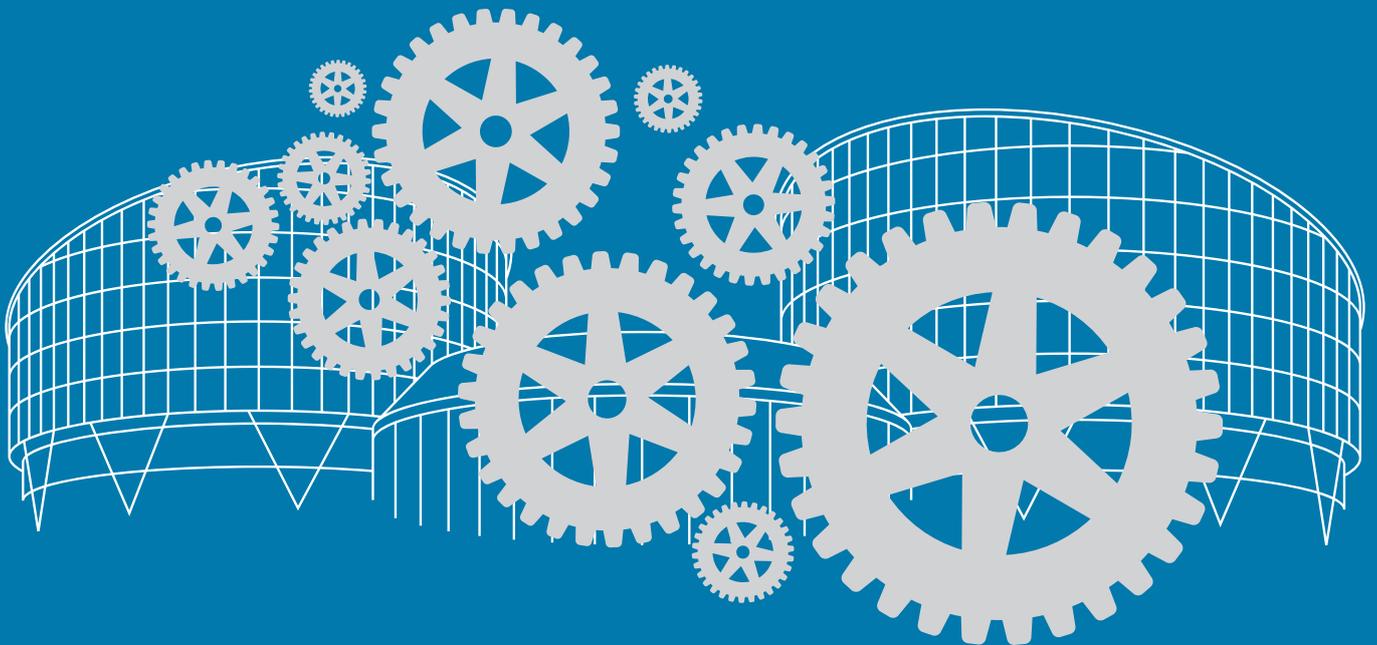


# REPORT

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## ON THE IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN POLAND



WARSAW  
MARCH 2017

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## Introduction

The Helsinki Foundation for Human Rights (HFHR) is one of the oldest non-Governmental organisations in Poland dealing with the protection of human rights and fundamental freedoms. As part of its activity, HFHR monitors the standards of human rights protection. HFHR is closely working with the Council of Europe system of human rights protection. One of the main pillars of HFHR's activity is litigation before the European Court of Human Rights and the monitoring of the process of the implementation of judgments process before the Committee of Ministers.

Although the HFHR acknowledges the efforts of the Polish Government to implement judgments of the ECtHR, it also recognizes that, according to the statistics of the Polish Ministry of Foreign Affairs, at the end of 2015 more than 300 cases were pending before the ECtHR<sup>1</sup>. A majority of these concerned structural, systemic problems. The HFHR believes it is relevant to stress problems concerning the implementation of judgments concerning art. 3 of the European Convention on Human Rights (hereinafter: the Convention), particularly the conditions of detention, overcrowding in prisons, dangerous detention regime. The HFHR sees a limited progress in the implementation of the judgment concerning the secret rendition sites. Moreover, the HFHR would like to refer to the deficiencies in the implementation of cases relating to article 5 (length of pre-trial detention, lack of protection of persons with disabilities and juvenile detention), article 6 (length of proceedings, execution of contacts with children) and article 10 (criminal defamation and liability for lack of pre-publication review).

## General comments

The HFHR is engaged in the reform process of the ECtHR and is a supporter of the Council of Europe protection mechanisms. In that respect the HFHR would like to stress a systemic deficiency, which requires procedural changes, namely, the limited supervision of the Committee of Ministers on the unilateral declarations.

According to Rule 43 of the Rules of the Court, “[i]f an award of costs is made in a decision striking out an application which has been declared admissible, the President of the Chamber shall forward the decision to the Committee of Ministers”. In the ECtHR case-law this Rule has been interpreted broadly, so as to include any payments that were awarded to the applicant in the Court's decision, including decisions regarding unilateral declarations. However, no such provisions were made for other terms and obligations constituted by the Court's decisions regarding unilateral declarations.

Protocol 14 to the Convention extended the Committee of Ministers' responsibilities to the supervision of the Court's decisions about friendly settlements. This provision's aim was to enhance the efficiency of the Court (and the Council of Europe) in protecting human rights and, in particular, in resolving the structural problems leading to the repetitive violations of human rights. Friendly settlements and unilateral declarations may effectively contribute to the reduction of the backlog of the Court and they may increase the Court's efficiency, as expressed in the Interlaken Declaration.

With the increased application of unilateral declarations, not only in repetitive cases, but also in strategic ones, there is a need to speedily extend the oversight of the Committee of Ministers beyond the sole payment, to include terms and obligations constituted by the Court's decisions regarding unilateral declarations.

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1 The Polish Affairs Ministry 2015 report on the state of implementation of ECtHR judgments is available at: <https://www.msz.gov.pl/resource/0bb35514-09b4-41fa-9c69-3738b1fd2443:JCR> (date of access: 28<sup>th</sup> February 2017).

The HFHR would also like to note that, according to the recommendations issued by the CoE Parliamentary Assembly in November 2011, one of the guarantees for the execution of the ECHR judgments is parliamentary supervision of the Government's activities in this regard. In February 2014, the joint Commission of Justice and Human Rights, together with the Foreign Affairs Commission of the lower chamber of the Polish Parliament (Sejm), created a permanent sub-commission for the execution of judgments of the ECHR. The appointment of the permanent sub-commission was a step towards making the domestic implementation process more stable and regular, and was the fruit of multiple convenings between the Sejm's Commission of Justice and Human Rights and the Senate's Commission of Human Rights, Rule of Law and Petitions. The sub-commission, composed of 11 MPs, was established to control the Government's actions towards the execution of judgments, such as proposals to amend laws, change Governmental practices and oversee the dissemination of judgments. They were also analyzing the Government's annual report on the matter.

Unfortunately, this initiative now appears to have been a flash in the pan. Since its establishment, the sub-committee met a few times, concentrating on the election of its President, but without really starting a substantive discussion about implementation problems. The lack of strong institutionalization of the sub-committee resulted in the refusal of the current parliament (elected in October 2015) to restore it. The current Government and parliament are opposing any international obligations and outside pressure, disregarding Venice Commission opinions and the Rule of Law Procedure opened by the European Commission.

In January 2016 the Ministry of Foreign Affairs addressed the Sejm seeking to re-introduce the sub-committee, an appeal that was repeated by the Helsinki Foundation for Human Rights in February and by the Polish Ombudsman in March. None of these institutions received a reply; the sub-committee has not been established. As a result, Poland has lost the opportunity to be one of the European leaders in the execution of ECHR judgments.

Unfortunately, the lack of response of the Sejm Spokesman to calls for reintroducing the sub-committee should be interpreted as a lack of political will to take implementation seriously. Moreover, there is little openness from politicians to discuss the eventual establishment of a supervisory body in the parliament. For now, the future of the parliamentary engagement in the implementation process in Poland remains uncertain, negating the progress made by the previous parliament.

## **ARTICLE 3**

### **PROHIBITION OF TORTURE**

#### **1. Overcrowding in the Polish prisons**

The most serious problem in the national penitentiary system noticed by numerous organizations – both Polish and international– is the overcrowding. The HFHR has, on many occasions, preceding the first judgments rendered by the ECtHR in Polish cases, raised concerns about that problem, especially in its' opinion about the overpopulation in Polish prisons of 20th February 2007. The HFHR noted, among other issues, that the deficiency in the living space could result in a financial liability of the State Treasury<sup>2</sup>.

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<sup>2</sup> HFHR's opinion from 20<sup>th</sup> February 2007 about the overcrowding in prisons, available at: [http://www.hfhrpol.waw.pl/precedens/images/stories/przeludnienie\\_hfpc\\_opinia.pdf](http://www.hfhrpol.waw.pl/precedens/images/stories/przeludnienie_hfpc_opinia.pdf) (date of access: 28<sup>th</sup> February 2017).

## Background of the cases

The systemic nature of the problem was first established in judgements of ECtHR in cases of *Orchowski v. Poland*<sup>3</sup> and *Sikorski v. Poland*<sup>4</sup>. In these cases, the applicants claimed that the conditions of their detention had given rise to inhuman and degrading treatment contrary to article 3 of the Convention. A part of the violation of article 3 of the Convention was the fact that in detention facilities in which the applicants served their sentence, the detainees had less than the required 3 m<sup>2</sup> of space per person guaranteed by Polish legislation.

## Implementation of the judgment

After the 2009 judgements the structural and national nature of the problem was noted by the government and current statistics confirm that the problem of overcrowding was reduced. According to the Prison Service statistics from January 2017, the population in Polish prisons amounted to 70 955 inmates for an overall capacity of some 79 965 places (88% in percentage)<sup>5</sup>. However, the statistics are based on the Polish legal standard of 3 m<sup>2</sup> space per prisoner. The Polish government was warned about the difference between the national and international legal standards in that respect by various international institutions, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) after its visit to Poland in 2013. During the visit, the CPT noticed, that prisoners were offered at least 3 m<sup>2</sup> of living space in multi-occupancy cells but the CPT's standard of 4 m<sup>2</sup> of living space per prisoner was met only in some of the cells<sup>6</sup>. Nowadays, the problem of prison overcrowding is slightly reduced, which should be considered as a positive change.

