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Date: 15/10/2021

DH-DD(2021)1050

Meeting: 1419th meeting (December 2021) (DH)

Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P.and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 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 : 1419e réunion (décembre 2021) (DH)

Communication des autorités (13/10/2021) relative au groupe d'affaires R.R, TYSIAC, P.et S. c. Pologne (requêtes n° 27617/04, 5410/03 et 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.

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

Warsaw, 13 October 2021

DPT.432.121.2019/96

Ms Clare Ovey
Head of the Department
for the Execution of Judgments
of the European Court of Human Rights
Council of Europe
Strasbourg

Dear Madam,

With regard to the process of execution of the judgments of the European Court of Human Rights in the cases of *P. and S. v. Poland* (application no. 57375/08), *Tysiąc v. Poland* (application no. 5410/03) and *R.R. v Poland* (application no. 27617/04) I should 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 interim resolution of 11 March 2021, adopted in the case at hand.

"To adopt clear and effective procedures on the steps women need to take to access lawful abortion, including in the event of a refusal of abortion on grounds of conscience, and to ensure that they are provided with adequate information on these procedures and that no additional unnecessary requirements are imposed on them by hospitals beforehand"

As the Government already indicated previously in its submissions to the Committee of Ministers, the procedure for legal pregnancy termination is clear and results from the provisions of the *Law of 7 January 1993 on Family Planning, Human Foetus Protection and Acceptable Conditions of Pregnancy Termination* (hereinafter: "the Law of 1993"). The termination of pregnancy, in the circumstances indicated under the Law of 1993 constitutes one of the guaranteed healthcare services and as such is provided by hospitals which concluded contracts with the National Health Fund in the field of gynaecology and obstetrics.

The Government wish to submit that the above procedure was also reflected in the *Recommendations of national consultants in the field of obstetrics and gynaecology and perinatology, concerning the care of patients who decide to terminate the pregnancy in circumstances indicated in the Law of 7 January 1993 on Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination*, elaborated in May 2019. These recommendations were distributed among the regional consultants.

In the light of the above, by signing a contract to provide medical care services, the service provider undertakes to deliver all services listed as guaranteed in the relevant secondary legislation in the scope and type of services for which the contract was concluded.

If it is not possible to provide medical services and such situation could not be predicted in advance, the service provider is obliged to take steps immediately to maintain the continuity of providing services, notifying at the same time the provincial branch of the National Health Fund about such case and actions undertaken. This may be the case when a doctor refuses to perform a service by invoking a conscience clause. If such a situation takes place in a medical entity bound by the contract (*i.e.* the doctor refrains from providing the service due to a conflict of conscience) and this entity does not indicate to the patient another medical entity in which she would have an opportunity to benefit from the medical service, this would constitute an improper realisation of the contract concluded with the Fund.

Furthermore, the Government has already submitted in its previous communications to the Committee of Ministers that provisions regulating the so-called “conscience clause” do not infringe the patient’s right to information. Therefore, on the one hand, the healthcare entity is obliged to perform the contract with the National Health Fund in a comprehensive manner, and on the other hand, to provide information on how to perform this contract if it is not possible to provide the service, *e.g.* due to invoking a conscience clause.

According to the provisions of the *Law of 15 April 2011 on Healthcare Institutions*, any entity engaging in medical treatment activities should make information concerning the scope and types of medical services publicly available. This procedure is legally regulated and is of a general nature, and thus applies to all healthcare services. The patient’s right to information is one of the rights guaranteed by law and implemented in practice.

The termination of pregnancy, in circumstances indicated in the Law of 1993 is one of the guaranteed services, thus in the light of the applicable regulations, ensuring its implementation (and the information obligation in this regard) is the responsibility of the service provider, *i.e.* the healthcare entity.

