

Warsaw, 7 September 2020

**Amicus curiae brief prepared by the  
Helsinki Foundation for Human Rights  
in the case of  
*B.B. v. Poland (Application no. 67171/17)***

**EXECUTIVE SUMMARY**

- In Poland there is no effective and expedient procedure that would ensure that women can exercise their right to have an abortion which is allowed by domestic law.
- The existing procedure for objecting to an opinion or decision of a doctor is excessively formalistic and does not guarantee that a pregnancy can be terminated within the legal time-limit. Additionally, medical institutions are currently under no direct legal obligation to inform a woman that abortion can be performed by a different doctor in a situation when a medical practitioner invokes the conscience clause as the basis for the refusal of an abortion.
- The obstacles faced by women who want to terminate a pregnancy in accordance with domestic law should be treated as a systemic problem in Poland.
- In the case of *B. B. p. Poland*, the ECtHR has the opportunity to develop standards for the protection of rights of women seeking lawful abortion, in particular in the area of positive obligations of the state authorities to introduce mechanism which would ensure that the right to abortion is not nullified by doctors' invocation of the conscience clause.

**I. INTRODUCTION**

1. The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation working in the field of human rights protection, whose statutory activities include, inter alia, dealing with issues related to the access to an lawful abortion. Furthermore, HFHR has undertaken numerous initiatives to ensure women' access to reproductive health and rights. For instance the HFHR has been involved in monitoring execution of the judgments delivered by the High Court in the cases *Tysi*ć *v. Poland*<sup>1</sup>, *R. v. Poland*<sup>2</sup>, and *P. and S. v. Poland*<sup>3</sup>.

2. In the case of *B. B. v. Poland*, the Applicant alleges violation of articles 3, 8, 13, 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). She claims that she was prevented from exercising her right under national law to perform an abortion on grounds of foetal health.

---

<sup>1</sup> Judgement of ECtHR of 20 March 2007, application no. 5410/03.

<sup>2</sup> Judgement of ECtHR of 26 May 2011, application no. 2761/04.

<sup>3</sup> Judgement of ECtHR of 30 October 2012, application no. 57375/08.

3. In light of the scope of consent granted by the ECtHR, the amicus curiae does not refer directly to the case under review but presents instead the broader context of the situation. In particular, HFHR wants to turn attention to the practical and legal aspects of accessibility of lawful abortion procedures in Poland. We would like to review whether the procedure of objecting to an opinion or decision of a doctor (also in the context of invoking the conscience clause by a medical practitioner) offer effective protection to women's rights.

## II. PROCEDURE FOR OBJECTING TO A DOCTOR'S OPINION OR CERTIFICATE

4. In 2008 was introduced to Polish law the procedure for objecting to an opinion or decision of a doctor. The procedure was adopted in the Act of 6 November 2008 on Patients' Rights and the Commissioner for Patients' Rights<sup>4</sup> and is related to implementation the ECtHR judgement in case *Tysi c v. Poland*. However the procedure has a universal character and its application is not necessarily limited to the area of reproductive rights. An objection to an opinion or certificate issued by a doctor or a dentist may be lodged with a Medical Commission with the Commissioner for Patients' Rights, if an opinion or a certificate impacts the rights or obligations of a patient under the law. The time limit for lodging the objection is 30 days from the date of issue of the opinion or a certificate. An objection has to have grounds, including a reference to the provision of law which was affected by the challenged medical opinion or certificate. The Medical Commission, issues a ruling promptly, but not later than within 30 days from the date of lodging the objection.

5. In HFHR's opinion, the procedure for objecting to a doctor's opinion or certificate, does not constitute an adequate procedural guarantee for women to use in situations when doctors refuse to perform a lawful abortion.

6. The objection procedure is excessively formalised. In particular, in rationales to their objection, patients are required to indicate particular legal provisions which set forth the patient's rights and duties affected by a given doctor's opinion or certificate. A copy of the opinion or certificate should be attached to the objection. At the same time, the procedure does not foresee the participation of a legal representative, in particular a professional counsel. A review of statistics concerning objections raised by patients shows that only a small part meet the formal requirements and are considered by the Medical Board by the Commissioner for Patient's Rights. In 2019, the Commissioner received 70 objections but only 18 met the formal requirements.<sup>5</sup> In 2018, 5 out of 31 objections were analysed by the Medical Board.<sup>6</sup> In 2017, the Commissioner received 15 objections, of which only one fulfilled the formal criteria.<sup>7</sup> Also in 2016, only one of 24 registered objections complied

---

<sup>4</sup> Journal of Laws of 2020, position 849 with subsequent changes.