However, there are numerous plans to amend the Criminal Code, which can result in the prolongation of punishments. That kind of tendency could result in an increase of number of detainees and the problem of overcrowding could increase (for more information please refer to the section on Excessive length of pre-trial detentions).

## 2. Conditions in the Polish detention facilities

### Judgment of the Court

In the case *Szafranski v. Poland*<sup>7</sup> another problem of Polish detention system has been elaborated. Mr Szafranski claimed that as a result of poor sanitary conditions and the insufficient separation of sanitary facilities from the rest of the cell, his rights under articles 3 and 8 of the Convention had been violated. The toilet facilities in the applicant's cell were separated from the cell by fibreboard partitions. This did not provide full privacy, but was sufficient to ensure that the prisoners were out of sight of others when they used the toilet. The ECtHR adjudicated that such standards in detention facilities

3 The ECtHR judgment from 22<sup>th</sup> October 2009 in the case *Orchowski v. Poland*, application no. 17885/04.

4 The ECtHR judgment from 22<sup>th</sup> October 2009 in the case *Sikorski v. Poland*, application no. 17599/05.

5 The Polish Prison Service Monthly statistical information – January 2017; available at: <http://www.sw.gov.pl/strona/statystyka--miesieczna> (date of access: 28 February 2017).

6 Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5<sup>th</sup> to 17<sup>th</sup> June 2013; available at: <http://www.cpt.coe.int/documents/pol/2014-21-inf-eng.pdf> (date of access: 28th February 2017).

7 The ECtHR judgment from 15<sup>th</sup> December 2015 in the case *Szafranski v. Poland*, application no. 17249/12.

should be changed. The toilet should guarantee full privacy and even if there is a full-time monitoring, intimate parts of the body should be covered.

## Implementation of the judgment

In Poland, the minimum conditions of a prison cell are established in the article 110 of The Criminal Executive Code<sup>8</sup>. The basic norms of the living space and standards of the cells (such as the requirement of accessorizing cells with the sanitary facilities) are still one of the most common subjects of prisons complaints. As noted in the National Preventive Mechanism Report of 2015, there are important differences between old and new detention facilities. In new or refurbished prisons, the conditions are much better than in others. The National Preventive Mechanism pointed out that the problem of overcrowding still exists, but there are also problems with privacy in the sanitary part or the accommodation of cells for prisoners with disabilities<sup>9</sup>. According to the action report of the Government in the case of *Szafranski v. Poland* from January 2017, modernisation of sanitary facilities in the Polish penitentiary institutions has been ongoing since 2011. These works are supposed to be completed within the next 4-5 years. Moreover, the action report stated that the judgment *Szafranski v. Poland* was translated and disseminated<sup>10</sup>.

Furthermore, the HFHR still receives numerous complaints from prisoners, in which they claim that the conditions of detention do not meet humane standards. Prisoners, instructed about the complaint mechanism from the Executive Criminal Code, are making frequent use of this official procedure, which was also acknowledged in the CPT's report. In 2015, Prison Service received 168.329 motions and complains from prisoners – 23,41 % more than in 2014<sup>11</sup>. The complaint mechanism is established in article 6 of the Executive Criminal Code. It states that the official complaint has to include a justification of the applicant's statements.

Moreover, the complaint has to be written in refined language, without prison dialect or swear words. It also may not be based on the same facts that has been presented in previous complaints of the same person. In 2015, The Polish Ombudsperson lodged a motion to the Constitutional Tribunal concerning the compliance of this procedure with the Constitution of the Republic of Poland<sup>12</sup>. The Ombudsman claimed that such requirements limit prisoners' right to complaint because not every applicant would be able to use required language or formulate a satisfactory justification. In the judgement from July 2016, the Constitutional Court did not agree with the motion and claimed that the procedure is lawful. The HFHR supports the Ombudsman position. In our opinion, the right to complain is one of the most basic rights of detainees and the restrictive conditions stipulated in the Executive Criminal Code could limit such right. In 2015, 3.724 complaints were found not admissible because of the conditions formulated in article 6 par. 3 of the Executive Criminal Code. This constituted 10% of all introduced

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8 The Criminal Executive Code (*Ustawa z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy*), Official Journal from. 1997 no. 90. item 557.

9 The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015; available at: <https://www.rpo.gov.pl/sites/default/files/Raport%20RPO%20KMP%202015.pdf> (date of access: 28<sup>th</sup> February 2017).

10 The Polish Government Action report from 12<sup>th</sup> January 2017 in the *Szafranski v. Poland*; available at: [http://hudoc.exec.coe.int/eng#{"EXECIdentifier":\["DH-DD\(2017\)44E"\]}](http://hudoc.exec.coe.int/eng#{) (date of access: 28<sup>th</sup> February 2017).

11 The Polish Ministry of Justice Annual information about the motions and complains – 2015 <https://bip.ms.gov.pl/pl/kontakt/informacja-o-sposobach-przyjmowania-i-zalatwiania-spraw/download,3339,0.html> (date of access: 28<sup>th</sup> February 2017).

12 The Polish Ombudsman motion to the Constitutional Court from 14<sup>th</sup> October 2015; available at: [https://www.rpo.gov.pl/sites/default/files/Wniosek\\_do\\_TK\\_ws\\_ograniczenia\\_skazanym\\_prawa\\_do\\_skargi.pdf](https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_ws_ograniczenia_skazanym_prawa_do_skargi.pdf) (date of access: 28<sup>th</sup> February 2017).

motions. Maintenance of such strict rules for complaints could result in an increase of inadmissible complaints in the future.

### **3. Lack of adequate accommodation for persons with disabilities and lack of adequate medical care and assistance in detention facilities**

According to the Final Resolution CM/ResDH(2016)278, adopted by the Committee of Ministers on 21 September 2016 at the 1265<sup>th</sup> meeting of the Ministers' Deputies, the examination of the execution of eight ECtHR judgments in the group of cases *Kaprykowski v. Poland*<sup>13</sup>, has been closed. The HFHR finds this decision to be premature for a series of reasons discussed below.

#### **Background and selected issues raised in the group *Kaprykowski v. Poland***

Mr. Kaprykowski was suffering from epileptic seizures and was diagnosed with encephalopathy accompanied by dementia, with ulcers and syphilis. He complained that he required specialised medical care and direct and constant assistance in his daily activities, which had not been provided to him during his detention. The ECtHR found in his case that the lack of adequate medical treatment in the detention center and placing him in a position of dependency and inferiority vis-à-vis his healthy cellmates undermined his dignity, as well as entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty. Mr. Kaprykowski's continued detention without adequate medical treatment and assistance amounted to a violation of article 3 of the Convention. In another judgment in the analyzed group of cases, namely *D.G. v. Poland*<sup>14</sup>, the applicant complained that the care and conditions of his detention had been incompatible with special needs resulting from his paraplegia. The ECtHR reached the conclusion that to detain a person who is confined to a wheelchair and suffering from paraplegia and serious malfunctions of the urethral and anal sphincters in conditions where he does not have an unlimited and continuous supply of incontinence pads and catheters and unrestricted access to a shower, where he is left in the hands of his cellmates for the necessary assistance, and where he is unable to keep clean without the greatest of difficulty, constitutes violation of article 3 of the Convention.

#### **Implementation of the judgments**

In the updated action report from the 21<sup>st</sup> June 2016<sup>15</sup>, the Polish Government has provided information about the measures to comply with the judgments in the *Kaprykowski* group of cases. When it comes to general measures of implementation, the Polish authorities have elaborated upon inter alia the medical services available to inmates, the improvement of sanitary and living standards in detention facilities, introduction of dedicated healthcare programs, as well as the developments in the availability of remedies. The updated action report provided e.g. information on civil compensatory remedy confirmed by the Supreme Court in the judgment of 17 March 2010 - the right to be detained in conditions respecting one's dignity belong to the catalogue of personal rights and actions infringing this right can lead to the State Treasury's liability<sup>16</sup>. In HFHR's views, the general measures aimed at realizing the *Kaprykowski* group of judgments have not been sufficient to prevent similar violations

13 The ECtHR judgment from 3<sup>rd</sup> February 2009 in the case *Kaprykowski v. Poland*, application no. 23052/05.

14 The ECtHR judgment from 12<sup>th</sup> February 2013 in the case *D.G. v. Poland*, application no. 45705/07.

15 Updated Action Report from 21<sup>st</sup> June 2016 in the *Kaprykowski* group of cases against Poland; application no. 23052/05.

16 *Ibidem*, p. 15.

of Article 3 of the Convention in the future. In 2016, the HFHR has brought to the attention of the Committee of Ministers of the Council of Europe that the Polish authorities did not provide adequate environmental and technical accommodations for the detained persons with physical disabilities<sup>17</sup>. The National Preventive Mechanism has identified in its monitoring report from 2015 a number of serious flaws in the accommodations that have been introduced for the detainees with disabilities<sup>18</sup>.

It needs to be underlined that the HFHR also regularly receives a large number of correspondence from inmates claiming that the medical treatment provided to them in prisons or detention centers is either insufficient or inadequate. The received correspondence also concerns inadequate treatment of inmates with physical disability. As a result, the Legal Intervention Programme of the HFHR in 2016 alone, has directed a number of intervention letters, e.g. it has supported in June 2016 r. Mr. A.R. who wanted to be provided with a break in his imprisonment period in order to be treated in a specialized medical facility<sup>19</sup>. Mr. A.R. was suffering from haemophilia. He broke his arm and was in dire need of an operation.

