 100, 102.

<sup>8</sup> P. and S. v. Poland, App. No. 57375/08, para. 108.

wholly inappropriate in situations where women are seeking access to legal abortion services – a situation in which the timely nature of any relevant process is imperative.

- Third, no procedures for ensuring execution and enforcement of the Medical Board's decisions have been put in place. As a result women who have obtained a decision recognizing an entitlement to legal abortion services have no way of enforcing the decision.
- Fourth, a range of procedural and rule of law deficits also undermine the effectiveness of the relevant procedure. These include the requirement that women must refer to relevant legal provisions that have been breached when filing a complaint, lack of entitlement for women to be heard during the process, and the lack of entitlement to appeal the decision of the Medical Board.
- Fifth, Polish law places no obligation on medical professionals to inform women in writing of their decision that they do not qualify for legal abortion services and of their right to complain.

Each of these flaws and deficits are outlined in greater detail in our submission to the Committee of Ministers on implementation of *R.R. v. Poland*.<sup>9</sup>

On 1 June 2015 the Polish Government published draft amendments to the complaint procedure but those have since lapsed following the October 2015 parliamentary elections. Currently, there are no new proposals pending that would improve the relevance and effectiveness of the complaint procedure for women who are seeking to establish and enforce their right to legal abortion services.

#### **4. ADOPTION OF EFFECTIVE MEASURES TO ENSURE THAT MEDICAL PROFESSIONALS' REFUSALS OF CARE ON GROUNDS OF CONSCIENCE DO NOT JEOPARDIZE WOMEN'S ACCESS TO LEGAL REPRODUCTIVE HEALTH CARE SERVICES**

In *P. and S.*, the Court held that “[s]tates are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”<sup>10</sup> The Court noted that a critical facet of Polish law in this regard was the legal requirement, “making it mandatory for such refusals to be made in writing and included in the patient’s medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to

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<sup>9</sup> Communication from Center for Reproductive Rights in the case of *R.R. v. Poland*, (02/09/2016) available at <https://rm.coe.int/16806a950f>.

<sup>10</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 106.

carry out the same service.”<sup>11</sup> The Court found that those minimum legal requirements, which at the time of its judgment were enshrined in Article 39 of the Medical Profession Act, were not complied with in practice in the case of *P. and S.* and that the medical staff “did not consider themselves obliged to carry out” the legal services requested by the applicants.<sup>12</sup>

In its June 2017 update to its Action Report the Polish Government asserts that it has complied with obligations to address these failures. It alleges that hospitals may incur liability for conscience-based refusals of abortion care that amount to a failure to perform contracts with the National Health Fund, which obliges all medical facilities to perform all health services they are contracted to deliver. However, such a remedy is *post facto* and thus by its very nature ineffective as a mechanism by which women can enforce entitlements to legal abortion services in a timely and preventative manner.<sup>13</sup> Additionally, the complaint procedure described in Section 3 above, and established under the 2008 legislation, was never intended to address refusals of care on grounds of conscience or other barriers faced by women in access to legal abortion services that do not involve a difference in medical opinion as to whether a woman is legally entitled to an abortion.

Moreover, since the Court’s judgment in *P. and S.*, deeply concerning retrogressive legal developments have taken place which have severely weakened the protection available to women in situations where medical professionals refuse to provide legal abortion services on grounds of conscience.<sup>14</sup> On 7 October 2015, the Polish Constitutional Tribunal ruled that Article 30 and 39 of the Medical Profession Act, which regulate the exercise of conscience-based refusals in Poland, are partially unconstitutional.<sup>15</sup> The Constitutional Tribunal’s judgment is final and results in the invalidation of the relevant parts of the provisions deemed unconstitutional.

Of considerable note, is the Constitutional Tribunal’s declaration that the referral obligation imposed on medical professionals under Article 39, that had required them to refer patients to an alternative provider, is unconstitutional. As a result of the ruling, medical professionals who refuse to provide abortion services on grounds of conscience are no longer obliged to refer women to another doctor or medical facility where they can obtain a legal abortion. This has severe implications for women who are seeking timely access to legal abortion services.

Moreover, in addition, the Constitutional Tribunal declared that the part of Article 30, which prohibited medical professionals from refusing to provide care in urgent situations to be

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<sup>11</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 107.