<sup>5</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2019 and 31 December 2019, p. 34, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2019-rok>.

<sup>6</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2018 and 31 December 2018, p. 39, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2018-rok>

<sup>7</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2017 and 31 December 2017, p. 40, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2017-rok>.

with criteria given by the law.<sup>8</sup> Similarly in 2015, only one objection was considered as to the substance.<sup>9</sup> In 2014, five out of 34 submitted objections were considered on the merits, while in 2013 only two out of 28 submitted objections met the formal requirements.<sup>10</sup>

7. What is more, the current legal framework concerning the objection procedure does not specify whether it is possible to raise an objection when a doctor refuses to issue an opinion or a certificate, or does it only orally. A possibility of raising an objection in such circumstances may have a particular importance in the context of applying for a lawful abortion. In such situations, doctors can refuse to issue a negative decision in writing or may delay issuance of such a decision, which can effectively undermine a woman's right to terminate pregnancy within a legally specified period. There are some doubts if the right to object also applies to refusals to refer a person for medical examination, including prenatal testing. This raised concerns which were expressed, for example, by the Commissioner for Patients' Rights. The Commissioner pointed to the need for a clear regulation which would foresee that the objection procedure applies to refusals to refer a person for medical testing<sup>11</sup>. Results of such testing can play a crucial role in making an assessment as to whether the state of the foetus justifies termination of pregnancy and, as a consequence, can be indispensable for a woman to make a decision on continuing her pregnancy.

8. In cases concerning abortion, time plays a crucial role. For this reason, one should negatively assess the 30-day deadline set up in law for consideration of an objection by the Medical Board. There is no regulation which would guarantee that the Medical Board will issue a decision before the end of the period when it is possible to obtain a lawful abortion.

9. It is worth noting that certain works were carried out in the Ministry of Health aiming at the simplification of the procedure for lodging an objection against a doctor's opinion or certificate. The need for changes in the procedure was expressed by the Commissioner for Patient's Rights.<sup>12</sup> But on 16 November 2016, the Permanent Committee of the Council of Ministers decided to exclude the matters pertaining to the procedure of objecting to an opinion or decision of a doctor from further legislative works on the Act on patients' rights and the Commissioner for Patients' Rights.<sup>13</sup> Finally, until today no amendments have

---

<sup>8</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2016 and 31 December 2016, p. 46, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2016-rok>.

<sup>9</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2015 and 31 December 2015, p. 43, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2015-rok>.

<sup>10</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2014 and 31 December 2014, p. 38, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2014-rok>.

<sup>11</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2015 and 31 December 2015, p. 43, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2015-rok>; <https://archiwum.rpp.gov.pl/prawo-do-zgloszenia-sprzeciwu>.

<sup>12</sup> Information published on the official website of the Ombudsman for Patients' Rights, available at: <https://archiwum.rpp.gov.pl/prawo-do-zgloszenia-sprzeciwu>.

<sup>13</sup> Response of the Government of the Republic of Poland of 14th September 2017 to the communication to the Committee of Ministers of Council of Europe by the HFHR of 1st September 2017, p. 3, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)991revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)991revE).

been adopted and introduced in the Act on patient's rights and the Commissioner for Patient's Rights which would significantly alter the objection procedure, transforming it into an effective mechanism for protecting rights.

10. For these reasons, in HFHR's assessment the procedure of objecting against a doctor's certificate or opinion does not secure the respect for the right to a legal termination of pregnancy.