Mr A.R. obtained the necessary medical documentation. The prison doctor stated that he could be hospitalized within the facilities of prison system. This resulted in the prolongation of the reconstruction of the damaged nerve and posed a threat to serious joint degeneration. Another HFHR's intervention from April 2016 pertained to the case of Mr. J.J. who was diagnosed as HIV-positive<sup>20</sup>. Mr. J.J.'s wife claimed that her husband was facing serious difficulties in obtaining access to antiretroviral therapy and she had to provide him with the necessary medication on her own accord. Further interventions of the HFHR can be found e.g. in the HFHR's communication to the Committee of Ministers concerning the execution of D.G. v. Poland judgment<sup>21</sup>.

### The HFHR's recommendations

In relations to the problems identified earlier by the ECtHR in the Kaprykowski group of cases there is still much room for improvement at the domestic level. The Polish authorities should direct additional financial means, so as to: (1) provide detained persons with better specialist and expensive treatment, also outside penitentiary facilities; (2) fulfil the process of providing adequate environmental and technical accommodations for the inmates with physical disabilities. The Polish authorities should also improve the training system of Prison Service and make sure that the Polish Ombudsman's Office is equipped with sufficient funds for the National Preventive Mechanism to fully realize its tasks under OPCAT.

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17 Communication from 1<sup>st</sup> of September 2016 of the Helsinki Foundation for Human Rights in the case of D.G. v. Poland (Kaprykowski group); available at: [http://hudoc.exec.coe.int/eng#%22EXEClntifier%22:%22DH-DD\(2016\)986E%22](http://hudoc.exec.coe.int/eng#%22EXEClntifier%22:%22DH-DD(2016)986E%22)]; (date of access: 28<sup>th</sup> February 2017).

18 The Polish Ombudsman Report from the Activities of the National Preventive Mechanism in year 2015, p. 14; available at: <https://www.rpo.gov.pl/pl/content/raporty-rpo-z-dzialalnosci-w-polsce-krajowego-mechanizmu-prewencji> (date of access: 28 February 2017).

19 Information on HFHR's intervention available at: <http://www.hfhrpol.waw.pl/interwencja/interwencje/hfpc-popi-era-prosbe-osadzonego-o-udzielenie-przerwy-w-odbywaniu-kary.html> (date of access: 28<sup>th</sup> February 2017).

20 Information on HFHR's intervention available at: <http://www.hfhrpol.waw.pl/interwencja/interwencje/interwencja-hfpc-w-sprawie-leczenia-osadzonego-zarazonego-wirusem-hiv.html> (date of access: 28<sup>th</sup> February 2017).

21 Communication from the 1<sup>st</sup> of September 2016 of the Helsinki Foundation for Human Rights in the case of D.G. v. Poland (Kaprykowski group), pp. 8-9.

## 4. Dangerous detainee regime

In June 2016 the Committee of Ministers decided to close the execution of the judgment in the case *Horych v. Poland*<sup>22</sup> by the Final Resolution CM/ResDH(2016)128<sup>23</sup>. However, HFHR still deals with cases that present similarities to this case. One of the example is the case of *Pugžlys v. Poland*<sup>24</sup> concerning particularly stringent and humiliating measures to which the applicant was subjected in the context of the criminal proceedings brought against him. The case is pending before the Committee of Ministers under standard supervision.

### Background of the case

After being arrested, the applicant was classified as a dangerous detainee and placed under a high security. From that moment the prison authorities were reviewing and extending the application of the regime to him every three months, repeating the grounds used in the initial decision. The measures imposed on the applicant were lifted only after 9 years.

Such situation was assessed by the ECtHR as a violation of article 3 of the Convention. The ECtHR has underlined that in its opinion it was not necessary to use the same full range of measures against the applicant continuously and routinely for almost 9 years in order to maintain prison security. Furthermore, the ECtHR has noted that the authorities did not counteract the effects of the applicant's isolation and did not provide him with the necessary mental or physical stimulation, with the exception of a daily and solitary walk within the segregated area

Lastly, the ECtHR has indicated that while extending the regime, the authorities failed to address the issue of whether any possible changes in the circumstances justifying the continued application of the "dangerous detainee" regime occurred. For this reason it is noted that in this instance the authorities failed to sufficiently justify the extension of the regime and that the procedure for reviewing the applicant's "dangerous detainee" status was a pure formality, limited to a repetition of the same grounds.

### Domestic law

In 2015 the Parliament accepted the amendments<sup>25</sup> to the Criminal Enforcement Code as sufficient implementation of the ECtHR judgements in cases of *Piechowicz v. Poland* and *Horych v. Poland*.

According to the amendment the "dangerous detainee" regime might be imposed on a detainee who has committed a crime of high degree of social harmfulness. Furthermore, during the process of "dangerous detainee" regime's extension the authorities were obligated to consider factors such as: prisoner's personal conditions, motivation while committing the crime, behaviour in prison and degree of demoralization.

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22 The ECtHR judgment from 17<sup>th</sup> April 2012 in the case *Horych v. Poland*, application no. 13621/08.

23 Resolution CM/ResDH(2016)128 Execution of the judgments of the European Court of Human Right, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016806577c6](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806577c6), (date of access: 28<sup>th</sup> February 2017).

24 The ECtHR judgment from 14<sup>th</sup> June 2016 in the case *Pugžlys v. Poland*, application no. 446/10.

25 Act of 10<sup>th</sup> September 2015 amending the Criminal Executive Code and certain other acts (*Ustawa z dnia 10 września 2015 r. o zmianie ustawy - Kodeks karny wykonawczy*), Official Journal from 2015 item 1573.

## Implementation of the judgement

The number of prisoners classified as “dangerous detainees”, as a direct result of Piechowicz and Horych judgement, has been systematically falling since 2012. While at the beginning of that year 311 prisoners were classified to serve their sentences in the “dangerous detainee” regime, in 2017 that number dropped to 122.

In the opinion of the HFHR, the amendment to Criminal Enforcement Code was a step in a right direction. However, the HFHR notes that prisoners should be rather classified as “dangerous detainee” based on a system of dynamic protection built around an assessment of an inmate’s personality and guided by risks posed by their personal traits and behavioural history and not based on the type of the committed crime.

It should also be noted that the 2015 amendment to Criminal Enforcement Code did not fully implement judgements in cases of Piechowicz and Horych. Therefore there is a need to take actions to implement judgement in the case of Pugżlys v. Poland and other Polish judgements concerning cases of prisoners held in “dangerous detainee” regime.

First of all, it has to be underlined that security measures applied to prisoners who are held in dangerous detainee regime do not differ depending of the threat posed by a prisoner. As a result, their cells are monitored through CCTV systems and the prisoners are being entirely isolated from other persons. What is more, prisoners are routinely shackled and strip -searched every time they leave or enter their cells, regardless of whether the threat posed by a prisoner is really imminent.

Furthermore, actions have to be taken in the context of mental or physical stimulation available to such prisoners. Therefore prisoners detained in “dangerous detainee” regime should be enabled to take part in trainings, workshops, courses, sports, unpaid work or any other activities organised for ordinary inmates. They should also be covered by intensive psychological supervision for the purpose of elimination of trauma resulting from an increased isolation.

The aforementioned amendment, contrary to ECtHR judgements in cases of Piechowicz and Horych v. Poland, did not introduce regulations forcing prison authorities to provide prisoners detained in the “dangerous detainee” regime with such interactions.

## 5. Secret detention sites

### Background cases

The cases Al Nashiri v. Poland and Abu Zubaydah v. Poland concerned liability for cooperation between Poland and the U.S. administration in the CIA high-value detainees (HVD) programme. The ECtHR ruled in July 2014 breach of article 3 of the Convention in both aspects: procedural – by failure to carry out an effective investigation into the applicants’ allegations of being subjected to torture, ill treatment and detention, and substantive – by enabling the U.S. authorities to subject the applicants to torture and ill-treatment on the Polish territory. The ECtHR found also that Polish authorities breached article 5 of the Convention on account of the applicant’s undisclosed detention on the territory of Poland and the fact that Poland enabled the U.S. authorities to transfer the applicant from its territory, despite the existence of a real risk that he would be subjected to further undisclosed detention. The Court held also that there had been a violation of article 6 by the fact that the transfer of the applicant exposed him to a real risk that he could have faced a “flagrant denial of justice”.

## Implementation of the judgments

Execution of the judgements is under enhanced supervision conducted by the Committee of Ministers since February 2015. Execution of Al Nashiri and Abu Zubaydah judgements is regularly a subject of Committee of Ministers meetings. Implementation of the judgements requires individual and general measures that should be undertaken.

### Individual measures

First of all, the Government informed that the just satisfaction had been paid to the applicants. Secondly, diplomatic notes were sent to the U.S. administration requesting for the diplomatic assurances that Mr. Al Nashiri would not be subjected to death penalty and that the applicants would not be exposed to flagrant denials of justice. The U.S. authorities refused to provide such guarantees. According to the Government communication of 8 February 2017, “any possible future actions should be thoroughly thought but reflection on constructive solutions in such difficult situation needs time in particular in the context of changes in the U.S. administration after 20 January 2017”. Additionally, the Government argued that “constant efforts of various Polish authorities aiming at obtainment of diplomatic assurances from the American side sufficiently proves their determination in the full implementation of those judgments of the ECtHR which concern very complex and sensible questions”.

Thirdly, according to the updated action plan submitted by the Government in October 2016, the U.S. administration refused to provide legal assistance. Moreover, the U.S. authorities informed that any further motions concerning alleged CIA detention spots will not be proceeded. The updated action plan described the main investigative activities conducted by the Prosecutor Office in Cracow, however the Government did not provide any details of the outcomes of these actions.

Even though the investigation had been prolonged until 11 October 2016, it is highly probable it will be discontinued without providing basic information about the person responsible for the existence of the secret detention site operated by the U.S. authorities on the Polish territory. In March 2016 media informed that the investigation conducted by the Prosecutor Office in Cracow would be discontinued. According to media press releases, the prosecutor office will discontinue the proceedings due to lack of new evidence or information relevant for the investigation<sup>26</sup>. It suggested that the prosecutor office will confirm in its decision that the secret CIA site detention was present in Poland.