"To ensure that lawful abortion and pre-natal examination is effectively accessible across the country without substantial regional disparities"

"To present the authorities assessment of the impact of the Constitutional Court's judgment of 22 October 2020 on the availability of pre-natal examination, in particular as it is not strictly linked to the access to lawful abortion but also helps to make informed decisions during pregnancy related to pre-natal treatment or preparation for birth, and to ensure that it is not limited"

With reference to the issue of access to prenatal examination after the Constitutional Court judgment of 22 October 2020 (case no. K 1/20) entered into force, the Government should like to reiterate that pursuant to the above judgment Article 4a section 1 point 2 of the Law of 1993 was declared to be incompatible with Article 38 in conjunction with Article 31 section 3 of the Polish Constitution.

Pursuant to the previous Article 4a § 1 point 2 of the Law of 1993, a pregnancy could be terminated by a physician if prenatal tests or other medical findings indicated a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment. In light of the above judgment, Article 4a § 1 point 2 of the Law in question expired on the day of the publication of the judgment in the Polish Journal of Laws. Since then pregnancy termination procedures cannot be conducted on the basis of Article 4a § 1 point 2.

After the Constitutional Court's judgment entered into force legal termination of pregnancy may be performed only when the pregnancy threatens the life or health of a pregnant woman or when there is a justified suspicion that the pregnancy is a result of a prohibited act. At the same time, it should be underlined that the judgment at stake does not have any impact on the provisions concerning availability of prenatal testing. It needs to be emphasized that prenatal examinations are primarily preventive and diagnostic examinations. Therefore such tests should not be identified solely as a method to determine circumstances allowing the termination of pregnancy.

The assumption that the sole intention of carrying out prenatal tests is termination of pregnancy, is incorrect. Prenatal tests allow to diagnose or exclude foetal defects or illnesses. Modern-day medicine allows to treat some developmental defects as early as during pregnancy, while others can be treated immediately after the childbirth. Early detection of developmental anomalies allows for better preparation for the birth of a child who, due to health problems, requires special care. Today's medicine allows for accurate, early and safe diagnosis of the health of the foetus, including possible malformations. Development and progress take place not only in prenatal diagnostics, but also in terms of the possibility of introducing intrauterine therapy of the foetus or the application of appropriate treatment immediately after childbirth. Early detection of developmental disorders allows for the selection of the appropriate place of delivery, where it is possible to ensure the best conditions of care and early treatment, as well as prepare parents to care for a child with special needs.

The organizational standard of perinatal care, as defined in the provisions of the Ordinance of Minister of Health of 16 August 2018, among the preventive services and activities in the field of health promotion as well as diagnostic tests and medical consultations performed for pregnant women, indicates the need to perform, *inter alia*, non-invasive prenatal examinations in the form of ultrasound examinations carried out in accordance with the recommendations of the Polish Society of Gynaecologists and Obstetricians. According to the regulations, a person caring for a pregnant woman should perform or refer her to ultrasound examinations in the following stages of pregnancy: 11-14 week of pregnancy, 18-22 week of pregnancy, 27-32 week of pregnancy, immediately after 40 week of pregnancy. These tests are one of the grounds for the possible implementation of in-depth diagnostics in accordance with the prenatal examination program. At the same time, the person caring for a pregnant woman may order additional preventive or diagnostic health services if the health condition of the pregnant woman or the results of previously conducted tests indicate a possibility of complications or pathologies of pregnancy, childbirth or the postpartum period.

The possibility of qualifying a pregnant woman to the current health programs, including prenatal examinations and foetal echocardiography, should also be included in the antenatal care plan, which includes all medical procedures related to antenatal care along with the timing of their performance. After a detailed interview with the patient, a person caring for a pregnant woman should enable her to make use of the program in situations related to her unfavourable obstetric history, including an earlier birth of a child with a genetic defect or ascertainment an increased risk of giving a birth to a child with a genetic defect. In the case of an unfavourable obstetric history detecting abnormalities in the assessment of the foetus, which may suggest the occurrence of genetic defects in the foetus, each pregnant woman should be included in the program.

It is the responsibility of a person caring for a pregnant woman to develop such a care plan. The application of the organizational standard of perinatal care is the responsibility of all entities performing medical activities and providing health services in the field of perinatal care provided to a woman during pregnancy, childbirth, puerperium and new-borns.

