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Meeting: 1340th meeting (March 2019) (DH)

Communication from the authorities (02/01/2019) in the case of P. and S. v. Poland (Application No. 57375/08).

Information made available under Rule 8.2a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1340e réunion (mars 2019) (DH)

Communication des autorités (02/01/2019) relative à l'affaire P. et S. c. Pologne (requête n° 57375/08) (***Anglais uniquement***).

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Warsaw, 21 December 2018

Republic of Poland
Ministry
of Foreign Affairs
Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPOPC.432.91.2017 / 31

Mr Fredrik Sundberg
Head of the Department
for the Execution of Judgments
of the European Court of Human Rights
Council of Europe
Strasbourg

Dear Sir,

With reference to the 1324th CM-DH meeting (September 2018) and process of execution of the European Court of Human Rights' judgment in the case of *P. and S. v. Poland* I would like to present you the following information received from the Polish Ministry of Health, which constitutes a response to the issues raised in the CM-DH decision of 20 September 2018, adopted in the case at hand.

Ad. para. 3 (i) of the CM-DH decision of 20 September 2018: Access to lawful abortion in the Polish healthcare system, in particular: a) when a doctor invokes the conscience clause and b) in case of failure by medical service providers to comply with their contracts with the National Health Fund as regards access to lawful abortion.

Poland guarantees women's access to abortion. This access is guaranteed by relevant regulations that have been put into practice.

Regulations concerning the termination of pregnancy are stipulated in the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* of 7 January 1993. In accordance with Article 4a (1) a pregnancy can be terminated by a physician if:
1) pregnancy endangers the mother's life or health;

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2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment;
3) there are reasonable grounds for believing that the pregnancy is the result of a criminal act.

When the reasonable suspicion that the pregnancy had resulted from a criminal offence arise, in order to be provided with the lawful abortion, it is necessary to obtain the prosecutor's declaratory statement in this respect. In the other two cases, the existence of one of the premises qualifying for the termination of pregnancy is attested by a physician other that the one performing the abortion, unless the pregnancy imminently endangers the woman's life.

Each year Poland collects data on the number of abortions carried out, which show the practical implementation of the above-stipulated legal provisions. According to these data, in 2008, when the events that gave rise to the application in the *P. and S.* case took place, 499 abortions were carried out, in 2015 - 1040, in 2016 – 1098, and in 2017 – 1057. The said data show that abortions are being carried out in Poland, and that their number has doubled since 2008.

As regards the so-called "conscience clause", the legal provisions regulating this issue should be invoked in the first place. In accordance with Article 39 of the *Physician and Dental Surgeon Professions* Law of 5 December 1996, a physician has the right to refer to the principle of conscientious objection when refraining from performing specific medical services, subject to the provisions of Article 30 of said Law (within the scope in which it provides for a physician's obligation to provide medical assistance whenever a delay in providing the same may result in danger to life or a risk of serious bodily injury or a grievous health disorder). In such cases, the physician is obliged to justify and record such decision in the relevant medical documentation. Furthermore, a physician performing his/her professional duties as an employee shall also duly notify his/her superior in writing prior to exercising the conscience clause.

At the same time it should be pointed out that the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* of 7 January 1993, in its Article 4b, provides that "persons covered by the social insurance and persons entitled to a free public medical care on the basis of other provisions, have the right to terminate the pregnancy in the medical facilities free of charge". The list of the guaranteed healthcare services connected with the termination of pregnancy is provided for in appendix no. 1 to the ordinance of the Minister of Health of 22 November 2013 *on the guaranteed healthcare services within the hospital treatment*.

It is important that under the legal provisions currently in force, including, above all, under the Regulation of the Minister of Health of 8 September 2015 *concerning the general conditions of healthcare service provision contracts*, all medical facilities (hospitals) entering into a contract with the National Health Fund shall be obliged to provide all services specified thereunder – within their full scope and in conformity to the letter of law. By entering into a healthcare service provision contract, the service provider undertakes to provide all services guaranteed under implementing regulations relevant to the act, within the scope and inclusive of all service types specified by the contract.