### **III. ACCESS TO LAWFUL ABORTION, IN PARTICULAR IN A SITUATION WHERE A DOCTOR INVOKES THE CONSCIENCE CLAUSE**

#### **a) The objection procedure**

11. In HFHR's assessment the objection procedure does not safeguard access to abortion in a situation where the conscience clause is invoked by a doctor. It shows the data obtained by the HFHR from the Commissioner for Patients' Rights.<sup>14</sup> In 2019 was lodged an objection by a woman who was not admitted to a hospital gynaecology department due to the lack of possibility to perform an abortion. The woman was eligible for lawful abortion under domestic law, which permits the termination of pregnancy in cases of a high probability of foetal defects or an incurable medical condition endangering the foetus' life (in this case: Edwards' syndrome). However, all doctors in the hospital, including the one who issued the negative decision, refused to terminate the pregnancy by invoking the conscience clause. Ultimately, the Medical Review Board at the Commissioner for Patients' Rights found the objection unjustified. The Board underlined that under Polish law a doctor has the right to refrain from performing a procedure on the basis of the conscience clause.

12. Additionally, the objection procedure in its current form does not guarantee that a woman may receive reliable, exhaustive and objective information on whether she has the right to have a lawful abortion performed. The objection procedure further fails to ensure that a woman will receive information on where the abortion procedure can be performed in a situation where the originally approached doctor invokes the conscience clause.

13. What is more, multiple irregularities in the implementation of provisions concerning abortion were indicated also by the NGOs. For instance, the Federation for Women and Family Planning stressed that a number of hospitals in Poland continue to institutionally refuse to provide abortion care on grounds of conscience what is contrary to the Polish law. According to Federation's reports: 'there continue to be entire regions of Poland where legal abortion care is inaccessible as no health facilities or professionals are providing the care. For example, in 2018 no abortions were performed in Podkarpackie voivodship, a region with a population of women of reproductive age of more than 500,000. In this region more than 3,000 doctors signed the conscience clause declaration attesting to their unwillingness to perform legal abortions'.<sup>15</sup>

---

<sup>14</sup> Letter of the Commissioner for Patients' Rights to the HFHR of 17 January 2020, ref. RzPP-DPR-WPL.0133.1.2020.

<sup>15</sup> Communication from the Center of Reproductive Rights and the Federation for Women and Family Planning to Committee of Ministers of Council of Europe in the cases of R.R., TYSIAC and P. and S. v. Poland (22/01/2020), available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)99-revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)99-revE).

14. Results of Federation's monitoring<sup>16</sup> of access to legal abortion in hospitals in Poland's largest cities show that hospitals: "impose many barriers and requirements that have no basis in law. Such requirements include mandatory psychological consultation in the perinatal hospice, additional medical tests and repetitive medical examinations, provision of certificates and approvals that are difficult to obtain such as a certificate from the National Consultant for Gynecology and Obstetrics or the approval of the Bioethical Commission, and convening medical consultations within health facilities to ascertain the woman's eligibility for legal abortion care".<sup>17</sup>

15. It should further be noted that the Polish Commissioner for Human Rights permanently indicates the difficulties in accessing legal abortion.<sup>18</sup>

### **b) Judgement of the Constitutional Tribunal delivered on 2015**

16. Despite that the facts of the case *B. B. v. Poland* took place in 2014, in HFHR's opinion it is worthy to mention about the ruling of the Constitutional Tribunal delivered on 2015. Since 2015 there is no provision of Polish law that would oblige a doctor or other medical practitioner to inform the patient about an effective way of obtaining a healthcare service (here, undergoing abortion) from a different healthcare provider (medical institution) in the case where the doctor or other practitioner refuses to perform the said service by invoking the conscience clause. This state of affairs is a consequence of the judgement of the Constitutional Tribunal ("CT") delivered on 7 October 2015<sup>19</sup>, in which the CT found the provisions introducing such an obligation unconstitutional. According to the CT, if a doctor invoking the conscience clause was legally obliged to refer the patient to a different medical facility, such an obligation would disproportionately interfere with the doctor's freedom of conscience protected under Article 53 (1) of the Constitution. The current legal situation, created after the relevant provisions lost their legal force in consequence of the CT's decision, leads to a significant disparity in the protection of doctors' freedom of conscience and patients' right to obtain medical services.

17. It should be stressed that in 2020 were carried out some legislative works on an amendment to Article 39 of the Act of 5 December 1996 on the medical and dental profession.<sup>20</sup> As it was stressed in the explanatory note on the draft amendment, the changes sought to execute the CT judgement of 7 October 2015. It was proposed that the

---

<sup>16</sup> Report „Dzień dobry, chcę przerwać ciążę – o procedurach dostępu do legalnej aborcji w polskich szpitalach” is available at: <http://federa.org.pl/wp-content/uploads/2017/06/RAPORT-SZPITALA-FEDERACJA.pdf>.

