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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

28 February 2014

Case Document No. 7

Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden
Complaint No. 99/2013

**OBSERVATIONS FROM
ORDO IURIS INSTITUTE**

Registered at the Secretariat on 28 February 2014



ORDO IURIS

INSTYTUT NA RZECZ KULTURY PRAWNEJ

28th February 2014

Prof. Julius Jimena Quesada
President of the
European Committee of Social Rights
Council of Europe
F-67075 Strasbourg

Ordo Iuris Institute for Legal Culture (hereinafter: *Ordo Iuris* Institute) hereby requests possibility to intervene as a third party, pursuant to Rule 32A of the European Social Charter, in the collective complaint **no. 99/2013** of the *Federation of Catholic Family Associations in Europe*, (hereinafter FAFCE) against Sweden in support of FAFCE.

The *Ordo Iuris* Institute is an independent Polish civic organisation uniting lawyers working for the protection of human rights and for the prevention of social exclusion. *Ordo Iuris* Institute cherishes the values that inspired the establishment of the Council of Europe.

Aleksander Stępkowski
President
Ordo Iuris Institute for Legal Culture



ORDO IURIS

INSTYTUT NA RZECZ KULTURY PRAWNEJ

28th February 2014

RÉGIS BRILLAT
Head of the Department of the European Social Charter
and the European Code of Social Security
Executive Secretary of the European Committee of Social
Rights
Council of Europe
F-67075 Strasbourg

Third party intervention in support of Federation of Catholic Family Associations in Europe
by
The *ORDO IURIS* INSTITUTE FOR LEGAL CULTURE
to
EUROPEAN COMMITTEE OF SOCIAL RIGHTS
in relation to Complaint no. 99/2013
Federation of Catholic Family Associations in Europe v. Sweden

I. Introductory remarks

The following observations are submitted by the *Ordo Iuris* Institute for Legal Culture (hereinafter: *Ordo Iuris* Institute) pursuant to Rule 32A of the European Social Charter. The *Ordo Iuris* Institute is an independent Polish civic organisation working for the protection of human rights and for the prevention of social exclusion. *Ordo Iuris* cherishes the values that inspired the establishment of the Council of Europe. *Ordo Iuris hereby submits* its observations upon the merits of the complaint of the *Federation of Catholic Family Associations in Europe*, (hereinafter FAFCE) against Sweden in support of FAFCE.

Conscientious objection is authorised in Poland by Article 39 of the Act on the Professions of Physicians and Dentists¹ which is based on the principle of freedom of conscience as expressed in Art. 53 of the Polish Constitution² strictly reflecting Art. 9 of the European Convention of Human Rights. Furthermore, on December 6th 2013 the Steering Committee of the Polish Supreme Medical Council issued an official statement on the use of conscientious objection in medical practice,³ which is particularly relevant with respect to conscientious objection in the Polish healthcare system. The statement is available on the Internet⁴ and its translation is attached to this intervention.

The *Ordo Iuris* Institute hereby delivers its observations upon the merits of the FAFCE v. Sweden case, supporting the submission that the failure to enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers in Sweden

¹ Act of 5 December 1956, *Dziennik Ustaw* 2011, No. 277, Item 1634.

² Act of 2 April 1997, *Dziennik Ustaw* 1997, No. 78, Item 483.

³ Statement No. 74/13/P-VI.

⁴ http://www.nil.org.pl/_data/assets/pdf_file/0020/93134/ps074-13-VI.pdf (24 April 2014).

constitutes an instance of non-compliance with Article 11, Paragraph 2, read alone or in conjunction with Article E (non-discrimination).

Article 11, Paragraph 2 of the ESCH concerns the right to protection of health and puts an obligation on the Parties to undertake, either directly or in cooperation with public and private organisations, to undertake appropriate measures designed, inter alia, to “provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters”. Article E of the ESCH states that the enjoyment of rights set forth in the Charter shall be “secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status.” Therefore, the relevant provisions concerning the practice of conscientious objection should concern the criteria of “religion, political or other opinion”.