In accordance with the provisions of the *Healthcare Institutions* Law of 15 April 2011, any entity engaging in medical treatment activities shall make information concerning the scope and types of medical services publicly available. Furthermore, any entity engaging in medical treatment activities shall, at the patient's request, issue detailed information concerning the medical services provided, especially information concerning the diagnostic and/or therapeutic methods applied, including information on the quality and safety of said methods. Consequently, in a case where a physician refuses to perform termination of pregnancy by invoking the conscience clause, the obligation of providing information on how to enforce the contract with the National Health Fund in this respect lays within the service provider, *i.e.* healthcare facility in which the physician refrained from performing medical procedure against his or her conscience. On the side note, it should be underlined that the right to invoke a "conscience clause" is the physician's right, it cannot be invoked by the medical entity.

Furthermore, as it is the case with other publicly financed healthcare services, information on the healthcare entities providing services in the field of obstetrics and gynecology can be given by the regional branches of the National Health Fund.

It should also be mentioned that every year the issue of invoking the conscience clause in the context of doctors' professional responsibility is analysied. In 2013-2017, district medical boards and the Supreme Medical Board have not reviewed any cases relating to doctors invoking the conscience clause in connection with a refusal to perform termination of pregnancy

Moreover, in 2014 the Ministry of Health collected information about invoking the conscience clause in hospitals. To this end, 406 hospitals with gynecological and obstetrics wards were asked to provide information about the number of cases in which, in 2013, physicians invoked the conscience clause in reference to pregnant women in situations involving:

1) refusal to perform an abortion,
2) refusal to issue a referral for pre-natal examinations.

The Ministry of Health received answers from 375 entities, of which only three indicated that in 2013 a physician invoked the conscience clause (in all the three cases, patients were referred to another health care entity).

The refusal of the medical service provider who is contracted in the field of obstetrics and gynecology, to perform the termination of the pregnancy in the cases provided for in the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* with a simultaneous failure to indicate (by a service provider, not personally by a physician) a medical facility where a woman could obtain the said healthcare service, counts as a faulty realisation of the contract. All complaints or other information about such a faulty realisation by a medical service provider of its contract with the National Health Fund constitute a basis for institution of the clarification proceedings.

Based on information received from the National Health Fund, so far the Head Office of the National Health Fund has not received any complaints from the patients about refusals to perform an abortion, the patients have not contacted the National Health Fund to enquire about the possibility of performing

such medical procedure either. Audits have nonetheless been carried out in this scope in a number of regional National Health Fund branches, for instance, in the Opole and Lower Silesia.

The audit in the Opole regional branch was carried out in 2016 following a letter from the Patient Rights Ombudsman for and it concerned two healthcare entities. In one of them, doctors refused to carry out an abortion on a patient by invoking the conscience clause. The patient was referred to a hospital with a third degree reference system. In the second inspected entity, a geneticist issued a positive opinion in respect of the termination of pregnancy, however, with a reservation that in his opinion another in-depth examination was needed before the termination is performed. The audit showed that this procedure was adequate to the state of health of the patient and the foetus. The termination of pregnancy was carried out without undue delay. The patient was provided with all the information in connection with her hospitalization by the medical personnel as soon as this information was available to the staff. The audit of the two entities has shown that procedures carried out with respect to the patient were in line with the regulations in force.

In turn, in the regional Lower Silesia branch of the National Health Fund only one referral to a facility where a termination of pregnancy could be performed was made in the current year.

In the other provinces, in recent times, the regional branches of the National Health Fund have not registered refusals to terminate pregnancies in respect of a person who is entitled to an abortion. No complaints or questions from patients have been filed with them by patients regarding the place where it is possible to perform such medical procedure recently.

Ad para. 3 (ii) of the CM-DH decision of 20 September 2018: Why the existing mechanism to protect patient data was not effective in the applicants' case.

The laws in force in Poland impose an obligation on hospital staff to maintain confidentiality of information about their patients and provide for liability in the event that this information is disclosed.

The physician-patient privilege obligation has been primarily regulated under the following legal provisions:

1) The *Physician and Dental Surgeon Professions* Law of 5 December 1996;
2) The *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008.

The obligation is also provided for by the Code of Medical Ethics.

