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

Reply from the authorities (01/12/2021) following a communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (21/10/2021) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08).

Information made available under Rule 9.9 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)

Réponse des autorités (01/12/2021) suite à une communication d'ONG (Center for Reproductive Rights and the Federation for Women and Family Planning) (21/10/2021) relative aux affaires R.R., TYSIAC et P. et S. c. Pologne (requêtes n° 27617/04, 5410/03, 57375/08) ***[anglais uniquement].***

Informations mises à disposition en vertu de la Règle 9.6 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, 1 December 2021

DPT.432.121.2019/100

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

Dear Madam,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 21 October 2021 by the Center for Reproductive Rights and Federation for Women and Family Planning concerning execution of judgments of the European Court of Human Rights in the cases of *Tysiąc v. Poland* (application no. 5410/03), *R.R. v. Poland* (application no. 27617/04) and *P. and S. v. Poland* (application no. 57375/08), I should like to submit the following comments prepared on the basis of information submitted by the Ministry of Health.

Yours faithfully,

Jan Sobczak
Government Agent

Enc.

Enclosure

Reply to the Communication of the Center for Reproductive Rights and Federation for Women and Family Planning of 21 October 2021 concerning the execution of the Court' judgments in the cases of *Tysiąc v. Poland, R.R. v. Poland* and *P. and S. v. Poland*

In reply to the Communication of the Center for Reproductive Rights and Federation for Women and Family Planning (hereinafter: "the Center" and "the Federation") of 21 October 2021 concerning the execution of the judgments of the European Court of Human Rights in the cases of *Tysiąc v. Poland*, *R.R. v. Poland* and *P. and S. v. Poland*, the Government of Poland should like to submit the following comments.

RE point 1 of the Communication: Allegations related to the regressive developments following the 2020 ruling by the Constitutional Tribunal

As concerns the judgment of the Constitutional Tribunal of 22 October 2020 it should be noted that the Polish Constitutional Tribunal adopted a judgment in which it found that Article 4a section 1 point 2 of the *Act of 7 January 1993 on Family Planning, Human Foetus Protection and Acceptable Conditions for Pregnancy Termination* (hereafter: "the Act of 1993") was incompatible with Article 38 in conjunction with Article 30 in conjunction with Article 31 section 3 of the *Constitution of the Republic of Poland*. Pursuant to Article 4a section 1 point 2 of the *Act of 1993*, a pregnancy could be terminated by a physician if prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffered from an incurable life-threatening disease. This provision expired on the day of publication of the Constitutional Tribunal's judgment of 22 October 2021 in the Polish Official Journal of Laws and since then the pregnancy termination cannot be performed on the basis of that provision.

However, pursuant to the present wording of the *Act of 1993,* the termination of pregnancy may still be performed on the basis of the other two premises, *i.e.* when pregnancy threatens the pregnant woman's life or health and when there are reasonable grounds for believing that the pregnancy is the result of a criminal act. In such circumstances the termination of pregnancy constitutes a guaranteed medical service and its performance is the obligation of the service provider (a medical entity) that concluded a contract with the national Health Fund in the field of obstetrics and gynaecology.

RE point 2 of the communication: Allegation that official data on legal abortions is not evidence of effective implementation of the law

The data concerning the numbers of performed pregnancy termination in Poland is collected on the basis of reports prepared in connection with the implementation of the Public statistics research program (according to the Act on public statistics). Pursuant to Article 3 of the said Act official statistics ensure reliable, objective and systematic information to the society of state bodies and public administration as well as entities of the national economy about the economic, demographic, social and environmental situation. Therefore, reports of the Council of Ministers on the implementation of the Act of 1993 are prepared on the basis of the data from this source. According to that data, in 2020 there were 1076 pregnancy terminations, including 21 - when the pregnancy posed a threat to the life or health of the pregnant woman, 1053 - 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 and 2 - when there was a justified suspicion that the pregnancy resulted from a criminal act.

It should be also indicated that the above data do not reflect the termination of pregnancy procedures performed illegally due to the non-legal nature of this phenomenon.

