



Federation
for Women
and Family
Planning

Secretariat of the Committee of Ministers
Council of Europe
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RE: 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)

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 and the Federation for Women and Family Planning submits an information on the implementation of the judgment of the European Court of Human Rights (the ECtHR or Court) in the case of *P. and S. v. Poland* (App. No. 57375/08). Our communication highlights the key flaws in the implementation of the decision.

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. 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.

On October 30, 2012, the ECtHR handed down its judgment in *P. and S. v. Poland*. The decision became final on January 30, 2013. The Court found that significantly impeding a pregnant adolescent's access to abortion although abortion is legally available to her as a victim of sexual violence and releasing confidential medical data relating to her abortion violates her right to respect for private life (Article 8). Additionally, by separating a pregnant minor from her family and detaining her in a juvenile shelter as well as harassing and manipulating her in order to dissuade her from obtaining an abortion the Polish government infringed upon her right to liberty (Article 5) and her right not to be subjected to inhuman and degrading treatment (Art. 3).

The Polish Government submitted an Action Report on the implementation of the judgment in *P. and S. v. Poland* on November 29, 2013 [Doc. DH-DD(2014)258] [hereinafter 'Action Report']. In the Action Report, the government alleges that it took a variety of general measures to remedy the violations in *P. and S.* and thus fully implemented the judgment. The government's measures, however, have proven grossly inadequate and do not satisfy the mandates of the judgment as detailed below. Therefore, it is our hope that the Committee will speedily schedule a review of the implementation of the judgment and continue monitoring its execution.

- **ENSURE ACCESS TO LEGAL ABORTION: Poland must introduce binding measures to ensure uniform implementation of the abortion law, including clear procedural requirements and safeguards.**

In *P. and S.*, the ECtHR reiterated that it “has already found in the context of similar cases against Poland that once the State, acting within its limits of appreciation, 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.” [para. 99] In respect to the facts in *P. and S.*, the Court held that “effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy” [para. 111] and that uncertainty about the procedural requirements to obtain a lawful abortion in Poland “resulted in a striking discordance between the theoretical right to [] abortion [in Poland]... and the reality of its practical implementation.” [para. 111] In addition, the ECtHR reprimanded Poland over the fact 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.” [para. 108]

In response to these findings, the Polish government highlighted in its Action Report that the right to file an objection against a doctor’s opinion or statement, established under the Act on Patient Rights and the Patient Rights’ Ombudsman (2008), can be used satisfactorily in situations similar to the applicant’s. The reference to this procedure is misleading since it cannot provide an effective remedy under circumstances such as the ones in *P. and S.* The mechanism applies to the review of a medical opinion that the conditions for a legal abortion are not met. In *P. and S.*, however, it had already been established by a prosecutor, as required by the Family Planning Act (1993), that such conditions were met in the first applicant’s case. [*P. and S.*, paras. 10; 100; 102] However, due to “procrastination and confusion” as well as the provision of “misleading and contradictory information” on the side of the health care providers, the applicant’s access to the abortion she was legally entitled to “was marred.” [*P. and S.*, para. 108] Therefore, even assuming that this mechanism were properly implemented in Poland, which is not the case, it would not apply in cases such as the one in *P. and S.* where in theory access to abortion is granted, but in practice willful procrastination by health care providers and abuse of conscientious objection prevent the realization of the woman’s legally granted right. In addition, this mechanism was not meant to handle cases of conscientious objection, or when refusals are not based on medical science.

Moreover, it should be noted that the above-mentioned appeal mechanism does not live up to the standard established in *Tysiąc v. Poland* (App. No. 5410/03) and further reiterated in *R.R. v. Poland* (App. No. 27617/04). Practice has shown that this procedure is ineffective, as repeatedly highlighted in the third party communications on the implementation of these cases¹, and hardly used by women who have been denied access to abortion.

To date, the Polish government has not introduced any binding measures to ensure uniform implementation of the abortion law, including clear procedural requirements and safeguards. The government has also not taken any steps to provide women who have been granted the right to legal abortion with an opportunity to be heard when their right is not honored and enforced properly by health care providers.