<sup>12</sup> *P. and S. v. Poland*, App. No. 57375/08, paras. 107-108.

<sup>13</sup> *Tysic v Poland*, para. 118.

<sup>14</sup> Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Poland from 9 to 12 February 2016, CommDH(2016)23, p. 36, available at <https://rm.coe.int/16806db712>.

<sup>15</sup> The Polish Constitutional Court, case no 12/14. See <http://trybunal.gov.pl/rozprawy/wokanda/art/8434-prawo-do-odmowy-wykonania-swiadczenia-zdrowotnego-niezgodnego-z-sumieniem/>

unconstitutional. While this does not affect the legal obligation on all medical professionals to provide abortion care to a woman whose life or health is at immediate risk, it has significantly narrowed the scope of doctors' duty of care and will have severe consequences for women's well-being, as a range of additional situations regularly arise in which women urgently require timely access to abortion services.

This ruling raises serious concerns regarding the implementation of *P. and S. v. Poland*. It clearly contradicts the Court's judgment and contravenes basic standards of medical ethics, the recommendations set out by the Polish Bioethics Committee of the State Academy of Science, and international guidelines issued by the World Health Organization.<sup>16</sup>

Moreover, no effective procedures or mechanisms have been put in place to ensure that medical professionals comply with their obligations under the Medical Profession Act when refusing health care on grounds of conscience, including the duty to note a refusal in the patient's medical records. The government has failed to take effective measures to enforce the law and sanction abusive refusals of legal reproductive health services, which remain widespread. The consequences of these failures continue to have egregious consequences for women in Poland seeking access to legal abortion services and a series of harrowing cases have been well documented and are described in more detail in our 2016 submission regarding implementation of the *R.R.* judgment.<sup>17</sup>

The independence and impartiality of relevant disciplinary procedures are also in doubt. Under Polish law, the National Doctors Board is entrusted with addressing disciplinary cases against doctors who fail to comply with procedural requirements when refusing health care on grounds of conscience. Yet, the National Doctors Board filed the Constitutional Tribunal case described above in which it challenged the constitutionality of procedural requirements, placed on medical professionals who refuse care on grounds of conscience, and compliance with which it is assigned to oversee.

To give effect to the Court's judgment in *P and S.*, Poland must amend the law to ensure that women and adolescents who are refused abortion services on grounds of conscience are referred in a timely manner to an alternative health care professional willing and able to perform the abortion. Legal provisions must also be enacted to explicitly clarify that health care providers

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<sup>16</sup> Bioethics Committee of the State Academy of Science, No. 4/2013, November 12, 2013; World Health Organization, Safe abortion: technical and policy guidance for health systems, p. 95; International Federation of Gynecology and Obstetrics (FIGO), Resolution on 'Conscientious Objection' (2006), available at <http://www.figo.org/sites/default/files/uploads/OurWork/2006%20Resolution%20on%20Conscientious%20Objection.pdf>; FIGO, Ethical Guidelines on Conscientious Objection, in Ethical Issues in Obstetrics and Gynecology, p. 25, available at <http://www.glowm.com/pdf/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf>.

<sup>17</sup> Communication from Center for Reproductive Rights in the case of *R.R. against Poland*, (02/09/2016) (13/09/2016) available at <https://rm.coe.int/16804ada03>.

who refuse care on grounds of conscience must provide women and adolescents with information on when and in what circumstances abortion is legal and on where services are available. Furthermore, Poland must establish effective procedures and mechanisms to monitor and enforce compliance with relevant legal provisions. Finally, Poland must guarantee the availability and distribution of an adequate number of health care providers willing and able to perform lawful abortion services throughout the country. To this end it must also systematically monitor the number of available willing providers and the number of those refusing to provide care.