RE point 3 of the communication: Allegation that the complaint procedure is not an effective mechanism for women and adolescent girls to enforce the right to legal abortion care and prenatal testing

The *Law of 6 November 2008 on Patients' Rights and the Commissioner for Patients' Rights* introduced a patient's right to object a physician's opinion or ruling. This right is a patient's and his/her statutory representative's right.

In line with the above-mentioned law, an objection to an opinion or ruling issued by a physician or a dentist may be lodged with the Medical Commission operating at the Commissioner for Patients' Rights, if an opinion or a ruling impacts the rights or obligations of a patient under the law. The Medical Commission operate pursuant to the *Ordinance of the Minister of Health on the Medical Commission operating at the Commissioner for Patients' Rights* of 10 March 2010.

Information about the patient's right to object to the physician's opinion or ruling has been posted on the *Commissioner for Patients' Rights* website in several places. Employees of the Commissioner's Office also discuss issues related to the implementation of this right during training courses for medical entities.

The patient's right to object to a physician's opinion or ruling, introduced into the Polish legal system, is general in nature, *i.e.* it has not been narrowed down to the case of pregnancy termination refusal under the circumstances stipulated under the *Act of 1993*. Making the aforementioned norm

general in nature was a purposeful action with the intention of protecting the rights of all patients whose rights or duties as stipulated by the law are affected by a physician's opinion or ruling (and under circumstances where no other legal remedies are provided for).

As it was indicated above, pursuant to the *Law on Patients' Rights and the Commissioner for Patients' Rights*, a patient or his/her legal representative may object to the opinion or ruling referred to in Article 2 section 1 of the *Physician and Dental Surgeon Professions Law*, if the opinion or ruling affects the patient's rights or obligations under the law. The above cited provision of the *Physician and Dental Surgeon Professions Law* indicates that the practice of the medical profession consists in providing by a person with the required qualifications, confirmed by relevant documents, health services, in particular: health examination, diagnosis and prevention of diseases, treatment and rehabilitation of patients, providing medical advice, as well as issuing medical opinions and certificates. The right to object may be exercised by a woman who has been refused a termination of pregnancy in a situation where one of the conditions for performing such procedure, specified by the provisions of the *Act of 1993*, are met. Similarly, such a right may be exercised by a pregnant woman who has been refused a referral for prenatal tests, if there are reasons to perform them. Just as the physician's refusal to perform an abortion – regardless of the prerequisite for performing this procedure in a given case – affects the patient's rights, similarly, these rights are also affected by the refusal to issue a referral for prenatal tests, if the patient, pursuant to the provisions of the above-mentioned regulation, is entitled to them. The issue in question does not raise any interpretation doubts.

Referring to the issue of a proper consideration of the objection raised, it should be indicated that in accordance with Article 31 section 5 of the *Law on Patients' Rights and the Commissioner for Patients' Rights* the Medical Commission shall issue a decision immediately, not later than within 30 days of the objection being raised. This deadline is therefore the maximum time-limit for the proceedings performed by the Commission. Moreover, the employees of the Office of the Commissioner for Patients' Rights are sensitive to situations that require quick action, as evidenced by the time schedules of proceedings conducted in this respect.

Referring to the issue of providing the patient with an opportunity to present her/his position it should be noted that the current regulations guarantee such a right. Pursuant to § 4 of the *Ordinance of the Minister of Health of 10 March 2010* the patient or their statutory representative may participate in the meeting of the Medical Commission, except for the part of the meeting during which the deliberation and voting on the decision take place, and provide information and explanations on the matter.