Therefore, to comply with the ECtHR's findings, Poland must:

- Enforce the Family Planning Act (1993) to ensure effective access to legal abortion,
- Clarify the practical steps and requirements for obtaining a legal abortion without delay,
- Issue binding regulations to prevent misleading information and the abuse of procedural requirements to delay or deter women from obtaining legal abortions, and
- Provide women whose legal right to an abortion is not honored by health care providers with a speedy and effective mechanism in order to enforce their right in practice.

➤ **ADEQUATELY REGULATE AND MONITOR THE PRACTICE OF CONSCIENTIOUS OBJECTION: The Polish authorities must amend the existing regulation of conscientious objection to ensure that health providers' refusal on the grounds of conscience does not hinder women's access to lawful reproductive health services and establish effective oversight and monitoring mechanisms of such regulation.**

According to the ECtHR's ruling in *P. and S.*, “[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.” [para. 106] The Court went even further and noted that Polish law in principle provides for a mechanism “allowing the right to conscientious objection to be reconciled with the patient's interests, by 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 carry out the same service.” [para. 107] In the specifics of P.'s case, the Court found that those minimum legal requirements had not been complied with [para. 107] and that the medical staff “did not consider themselves obliged to carry out” the legal services requested by the applicants. [para. 108] The Court ruled that these violations significantly impeded P.'s access to the abortion services she was legally entitled to and constituted a breach of her right to respect for private life (Article 8). [paras. 107; 108; 112] One hospital also practiced an institution-wide objection, which constitutes a breach of domestic Polish law as well as international human rights and medical standards. In its 2013 Concluding Observations on Hungary, the Committee on the Elimination of Discrimination against Women made explicit that it is a State party's duty to “ensure that ... [conscientious objection] remains a personal decision rather than an institutionalized practice.”²

The Polish authorities have not introduced effective measures to oversee, monitor and prevent practical violations of the legal regulation on conscientious objection. Although the government highlighted in its Action Report that Poland has a mechanism to sanction doctors under the Act on Medical Chambers (2009) for violating medical ethics and professional principles and a regulation to penalize institution-wide conscientious objection, these sanctions have proven ineffective in reality. Those remedies are retroactive and compensatory in nature and thus cannot be considered as effectively preventing violations of patients' rights and securing timely access to lawful abortion services. In addition, although the Medical Chambers are obliged to monitor the proper workings of the medical profession in Poland, the Chambers fail to pay proper attention to violations of the regulations on conscientious objection. Moreover, the Ministry of Health has not taken effective steps to ensure that the Chambers fulfill their obligation with due care.

Therefore, to implement the ECtHR's judgment, Poland must, in addition to implementing the existing law:

- Amend the legal provisions regulating refusals of care on the grounds of conscience to ensure that health care providers' refusals do not hinder women's timely access to legal abortion services. The amendment should include a duty of objecting providers to provide abortion, where a referral is not possible or where care is urgently needed. It should also specify that health care providers cannot refuse to provide information or procedures intended to provide patient information about her health, nor they can refuse to refer a patient to health care providers committed and able to perform abortions,
 - Guarantee that patients are adequately and duly informed about their doctors' refusals to provide abortions on the grounds of conscience,
 - Take steps to provide mandatory education on specific medical procedures and continuously update health care providers and providers in training about their duties, relevant laws, and clinical protocols/procedures,³
 - Ensure that health care institutions do not engage in the practice of institution-wide conscientious objection,
 - Establish effective accountability mechanisms to hold health care providers and health care institutions liable for breaching the law, and
 - Take measures to ensure an adequate number of health care providers committed and able to perform lawful abortion services throughout the country, including establishing monitoring mechanism that will enable the government to monitor systematically the number of committed providers and the number of those refusing to provide care.
- **PROTECT CONFIDENTIAL MEDICAL DATA: Poland must monitor the protection of patients' confidential medical information, sanction violations more rigorously and introduce effective legislative safeguards to ensure that laws are implemented and monitored properly.**

In *P. and S.*, the ECtHR ruled that the hospital's disclosure of P.'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." [para. 133] 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." [para. 128]

Despite the gravity of the violation in *P. and S.*, the Polish government's investigation into the actions of P.'s hospital in Lublin did not result in any penalty. The Polish government has not introduced any new legislative or regulatory measures to better protect confidential medical data or to improve their measures of sanctioning the disclosure of such.