While the aforementioned regulations, notwithstanding physician-patient privilege, provide for physicians' obligation to ensure that all persons assisting or helping him/her in the performance of his/her professional duties respect the rule of professional secrecy, and the patient's right to enjoy physician-patient privilege extends to all medical professions, it ought to be emphasised that in the case of medical professions other than that of a physician, the rule of professional secrecy has also been provided for in separate legal provisions. With regard to:

1) nurses and midwives – under Article 17(1) of the *Nurse and Midwife Professions Law* of 15 July 2011 (*Journal of Laws of* 2016, item 1251, as amended);

2) medical assistants – under Article 7 of the *Medical Assistant Profession Law* of 20 July 1950 (*Journal of Laws* of 2016, item 1618);
3) laboratory diagnosticians – under Article 29 of the *Laboratory Diagnostics Law* of 27 July 2001 (*Journal of Laws of* 2016, item 2245);
4) pharmacists – under Article 21 of the *Pharmaceutical Chamber Law* of 19 April 1991 (*Journal of Laws of* 2016, item 1496);
5) physiotherapists – under Article 9 of the *Physiotherapist Profession Law* of 25 September 2015 (*Journal of Laws,* item 1994, as amended);
6) psychologists – under Article 14 of the *Psychologist Profession and Psychologists' Professional Governing Body Law* of 8 June 2001 (*Journal of Laws,* item 763, as amended).

Moreover, it should be pointed out that with regard to actions taken on the basis of the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* of 7 January 1993, Article 4c(1) introduces an additional and separate obligation to maintain confidentiality, emphasising that all persons taking actions arising from the act are obliged to keep all and any information received in the course of performing such actions confidential, in accordance with separate legal provisions.

What is more, the entry into force of the General Data Protection Regulation of the European Parliament and Council no. 2016/679 of 27 April 2016 resulted in further enhancement of the protection of patients' personal data. The regulation is directly applicable in all Member States of the European Union and it provides for uniform norms of protection of individuals in connection with the processing of personal data, being one of the fundamental rights.

In respect of the practical realisation of all of the above-presented regulations, it should be noted that as regards the professional liability of doctors, in years 2008-2016 the district medical boards examined 28 cases into breaches of medical confidentiality. In 17 of these cases, a penalty of admonition was ruled, in 4 – a penalty of reprimand, and in 7 cases the board ruled for acquittal. During the same period, the Supreme Medical Board ruled in 17 such cases, of which 5 ended with an admonition, 1 – with a reprimand, and 1 – with a fine. In 5 cases, the board decided to reverse the rulings of the district medical boards, in 3 cases it ruled to acquit and in 2 cases it ruled to discontinue them.

The patient's right to confidentiality of information is one of the rights whose observance is also analysed by the Patient Rights Ombudsman, on the basis of interventions undertaken. According to the Ombudsman's data, in 2013 this right was violated in 2 cases, in 2014 in 4 cases, in 2015 in 11 cases, in 2016 in 7 cases, and in 2017 in eight cases (which represented from 1% to 2% of all violations respectively that were found following explanatory proceedings carried out during this time). The Ombudsman has come to the conclusion that the patient's right to confidentiality of information about him or her is, as a rule, being respected,

Therefore, it should be concluded that cases of breaches of medical confidentiality were incidental in nature and were caused by a human factor. The breach of medical confidentiality in the case of *P. and S. v. Poland* was also of such nature.

Ad para. 3 (iii) of the CM-DH decision of 20 September 2018: How the authorities envisage further safeguarding the rights of minors seeking lawful abortion so as to prevent new Article 3 violations.

The provisions of the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* of 7 January 1993 are of general nature, thus they concern all patients, including minor ones. There are however special provisions that apply to that group of patients concerning the issue of giving consent to a medical procedure. According to Article 4a (4) of the 1993 Law, in the case of a minor patient, a written consent by her legal guardian is needed to perform termination of her pregnancy. Additionally, in the case of a minor over 13 years old, her written consent is also required. In the case of a minor patient below 13 years old, consent of the guardian court (*sąd opiekuńczy*) is needed and the minor has the right to give her opinion. In a situation where a legal guardian of a minor patient does not consent to the abortion, consent by the guardian court is required.

Also the issue of informing minor patients about their state of health and available procedures is regulated in a general manner in the *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008, *i.e.* in respect of all healthcare services, including those connected to the termination of pregnancy. Article 9 of the 2008 Law provides that a patient, including a minor over 16 years old or his or her legal guardian, has the right to obtain from a medical professional (within his or her competences) information about state of health, diagnosis, proposed and available diagnostic and medical care methods, their foreseeable consequences or consequences of refraining from performing them, about the results of the treatment and its prognosis.