In years 2018-2019 there were in total 101 objections submitted to the Commissioner for Patients' Rights (2018 - 31, 2019 - 70). The Medical Commission examined 23 objections (which fulfilled the formal requirements). In 2019 one objection concerned the termination of pregnancy. 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 the 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, in particular:

1. On 24 April 2020 an objection to a refusal of pregnancy termination was submitted. The physician of a hospital stated that the diagnosed defect of the foetus did not entitle to perform the procedure. The same day the patient was asked to send a copy of the questioned opinion. The patient was also contacted by telephone. Because of the lack of response on 27 April 2020 a letter was sent to the patient again. On 28 April 2020, due to the miscarriage, the patient withdrew the objection.
2. On 1 June 2020 an objection to a refusal of pregnancy termination in a hospital was submitted. On 9 June 2020 the Medical Commission examined the objection and found it justified. The physician's opinion concerning the refusal of pregnancy termination was connected with the gestational age. The Commission ruled that this age should be counted differently and the patient was eligible for the procedure. The defect of the foetus allowed performing the procedure.
3. On 15 July 2020 an objection to a refusal of pregnancy termination in a hospital was submitted. On 21 July 2020 the Medical Commission examined the objection and found it justified. The physician's opinion concerning the refusal of pregnancy termination was connected with the gestational age. The Commission ruled that this age should be counted differently and the patient was eligible for the procedure.
4. On 13 October 2020 an objection to a refusal of pregnancy termination was submitted. However, its content indicated that the patient turned to another medical entity in which the procedure was performed. Therefore, the patient has exercised her right to guaranteed health care service. The Commissioner for Patients' Rights decided that the questioned medical opinion no longer affected the patient's rights and obligations, what was the obstacle to substantive examination of the objection and that any recognition of the objection will not affect the implementation of the right resulting from the applicable law. Due to the reasons mentioned above the objection was returned to the patient, pointing at the same time to a possibility of conducting an explanatory procedure in the context of a violation of the right to health services due to her as a patient.

5. On 30 November 2020 an objection was submitted. Its content indicated that the patient was refused pregnancy termination due to the defect of the foetus. The reason for the refusal was the late gestational age. After a prompt phone contact with the patient it turned out that the pregnancy termination procedure was performed in another medical entity. Similarly to the point above, the objection was returned with an indication of further legal steps that could be undertaken.

Furthermore, in order to facilitate contact with the Bureau of the Commissioner for Patients' Rights, the nationwide toll-free hotline 800-190-590 was established over 10 years ago. Staff operating the line informed callers on the rights of insured persons, guided them on how to report a violation of patients' rights, provided contact details to medical facilities and offices that cooperate with the National Health Fund, informed 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's branches. The helpline's staff is composed of several dozen employees of the National Health Fund's provincial units and of the Bureau of the Commissioner for Patients' Rights. The new uniform all-Poland number has replaced more than a dozen of previous numbers operating within the National Health Fund's branches. It guarantees obtaining prompt, comprehensive and transparent information about the functioning of the health care system in Poland.

RE point 4 of the communication: Allegation that the refusals of care and enforcement failures continue to impede access to legal abortion care

In accordance with Article 39 of the *Act of 5 December 1996 on Physician and Dental Surgeon Professions*, a physician has the right to refer to the principle of conscientious objection when refraining from performing specific medical services, subject to Article 30 of the said Act (within the scope in which it provides for a physician's obligation to provide medical assistance whenever a delay in its provision might 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 medical documentation. Furthermore, a physician performing his or her professional duties as an employee shall also duly notify his or her superior in writing, prior to exercising the conscience clause.

At the same time, it should be noted that the *Act of 1993* in its Article 4b provides that „persons covered by social insurance and persons entitled under separate provisions to free medical care are entitled to a free termination of pregnancy in medical entities". The list of guaranteed services related to termination of pregnancy is specified in the Appendix 1 to the *Ordinance of the Minister of Health of 22 November 2013 concerning guaranteed medical services in the field of hospital treatment.*

Simultaneously, it must be underlined that when providing guaranteed health care services, the service providers perform contractual obligations stemming from contracts concluded with the National Health Fund. Obligatory provisions of contracts concluded with the service providers are presented in the general terms of contracts for the provision of healthcare services (hereinafter referred to as "the GTC"), constituting an annex to the *Ordinance of the Minister of Health of 8 September 2015 concerning the general conditions of healthcare service provision contracts*.