To ensure that serious violations of confidentiality such as those in the case in *P. and S.* do not reoccur, the Polish government must:

- Improve its regulations to effectively implement, secure and monitor domestic laws on the protection of confidential medical data, and
 - Ensure that unlawful disclosures of confidential information are sanctioned appropriately.
- **RESPECT MINORS' REPRODUCTIVE AUTONOMY AND GIVE DUE REGARD TO THE DIGNITY OF MINORS IN REPRODUCTIVE HEALTH SERVICES: Poland must ensure that adolescents' autonomous decision-making is given due weight with respect to possible termination of their pregnancies and ensure that minors are treated in a respectful and dignified manner when seeking reproductive health services.**

In accordance with the Convention on the Rights of the Child, the ECtHR acknowledged that, with evolving capacity, a minor enjoys personal autonomy in the decision whether or not to obtain an abortion. The ECtHR confirmed that “legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor’s reproductive choices, because proper regard must be had to the minor’s personal autonomy in this sphere. This consideration applies also in a situation where abortion is envisaged as a possible option.” [para. 109] Since the judgment in *P. and S.*, however, the Polish government has not highlighted any steps taken to protect minors’ reproductive autonomy in abortion decisions and to introduce youth-friendly reproductive health services.

Furthermore, the ECtHR held that the cumulative effect of the violations of P.’s and S.’s rights in the case amounted to ill treatment under the Convention, in particular considering the young age of P., which the Court considered “of a cardinal importance” for its analysis. [para. 161] The Court concluded that “no proper regard was had to the first applicant’s vulnerability and young age and her own views and feelings” [para. 166] 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.” [para. 168] The Polish government has not highlighted that it has or is planning to introduce regulations or procedural safeguards to protect minors’ self-determination and dignity in respect to reproductive choices.

To comply with international law and the judgment in *P. and S.*, the Polish government must:

- Adopt measures that empower minors to make independent and informed reproductive choices and give due regard to their role as decision-makers,
- Ensure that minors are treated with respect and deference when seeking reproductive health services, and
- Introduce youth-friendly reproductive health services. According to the World Health Organization (WHO), youth-friendly services should be accessible (i.e. adolescents are able to obtain the services), acceptable (i.e. adolescents are willing to obtain the services), equitable (i.e. all adolescents can obtain the services), appropriate (i.e. the health services that are offered are the ones that adolescents need), and effective (i.e. the health services offered in fact contribute to adolescents’ good health).⁴ In respect to the manner in which youth-friendly health services should be provided, the WHO highlighted that, among other features, effective services should be confidential,⁵ appealing to adolescents and nonjudgmental.⁶

- **ENSURE THAT CHILDREN’S DUE PROCESS RIGHTS ARE HONORED BEFORE ISSUING CARE ORDERS: The Polish government must establish procedural safeguards to ensure that children’s due process and participatory rights are honored before issuing care orders.**

The ECtHR confirmed in *P. and S.* that it “is of the opinion that if the authorities were concerned that an abortion would be carried out against the first applicant’s will, less drastic measures than locking up a 14-year old girl in a situation of considerable vulnerability should have at least been considered by the courts.” [para. 148] The Council of Europe’s Guidelines on Child-Friendly Justice mandates that, when children come in contact with the justice system, their views must be heard and their rights and needs must be considered before any decision is made that affects them. In addition, the Guidelines set forth that detaining a minor should only be a matter of last resort. The use of a care order to prevent an adolescent victim of sexual violence from obtaining medical treatment does not, by any means, conform to these standards.