The efficient measure of legal protection, inter alia for women who were refused pregnancy termination (regardless of the premise allowing for legal abortion and regardless of the basis of the doctor's refusal to perform it) remains to be an objection to a physician's opinion or ruling. The patient's right to object to a physician's opinion or ruling was introduced into the Polish legal system under provisions of the *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008, primarily for the purpose of implementing the judgment of the European Court of Human Rights in the case of *Tysiąc v. Poland*. However, the law is general in nature, therefore it protects the rights of all patients, including minor patients, whose rights or duties as stipulated by the law are affected by a doctor's opinion or ruling (and under circumstances where no other legal remedies are provided for).

Based on the information provided by the Patient Rights Ombudsman, the number of the objections examined by the Medical Commission in the years 2013-2017 is as follows:

2013 – Medical Commission examined 2 objections, including 1 concerning the indications for the abortion procedure. It was ruled unfounded.

2014 – Medical Commission examined 5 objections, including 2 concerning the indications for the abortion procedure. Both were ruled unfounded.

2015 – Medical Commission examined 1 objection which concerned the indications for the abortion procedure. It was ruled unfounded.

2016 – Medical Commission examined 2 objections, including 1 (lodged at the end of 2015) concerning the doctor's ruling on the lack of premises for termination of pregnancy. It was ruled unfounded.

2017 – Medical Commission examined 1 objection which did not concern the refusal of abortion.

It should be also underlined that since 2011, information on the patient's right to object to a doctor's opinion or ruling, and particularly information about the formal requirements of lodging the objection, is available at the Patient's Rights Ombudsman website, www.bpp.gov.pl, in the tab "Right to file an objection". At the beginning of 2015 information on the website was precised and expanded, in order for the patients to obtain thorough knowledge about the rules of the objection.

Moreover, in accordance with provisions of the *Patient Rights and Patient Rights Ombudsman* Law, patient has the right to be informed about the patient's rights stipulated in this and other acts, including about the restrictions of these rights provided by the law. The medical entity providing healthcare services is obliged to make such information available in the written form in its premises by presenting it in a generally accessible place. The entity's obligation in that respect concerns all the patient's rights, including the right to objection to a physician's opinion or ruling.

It should furthermore be pointed out that apart from introducing the right to objection, the *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008 appointed a central governmental authority – the Patient Rights Ombudsman – that is crucial to the protection of the rights of all patients, including pregnant women experiencing difficulties with access to pregnancy termination.

The Ombudsman's activities include the protection of patient rights as stipulated in the law under consideration and in separate legal provisions.

The scope of the Ombudsman's activities includes but is not limited to:

1) Conducting procedures concerning practices that violate collective patient rights,
2) Conducting procedures under Articles 50-53 of the Law (the provisions of which govern the Ombudsman's ability to launch clarification procedures, should he/she receive *prima facie* information of a probable patient rights violation);
3) In civil cases – performing tasks stipulated under Article 55 of the Law;
4) Co-operating with public authorities – with the respective minister for health-related issues – for the purpose of ensuring patient rights;
5) Submitting opinions and motions intended to provide effective protection of patient rights to relevant public authorities, organisations, institutions, and medical profession governing bodies;
6) Co-operating with non-governmental, social, and professional organisations with patient rights protection included in their statutory objectives;
7) Analysing patient complaints for the purpose of identifying threats and health protection areas that must be addressed.

Furthermore, in response to written motions and e-mailed reports, and in relation to personal patient visits to the Patient Rights Ombudsman's Office, the Ombudsman provides information concerning the broadly understood issue of pregnant women. In addition, in order to facilitate quick contact with the Patient Rights Ombudsman, a nationwide toll-free helpline is in place: 800-190-590. Staff on duty provide daily and current information concerning patient rights and action recommended under specific circumstances, listing legal measures available to patients. As the helpline is active Monday to Friday from 09:00 a.m. until 09:00 p.m., it can also be contacted in the afternoons and evenings.

In the light of the above, a pregnant woman, including a pregnant minor, who was refused access to a medical procedure to which she was entitled to, or whose right was breached, has the possibility to turn to the Patient Rights Ombudsman, who may initiate clarification proceedings in this respect. Thus, a patient who has been refused pregnancy termination procedure may also – in addition to raising her objection to a physician's opinion or ruling – exercise her rights with the use of the aforementioned remedy.

