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Meeting: 1514th meeting (December 2024) (DH)

Item reference: Action Plan (14/10/2024)

Communication from Poland concerning the case of M.L. v. Poland (Application No. 40119/21)

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Réunion : 1514^e réunion (décembre 2024) (DH)

Référence du point : Plan d'action (14/10/2024)

Communication de la Pologne concernant l'affaire M.L. c. Pologne (requête n° 40119/21) (**anglais uniquement**)

DGI

14 OCT. 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

ACTION PLAN¹

Information on the measures taken to implement the judgment in the case *M.L. against Poland*

Case description

M.L. v. Poland, application no. 40119/21, judgment of 14/12/2023, final on 14/03/2024.

The case concerns the breach of the applicant's right to respect for private life on the account of cancellation of her appointment for a legal abortion in a hospital and the resulting need to travel to other country to terminate her pregnancy, because of the entry into force in January 2021 of the judgment of the Constitutional Tribunal, adopted on 22 October 2020 – delivered by a panel whose composition did not meet the requirement of a “tribunal established by law” – which held that legal provisions allowing for abortion on grounds of foetal abnormality had been incompatible with the Polish Constitution (violation of Article 8 of the Convention).

The applicant during her pregnancy underwent medical tests which determined that the foetus had a genetic disorder. Subsequently, she was qualified for an abortion under section 4a(1)(2) of the Act of 7 January 1993 on family planning, protection of the human foetus and conditions permitting pregnancy termination (“the 1993 Act”), which allowed for a termination of pregnancy when prenatal tests or other medical grounds pointed to a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life. The procedure was to be carried out two days later, on 28 January 2021. However, on 27 January 2021, the Constitutional Tribunal's judgment of 22 October 2020, finding the above-indicated provision of the 1993 Act unconstitutional and repealing it, was published and, as a result, came into effect. Consequently, on 28 January 2021, the applicant was informed by a physician in the hospital where the procedure was scheduled to take place that, given the amendments to the domestic law, she could not have an abortion in Poland. Immediately afterwards, the applicant travelled to the Netherlands, where the pregnancy was terminated in a private clinic.

In its judgment, the Court found that the restriction to the applicant's rights was issued by a panel not complying with rule of law requirements, due to the grave irregularities vitiating the election of some of the Constitutional Court judges sitting on the panel. This restriction also lacked foreseeability, as the Constitutional Court's ruling interfered with the medical procedure for which the applicant had qualified and which had already been put in motion, depriving her of safeguards against arbitrariness.

The applicant was awarded just satisfaction in respect of non-pecuniary damage in the amount of 15 000 EUR, as well as 1 004 EUR in respect of pecuniary damage.

I. Payment of just satisfaction and individual measures

1. Details of just satisfaction

Pecuniary damage	Non-pecuniary damage	Costs and expenses	Total
1 004 EUR	15 000 EUR	-	16 004 EUR
Due on: 14/06/2024			Paid on: 24/05/2024

In the circumstances of the present case, and in the light of payment of the just satisfaction ordered by the Court, no additional individual measures seem necessary.

¹ Information submitted by the Polish authorities on 14 October 2024.

II. General measures

1. Legislative measures

1.1. With regard to the issue of unlawfulness of the interference.

Having regard that the violation of the Convention in the *M.L.* case stemmed from the restrictions on access to abortion introduced by the Constitutional Tribunal's judgment of 22 October 2020, which was issued by a panel whose composition did not meet the requirement of a "tribunal established by law", the general measures needed in this case are of the same nature as those in the case of *Xero Flor w Polsce Sp. z o.o. v. Poland* (application no. 4907/18, judgement of 7 May 2021).

In this respect the Government wish to inform that a package of solutions to remedy the situation with regard to the Constitutional Tribunal was adopted on 13 September 2024 by the Parliament. The two laws – the Act on the Constitutional Tribunal and the Act introducing the Act on the Constitutional Tribunal, contain a comprehensive system regulation concerning the Constitutional Tribunal and introduce innovative solutions.

Pursuant to the Act on the Constitutional Tribunal:

- the Constitutional Tribunal will examine *ex officio* the correctness of the procedure of adoption of any act subjected to the constitutional control before it;
- the Constitutional Tribunal will be obliged to request a preliminary ruling from the European Court of Justice in cases referred to in Article 267 of the Treaty on the Functioning of the European Union (i.e. when questions about the interpretation of the Treaties arise);
- the position of a judge in the Constitutional Tribunal could not be held by a person who in the preceding four years held a mandate of a member of the parliament or was a member of the Council of Ministers;
- the entities allowed to introduce candidates for the position of a judge of the Constitutional Tribunal will be extended to cover, among others, General Assembly of the Supreme Court and the Supreme Administrative Court, as well as the central organs of the legal professions' associations;
- the election of a judge to the Constitutional Tribunal will require the majority of 3/5 votes in favour with at least half of the statutory number of members of the Sejm present;
- the President of the Republic of Poland will have the obligation to accept the oath (*ślubowanie*) of a newly elected judge of the Constitutional Tribunal no later than 14 days after her or his election by the Sejm;
- the rules for electing the President of the Constitutional Tribunal will be clarified and, inter alia, introduce 3-year term of office and its limitation to a maximum of two terms;
- as a rule, all cases before the Constitutional Tribunal will be examined at a public hearing;
- the General Assembly of the Constitutional Tribunal will be convened at least once a month.