The HFHR’s major concern regarding the effectiveness of the domestic investigation relates to lack of independence of prosecutor office. On 25 August 2016, the Helsinki Foundation for Human Rights submitted comments describing the latest amendments to law changing the structure of prosecutor office. After 4 March 2016 the office of the Prosecutor General is held by the Minister of Justice, who is an active politician and who even does not necessarily need to meet the requirements for the office of prosecutor candidate (he can be a trainee prosecutor, *asesor prokuratorski*). According to the CoE Commissioner for Human Rights, these amendments raise important human rights concerns. The new law widened the competences of the Prosecutor General and did not establish any safeguards against undue political influence on each investigation or against abuse of his/her power.

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<sup>26</sup> Śledztwo w sprawie więzień CIA w Polsce do umorzenia. Treść uzasadnienia wzbudzi kontrowersje (16 March 2016), available (in Polish) at: <http://www.rmf24.pl/fakty/polska/news-sledztwo-w-sprawie-wiezien-cia-w-polsce-do-umorzenia-tresc-u,nld,2163348> (date of access: 27th February 2017).

The Prosecutor General has the power to intervene at each stage of legal proceedings led by any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases. The Prosecutor General can also revoke or modify decisions taken by prosecutors. The individual instructions might be reviewed by the higher prosecutor, who however was directly appointed by the Prosecutor General without any competitive process on the basis of a discretionary decision. Thus it is highly doubtful whether this review will be effective.

According to the ECtHR case law, the investigation authorities should be independent of the executive power - “independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms”<sup>27</sup>. The above amendment rise a serious doubt whether this standard can be achieved with respect to execution of Al Nashiri and Abu Zubaydah judgements and conducting effective and independent investigation.

### General measures

According to the updated action plan of October 2016, the Government “intends to strengthen and broaden the powers of control and supervision over the activities of the special services”. Moreover, the Government stated that it would consider possibility “to clarify the existing provisions concerning the principles of establishing cooperation by special services with the competent authorities and services of other states particularly by supplementing the principles of cooperation with the services of other countries with the statutory requirement to conclude the agreements in writing”.

In December 2016 the Committee of Ministers “invited the Polish authorities to complete rapidly their reflection on the measures required to strengthen supervision over the intelligence services, including over the high-level decision-making process”. Until now, no legislative draft concerning this issue has been presented. There is still no guarantees against over-classification of data concerning national security. Finally, the Government did not take any steps to guarantee independent oversight of intelligence covert operations. The Anti-terrorism Act adopted on 10 June 2016 provide the special security services with new competences, which do not require any judicial review.

### The HFHR’s recommendations

The HFHR would like to underline that the applicants remains under the custody of the U.S. jurisdiction. Mr. Abu Zubaydah is deprived of liberty without being charged. Mr. Al Nashiri faces a threat that he will be sentenced to death penalty. Thus the measure concerning gaining diplomatic assurances has not been achieved. Secondly, two and half years after the ECtHR issued both rulings, the investigation did not provide any new information concerning the accountability for existence of CIA secret detention sites in Poland where both applicants were subjected to “enhanced interrogation techniques” which constituted a violation of basic human rights. Thirdly, no amendments to law were implemented in order to ensure that such a gross human rights violation will not happen in future. In the HFHR’s opinion, the Prosecutor General shall consider to declassify the documents concerning the existence of secret CIA detention in Poland in order to serve the justice and implement Al Nashiri and Abu Zubaydah judgements. The Court underlined in both rulings that “securing proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the Polish State institutions’ adherence to the rule of law”. Thus effective investigation aims also at “preventing any appearance of impunity, collusion in or tolerance of unlawful acts”.

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27 Al. Nashiri, par. 483.

# ARTICLE 5

## RIGHT TO LIBERTY AND SECURITY

### 1. Excessive length of pre-trial detentions

#### Background cases

The Trzaska group<sup>28</sup> of cases concerns excessive length of pre-trial detentions and the deficiencies in instance review of the decisions on the use or prolongation of this measure. In the judgement issued in *Trzaska v. Poland*, the ECtHR found the violation of article 5 par. 3 of the Convention, indicating that the examination of the premises and, therefore, the legitimacy of pre-trial detention of the applicant, failed to meet the criteria of diligence required in cases in which the applicant is detained (par. 67 of the judgement). Finding the violation of article 5 par. 3 of the Convention, the ECtHR noted that the review of the lawfulness of the applicant's detention was carried out in a manner which failed to respect the principle of equality of arms and with significant delay that resulted in prolonged period of pre-trial detention and lengthiness of the proceedings (par. 77 and 78 of the judgment). 170 similar cases regarding the use and prolonged pre-trial detention were classified as part of the Trzaska group of cases.

In the judgment of 3 February 2009, in the case of *Kauczor v. Poland*<sup>29</sup> the ECtHR concluded that “for many years, at least as recently as in 2007, numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of »a practice that is incompatible with the Convention«. The judgment acknowledged that “in many similar previous cases in the recent years the Court has held that the reasons relied upon by the domestic courts in their decisions to extend pre-trial detention were limited to paraphrasing the grounds for detention provided for by the Code of Criminal Procedure and that the authorities failed to envisage the possibility of imposing other preventive measures expressly foreseen by the Polish law to secure the proper conduct of the criminal proceedings”.

In the judgment of 5 January 2010 in the case of *Frasik v. Poland*<sup>30</sup> the ECtHR declared inter alia the violation of article 5 par. 4 of the Convention on account of the fact that the appeal against the decision prolonging the pre-trial detention had not been examined “speedily”.

During its meeting on 4 December 2014, the Committee of Ministers of the Council of Europe passed a resolution CM/ResDH(2014)268 on closing the supervision of the execution of the Court's judgments in Trzaska group of cases.

#### Implementation of the judgment

The Act of 27 September 2013 on the amendment to the Code of Criminal Procedure reduced the range of mandatory defence in a District Court as a Court of First Instance. According to the new wording of article 80 a free of charge defence lawyer will be appointed at the request of a defendant who does not have a privately-retained lawyer. The former wording of the provision provided such

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28 The ECtHR judgment from 11<sup>th</sup> July 2000 in the case *Trzaska v. Poland*, application no. 25792/94.

29 The ECtHR judgment from 3<sup>rd</sup> February 2009 in the case *Kauczor v. Poland*, application no. 45219/06.

30 The ECtHR judgment from 5<sup>th</sup> January 2010 in the case *Frasik v. Poland*, application no. 22933/02.

an option also for those who were accused of felony and deprived of liberty. Simultaneously, the legislator provided that during the judicial stage of criminal proceedings, the accused who requests for a defence lawyer will be given a Public Defence Solicitor (added article 80a).

Unfortunately, the option to provide a defence lawyer to every accused was quickly abandoned. In the Act of 11 March 2016 on the amendment to the Code of Criminal Procedure the legislator removed the article 80a, not changing the range of “mandatory defence”, which caused the limitation of the access to a defence lawyer for the accused in pre-trial detention during the judicial stage of criminal proceedings.

What is most important in the context of the judgment of the ECHR in the case of *Trzaska v. Poland*, the abovementioned amendment to the CCP set the condition that a severe punishment is a sufficient ground for applying pre-trial detention. According to the existing article 258 par. 2 “[I]f the accused has been charged with a crime or with a misdemeanour carrying the statutory maximum penalty of deprivation of liberty of a minimum of 8 years, or if the court of the first instance sentenced him to a penalty of deprivation of liberty of no less than 3 years, the need to apply the preliminary detention in order to secure the proper conduct of proceedings may be justified by the severe penalty threatening the accused”. However, according to the jurisprudence of the ECtHR, the real possibility of the imposition of severe penalty of deprivation of liberty is not intrinsically a sufficient condition to apply a custodial preventive measure for long periods of time. The ECtHR indicates that the court should bear in mind that as time passes the primary ground for pre-trial detention becomes less significant. The decreasing significance of the grounds for custodial preventive measure applies also to the cases where the arrested is at risk of a severe penalty of deprivation of liberty. The Amendment of 11 March 2016 is therefore a step back in terms of consistency of domestic legal order with the standards of the Convention.

On 19 March 2016 the Polish Bar Council presented the General Secretariat of the Council of Europe a report on the execution of judgments of the ECtHR in the group of cases *Trzaska v. Poland* by the Republic of Poland. Similarly to the HFHR, the Polish Bar Council is of the opinion that the decision of the Committee of Ministers was premature and the oversight of the execution of the judgments from *Trzaska* group of cases should be continued, especially in the light of data received from the regional courts and appellate courts in Poland. The report stated that the requests for prolonging pre-trial detention for the period of over two years were allowed by appellate courts in the majority of cases. Statistical data collected by the Polish Bar Council shows that this was the case in almost 95% of cases. The average effectiveness of appeals in these cases (without a split into the entity that filed the appeal) was 2% nationwide. Moreover, only in 52 of cases in 2010-2014 at seven appellate courts nationwide, any appeal against the decision on prolongation of pre-trial detention for the period of over two years was allowed. According to the Polish Bar Council, pre-trial detention, prolonged by the courts of appeal (therefore lasting at least 2 years), is applied practically until the termination of the proceedings in the case.

Every year, the HFHR presents courts with several legal opinions, in particular cases on the violations of the Convention standards by prolonging pre-trial detention. The effect of these opinions is most frequently the abandoning of the pre-trial detention in a given case. Therefore, only the involvement of the HFHR results in the recognition of the ECtHR standards by national courts, which is obliged to recognise those standards *ex officio*, as they are parts of the domestic legal order.

Based on the HFHR observations it is impossible to say that the range of the application of pre-trial detention is only related to cases where it is “absolutely necessary” to provide the proper course of proceedings. It especially relates to the prolongation of pre-trial detention in cases where the defendant faces a severe penalty of deprivation of liberty. Further decisions of the courts in this matter

are most often justified by the same arguments. Therefore, issues like obstruction of justice after the evidence has been collected or the role of particular persons in the case are not taken into consideration. Often, the pre-trial detention order concerning a dozen or even several dozen persons (who are accused of different actions), is relying on the same general arguments for each of the accused. It is extremely rare that the justifications for detentions contain arguments resulting from the ECtHR case law. Particularly in respect of the possibility to apply non-custodial measures and by considering arguments why these measures are insufficient in a particular case. There is a widespread practice in courts to state that only pre-trial detention is capable of securing the proper course of proceedings in a particular case. Therefore, it does not appear that the application of pre-trial detention in Poland has undergone an in-depth reform since the ECtHR judgment in the case of Kauczor.