At the same time, it should also be noted that the case of *P. and S. v. Poland* refers to the circumstances which took place in May/June 2008, *i.e.* preceding the enactment of the *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008. Thus, the applicants had no option to enforce the protection of their rights based on the provisions and mechanisms introduced under said Law.

Lastly, it should be pointed out that of special concern for the situation of minors, and in response to the civil society's opinions, a change was made in 2016 in the way the data on abortions are collected. The age category "below 20 years of age" has been broken into two categories, *i.e.* "18-20 years" and "below 18 years of age", in order to illustrate the number of abortions underwent by minors.

- In accordance with this way of doing statistics in 2017 - 18 abortions were carried out on patients below 18 years of age in 2016 - 31 such surgical procedures were carried out.
- Previous years' data cover the "below 20 years of age" category, under which in 2013 - 15 abortions were carried out, in 2014 - 44, and in 2015 - 56.

Ad para. 4 of the CM-DH decision of 20 September 2018: Measures adopted to provide women seeking lawful abortion with appropriate consideration and adequate information on the steps they should take to exercise this right, in particular when pregnancy results from a criminal act.

The access to the pregnancy termination procedure, as provided in the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* of 7 January 1993, was described above.

Turning to the issue of appropriate consideration of each case when a patient seeks lawful abortion, it should be emphasised that in the light of the *Physician and Dental Surgeon Professions* Law of 5 December 1996 one of the basic obligations of a physician is to practise his or her profession in accordance with the up to date medical knowledge, by using available measures and methods of preventing, diagnosing and treating diseases, in accordance with the work ethics and with due

diligence. That principle of general nature applies also while providing healthcare services to a pregnant patient, in respect of which the premises stipulated in Article 4a (1) of the law on *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination* were met.

In addition, Article 37 of the *Physician and Dental Surgeon Professions* Law states that in the case of a doubt concerning diagnosis or treatment, the physician, if he or she deems it appropriate in the light of the requirements of medical knowledge, should ask for a specialist's opinion or call for a medical consilium – out of his or her own motion or upon request from the patient or the patient's legal guardian.

The above regulations guarantee appropriate consideration of each case to all patients, including pregnant women.

Also in the case of making the use of the right to object to a physician's opinion or ruling, special provisions guaranteeing proper examination of each case are in place. According to the Minister of Health's ordinance on *the Medical Commission operating at the Patient Rights Ombudsman* of 10 March 2010, the patient or the patient's legal guardian has the right to participate in the hearing of the Medical Commission, except for the deliberation and voting, and to provide information and clarifications on the case.

With regard to providing patients with accurate information, it should be noted that both the patient's right to information and the corresponding obligation of a physician to give information, are regulated by the relevant provisions.

As it was mentioned above, Article 9 of the *Patient Rights and Patient Rights Ombudsman* Law of 6 November 2008 provides that a patient, including a minor over 16 years old or his or her legal guardian, has the right to be informed about his or her state of health. After receiving such information, the patient has the right to give his opinion in this respect to the medical personnel. A minor patient over 16 years old has the right to be informed about the diagnostic and therapeutic process.

The physician's obligation to give information derives from Article 31 of the *Physician and Dental Surgeon Professions* Law of 5 December 1996, according to which a doctor is obliged to provide patient or his or her legal guardian with information about his or her state of health, diagnosis, proposed and available diagnostic and medical care methods, their foreseeable consequences or consequences of refraining from performing them, about the results of the treatment and its prognosis. The said obligation to inform applies also to minor patients over 16 years old. In addition, in the case of a minor patient below 16 years old, or an unconscious patient, or a patient unable to understand the meaning of the information given, the information is provided to a person close to the patient (within the meaning of Article 3.1(2) of the *Patient Rights and Patient Rights Ombudsman* Law). Therefore, a minor patient over 16 years old is duly informed by a doctor about the diagnostic and therapeutic process and his or her opinion is being heard.

Lastly, it should be stressed that Polish regulations cover also the specific issue of informing female patients about healthcare services to which they are entitled – obligation to inform lays in such cases on the healthcare entity. As it was stated before, basing on the provisions of the *Healthcare Institutions* Law

of 15 April 2011, any entity engaging in medical treatment activities shall make information concerning the scope and types of medical services publicly available and, upon a patient's request, provide additional information about such services (including about diagnostic and treatment methods that are used and about their quality and safety).

With kindest regards,

pp. Mateo Kaczmarek

Jan Sobczak
Government Agent