According to § 3 of the GTC, a service provider is obliged to perform a contract in accordance with the conditions of providing services described in the *Act of 27 August 2004 on Publically Financed Healthcare Services* and its implementing regulations (in particular concerning the guaranteed services), as well as with the general and detailed conditions of contracts specified by the President of the National Health Fund. The service provider is also obliged to provide services with due diligence and respect of patient's rights. Furthermore, pursuant to § 9 section 1 of the GTC, the service provider performs services throughout the duration of the contract in accordance with the set work schedule and the material and financial plan.

By entering into a healthcare service provision contract, the service provider undertakes to provide all services guaranteed under implementing regulations of the act, within the scope and inclusive of all service types specified by the contract.

It should also be noted that in case the service cannot be provided (and such a situation could not have been foreseen) the service provider is obliged to immediately take steps to maintain the continuity of services (transferring the patient to another service provider performing the indicated service), informing at the same time the regional branch of the National Health Fund about the situation and the actions undertaken.

Moreover, in accordance with § 8 of the GTC the service provider provides comprehensive services, including the performance of necessary tests (including laboratory tests and imaging diagnostics) and medical procedures related to these services.

In a case when a physician performing his or her professional duties as an employee or as a part of a service informs the service provider about his or her refusal to perform a service on the basis of Article 39 of the *Physician and Dental Surgeon Professions Law* (the exercise of the conscience clause), the service provider is obliged to ensure otherwise the performance of this service. The method of providing health services in a given entity should be organized in a manner enabling the physicians to perform their duties in accordance with their conscience on the one hand, and the patients' right to obtain the medical service they are entitled to on the other. Failure to perform a service constitutes a defective performance of contract for which a contractual penalty may be imposed on the service provider (§§ 29 and following of the GTC) or even the contract may be terminated (§ 36 of the GTC).

As a rule, all medical entities (hospitals) that have concluded a contract with the National Health Fund are obliged to provide services provided for therein - to the full extent and in accordance with the applicable law. Invoking a conscience clause should not violate this obligation.

Consequently, in a case where a physician refuses to perform a medical service inconsistent with his or her conscience, the obligation of providing information on how to enforce the contract with the National Health Fund in this respect lies with the service provider, *i.e.* the healthcare facility in which the physician refrained from performing medical procedure against his or her conscience. This procedure is legally regulated and of general nature, hence it applies to all healthcare services.

The above-mentioned provisions were 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 pregnancy in circumstances indicated in the provisions on family planning, human foetus protection, and acceptable conditions for pregnancy termination*, drafted in May 2019. These recommendations underline that every hospital which had concluded a contract with the National Health Fund for the provision of healthcare services in the field of obstetrics and gynaecology shall be obliged to ensure that the said procedure is carried out (as per the list of guaranteed services in the field of hospital treatment). National consultants indicated in these recommendations that "the breach of law in this respect may result in an imposition of contractual penalties by the National Health Fund, a civil claim submitted by a patient, or sanctions imposed by the Commissioner for Patients' Rights". The recommendations were distributed among regional consultants.

With regard to invoking the conscience clause by a medical entity, it should be clarified that the right to refrain from performing a health service that is inconsistent with one's conscience is the right of the doctor. It should be also underlined, that conscience is an individual category and the conscience clause can only be invoked by an individual. It is about the right to self-determination in matters of worldview, free from any pressure, which is not met by a collective refusal.

It should be underlined that the conscience clause is a physician's right and may be applied *ad casum*. A physician can invoke this clause except when a delay in providing medical assistance of this nature could result in a risk of loss of life, serious injury or serious health impairment. This clause may be used in a direct relation between a patient and a physician, thus the physician cannot indicate in advance whether the above-mentioned case will take place. Furthermore, pursuant to current legal provisions all medical entities (hospitals) which have signed contracts with the National Health Fund are obliged to deliver medical services included therein – in the full scope and in compliance with the applicable laws. The inability to provide services constitutes a defective performance of the contract. By signing a contract to provide medical care services, the service provider undertakes to deliver all services in a given scope and type for which the contract was concluded. 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 Act of 1993 with a simultaneous failure to indicate a medical facility where a woman could obtain the said healthcare service, counts as a defective performance of the contract. Responsibility for ensuring access to services provided under the contract lies with the service provider – the medical entity.