<sup>17</sup> Communication from the Center of Reproductive Rights and the Federation for Women and Family Planning to Committee of Ministers of Council of Europe in the cases of *R.R., TYSIAC* and *P. and S. v. Poland* (22/01/2020), available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)99-revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)99-revE).

<sup>18</sup> Information on the activity of the Commissioner for Human Rights and the observance of human and civil rights and freedoms in the Republic of Poland in 2016, p. 206, available at: <https://www.rpo.gov.pl/sites/default/files/Informacja%20RPO%202016%20do%20druku.pdf>;

Information on the activity of the Commissioner for Human Rights and the observance of human and civil rights and freedoms in the Republic of Poland in 2017, pp. 121, 489-490, available at: [www.rpo.gov.pl/sites/default/files/Informacja%20roczna%20RPO%20za%20rok%202017.pdf](http://www.rpo.gov.pl/sites/default/files/Informacja%20roczna%20RPO%20za%20rok%202017.pdf);

Information on the activity of the Commissioner for Human Rights and the observance of human and civil rights and freedoms in the Republic of Poland in 2018, pp. 301-304, available at: <https://www.rpo.gov.pl/sites/default/files/Informacja%20Roczna%20Rzecznika%20Praw%20Obywatelskich%20za%20rok%202018.pdf>.

<sup>19</sup> Case No. K 12/14.

<sup>20</sup> Journal of Laws of 2020, position 514 with subsequent changes.

obligation to inform a patient about an alternative option for obtaining a medical service from another doctor or a different medical institution and to notify the patient of the possibility to obtain such a service should be imposed on the healthcare provider which employed the doctor who refused to perform a procedure that they considered irreconcilable with their conscience.

18. What is important, the Council of Ministers (Government) sent the draft to the Parliament on 16 January 2020.<sup>21</sup> But few months later during the legislative process the mentioned amendment was deleted from the final text of the Act of 16 July 2020 amending the Act of 5 December 1996 on the medical and dental profession.<sup>22</sup>

19. However, the proposed regulation arguably failed to ensure that a woman denied access to a medical procedure by a doctor invoking the conscience clause may *always* receive information on where else the procedure can be performed. First of all, according to the draft version of the amendment, a doctor had no obligation to refer the patient to the administration/management department of the doctor's medical institution or to inform the patient about their rights. What is more, the proposed amendment made no guarantee that the medical institution is informed about each and every case in which its doctors invoke the conscience clause and has the possibility to address such a situation, because only a doctor employed on the basis of an employment contract (or performing their duties as a service member) is required to notify their supervisor in writing before invoking the conscience clause. Notably, the proposed regulation did not refer to doctors contracted to work for medical institutions on any other basis, such as a contract falling outside the aegis of employment law.

### **c) Assessment of other regulatory mechanisms**

21. Also it should be verify if exist another measures, which can be considered as effective mechanisms ensuring access to lawful abortion. According to the Act of 15 April 2011 on healthcare institutions<sup>23</sup>, medical entities are obliged to provide publicly accessible information about the scope and type of the healthcare services offered. At a patient's request, the medical institution must also provide detailed information on the healthcare services offered, in particular on the applied testing and treatment methods, as well as the quality and safety of those methods. Appropriate information about medical institutions can also be received from regional branches of the National Health Fund ("NHF"). However, in HFHR's opinion, the above options of accessing information fail to ensure that women may effectively receive information on the available options of pregnancy termination. Above all, under the applicable law, the burden of searching for a proper facility and reviewing its services falls onto women. Such a search can be time-consuming, which is a substantial consideration given the strict period during which a pregnancy may be terminated under the law.

22. In addition, the NHF has the right to supervise the compliance of medical institutions with their contractual obligations to provide healthcare services i.a. pregnancy termination. Also, a notification of a service provider's (alleged) violation of a contract for

---

<sup>21</sup> Government-sponsored bill amending the Act of 5 December 1996 on the medical and dental profession, Sejm paper No. 172, <http://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?id=E28B6568AB5E0382C12584F6003E3BAF>.

<sup>22</sup> Journal of Laws no. 1291.