Another issue is the statistical decrease in the number of people in pre-trial detention in the recent years. It is difficult to assess whether this is a result of the more common application of non-custodial preventive measures, or of a decrease in crime rate or a consequence of fewer prosecutorial motions for the application of pre-trial detention. In this context it is worth noting that according to the data of the General Prosecutor's Office, in 2007 prosecutors filed 35.880 motions for pre-trial detention, whereas in 2014 there were 18.835 motions. Simultaneously, the Prosecutor's Office indicates the increasing effectiveness of prosecutorial motions for pre-trial detention.

The HFHR shares the view of the Polish Bar Council that the decision of the Committee of Ministers to close the oversight of the Trzaska group of cases was premature and should be continued. In our opinion, Poland is still struggling with systemic problems of the application of pre-trial detention. It is confirmed by the announcement of actions against Poland for violations of article 5 par. 3 of the Convention.

## 2. Lack of adequate protection of the personal liberty of persons with mental disabilities

The lack of adequate protection of personal liberty of persons with mental disabilities and the abuse of involuntary psychiatric commitment is a very serious human rights problem in Poland. Despite judgments of the ECtHR and the Constitutional Court, as well as the ratification of the UN Convention on the Rights of Persons with Disabilities, the Polish authorities still tolerate involuntary placement of persons with mental disabilities in psychiatric institutions, where their rights are violated.

### Background of the case

The case of *Kędzior v. Poland*<sup>31</sup> considered violation of the applicant's right to protection of personal liberty and effective remedies. This was the first case in which the ECtHR held that Polish regulations regarding involuntary placement of incapacitated persons in social care homes are inconsistent with the Convention.

In February 2002 the applicant, Stanisław Kędzior, a totally incapacitated man, was placed in the social care home against his will. Since he was completely deprived of his legal capacity, the procedure was initiated by his legal guardian. Placement in the social care home took place on the basis of administrative decisions with no involvement of courts – motion of the applicant's guardian was interpreted as expressing the applicant's own will. After the placement in the social care home, the applicant tried to initiate proceedings before the courts in order to be released from the institution, however this was

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31 The ECtHR judgment from 16<sup>th</sup> November 2012 in the case *Kędzior v. Poland*, application no. 45026/07.

unsuccessful due to the fact that the domestic law did not provide totally incapacitated persons any effective remedies in this regard.

The ECtHR held unanimously that there was a violation of articles 5 par 1 and 5 par 4 of the Convention. The ECtHR held that the authorities did not prove that the state of mental health of the applicant justified his detention and moreover that they failed to assess whether there were grounds to continue to the applicant's confinement. That situation was caused by the deficiencies in the Polish law, which does not oblige domestic authorities to review periodically the legality and purposefulness of detention of persons with mental disabilities. As to article 5 par 4, the ECtHR took into account that the applicant did not possess at his disposal any effective procedure by which he could challenge the necessity for his continued stay in the social care home and obtain his release.

### Subsequent case law of the ECtHR

In the case of *K.C. v. Poland*<sup>32</sup> the Court ruled that the lack of effective supervision of the continuous necessity of compulsory stay of partially incapacitated woman in the social care home was inconsistent with Article 5 par 1 of the Convention.

In 2015 and 2016 the Government submitted four unilateral declarations<sup>33</sup> in which it admitted that the rights of incapacitated persons placed in social care homes (on the basis of the same provisions as *Mr. Kędzior*) were violated. On 8 July 2016 the ECtHR communicated yet another case concerning the same problem – *Żelawski v. Poland* (application no. 16103/15).

### Domestic law

Issues related to admission of persons to social care homes are regulated, *inter alia*, in the Psychiatric Protection Act (“PPA”)<sup>34</sup>. According to the Article 38 PPA “person who, on account of mental disorder or mental disability, is unable to take care of himself or herself and cannot be taken care of by another individual, and does not need hospital treatment, may be placed in a social care home with his or her consent or the consent of his or her guardian”.

When placement in the social care home is voluntary, the guardianship court is not involved in the procedure. The court is involved only in the proceedings for involuntary placement. However, in cases of totally incapacitated persons, the will of the guardian is generally treated as expression of the will of the person under guardianship. Therefore, when the guardian approves placement in the social care home it is considered as “voluntary admission”. According to the Family and Guardianship Code the guardian should obtain the court's authorization in “all major issues regarding person under guardianship”, however, the procedure in which the guardianship court reviews motions for such permissions does not provide any protection against arbitrariness for incapacitated person (i.e. there is even no requirement to hear him/her).

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32 The ECtHR judgment from 25<sup>th</sup> November 2014 in the case *K.C. v. Poland*, application no. 31199/12.

33 Decisions of the ECtHR in the cases of *T.T. v. Poland* (from 10<sup>th</sup> March 2015, application no. 3090/13), *Dziedzic v. Poland* (from 2<sup>nd</sup> February 2016, application no. 20893/13), *Skomorochow v. Poland* (from 8<sup>th</sup> November 2016, application no. 49424/12), *Wielogórski v. Poland* (from 6<sup>th</sup> December 2016, application no. 41244/14).

34 Psychiatric Protection Act (*Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego*), Official Journal from 2016 item 546 as amended.

In addition, incapacitated person who is already placed in a social care home with the approval of his/her guardian does not have access to any remedies by which he/she could request a judicial review of legality and purposefulness of continuous stay in the social care home.

According to the HFHR estimations, based on the information provided by the largest social care homes from each voivodship, there may be at least 12.500 of totally incapacitated persons placed in the social care homes.

## Implementation of the judgment

Despite the lapse of almost 4,5 years, the ECtHR judgment has not yet been implemented on the general level, and so the abovementioned provisions, which led to the violation of the Convention, are still in force.

The first draft law aimed at implementation of *Kędzior v. Poland* judgment was presented by the Government in June 2014. However, eventually it was not even submitted to the Parliament and so after the elections in Autumn 2015 the legislative works were terminated.

Due to the complete inactivity of the Parliament, in November 2015 the Ombudsman challenged abovementioned Articles 38 and 41 of PPA to the Constitutional Tribunal. On 28 June 2016 the Constitutional Tribunal delivered its judgment. It declared the analyzed provisions inconsistent with article 41 (personal liberty), 45 (right to court) and 30 (protection of dignity) of the Polish Constitution.

After the Constitutional Tribunal's judgment, the Ministry of Health presented, on 29 September 2016, another draft law aimed at reforming the PPA. It provides, *inter alia*, that placement of incapacitated person in social care home against his/her will but with the approval of his/her guardian will be considered as involuntary commitment. As a consequence, it would require the decision of the court and moreover the person placed in the social care home will be entitled to request the court to conduct a review of legality and purposefulness of continuous stay. Moreover, the law will provide that at least every six months the incapacitated person placed in social care home against his/her will, but with the approval of his/her guardian, will be examined by doctors with the aim to establish whether his/her stay in social care home is justified. The law will also introduce certain other important solutions, such as the right to lawyer appointed by the court *ex officio* in any case concerning involuntary placement in psychiatric hospital or social care home.

The work on the draft law is still at the inter-Governmental stage and no official draft has been submitted to the Parliament so far. At the meeting of the Senate's legislative commission on 20 February 2017 the representative of the Ministry of Health informed that the draft law will be submitted to the Parliament within the upcoming 2 months.

The HFHR believes that the draft law may sufficiently implement *Kędzior v. Poland* judgment, however, to fully realize international standards, the Government should undertake actions in order to reduce the institutionalization of persons with mental disabilities and to respect their right to live in community as required by Article 19 of the UN Convention on the Rights of Persons with Disabilities<sup>35</sup>.

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35 In November 2016 HFHR prepared a legal opinion regarding the Government's draft law, which is available at: <http://www.hfhr.pl/wp-content/uploads/2016/11/Opinia-HFPC-nowelizacja-u.o.z.p..pdf>; (date of access: 27th February 2017).

## 3. Lawfulness of juvenile detention

### Background of the case

The case of *Grabowski v. Poland*<sup>36</sup> concerned an applicant, a minor at the time, who was arrested on suspicion of committing a number of armed robberies. He was initially detained in a police establishment for children and then, by way of a court order, was placed in a shelter for juveniles for a period of three months. In July 2012 the District Court ordered that his case be examined in correctional proceedings under the Juvenile Act. Once such an order is issued, the family courts' common practice in Poland is not to issue a separate decision extending the placement in a shelter for juveniles. Despite numerous requests for Mr Grabowski to be released on expiry of the three-month period (that is, on 7 August 2012), he remained in the shelter until the judgment in his case was delivered on 9 January 2013 in the correctional proceedings. Notably, in a decision of 9 August 2012, the Cracow-Krowdrze District Court dismissed Mr. Grabowski's application for release, excluding the possibility of any other alternative security measure on the ground that he had been accused of committing criminal acts with the use of a dangerous object.

### Judgment of the Court

The ECtHR noted that Mr. Grabowski was detained in a juvenile centre between 7 August 2012 and 9 January 2013 solely on the basis that a judge had referred his case for examination in correctional proceedings under the Juvenile Act. The Court found that the applicant's detention had not been lawful, in violation of article 5 par. 1 and a violation of article 5 par. 4.

### Domestic law

According to the article 27 par. 3 of the Juvenile Justice Act<sup>37</sup> detention of a minor in a juvenile shelter before referring the case to trial may not exceed 3 months. This period may be extended by another 3 months due to special circumstances of the case. Article 27 par. 6 sets a principle that the overall length of stay in a juvenile shelter until a ruling is made by the court of first instance, may not be longer than one year. However, this principle is also undermined because according to the article 27 par. 7 the period defined in paragraph 6 may be extended for definite time, if necessary.