Moreover, pregnant women who meet at least one of the following criteria:

- age of 35 or more (a women is eligible for the test from the beginning of the calendar year in which she turns 35);
- chromosomal aberration in the foetus or the child during last pregnancy;
- structural chromosomal aberrations confirmed with the pregnant woman or the child’s father;
- confirmation or significantly increased risk of delivering a baby with monogenetically determined or multifactorial disease;
- confirmation of abnormal ultrasound or biochemical test result in pregnancy, indicative of increased risk of chromosomal aberration or foetal defect

on the basis of referral from the physician supervising the pregnancy are being qualified to prenatal tests programme, stipulated in *Ordinance of the Minister of Health of 6 November 2013 on guaranteed services in the field of health programmes.*

As part of the prenatal testing program, procedures related to counselling, biochemical tests, foetal ultrasound for the diagnosis of congenital defects, genetic tests, collection of foetal material for genetic tests (amniocentesis, trophoblast biopsy or cordocentesis) are carried out. The program is addressed to all pregnant women with an increased risk of congenital defects, who require in-depth prenatal diagnostics. Therefore, it should be pointed out that care for a pregnant woman in the field of prenatal diagnosis is consistent and comprehensive.

Referring to the practical implementation of the prenatal testing program, it should be explained that the number of women undergoing tests under the program is systematically increasing. Currently it exceeds 100 000 patients yearly (in 2015 - 90 695 patients, in 2019 - 111 730), what constitutes circa 25 – 30% of all pregnancies. The number of service providers implementing the program is also systematically increasing (in 2015 – 102 healthcare providers, in 2020 – 127), ensuring access to tests for all pregnant women in need.

What should be noted is that the Law of 1993 in its preamble recognizes the right to responsible decisions about having children and imposes an obligation on the state to enable decisions in this regard. For this purpose, government administration and local self-government bodies, within the scope of their competences specified in special provisions, have been obliged to provide pregnant women with medical, social and legal care, in particular through:

- prenatal care for foetus and medical care for a pregnant woman,
- material assistance and care for pregnant women in difficult financial conditions, on the terms set out in the Act of 29 November 1990 on social assistance,
- access to detailed information on entitlements, allowances and benefits due to pregnant women, mothers, fathers and their children, as well as information on institutions and organizations helping in solving psychological and social problems, as well as dealing with issues of adoption.

The government administration and local self-government bodies, within the scope of their competences specified in special provisions, were also obliged to provide citizens with free access to methods and means for conscious procreation, as well as free access to information and prenatal tests, especially when there is an increased risk of or a suspicion of a genetic or developmental defect in the foetus or an incurable disease that threatens the life of the foetus.

Not without a significance in the issue under consideration is also the fact that the Ministry of Health ran a health policy program entitled: “Program of comprehensive diagnostics and intrauterine therapy in the prevention of the consequences and complications of developmental defects and

diseases of the unborn child - as an element of improving the health of unborn children and newborns for the years 2018-2020 (this program was extended until mid-2021). Subsequently, based on the experience and algorithms of conduct developed during the implementation of the above-mentioned program, it is planned to include intrauterine surgery of the foetus as a separate product within the framework of guaranteed services financed by the National Health Fund. At present this product is being developed by the Agency for Medical Technology Assessment.

The main goal of this program is to improve the health of unborn children and newborns through the use of intrauterine therapy in the prevention of the consequences and complications of developmental defects and diseases of unborn children. The goal of improving the health of unborn children is achieved through the implementation of comprehensive foetal therapy using all available options so as to obtain the highest possible success result in the therapy used. The detailed goals of the program are:

- reduction of the number of infant deaths due to congenital malformations;
- reduction of the number of children with disabilities due to foetal defects and diseases by improving the intrauterine condition of the foetus;
- extension of the duration of pregnancy through the use of intrauterine therapy;
- equipment of the domestic centres providing intrauterine therapy with the equipment necessary for performing intrauterine procedures.