<sup>23</sup> Journal of Laws of 2020, position 295 with subsequent changes.

the provision of medical services should constitute a basis for commencement of the clarification proceedings.

23. The data obtained by the HFHR from the NHF<sup>24</sup> show that between 2008 and 2019, the Fund conducted only four proceedings related to the imposition of contractual penalties on medical facilities for non-performance or breach of the medical services contract, consisting in a refusal to perform an abortion. One proceeding ended in the imposition of a contractual penalty (in 2014, a facility from the Mazovian voivodeship). The remaining proceedings did not result in the imposition of penalties (in 2015, a facility from the Mazovian voivodeship; in 2016 two proceedings, an entity from the Opolskie voivodeship).

24. On the other hand, the data of the NHF<sup>25</sup> show that the Fund registered more than 4 cases concerning a refusal to perform an abortion. The NHF dealt with the following cases:

- One case in 2011 concerning a refusal by a psychiatrist to issue a certificate which would enable the patient to have an abortion (entity from the Silesian voivodeship);
- Two cases in 2015. In the first case, explanatory proceedings conducted by the Fund showed that there were no medical bases for abortion. In the second case, the refusal was related to the doctor's invocation of the conscience clause (entity from the Podkarpackie voivodeship);
- One case in 2016 concerning a refusal to perform an abortion by an entity which had a contract with for such medical services (entity from the Silesian voivodeship);
- Two cases in 2018;
- Eleven cases in 2019.

25. It is visible that the above-listed cases did not translate into initiation of proceedings for imposition of contractual penalties by the NHF.

26. Also the information obtained by the HFHR demonstrate that the violations of patients' rights connected with lawful abortion recorded by the Commissioner for Patients' Rights did not give rise to any clarification proceedings launched by the NHF.

27. The data of the Commissioner for Patients' Rights<sup>26</sup> show that between 2008 and 2019, the Commissioner considered 20 complaints (other than an objection to the decision or opinion of a doctor) concerning a refusal to perform an abortion. In five cases, the Commissioner concluded that there had been a violation of patient's rights (including the right to a medical service) and in four the proceedings were pending at the date of delivering the data to the HFHR in 2018. Also in four cases, the Commissioner informed the patient about available remedies, and in two discontinued proceedings upon the patient's motion. In addition, in 2018 the Commissioner noted four phone calls with women who faced obstacles in access to termination of pregnancy on the basis of prenatal testing results (3 cases from Podkarpackie voivodship, 1 case from Podlaskie voivodship).

---

<sup>24</sup> Letter of the NHF to the HFHR of 6 March 2018, no. DSOZ.0123.7.2018.GKU. Letter of the NHF to the HFHR of 29 January 2020, no. DSOZ-DRS.0123.4.2020 2020.5548.CPKO.

<sup>25</sup> Letter of the NHF to the HFHR of 6 March 2018, no. DSOZ.0123.7.2018.GKU. Letter of the NHF to the HFHR of 29 January 2020, no. DSOZ-DRS.0123.4.2020 2020.5548.CPKO.

<sup>26</sup> Letter of 6 April 2018, no. RzPP-ODO.0133.3.2018; Letter of 12 March 2020, no. RzPP-DPR-WPL.0133.1.2020.KBI.

28. The situations in which the Commissioner for Patients' Rights noted irregularities:

- A refusal to perform an abortion when the pregnancy endangers the life or health of the woman – violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights), to medical documentation and to file an objection to the medical opinion or decision – case from 2014, entity from the Warmińsko-Mazurskie voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus – violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights), to medical documentation and to file an objection to the medical opinion or decision – case from 2014, entity from the Mazovian voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to healthcare services provided with due diligence (Article 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to information, but no violation of the right to have a medical service performed (Article 6 of the Act on patient's rights and the Commissioner for Patients' Rights) – case from 2015, entity from the Wielkopolskie voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to have a medical service performed, to healthcare services provided with due diligence (Articles 6 and 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to medical documentation – case from 2015, entity from the Mazovian voivodeship;
- A refusal to perform an abortion when there is a high probability of severe and irreversible defects of the foetus - violations found of the patient's right to have a medical service performed, to healthcare services provided with due diligence (Articles 6 and 8 of the Act on patient's rights and the Commissioner for Patients' Rights) and to medical documentation – case from 2015, entity from the Podkarpackie voivodship.