Consequently, in a case where a physician refuses to perform a medical service inconsistent with his or her conscience, the obligation of providing information on how to enforce the contract with the National Health Fund in this respect lies with the service provider, *i.e.* the healthcare facility in which the physician refrained from performing medical procedure against his or her conscience.

RE point 5 of the communication: Allegation related to inadequate information on how women and adolescent girls can exercise their right to legal abortion services

With regard to the issue of the implementation of the patients' right to information about the possibility of performing the termination of pregnancy it should be noted that in accordance with Article 14 of the *Act of 15 April 2011 on Healthcare Institutions,* an entity performing medical activities shall disclose to the public information on the scope and types of health services provided. The entity performing medical activities, at the patient's request, shall also provide detailed information on the provided health services, in particular information on the diagnostic or therapeutic methods used, as well as the quality and safety of these methods.

In addition, in the light of the applicable regulations, by signing the contract for the provision of healthcare services, the service provider undertakes to provide all services specified as guaranteed in the relevant executive regulations to the act, in the given scope and type of services for which the contract was concluded.

It should also be pointed out that if it is not possible to provide services and such situation could not be predicted earlier, the service provider is obliged to immediately take steps to maintain the continuity of providing services (transfer the patient to another service provider that provides the indicated service), notifying at the same time the provincial branch of the National Health Fund about the above and the actions undertaken.

In a case when a physician performing his/her professional duties as an employee or as a part of a service informs the service provider about his/her refusal to perform a service on the basis of Article 39 of the Medical Professions Act (the exercise of the conscience clause), the service provider is obliged to ensure the performance of this service in a different way. The method of providing health services in a given entity should be organized in a manner enabling the physicians to perform their duties in accordance with their conscious on the one hand, and the patients' right to obtain the medical service they are entitled to on the other.

In such a case, the information obligation regarding the performance of the contract with the Fund lies with the service provider, *i.e.* the medical entity in which the physician refrained from providing the service. This procedure is legally regulated and of a general nature, thus it applies to all services.

The above regulations have been reflected in already mentioned *Recommendations of national consultants in the field of obstetrics and gynaecology and perinatology, concerning the care of patients who decide to terminate pregnancy in circumstances indicated in the provisions on family planning, human foetus protection, and acceptable conditions for pregnancy termination.*

RE point 6 of the communication: Allegation related to the failures to enforce National Health Fund contracts

The Minister of Health in 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 Act 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 the National Health Found, the 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. The National Health Fund supervises compliance with contractual obligations arising from contracts concluded with it. All complaints or other information

about a faulty implementation by a medical service provider of its contract with the National Health Fund constitute a basis for institution of clarification proceedings.

RE point 7 of the communication: Allegation related to the question of ensuring respect for patient data confidentiality and respectful treatment of adolescents seeking legal abortion services

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. *Patients' Rights and the Commissioner for Patients' Rights Law of 6 November 2008.*

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

Moreover, it should be pointed out that with regard to actions taken on the basis of the *Act of 1993*, Article 4c section 1 introduces 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.

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.

The legal regulations in force in Poland regulate in detail the issue of the obligation of hospital staff to keep confidential information about the patient and the issues of liability for failure to keep this secret.

The patient's right to confidentiality of information is one of the rights whose observance is also analysed by the Commissioner for Patients' Rights, on the basis of interventions undertaken. According to the Commissioner'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, in 2017 in 8 cases, in 2018 in 6 cases, in 2019 in 6 cases and in 2020 in 13 cases (which represented from 1% to 2% of all violations respectively that were found following explanatory proceedings carried out during this time). The Commissioner has come to the conclusion that the patient's right to confidentiality of information about him or her is, as a rule, respected.

Therefore, it should be concluded that cases of breaches of medical confidentiality were of an incidental 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 a nature.