In order to increase the awareness of future parents in the field of perinatal care services, including prenatal tests, activities aimed at disseminating systemic solutions in preconception and perinatal care were included in the National Health Program for 2021-2025.

As concerns the amount of funds spent, the number of service providers and women included in the Prenatal Testing Program in years 2017-2020 and first half 2021 r. are as follows:

- in 2017 –78,301,669.12 PLN, number of service providers – 134, number of women – 106 986,
- In 2018 –82,842,787.39 PLN, number of service providers – 123, number of women - 109 909,
- In 2019 – 88,859, 864.49 PLN, number of service providers – 131, number of women - 108 949,
- In 2020 –76,941,168 PLN, number of service providers – 126, number of women - 110 844,
- January – July 2021 – 43,448,241 PLN, number of service providers - 123, number of women - 72 601.

In order to illustrate the availability of prenatal tests after the entry into force of the above-mentioned judgment of the Constitutional Court, it seems justified to present comparative data on the number of such examinations carried out in full years. Full data for 2021 will be available at the beginning of 2022 what will enable the presentation of full information in the above-mentioned scope.

With regard to the issue of the availability of pregnancy termination procedures the Government should like to reiterate that, in cases stipulated in the Law of 1993, such medical

procedure is one of the guaranteed services and must be conducted by service providers who concluded contract with National Health Found in the field of obstetrics and gynaecology.

In Poland, data on the number of performed pregnancy terminations are collected annually. In 2000 there were 138 pregnancy terminations conducted. In 2008, when the events that gave rise to the application in the case of *P. and S.* took place, 499 abortions were carried out, whereas in 2015 – 1040, in 2016 – 1098, in 2017 – 1057, in 2018 – 1076 and in 2019 – 1110. The said data proves that abortions are being carried out in Poland, and that their number has doubled since 2008. The above numbers also show that pregnancy termination procedures are effectively carried out in Poland and, what is more, nowadays they are six times as large as it in 2000.

The table below presents the number of conducted pregnancy termination procedures in 2020.

Voivodship	**Pregnancy terminations conducted in 2020**			
	Total	**when the pregnancy posed a threat to the life or health of the pregnant woman**	**when 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**	**when there was a justified suspicion that the pregnancy resulted from a criminal act**
Dolnośląskie	96	1	95	0
Kujawsko-pomorskie	33	1	32	0
Lubelskie	12	1	11	0
Lubuskie	20	1	19	0
Łódzkie	112	3	109	0
Małopolskie	98	0	98	0
Mazowieckie	239	2	237	0
Opolskie	24	1	23	0
Podkarpackie	1	0	1	0
Podlaskie	26	0	26	0
Pomorskie	147	9	138	0
Śląskie	123	1	120	2
Świętokrzyskie	19	0	19	0
Warmińsko-mazurskie	21	0	19	0
Wielkopolskie	62	1	61	0
Zachodniopomorskie	45	0	45	0
Poland	**1076**	**21**	**1053**	**2**

Source: e-Zdrowie Center

The data for 2021 will be available in the mid-2022.

Moreover, the Minister of Health by a letter of 23 August 2021 requested the President of the National Health Found to actively monitor performance by individual healthcare entities of the contractual obligations concerning pregnancy termination procedures in individual regions and their

availability (to the extent that these treatments are permissible in the light of the provisions of the Law of 1993). The details of the letter are presented below.

"To adopt the necessary reforms of the objection procedure without further delay and URGED them also to include in the legislation an obligation for hospitals to refer a patient to an alternative healthcare facility if a medical service is refused on the grounds of conscience and to monitor effectively its observance in practice"

Firstly, it should be underlined that the patient's right to object to a physician's opinion or ruling, was introduced into the Polish legal system in the *Law of 6 November 2008 on the Patients' Rights and the Commissioner for Patients' Rights* and primarily for the purpose of implementing the judgment of the European Court of Human Rights in the case of *Tysiąc v. Poland.* The objection to a physician's opinion or ruling constitutes an efficient measure of legal protection, *inter alia* for women who were refused pregnancy termination under any circumstance stipulated by the *Law of 1993,* prenatal test referral, or if they were refused the prenatal tests despite a referral.