29. The analysis of this data shows no correspondence to proceedings conducted by the NHF concerning the imposition of contractual penalties for breach of contract with respect to termination of pregnancy procedures. It is thus evident that the existing framework of regulatory measures, including contractual penalties for the breach of contracts with the NHF, cannot be considered an effective mechanism ensuring access to lawful abortion. It should be stressed that clarification proceedings (and contractual penalty proceedings) are only pursued (conducted) after a suspected irregularity involving a refusal to perform a medical procedure (e.g. an abortion) appears. No legal provision stipulates that such proceedings should end within a certain time-limit so to enable a woman to exercise her right to a lawful abortion before this right becomes unenforceable. This is yet another reason for considering the existing measures ineffective and devoid of practical applicability as remedies protecting the rights of women seeking an abortion.

#### IV. VIEWS OF INTERNATIONAL BODIES

30. Also several international bodies expressed serious concerns about access to lawful abortion in Poland.

31. The Committee against Torture (CAT) in Concluding observations on the combined fifth and sixth (2013)<sup>27</sup> and seventh (2019)<sup>28</sup> periodic reports of Poland underlined the necessity of introducing in Polish law an effective mechanism ensuring access to safe and legal abortion, especially in cases of conscientious objection. In 2019 the CAT stated that: “there is no effective regulation of conscience-based refusals by doctors to perform abortions, with no guidelines on how to access legal abortion services and no information on the lack of obligation to seek additional medical opinions from a specialist, a joint consultation or confirmation by a ward administrator in cases where denial of procedure will result in physical and mental suffering so severe in pain and intensity as to amount to torture (...).<sup>29</sup>

32. Similar comments were included in Human Rights Committee’s (HRC) Concluding observations on the seventh periodic report of Poland (2016).<sup>30</sup> The HRC was concerned that: “ women face significant procedural and practical obstacles in accessing safe legal abortion, which prompts many of them to travel long distances or abroad to access safe legal abortion. In addition, it notes with concern that: (a) the so-called “conscience clause” (...) has, in practice, often been inappropriately invoked, with the result that access to legal abortion is unavailable in entire institutions and in one region of the country; (b) as a result of the judgment of the Constitutional Tribunal of October 2015, there is no reliable referral mechanism for access to abortion following the exercise of conscientious objection; and (c) in some areas of the State party, few if any health providers are willing to offer legal abortion services”.<sup>31</sup>

33. It is worthy to underline that the Poland is under the pending enhanced procedure of supervision of the execution of ECtHR’s judgements in cases *Tysi c v. Poland*, *R.R. v. Poland* and *P. and S. v. Poland*. Since 2011, the Committee of Ministers of Council of Europe (CoM) regularly examines whether the authorities adopt necessary reforms in order to implement standards established in mentioned cases. In 2019 the CoM clearly noted the lack of positive progress since 2014 in introducing legal framework enabling women effectively exercise the right to lawful abortion.<sup>32</sup> Similarly in 2020 the CoM stressed that: “in light of the lack of the reform of the objection procedure and the continuing concerns

---

<sup>27</sup> Committee Against Torture, Concluding observations on the combined fifth and sixth periodic reports of Poland adopted by the Committee at its fifty-first session (28 October–22 November 2013), ref. CAT/C/POL/CO/5-6, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f5-6&Lang=en).

<sup>28</sup> Committee Against Torture, Concluding observations on the seventh periodic report of Poland adopted by the Committee at its sixty-seventh session (22 July–9 August 2019). Ref. CAT/C/POL/CO/7, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f7&Lang=en).

<sup>29</sup> Ibidem.

<sup>30</sup> Human Rights Committee, Concluding observations on the seventh periodic report of Poland adopted by the Committee at its 118th session (17 October–4 November 2016), ref. CCPR/C/POL/CO/7, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en).

<sup>31</sup> Ibidem.