### Implementation of the judgment

The above-described practice of not issuing a separate decision to extend placement in a shelter for juveniles once the juvenile's case had been referred for correctional proceedings, had resulted from the lack of precision in the provisions of the in the article 27 of the Juvenile Justice Act. In the judgment the Court underlined that Poland had to take legislative measures to stop the practice which has developed and to ensure that each and every deprivation of liberty of a juvenile is authorised by a specific judicial decision.

The insufficiency of the regulations was emphasized also by the Ombudsman for Children in the report from 2015 submitted to the UN Committee on the Rights of the Child . The Ombudsman particularly stressed that the period of detention in juvenile shelter should not exceed 3 months and the complete maximum period of detention in juvenile shelter should be defined by law. Moreover, in

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36 The ECtHR judgment from 30<sup>th</sup> June 2015 in the case *Grabowski v. Poland*, application no. 57722/12.

37 Juvenile Justice Act (*Ustawa z dnia 26 października 1982 r. o postępowaniu w sprawach nieletnich*), unified text in Official Journal from 2016 item 1654.

2015 also the Commissioner for Human Rights submitted an intervention to the Minister of Justice while calling for an urgent amendment to the Act on proceedings in juvenile cases due to the necessity to implement the judgment of the ECtHR in case *Grabowski v. Poland*<sup>38</sup>.

In the action plan of 24 June 2016, the Government admitted that court practice on this matters still differs, and additional actions are necessary<sup>39</sup>. It proves that the case of *Grabowski* was not an isolated case. Moreover, the Government informed that the new Common Court's Rules came into force on 1 January 2016. According to its provisions the judges are obliged to refer a case of juvenile for a hearing to resolve issues indicated in article 27 of the Act on the Procedure in Juvenile Cases. Moreover par. 243 of Common Court's Rules obliged the court to send a copy of the decision prolonging the stay of juvenile in a shelter for juveniles early, so that the shelter administration received it at least 3 working days before the deadline specified in the decision regarding application of measure or prolongation.

In the opinion of the HFHR there is still a need to amend the article 27 of the Juvenile Justice Act to fully implement the ECtHR judgment.

## ARTICLE 6

### RIGHT TO A FAIR TRIAL

#### 1. Excessive length of proceedings

Excessive length of proceedings has been a major human rights problem in Poland for many years. Although, under the influence of the ECtHR's case law, the Polish authorities introduced remedies aimed at compensating parties of prolonged proceedings for the negative consequences of delays, in practice they turned out to be inefficient.

##### Background of the case

In June 2004, the Parliament adopted the Act on a complaint about a breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay (2004 Act)<sup>40</sup>. The act was adopted as an implementation of the Court's judgment in the case of *Kudła v. Poland*<sup>41</sup>. It gave the parties of overlong proceedings the right to complain to the court of higher instance and to request a financial compensation.

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38 The Polish Ombudsman intervention, available at: <https://www.rpo.gov.pl/sites/default/files/Summary%202015.pdf> (date of access: 28<sup>th</sup> February 2017).

39 The Polish Government Action plan from 24<sup>th</sup> June 2016 in the case *Grabowski v. Poland*, available at: [http://hudoc.exec.coe.int/eng#{"EXECIdentifier":\["DH-DD\(2016\)796E"\]}](http://hudoc.exec.coe.int/eng#{); (date of access: 27<sup>th</sup> February 2017).

40 Act on a complaint about a breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay (*Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*), unified text - Official Journal from 2016 item 1259. The original name of this statute was the Act on complaints about a breach of the right to a trial within a reasonable time.

41 The ECtHR judgment from 26<sup>th</sup> October 2000 in the case *Kudła v. Poland*, application no. 30210/96.

At first, the 2004 Act was considered as an effective remedy by the ECtHR and individual applications, submitted without using it in domestic proceedings, were rejected on the basis of article 35 par. 1 of the Convention. However, over time the effectiveness of the 2004 Act began to be questioned. The compensations awarded to the parties were rather low (according to the 2004 Act, their amount had to be at least PLN 2,000 but could not exceed PLN 20,000) and moreover, the courts, while analysing the scale of lengthiness, took into account only the duration of the proceedings in this phase of proceedings in the course of which the complaint was submitted.

## Judgment of the Court

In the case *Rutkowski and others v. Poland*<sup>42</sup> the ECtHR reviewed three applications concerning the excessive length of proceedings. All applicants submitted complaints on the basis of the 2004 Act, however the amounts of compensations they received was far below the average sum awarded by the Court in analogous cases. Moreover, while analyzing the length of the proceedings, the domestic courts took into account only one phase of the proceedings.

In its judgment, the Court held that there was a violation of Articles 6 par. 1 and 13 of the Convention. In particular the Court found that “a complaint under the 2004 Act failed to provide the applicants with »appropriate and sufficient redress« (...) in terms of adequate compensation for the excessive length of the proceedings in their cases”.

In addition, the ECtHR applied a pilot-judgment procedure under article 46 of the Convention. It took into account the fact that “since the Act’s entry into force at least 100 *prima facie* well-founded applications per year have been lodged with the ECtHR by persons who have exhausted the domestic remedies but have not obtained any, or obtained insufficient, redress for a violation of their right to a hearing within a reasonable time. The caseload developments demonstrate the growing and steady inflow of Polish length-of-proceedings cases on the Court’s docket”. As of the date of adoption of the judgment there were 650 Polish applications concerning excessive length of proceedings pending before the Court. The Court held that in order to fully implement the judgment, the Polish authorities would have to eliminate two interrelated reasons of violation of article 13 of the Convention: the abovementioned “fragmentation of proceedings” approach and too low compensations awarded to the parties whose right to a hearing within a reasonable time was breached. As a consequence of application of pilot-judgment procedure, the Court suspended the review of 591 similar pending applications for two years, giving the Government time to process the communicated applications and afford redress to all victims via non-contentious solutions (friendly settlements or unilateral declarations). As regards applications lodged after the delivery of the judgment, the Court decided that adversarial proceedings in those cases should be adjourned for one year following the delivery of the judgment.

## Implementation of the judgment

In December 2016, the Parliament adopted an amendment to the 2004 Act which, in theory, were aimed at implementation of the abovementioned ECtHR judgment.

First of all, the amendment introduced to the Act a separate provision which explicitly stipulated that during the assessment of lengthiness of the proceedings, courts have to take into account the duration of the proceedings as whole, that is from the moment of their initiation to the day of review

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42 The ECtHR judgment from 7<sup>th</sup> July 2015 in the case *Rutkowski and others v. Poland*, application no. 72287/10.

of the complaint. Such an amendment has to be assessed positively as it finally eliminated so-called “fragmentation of proceedings”.

However, the same cannot be said about another change, which concerned the amount of compensation for excessive length of proceedings. The amendment did not change the minimum and maximum amount of compensation (respectively: PLN 2.000 and PLN 20.000), but introduced only certain rules as to how to estimate its level. According to it, for each year of excessive length of proceedings, the party would be entitled to at least PLN 500. This sum could be higher if the case concerned questions of particular importance to a given party.

In the HFHR opinion such regulations would not ensure that the Polish law finally satisfies the ECHR standards. To fully implement *Rutkowski v. Poland* judgment, the Parliament should abolish the maximum limit of the compensation and substantively increase the amount of compensation for each year of lengthiness.

In addition, the HFHR noticed certain other problems with the functioning of the 2004 Act. In particular, in one case the complaint submitted under 2004 Act by our client was dismissed just because previously the court had granted compensation for the excessive length of proceedings to the opposite party. According to the court this situation created some kind of *res iudicata* state. In the HFHR opinion such an interpretation completely disregards the essence of the complaint regulated in the 2004 Act and violates the Convention standards. The HFHR lawyers prepared an individual application to the ECtHR on behalf of a man whose complaint was dismissed.

Moreover, the 2004 Act does not apply to the administrative proceedings, although, at least in some cases, they can be qualified as “proceedings concerning civil rights and obligations” within the meaning of Article 6 par. 1 of the Convention. One has to keep in mind that very lengthy administrative proceedings are not uncommon in Poland – recently the HFHR submitted an *amicus curiae* opinion in the case concerning proceedings which lasted for more than 10 years and still have not been finalized<sup>43</sup>. The legal remedies against the lengthiness in this area are regulated in the Code of Administrative Proceedings. First, the party to proceedings has to file a complaint to the administrative authority of the second instance and in case of negative result – a complaint to the regional administrative court. Until 2015 the administrative courts could not grant any form of compensation for the victim of excessive lengthiness, although now it is possible. However, the compensations are even lower than under the 2004 Act: the law does not regulate the minimum amount of compensation and the maximum amount is five times the average salary in Poland (around PLN 20.200). If the administrative organ does not enforce the court’s judgment regarding the excessive length of proceedings and does not issue a decision in a specified time limit, the party may apply to the court once again. This time, the maximum limit of the compensation would twice as high as before. The HFHR notices, that the concept of “fragmentation” of proceedings is sometimes applied by the administrative courts, however recently the Supreme Administrative Court ruled that the while assessing the lengthiness of proceedings the court has to take into account the individual circumstances of the case, including the length of precious stages of the proceedings.

The HFHR believes that in order to fully implement the ECtHR standards, the Parliament should standardize the procedures regarding the excessive length of administrative and other proceedings, explicitly forbid the fragmentary assessment of the length of proceedings also in the context of administrative proceedings, and increase the amount of compensation for the parties.

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43 HFHR’s opinion from 19<sup>th</sup> August 2016, available at: [http://www.hfhr.pl/wp-content/uploads/2016/08/HFPC-20160822\\_NSA\\_przewleklosc.pdf](http://www.hfhr.pl/wp-content/uploads/2016/08/HFPC-20160822_NSA_przewleklosc.pdf) (date of access: 27<sup>th</sup> February 2016).

## ARTICLE 8

# RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

### 1. Execution of contacts with children

According to the Resolution CM/ResDH(2014)295, adopted by the Committee of Ministers on the 17<sup>th</sup> December 2014 at the 1215bis meeting of the Ministers' Deputies, the examination of the ECtHR judgment in case *Z. v. Poland*<sup>44</sup>, which became final on the 20<sup>th</sup> July 2010, has been closed. The HFHR would like to present remarks concerning the consequences of the execution of this judgment that resonate in the Polish legal system today.