In turn, the Act introducing the Act on the Constitutional Tribunal provides for a general rule on the invalidity of judgments issued with the participation of persons who were not authorized to adjudicate. As a result, there will be an obligation to repeat all judicial procedures in which persons who were not authorized to adjudicate had taken part in. This will eliminate flawed rulings from legal circulation. At the same time, the law provides that a certain category of decisions (i.a. those issued in individual cases) made by a panel with a participation of a person not authorized to adjudicate, will remain in force. It should be emphasized that if the decision concerned a case initiated by a constitutional complaint, the applicant will be able to re-file a constitutional complaint within 3 months of the entry into force of the Act. To ensure transparency, the law provides that the Constitutional Tribunal shall publish the list of all invalid judgments and decisions within one month of the entry into force of the Act.

Both laws were adopted on 13 September 2024 and transmitted to the President of the Republic of Poland for signature. On 7 October 2024 the President referred both acts to the Constitutional Tribunal within the framework of preventive constitutionality control. In his motion the President alleged that the laws in question are in non-conformity with the Constitution of the Republic of Poland due to the envisaged

invalidation of certain judgments issued by the Constitutional Tribunal and the questioning of the status of some of the Tribunal's judges.

Therefore, the above-described laws have not yet entered into force.

In addition, on 4 September 2024 the Government of Poland (Minister of Justice) has requested the Venice Commission for its opinion on the draft amendments concerning the Constitutional Tribunal, described above. The opinion is scheduled to be issued by the end of 2024. More details, together with the English version of the laws described above, are available at the website of the Venice Commission at <https://www.venice.coe.int/webforms/documents/?opinion=1203&year=all>.

1.2. With regard to the issue of unforeseeability of the interference.

Having regard to the Court's finding that the *M.L.* case disclosed also the lack of foreseeability given the fact that the entry into effect of the Constitutional Tribunal's judgment interfered with a medical procedure already in motion, thus disclosing lack of proper safeguards against arbitrariness, the Government wish to point to the fact that in accordance with Article 190 section 1 and 3 of the Constitution of the Republic of Poland the judgments of the Constitutional Tribunal have universally binding force and are final, and enter into force on the day of their announcement. Only the Constitutional Tribunal itself may specify a different date of a loss of binding force of a normative act deemed unconstitutional, other than the date of the announcement.

Therefore, the interference in the present case could not be reasonably predicted, as the date of a loss of binding force of the section 4a(1)(2) of the 1993 Act was depending on a discretion of the Constitutional Tribunal. Such an unforeseeability of the interference could not have been alleviated by the existing provisions concerning the provision of healthcare services financed from public funds, despite their comprehensive character. Pursuant to Article 20 of the Act of 27 August 2004 on healthcare services financed from public funds ("the Healthcare Services Act"), outpatient and stationary healthcare services are provided in the order of the demand and during the hours of the operation of the healthcare provider which has a contract with the National Health Fund. The healthcare provider informs the patient in the manner of its choice about the date of a medical procedure the patient had qualified for, and such an information constitutes the healthcare provider's commitment to provide the healthcare service in question.

The Healthcare Services Act provides for the possibility of changing the date of the provision of a healthcare service that may result from, inter alia, an occurrence of circumstances that could not have been foreseen at the time of scheduling the date of a procedure, and which make it impossible to provide the healthcare service in accordance with the schedule. In such a case the healthcare provider informs the patient in any available way about the change and the reason for it.

However, in the circumstances of the *M.L.* case, where the cancellation of a healthcare service (i.e. termination of a pregnancy) stemmed from entry into effect of the Constitutional Tribunal's judgment finding the legal basis for the provision of the said service unconstitutional and repealing it, provision of such a service or rescheduling it to another date, were not possible.

Therefore, the Government is of the opinion that the problem of unforeseeability of the interference in the present case was of an extraordinary nature and could be classified as a one-off, or a very rare instance of a case, and that the currently existing regulations regarding the provision of healthcare services financed from public funds are sufficiently safeguarding patients against arbitrariness of rescheduling or cancelling appointments.

2. Translation and dissemination of the Court's judgment

The Court's judgment in the *M.L.* case was translated into Polish and published on the website of the Ministry of Justice at <https://arch-bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/>. In addition, information about the judgment in question was included in the news section on the Ministry's website at <https://www.gov.pl/web/sprawiedliwosc/najnowszy-wyrok-europejskiego-trybunalu-praw-czlowieka33>.

III. Conclusions of the respondent state

The Government considers that no further individual measures are necessary in the present case and undertakes to inform the Committee on implementation of the general measures planned in order to comply with Poland's obligations under Article 46 § 1 of the Convention.