<sup>32</sup> Decision of the Committee of Ministers of 14 March 2019 concerning the execution of the ECtHR judgement of *Tysi c* and *R.R. v. Poland*, ref. CM/Del/Dec(2019)1340/H46-31, available at: <http://hudoc.exec.coe.int/eng?i=004-20592>.

as to its effectiveness, expressed by the Council of Europe Commissioner for Human Rights, the Polish Commissioner for Human Rights and civil society, strongly urged the authorities to adopt the necessary reforms without further delay and recalled in this context that respect for the rule of law requires States to ensure the legal and practical conditions for the effective exercise of the rights conferred by law”.<sup>33</sup> What is important, in communication from the Commissioner for Human Rights of the Council of Europe presented to the CoM was underlined that: “the situation in the area of sexual and reproductive health and rights in Poland has not only failed to improve, but has in fact worsened in recent years. She considers that much remains to be done to ensure women and girls’ access to sexual and reproductive health and rights in Poland as an essential component of guaranteeing women’s human rights and advancing gender equality. There is a need to ensure their effective access to safe and legal abortion, including access to reliable information on the conditions and procedures in that regard. In particular, there is a need to urgently address important shortcomings in the legal and institutional framework of conscience-based refusals which seriously hamper the practical enjoyment by women and girls in Poland of their sexual and reproductive health and rights, even in those very limited situations where abortion is legal”.<sup>34</sup> The Commissioner underlined views and reports indicating that the practice of invoking the conscience clause by medical practitioners has become increasingly common in Poland in recent times. She noted that: “in particular that since 2014 almost 4,000 Polish doctors have signed a “Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility”, through which they expressed their commitment to following “divine law” in their professional work and to reject abortion, contraception and in vitro fertilisation”.<sup>35</sup>

## V. CONCLUSIONS

34. Bearing in mind the arguments presented, we submit the following conclusions:

- in the case of B. B. p. Poland, the ECtHR has the opportunity to develop standards for the protection of rights of women seeking lawful abortion, in particular in the area of positive obligations incumbent on state authorities to introduce mechanism which would ensure that the right to abortion is not nullified by doctors’ invocation of the conscience clause;
- non-governmental organizations, national institutions dealing with the protection of human rights, as well as international bodies and organizations indicate that in Poland there is no effective and expedient procedure that would ensure that women can exercise their right to have an abortion which is allowed by domestic law;

---

<sup>33</sup> Decision of the Committee of Ministers of 5 March 2020 concerning the execution of the ECtHR judgement of *Tysi c and R.R. v. Poland*, ref. CM/Del/Dec(2020)1369/H46-21, available at: <http://hudoc.exec.coe.int/eng?i=004-20592>.

<sup>34</sup> Communication from the Council of Europe Commissioner for Human Rights (27/01/2020) in the cases of *R.R., Tysi c and P. and S. v. Poland*, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)101-revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)101-revE). Commissioner’s observations were based i.a. on the report by Dunja Mijatovi c, Commissioner for Human Rights of the Council of Europe, following her visit to Poland from 11 to 15 March 2019, ref. CommDH(2019)17, available at: <https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848>.

<sup>35</sup> *Ibidem*.

- in particular, the existing procedure for objecting to an opinion or decision of a doctor is excessively formalistic and does not guarantee that a pregnancy can be terminated within the legal time-limit. Additionally, medical institutions are currently under no direct legal obligation to inform a woman that abortion can be performed by a different doctor in a situation when a medical practitioner invokes the conscience clause as the basis for the refusal of an abortion;

- Despite that in 2007 ECtHR delivered first judgement in case against Poland concerning access to safe and legal abortion, the authorities failure to adopt necessary reforms thereof indicates that the obstacles faced by women who want to terminate a pregnancy in accordance with domestic law should be treated as a systemic problem in Poland;

- the decision in the case of B. B. v. Poland will be of import not merely to the Applicant, but also for other women seeking lawful abortion.

*The amicus curiae opinion was drafted by advocate Jaroslaw Jagura, lawyer in the Strategic Litigation Programme of the Helsinki Foundation for Human Rights, under the supervision of advocate Dr. Katarzyna Wiśniewska, Coordinator of the Strategic Litigation Programme and Dr. Piotr Kłodoczny, Secretary of the Board of the Helsinki Foundation for Human Rights.*

On behalf of the Helsinki Foundation for Human Rights,

*Piotr Kłodoczny, Ph. D.*

Secretary of the Board

Helsinki Foundation for Human Rights

*Danuta Przywara*

President of the Board

Helsinki Foundation for Human Rights