II. Conscientious objection in general

1. The issue of the legal recognition of conscientious objection implies a broader problem, of the way the nature of the state’s sovereign power is understood. Is the state arbitrary and sovereign, with the exclusive power to define what is good and evil at its pleasure; or is the result of the legislative authority’s work subject to a reasonable person’s moral evaluation? The latter possibility seems to be particularly important in the context of specific situations in which, due to extraordinary situations, adherence to abstract and generalised rules might amount to the legal enforcement of conduct which a legally bound person may consider intrinsically evil. In such a situation the law should provide for solutions allowing a person performing his/her professional duty to refrain from complying with a law which he/she reasonably considers would require him/her to commit acts which are evil. ***Otherwise, the law would be a means of denying the individual responsibility of professionals and reducing their professional duties to the automatic and thoughtless performance of legal provisions.***
2. The issue of conscientious objection raises a fundamental question: *should a legal system allow a reasonable person to take personal responsibility for the performance of his/her professional duty by refraining from carrying out a prima facie statutorily required duty to follow a specific procedure which that person upon reasonable grounds (including religious premises) considers evil?* Recognition of conscientious objection is particularly important in cases where a professional is called upon to perform procedures which are not only contrary to her/his *reasonable judgement of what is good and evil in a particular situation* (viz. grounds of conscientious objection), but also which, according to her/his professional appreciation, might in particular circumstances be harmful for the person demanding the performance of such a procedure.
3. The legal recognition of conscientious objection must also be recognised as an instrument protecting employees from being placed under undue, discriminatory pressure by their employer. This is evidenced in the case of Ellinor Grimmark, a Swedish nurse who lost her job in the Hospital in Eksjö due to her refusal to assist in abortions on the grounds of her moral convictions. The case is now being considered in Sweden by the Discrimination Ombudsman. The case illustrates that the **absence of legal authorisation for conscientious objection is very likely to encourage discriminatory practices against employees.**
4. It is important here to note that conscientious objection **must not** be regarded as a general capacity to question the law in force on the basis of an individual’s personal (subjective) opinion. Conscientious objection allows a professional in particular

circumstances to avoid the performance of an act which that person understands as intrinsically evil, without questioning the law in force or the procedure in itself. For that reason, conscientious objection, if provided by the law, allows for a reasonable solution in a specific situation which would otherwise cause a serious disturbance in the operation of legal procedures. **Conscientious objection does not undermine the legal system but enables its operation in conflicting circumstances.**

5. Needless to say, the aim of **conscientious objection** is to prevent acts which may be deemed evil, therefore it **must not be used to condone a refusal to perform acts which are urgently needed for the protection of a patient's life**. It is unwarranted to consider putting a patient's life directly at risk a result of an individual's reasonable moral assessment of the circumstances in a given case, and such behaviour does not fall within the scope of conscientious objection.

III. The European Context

6. The right to conscientious objection must be considered an intrinsic consequence of accepting the principle of freedom of conscience, as acknowledged by Art. 9 of the European Convention of Human Rights and Fundamental Freedoms and Art. 18 of the European Covenant of Civil and Political Rights. Therefore the admission of conscientious objection belongs to the core of the principles fundamental to the social order established after the Second World War. It is worth noticing here that the Nuremberg trials ruled that no-one is absolved from the moral assessment of the activities required by the statutory provisions pertaining to the performance of their professional duties. This principle also applies to soldiers obeying orders. A person might be found guilty of acts which are objectively and apparently evil despite the fact that such acts were imposed by the formally binding statutory provisions. Regardless of the different opinions as to the proper reasons for verdicts of guilty on individuals who committed Nazi crimes during the Second World War in outcome of their adherence to statutory provisions, it must be accepted that the Nuremberg trials recognised:
 - 1) the individual's duty to make a personal moral assessment of the acts he/she is statutorily bound to perform;
 - 2) the individual's obligation to comply with such an assessment if it shows that the acts he/she is statutorily required to perform are reasonably considered to be evil.

Therefore it should be taken as uncontroversial that ***a person performing professional duties is bound to take personal responsibility for his/her actions, as manifested in his/her moral assessment of the acts he/she is required to perform by the statutory instruments, as applicable in the particular circumstances of the case.*** Recognition of this principle leads to two consequences:

- I. first: the legal system must not allow a professional to refrain from the duty to take individual moral responsibility for the acts he/she performs on the excuse that he/she is obliged to follow statutory provisions;
 - II. second: the legal system shall provide an appropriate normative framework allowing individuals to undertake individual responsibility for acts they perform in fulfilment of their professional duty. The legal recognition of conscientious objection is the principal means leading to this end.
7. The issue of conscientious objection is particularly important in areas which involve the protection of human life, and thus it is a particularly important aspect of every healthcare system. As we have already said, this is a result of the international recognition of the freedom of thought, conscience, and religion acknowledged in Art. 9 of the European Convention of Human Rights

and Fundamental Freedoms. Therefore, as rightly stated in Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe,⁵ the protection of the right to health must be considered jointly with the obligation to ensure respect for the right of freedom of thought, conscience, and religion of healthcare providers, which creates an obligation on the part of member states to guarantee the right to conscientious objection in the performance of medical procedures. For this reason, **the facilities enabling professionals to take individual responsibility in matters of healthcare services, as required by Art. 11 (2) of the European Social Charter, include the legal recognition of conscientious objection.**

IV. Conclusion

The *Ordo Iuris* Institute hereby supports the Complaint submitted by FAFCE and its invitation to the European Committee of Social Rights to declare that Sweden has failed to comply with its obligations under Article 11, read alone or in conjunction with Article E of the European Social Charter.



Aleksander Stępkowski
President
Ordo Iuris Institute for Legal Culture

⁵ Resolution 1763 (2010) *The right to conscientious objection in lawful medical care.*

**Attachment to the *Ordo Iuris* Institute's third party intervention
upon the merits of the
Complaint no. 99/2013**

STATEMENT NO. 74/13/P-VI

**Issued on 6TH December 2013 by PREZYDIUM NACZELNEJ RADY LEKARSKIEJ (THE STEERING COMMITTEE
OF THE SUPREME MEDICAL COUNCIL OF THE REPUBLIC OF POLAND)**

On the use of the right of conscientious objection in medical practice

In connection with the recent notifications in the media on the opinions held by diverse individuals and institutions on the use of the right of conscientious objection in medical practice, the Steering Committee of the Supreme Medical Council of the Republic of Poland hereby observes that a medical practitioner or dentist (hereinafter doctor) should perform his professional duties in compliance with the guidelines of science and with due respect for the human person regardless of his/her age, sex, race, genetic heritage, nationality, religion, social background, material situation, political views, or any other conditions; he is always obliged to assist in his professional capacity in situations of urgency due to the risk of loss of a patient's life or serious loss of health.

Like everyone else, a doctor has the right to refuse to conduct activities which are against his conscience. Article 53 of the Constitution of the Republic of Poland and Article 18 of the International Covenant on Civil and Political Rights guarantee everyone the right to act in accordance with his conscience and beliefs. The doctor's right to pursue his professional activities in compliance with his moral standards is also confirmed in Resolution No. 1763 of the Council of Europe Parliamentary Assembly on the right to conscientious objection in lawful medical care (2010), which stresses that in the event of a doctor's refusal to perform a given procedure on the grounds of conscientious objection, it is the institutions and legal entities responsible for the organisation of healthcare that should bear the responsibility for informing the patient on the legal means of obtaining the given procedure.

A doctor should perform his professional duties in compliance with the instructions and prohibitions of his moral standards, worldview, or religion. A doctor may be denied this right only in situations of urgency due to the risk of a patient's loss of life or of the serious impairment of health. So long as there is no risk of loss of life or health, the rights of other persons cannot serve as the grounds to limit a doctor's right to proceed in accordance with his conscience.

In connection with the above the Steering Committee hereby observes that

1. A doctor has the right to refuse to take part in procedures which are against his conscience (in particular the performance of a treatment against his conscience, participation or assistance in such treatment, and the issue of an opinion on a patient's health for the purpose of recommending such treatment).
2. A doctor who refuses to perform a procedure on the grounds of conscientious objection should inform the patient of his refusal due to conscientious objection and enter it in the medical records. However, he cannot be expected to inform the patient of his worldview or of the grounds for his conscientious objection.

3. A doctor who refuses to perform a procedure on the grounds of conscientious objection should not attempt to influence the patient's decision; neither should he attempt to impose his opinion on the patient. A refusal to perform a procedure on grounds of conscientious objection should not be conducted on the basis of medical arguments, particularly ones which refer to the effectiveness or safety of the procedure in question.

4. A doctor is not obliged to declare his views a priori. There are no grounds for proposals to draw up lists with the names of doctors who hold a given view, which could lead to discrimination in the employment of the doctors who are on such lists.

5. Medical chambers should assist doctors who declare conscientious objections in all cases of unlawful pressure on their autonomy.

Secretary

Mariusz Janikowski

President

Maciej Hamankiewicz