#### Background of the case

In 1996 the applicant's daughter was born. Z. was living with his daughter and her mother until the year 2000, when, following a conflict between spouses, he moved out of their common place of residence. During years 2000-2010 different District Courts in Poland regulated the applicant's contacts rights with his daughter. The child's mother has on numerous occasions not complied with the court's orders concerning contacts, despite the imposition of pecuniary fines. The solutions suggested by the domestic courts to resolve the situation were inefficient. Since 2010 the applicant has been deprived of any contact with his daughter. He thus complained to the ECtHR that the Polish authorities had failed to enforce his right to contact with his daughter and that the process of enforcing the courts' decisions had lasted too long. In its judgment the ECtHR found that the domestic authorities failed in their positive obligation to provide the applicant with prompt and effective assistance, which would make it possible for him to effectively enforce parental and contact rights.

#### Implementation of the judgment

The Polish Government has in its action report from 7<sup>th</sup> September 2014<sup>45</sup> elaborated upon the general measures introduced to facilitate the process of execution of this kind of decisions or make it more efficient. The Government has described the amendment to the Polish Code of Civil Procedure<sup>46</sup>, which entered into force on the 13<sup>th</sup> of August 2011 and (under art. 598<sup>15</sup> -598<sup>21</sup>) provided for a two-stages special procedure concerning execution of contacts with children<sup>47</sup>. The Government also informed on the monitoring activities conducted by the Minister of justice in the field of enforcement of the domestic courts' judgments regarding contacts with children and forcible removal of children, as well awareness-raising and training activities. The HFHR (in cooperation with the law firm Chajec, Don-Siemion par. Żyto Legal Advisors) provided in turn a more critical analysis of the implementation of the *Z. v. Poland* judgment<sup>48</sup>. In our written opinion, we argued *inter alia* that the mere

44 The ECtHR judgment from 20<sup>th</sup> April 2010 in the case *Z v. Poland*, application no. 34694/06.

45 The Polish Government Action report from 7 September 2014 concerning the cases of Dąbrowska, Pawlik, P.P., Stochlak and *Z. v. Poland* (applications No. 34568/08, 11638/02, 8677/03, 38273/02 and 34694/06); available at: [http://hudoc.exec.coe.int/eng#%22EXECIdentifier%22:%22DH-DD\(2014\)1166E%22](http://hudoc.exec.coe.int/eng#%22EXECIdentifier%22:%22DH-DD(2014)1166E%22)} (date of access: 28<sup>th</sup> February 2017).

46 Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), unified text – Official Journal from 2016 item 1822.

47 Amendment to the Polish Code of Civil Procedure (*Ustawa z dnia 26 maja 2011 r. o zmianie ustawy - Kodeks postępowania cywilnego*), Official Journal from 2011 no. 144 item 854.

48 Communication from 9<sup>th</sup> of September 2014 of the Helsinki Foundation for Human Rights in the case of *Z. v. Poland*; available at: <http://hudoc.exec.coe.int/eng#%22fulltext%22:%22z.%22,%22EXECState%22:%22POL%22,%22EXECViolations->

obligation to pay a fine, as provided in the new articles of CCP, did not seem to be a sufficient motivating factor for persons who persistently obstruct the other parent's contact right with the children. One of the recommendations presented in our communication was that further coercive measures could be introduced in addition to aforementioned financial fines<sup>49</sup>.

After the Resolution CM/ResDH(2014)295 was adopted by the Committee of Ministers on the 17<sup>th</sup> December 2014, another judgment was issued by the ECtHR in a case where Polish authorities have failed to take effective steps to enforce his right of contact with, namely the judgment from the 6<sup>th</sup> October 2015 in case of *Stasik v. Poland*<sup>50</sup>. In this case the Polish authorities failed to make adequate and effective efforts to execute the interim contact order issued in favour of the applicant on the 21<sup>st</sup> of July 2010, so the *Stasik* case has limited practical importance as far as the practicality of described amendments to the CCP is concerned.

In 2015, the Institute of the Administration of Justice (pol. *Instytut Wymiaru Sprawiedliwości*) conducted research concerning domestic case-law on the execution of contacts with children<sup>51</sup>. Under the chapter "[C]ases where the purpose of the proceedings have been realized", the researchers have concluded that according to available data only in 31,9% of the analyzed cases the contacts have been realized properly and it could be foreseen that they would be realized according to the court's judgment or settlement in the future as well<sup>52</sup>. The representatives of legal doctrine are also highly sceptical towards the functionality of measures of execution of contacts with children defined in art. 598<sup>15</sup>-598<sup>22</sup> CCP<sup>53</sup>.

## The HFHR's recommendations

The problem of execution of contacts with children is still present in Poland, despite the introduction of the relevant amendments of the Code of Civil Procedure, which entered into force on the 13<sup>th</sup> of August 2011. The HFHR thus support its views, presented in the Communication from the 9<sup>th</sup> of September 2014 sent to the Committee of Ministers in the case of *Z. v. Poland*, which concerned, among others, the activities designed to accelerate the proceedings in child contact cases and introduction of other means to improve compliance in child contact rulings.

## 2. Access to abortion

Access to legal reproductive health services for women has been one of major human rights problem in Poland for many years. What is more, consequences of the of Polish Constitutional Tribunal judgment issued on 7 October 2015<sup>54</sup>, in which the Tribunal found that the referral obligation on doctors (obligation to indicate real possibilities of obtaining medical services at another health care entity) who

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From ECHR%22:[%228%22],%22EXECSupervision%22:[%22CLOSED%22],%22EXECIdentifier%22:[%22004-19023%22]} (date of access: 28<sup>th</sup> February 2017).

49 *Ibidem*, paras. 6.31 - 6.33.

50 The ECtHR judgment from 6<sup>th</sup> October 2015 in the case *Stasik v. Poland*, application no. 21823/12.

51 E. Holewińska-Łapińska, M. Domański, J. Słyk, *Orzecznictwo w sprawach o wykonywanie kontaktów z dziećmi* (eng. *The case-law on the execution of contacts with children*), Instytut Wymiaru Sprawiedliwości, Warszawa 2015.

52 *Ibidem*, p. 56.

53 See e.g. Wąworek R., *Utrudnianie kontaktów z dzieckiem - rozwiązania prawne i praktyka w Polsce i w Europie oraz postulaty de lege ferenda* (eng. *The obstruction of contacts with children - legal and practical solutions in Poland and Europe, as well as legislative postulates*), LEX database, 2016.

54 The Constitutional Courts's judgment of 5 October 2015, case-file K 12/14, available at: <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2012/14> (date of access: 8<sup>th</sup> March 2017).

refuse to perform medical service because of personal conscience is unconstitutional, may result in progressive limitation in exercising the right to legal abortion. Also in 2016 in Polish Parliament was proceeding a legislative proposal (citizen's legislative initiative) introducing a complete ban on abortion into Polish law. In this context, it is important that Polish authorities should fulfil standards set in ECtHR judgments concerning access to legal abortion.

### Background of the case

In the case *R. R. v. Poland*<sup>55</sup>, the ECtHR found the violation of article 3 and article 8 of the Convention, because Polish authorities did not secure the applicant, the right to perform pre-natal genetic test (available according to domestic law), which would have enabled the applicant to take an informed, conscience decision about the termination of pregnancy, within the time-limit prescribed by law to take that decision.

Also, in the case *P. and S. v. Poland*<sup>56</sup>, the ECtHR decided that Poland violated article 3, 8 and also article 5 § 1 of the Convention. The applicants were a mother and a minor daughter, who was pregnant as a result of rape. The authorities did not secure effective access to information about the conditions of lawful abortion. What is more, the hospital, in which the applicant could proceed with abortion, disclosed to the public her personal data and before placement her in hospital, she was placed in a juvenile shelter in order to prevent her from receiving a lawful abortion.

In these cases the ECtHR underlined that Poland have to ensure a procedural framework enabling a pregnant woman to exercise her rights of access to lawful abortion as long as its domestic law allows abortion in specified cases. Also the ECtHR noted that authorities are under positive obligations to create a procedural framework to guarantee that available, relevant, full and reliable information on the foetus' health can be obtained by the pregnant women. Furthermore, the ECtHR held that Poland is obliged to organise the health service in such a way to ensure that effective exercise of freedom of conscience of health care professionals does not prevent patients from obtaining access to services to which they are entitled according to domestic law.

### Implementation of the judgments

After the ECtHR judgment in the case of *Tysi c v. Poland* the Patient Rights and Patient Ombudsman Act of 6 November 2008<sup>57</sup> were introduced. They introduced a patient's right to lodge an objection against a medical opinion or a medical decision that affects patient's rights or obligations provided for by law. The objection should be submitted to the Patient Ombudsman Medical Commission within 30 days of the day in which a medical decision is issued. Also, the objection have to contain a written justification referring to the specific legal provisions that have been violated in the patient's opinion. The above mentioned procedure is general in scope and it can be use also to decisions refusing medical services connected with reproductive rights.

In the opinion of Polish authorities, this procedure fulfil the general the conditions of the ECtHR judgments in cases *R. R. v. Poland* and *P. and S. v. Poland*.

In the HFHR opinion however, the above mentioned procedure does not safeguard the exercise of the rights to lawful abortion and does not respond fully to the ECtHR standard. The HFHR underlined

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55 The ECtHR judgment from 26<sup>th</sup> May 2011 in case *R. R. v. Poland*, application no 27617/04.

56 The ECtHR judgment from 30<sup>th</sup> October 2012 in case *P. and S. v. Poland*, application no. 57375/08.

57 Consolidated text: Journal of Laws of 2012, No. 0, item 159 as amended.

the drawbacks of such objection procedure in the communication submitted to the Committee of Ministers of Council of Europe in respect of implementation of the judgment in case *R. R. v. Poland*<sup>58</sup>. In the HFHR opinion the objection procedure is ineffective, overly formal, imprecise as well as too lengthy, what is in particular important in cases of legal abortion and prescribed by law time to take the decision to terminate the pregnancy.