## **5. ADOPTION OF EFFECTIVE MEASURES TO GUARANTEE THE PROTECTION OF PATIENTS' CONFIDENTIAL MEDICAL INFORMATION**

In *P. and S.*, the Court ruled that the hospital's public disclosure of the first applicant's wish to obtain an abortion "cannot be regarded as compatible either with the Convention standards as to the State's obligation to secure respect for one's private or family life, or with the obligations of the medical staff to respect patients' rights laid down by Polish law."<sup>18</sup> It highlighted that "the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for their private and family life as guaranteed by Article 8 of the Convention. ... Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health."<sup>19</sup>

Despite the gravity of this breach of confidentiality, no measures were taken to prevent similar breaches in the future. No disciplinary measures were pursued in the relevant case and no training programs or other preventative measures were put in place. Nor have any legislative or regulatory measures to ensure effective respect for confidential medical data or enhanced accountability for breaches, been introduced.

In its June 2017 update to the Action Report the Polish Government merely details the legal framework that was already in place at the time of the Court's judgment in *P. and S.* It fails to address the fact that it was medical professionals' lack of respect for existing legal provisions that resulted in the Court's finding of a separate violation of Article 8 and that only through the adoption of effective measures to redress these oversight and enforcement failures can the government address the violation found by the Court.

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<sup>18</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 133.

<sup>19</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 128.

## **6. ADOPTION OF EFFECTIVE MEASURES TO ENSURE THAT ADOLESCENTS ARE TREATED IN A RESPECTFUL MANNER WHEN SEEKING REPRODUCTIVE HEALTH SERVICES**

In its judgment the Court also held that the cumulative effect of the Polish authorities' behavior violated the first applicant's right to freedom from ill treatment under the Convention.<sup>20</sup> The Court concluded that "no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings"<sup>21</sup> and that "having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention."<sup>22</sup> The inhuman and degrading treatment suffered by the applicants was found by the Court to have been caused by a series of actions, including: a) pressurizing the applicant not to have an abortion; b) forcing the applicant to consult with a priest; c) requesting her mother to sign a declaration acknowledging that the abortion could result in the death of her daughter; d) disclosing personal information about the applicant which exposed her to pressure from strangers; e) placement of the applicant in a youth center for ten days against her mother's will; and f) opening a criminal investigation alleging the applicant had unlawful sexual intercourse with a minor.

The only general measure that the Government has taken in response to the Court's ruling on Article 3 was to hold a meeting of national and regional medical consultants in the field of obstetrics and gynecology. At this meeting existing regulations regarding abortion, access to prenatal tests, refusals of care on grounds of conscience, and medical confidentiality were described, as was the need to ensure pastoral care is only provided to patients who have expressly requested it. Such a meeting does not suffice to discharge Poland's obligations to take a series of general measures to implement the Court's judgment and thus far the Polish Government has failed to take serious and effective measures to ensure that the range of harmful actions that the applicants suffered do not reoccur.

In order comply with the judgment and ensure that adolescent girls who seek abortion services are treated in a respectful manner the Polish Government must also adopt effective measures that empower minors to make independent and informed reproductive choices and give due regard to their role as decision-makers and ensure that they are treated with respect and dignity when seeking reproductive health services. In this regard Poland must amend its laws to bring them into line with international human rights standards and allow adolescents to seek and obtain reproductive health services without having to obtain parental consent.<sup>23</sup> It must also introduce

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<sup>20</sup> P. and S. v. Poland, App. No. 57375/08, para. 161.

<sup>21</sup> P. and S. v. Poland, App. No. 57375/08, para. 166.

<sup>22</sup> P. and S. v. Poland, App. No. 57375/08, para. 168.

<sup>23</sup> Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, para. 39, U.N. Doc. CRC/C/GC/20 (Dec. 2016); Special Rapporteur on the right of everyone to

youth-friendly reproductive health services that are accessible, acceptable, and appropriate and are provided in a confidential and non-judgmental manner, including through the adoption of guidelines for medical professionals on how to treat adolescent patients who need sexual and reproductive health care.<sup>24</sup> To date the government has adopted no such measures in response to the Court's judgment.

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the enjoyment of the highest attainable standard of physical and mental health, Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Dainius Puras, para. 60, U.N. Doc. A/HRC/32/32 (2016).

<sup>24</sup> WORLD HEALTH ORGANIZATION, MAKING HEALTH SERVICES ADOLESCENT FRIENDLY: DEVELOPING NATIONAL QUALITY STANDARDS FOR ADOLESCENT-FRIENDLY HEALTH SERVICES 7-8 (2012).