In its Action Report the Polish government considered posting a link to *P. and S.* on the Ministry of Justice’s website, sending the case to the court that issued the decision and its higher court, as well as including the decision in the training of judges and prosecutors sufficient to remedy such grave violations of children’s rights.

In the light of international human rights standards and the judgment in *P. and S.*, the Polish government must:

- Establish appropriate procedural safeguards to guarantee that a child’s participatory and due process rights are protected in decisions on care orders, and
- Ensure that Polish authorities use juvenile detention only where there is no other, less drastic alternative.

For these reasons we respectfully urge the Committee of Ministers to continue supervising the execution of the ECtHR judgment in the case of *P. and S. v. Poland* and to issue recommendations to the state to create a legal and policy framework which complies with the requirements imposed by the judgment and Poland’s obligations under the Convention.

We hope that the Committee will find this communication useful in the deliberations on the execution of this judgment. Should you need further information, please do not hesitate to contact us.

Respectfully yours,



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¹ See Center for Reproductive Rights and Polish Federation for Women and Family Planning, *Communication on the Execution of the European Court of Human Rights Judgment in the Case of Tysiąc v. Poland* (App. No. 5410/03, Judgment of 20/03/2007, Final on 24/09/2007) (May 13, 2011), in Council of Europe, Committee of Ministers, *Communication from a NGO in the Case of Tysiąc against Poland* (Application No. 5410/03) and *Reply of the Government*, 1115th DH meeting, June 2011, Doc. No. DH-DD(2011)413 (May 30, 2011); Center for Reproductive Rights and Polish Federation for Women and Family Planning, *Communication on the Execution of the European Court of Human Rights Judgment in the Case of Tysiąc v. Poland* (App. No. 5410/03, Judgment of 20/03/2007, Final on 24/09/2007) (Nov. 10, 2010) (document on file with author); Naczelna Rada Adwokacka (Polish Bar Council), *Observations of the Polish Bar Council on the Implementation of the Judgments of the European Court of Human Rights by the Republic of Poland on the Protection of Reproductive Rights* (Dec. 6, 2013), in Council of Europe, Committee of Ministers, *Communication from a NGO (Polish Bar Council)* (02/01/2014) in the Case of R.R. against Poland (Application No. 27617/04) and *Reply of the Authorities* (15/01/2014) with Appendices, 1193rd DH meeting, 4-6 Mar. 2014, Doc. No. DH-DD(2014)141 (Jan. 30, 2014); Helsinki Foundation for Human Rights, *Communication from the Helsinki Foundation for Human Rights, R.R. V. Poland*, Application No. 27617/04 (Mar. 18, 2014), in Council of Europe, Committee of Ministers, *Communication from a NGO (Helsinki Foundation for Human Rights)* (21/03/2014) in the Case of R.R. against Poland (Application No. 27617/04) and *Reply from the Authorities* (05/05/2014), 120th DH Meeting, 3-5 June 2014, Doc. No. DH-DD(2014)605 (May 9, 2014).

² Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), *Concluding Observations: Hungary*, para. 31 (d), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013).

³ See Wendy Chavkin et al., *Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses*, 123 INT'L J. OF GYNECOLOGY AND OBSTETRICS S41, S53 (Supp. 3 2013); see also Christina Zampas, *Legal and Ethical Standards for Protecting Women's Human Rights and the Practice of Conscientious Objection in Reproductive Healthcare Settings*, 123 INT'L J. OF GYNECOLOGY AND OBSTETRICS S63, S65 (Supp. 3 2013).

⁴ WORLD HEALTH ORGANIZATION, *MAKING HEALTH SERVICES ADOLESCENT FRIENDLY: DEVELOPING NATIONAL QUALITY STANDARDS FOR ADOLESCENT-FRIENDLY HEALTH SERVICES* 7-8 (2012).

⁵ *Id.* at 5.

⁶ *Id.* at 6.