It should be noted that, at present in Polish Parliament amendments to the Patient Rights and Patient Ombudsman Act<sup>59</sup> are pending, but the draft do not provide significant changes into objection procedure.

### **The HFHR's recommendations**

The Polish authorities should ensure effective procedural framework safeguarding the exercise of the right to lawful abortion and right to receive full information about foetus health. This obligation is in particular important in the context of the Constitutional Tribunal judgment, which was mentioned above. According to this judgment doctors, who refuse to perform medical services because of personal conscience, have no longer the obligation to inform their patients about the possibility to obtaining medical services at another health care entity. The authorities have to ensure that the exercise of the conscience clause by doctors (or by whole medical entities, that have no justification in polish law) do not jeopardise the patients' rights to receive medical services to which they are entitled under the domestic law.

## **ARTICLE 10 FREEDOM OF EXPRESSION**

### **1. Criminal defamation**

Criminalisation of defamation remains an important threat to freedom of expression in Poland. In many cases concerning criminal defamation, the ECtHR ruled that Poland violated article 10 of the Convention, there was also a number of cases in which Poland presented a unilateral declaration acknowledging the violation (these cases are inter alia: *Koniuszewski v. Poland*, *Maciejewski v. Poland*, *Jucha and Żak v. Poland*, *Lewandowska-Malec v. Poland*, *Kurłowicz v. Poland*, *Długołęcki v. Poland*, *Dąbrowski v. Poland*, *Malisiewicz-Gąsior v. Poland*, *Sokołowski v. Poland*, *Galus v. Poland*, *Szczerbiak v. Poland*). These judgements include, among others, cases related to journalists convicted for statements from their articles or politicians convicted for their comments on matters of public interest. In all of the cases, the ECtHR ruled that the sanctions (related to punishment declared by domestic courts or by the criminal proceedings itself) constituted a disproportionate interference.

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58 Communication from HFHR from 18<sup>th</sup> March 2014, available at: [http://hudoc.exec.coe.int/eng#%22EXEIdentifer%22:\[%22DH-DD\(2014\)605E%22\]](http://hudoc.exec.coe.int/eng#%22EXEIdentifer%22:[%22DH-DD(2014)605E%22]).

59 Draft no. 1218, available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=D7632B933313C533C12580AE004COCB5>.

## Implementation of the judgment

In 2009 there was a modification of the Criminal Code, which softened the punishment prescribed for defamation<sup>60</sup>. However, defamation remains a criminal offence which is punishable up to one year of imprisonment for defamation through mass media (including the Internet). The insufficiency of the amendment was recently underlined by the Polish Ombudsman, who called on the authorities to fundamentally reform the institution of criminal defamation. The Ombudsman particularly stressed that the decriminalisation should be followed by the introduction of a new offence in the criminal code (serious slander – spreading intentionally false information about someone) and by amendments into the civil regime, in order to facilitate the recourse to civil defamation<sup>61</sup>.

The number of defamation cases in Poland remains high and generally increasing. According to the statistics provided by the Ministry of Justice, in 2012 there were 60 people sentenced for defamation committed through media. In 2013 and 2014 this number slightly decreased to 58 convictions each year, but it increased again in 2015, up to 70 convictions. Just in the first six months of the 2016, there were 51 convictions on the basis of article 212 par. 2 of the Criminal Code. Among these, since 2012, 21 people were sentenced for imprisonment (vast majority in suspension)<sup>62</sup>.

## The HFHR's recommendations

Although the Court does not require in its jurisprudence the abolition of criminal defamation in the domestic legal systems, years of observing defamation trials in Poland brought us to the conclusion that the only solution that may guarantee this institution is not overused is actually the decriminalisation and turning to the civil remedies as an appropriate measure to protect other people's reputation.

## 2. Criminal liability for the lack of authorisation of the press interview

### Background of the case

In the judgment *Wizerkaniuk v. Poland*<sup>63</sup> the ECtHR declared a violation of the article 10 of the ECHR with regard to a case concerning criminal conviction of a journalist for publishing an interview with

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60 By the Act of 5th November 2009 amending the Criminal Code, Code of Criminal Procedure, Code of Execution of Criminal Sentences, Fiscal Criminal Code and other acts (*Ustawa z dnia 5 listopada 2009 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy, ustawy - Kodeks karny skarbowy oraz niektórych innych ustaw*) Official Journal from 2009 no. 206 item 1589, prison sentence has been abolished in the case of the standard form of defamation (leaving punishment in the forms of a fine or a community sentence), while in the case of defamation through means of mass communication (the aggravated form), the maximum prison sentence has been decreased from two years to one year.

61 The Polish Ombudsman proposals are available on: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>, (date of access: 28<sup>th</sup> February 2017).

62 The statistics were provided by the representative of the Ministry of Justice on the meeting of the Inter-Governmental Committee for Implementation of the European Court of Human Rights judgments on 15<sup>th</sup> December 2016; [see]: The minutes of the Committee for Matters of the European Court of Human Rights: <https://www.msz.gov.pl/resource/a92225bc-4842-4c16-a7dc-9f1d8bdc3c4a:JCR>. We note that these statistics differ from those provided by the Polish Government in Action Reports nos. DH-DD(2017)160 or DH-DD(2017)18. We do not know the reason behind this inconsistency.

63 The ECtHR judgment from 5th July 2011 in the case *Wizerkaniuk v. Poland*, application no. 18990/05.

a politician despite a lack of his authorisation. The Court concluded that the criminal sanction imposed was disproportionate and criticized “...the mere fact that the applicant had published the text without the authorisation required by section 14 of the Press Law Act automatically entailed the imposition of the criminal sanction provided for under section 49 of that Act” (par. 77). Moreover the Court underlined that in general the Press Law Act provisions on authorization “cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society” (par. 84).

## Implementation of the judgment

The Government, despite several declarations of plans to amend the Press Law Act<sup>64</sup> provisions concerning the authorisation of the press interview, until this day has not adopted any legislative changes which are necessary in order to fully implement the ECtHR’s judgement. In 2012 the HFHR filed its detailed submission in this respect to the Committee of Ministers (all the concerns presented in the submission remain valid)<sup>65</sup>. As consequence, the provisions which were questioned by the ECtHR, are still enforced and continue to be applied by the domestic courts<sup>66</sup>.

Only in February 2017 the new draft law proposal amending the Press Law Act was presented to the public<sup>67</sup>. It was prepared by The Ministry of Culture and National Heritage and it is currently open to public consultations. The main changes of the draft law include setting up a time-limit within which the authorisation has to be granted (the time-limit is 24-hours in case of dailies and 3 days in case of magazines). In case when the interviewed person will not give his/her authorization in the prescribed time-limit, this lack of reaction will be deemed as his/her consent for publication of the interview. Moreover, the draft law is to replace the possibility to impose a criminal sanction on a journalist for a failure to obtain the authorisation with a sanction for “misdemeanour” (minor crime).

It should be underlined that even though the proposed regulation is a step in a right direction, the HFHR believes it does not sufficiently implement the standards set up the *Wizerkaniuk v. Poland* judgment and does not respond to all the drawbacks of the current regulation which were identified by the Court. For example, in the light of the draft law, the authorisation still can be used as tool for blocking publication that the interviewee finds inconvenient *post factum* and eventually expressly declines to grant his or her authorisation. Moreover, the proposed regulation does not require the courts to assess whether a journalist, who failed to comply with his obligation to obtain the authorisation of the interviewed person, has quoted them in a way capable of damaging their reputation (e.g. whether interviewee’s words were distorted or quoted out of context or conveyed in the manner which could mislead readers or depict the interviewee in a negative light). In fact, the courts would still not refer to the substance of the publication. The conviction will be based exclusively on a breach of a technical character, namely failure to obtain the authorisation. Furthermore the draft law does not introduce any distinction in respect of the authorisation requirement between the interviewee who is a person exercising public function and a private figure. Finally, the proposed misdemeanour regime of liability, even though it is less severe than the current criminal sanctions, can be still considered disproportional as a so-called “criminal liability *sensu largo*”.

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64 Press Law Act (*Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe*) Official Journal from 1984 no. 5 item 24.

65 The submission of the HFHR to the Committee of Ministers from 6 June 2012; available at: [http://hudoc.exec.coe.int/ENG?i=DH-DD\(2012\)631E](http://hudoc.exec.coe.int/ENG?i=DH-DD(2012)631E) (date of access: 28<sup>th</sup> February 2017).

66 See for example the judgment of the District Court in Sieradz from 22<sup>nd</sup> April 2015 r., case no. II Ka 71/15.

67 Draft law from 8<sup>th</sup> February 2017, available at: <https://legislacja.rcl.gov.pl/docs//2/12295206/12415832/12415834/dokument274813.pdf> and the justification for this law, available at: <https://legislacja.rcl.gov.pl/docs//2/12295206/12415832/12415834/dokument274814.pdf> (date of access: 28<sup>th</sup> February 2017).

## The HFHR's recommendations

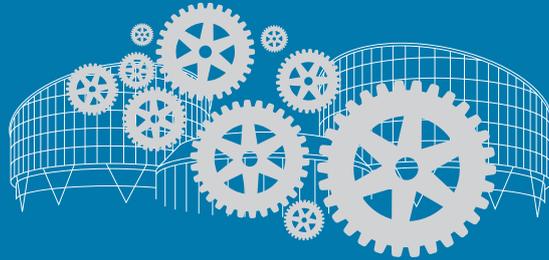
As consequence the draft law could still lead to a “chilling effect” for freedom of expression and eventually limit the public’s right to receive information. That is why, according to the HFHR, the specific regulation of authorisation should be abolished from the Press Law Act. The requirement of authorisation should instead remain as an element of journalistic accuracy that could be controlled by the courts within proceedings concerning violation of personal rights. Moreover, an interviewee whose right were violated by the journalists could rely on the Press Law Act provisions concerning the right to reply. In both cases the journalists and his newspaper shall bear the civil liability only.

**Should you require any further information please feel free to contact:**

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