It should be emphasized that the objection mechanism in its current form functions without prejudice to the specificity and time limits related to cases related to termination of pregnancy.

Furthermore, it must be pointed out that the Law of 6 November 2008 on Patients' Right and the Commissioner for Patients' Rights provided the appointment of a central governmental authority – the Commissioner for Patients' Rights – that is crucial to the protection of the rights of all patients, including pregnant women experiencing difficulties with access to pregnancy termination.

The Commissioner's activities include the protection of patient rights as stipulated in the law under consideration and in separate legal provisions. The scope of the Commissioner's activities includes but is not limited to:

1) Conducting proceedings concerning practices that violate collective patient rights,
2) Conducting proceedings under Articles 50-53 of the Law (the provisions of which govern the Commissioner'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.

In order to facilitate contact with the Bureau of the Commissioner for Patients' Rights, a nationwide free phone helpline 800-190-590 was established over 10 years ago. Staff operating the 800-190-590 number inform callers on the rights of insured persons, guide them on how to report a violation of patients' rights, provide contact details to medical facilities and offices that cooperate with the National Health Fund, inform about the rules of medical services and universal health insurance. In November 2018, the number 800-190-590 was transformed into a common phone number for the National Health Fund and the Bureau of the Commissioner for Patients' Rights as part of a Patients' Call Centre operating across Poland, in all the National Health Fund branches. The helpline's staff is composed of several dozen employees of the NHF provincial units and of the Bureau of the Commissioner for Patients' Rights. The new uniform all-Poland number replaced a dozen or so previous numbers operating within the Fund's branches. It guarantees obtaining fast, comprehensive and transparent information about the functioning of the health care system in Poland.

In 2020 altogether 31 objections were submitted to the Commissioner for Patients' Rights. 13 objections were examined with respect to merits by the Medical Commission. The remaining objections were returned to the applicants due to non-compliance with formal requirements. Out of 31 objections raised, 5 related to the refusal to perform a legal pregnancy termination on the basis of the provisions of law in force at the relevant time: 2 objections were examined on merits, one was withdrawn by a patient. In two other cases the Commissioner found that the termination of pregnancy had been performed in another healthcare entity before the objection was raised.

"To ensure effective monitoring of contractual obligations and functioning of contractual liability mechanism if lawful abortion or pre-natal examination contracted by a hospital is not performed"

The Minister of Health by a letter of 23 August 2021 requested the President of National Health Found to actively monitor performance by individual healthcare entities of contractual obligations concerning pregnancy termination procedures in individual regions and their availability (to the extent that these treatments are permissible in the light of the provisions of the Law of 1993).

In the above letter the Minister of Health reiterated the existing legal status according to which pregnancy termination, in cases provided by the Law of 1993, is one of the guaranteed services and must be conducted by service providers who concluded contract with National Health Found in the field of obstetrics and gynaecology.

The Minister of Health underlined that by signing a contract with National Health Found, service provider undertakes to provide all services listed as guaranteed in relevant secondary legislation, within the scope and in all service types specified by the contract. When the service cannot

be provided the service provider is obliged to immediately take steps to maintain the continuity of services, informing at the same time the regional branch of the National Health Fund about such case and the actions undertaken. This may be the case when physician refers to conscience clause and refrains from performing specific medical service. It should be highlighted that the refusal of the medical service provider who is contracted in the field of obstetrics and gynaecology, to perform the termination of the pregnancy in the cases provided for in the Law of 1993 with a simultaneous failure to indicate a medical facility where a woman could obtain the said healthcare service, is a faulty performance of the contract.

Furthermore, the Fund itself is responsible for ensuring compliance with contractual obligations resulting from contracts concluded with the National Health Fund. Any complaints or information on improper performance of contracts by service providers are the basis for the initiation of an explanatory procedure by the Fund.

Yours faithfully,

Jan Sobczak

Government Agent