

NATIONAL LEGAL INNOVATION STRATEGY Poland

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE
RIGHTS OF CHILDREN WITH DISABILITIES



Belgium



Bulgaria



Czech Republic and
Slovakia



Ireland



Lithuania



Poland



Romania



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Contents

- Introduction 3
 - 1. Right to live in the community 4
 - 2. Right to education 5
 - 3. Right to healthcare 6
 - 4. Right to a fair trial..... 6
 - 5. Freedom from abuse 8

- Methodology 9

- Selection of the right..... 10

- Overview of the legal remedies..... 12
 - 6. Civil proceedings..... 12
 - 7. Criminal proceedings..... 13
 - 8. Administrative proceedings..... 13
 - 9. Proceedings before the Constitutional Court 14

- Case selection 14

- Litigation plan..... 15
 - 10. Client intake process..... 15
 - 11. Litigation route 16
 - 12. Key partners..... 16
 - 13. Risk management plan..... 16
 - 14. Follow up activities 17

- Resources..... 17

Introduction

Poland does not have a coherent, centrally-coordinated and comprehensive child protection system. The issues related to child rights protection are spread across numerous legal instruments of different ranks. Poland has ratified a number of international human rights instruments concerning children and protection of their rights, in particular the Convention on the Rights of the Child (hereinafter: "CRC") of which it was an initiator and of the two optional protocols thereto – on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.¹ Furthermore, the Polish Constitution guarantees the protection of the rights of the child (Article 72). Also, the principle of protecting the best interest of the child is reiterated in numerous acts such as the Family and Guardianship Code and the Code of Civil Procedure. There are existing protection-oriented, child-related policies in various sectors, such as alternative care, social assistance, healthcare, education, and the system of domestic violence prevention. However, these do not add up to or meet the requirements of a coherent and comprehensive system for monitoring and protecting children's rights.

What is more, those pieces of the system which are in place are often focused on protection without necessarily fully acknowledging the child's status as a subject bearing rights. For State institutions, from social care centres (*ośrodek pomocy społecznej*) and schools to family courts (*sąd rodzinny*), a child is the object of actions, of care and protection. Even though these actions are predominantly motivated by the best interests of the child, the definition of what the best interests entails in a given case may be, and often is, established without the child's participation.² Both the initiation of proceedings, be they civil, criminal or administrative, and the course and result of proceedings are often out of children's reach. In these proceedings, children are usually dependent on statutory representatives and officials, without an opportunity of directly addressing institutions, e.g. with complaints, or to express their opinion to the institutions that make decisions in their cases. In the case of juvenile justice proceedings, the system fails to provide comprehensive protection of children's right to a fair trial and the right to defence.

Treating a child as a subject of rights requires, first and foremost, securing the child's right to an effective remedy for violations. This is possible through ensuring that the child has access to decision-making institutions, in particular access to justice through courts. In order for this to be effective, in addition to being protected, the child needs to be able to enjoy the right to information and the right to be heard on a basis of equality.³

The problems with treatment of children as bearers of rights and their access to justice, in particular limitations placed on the right to be heard, will be more pronounced in the case of children with mental disabilities. This is due to various factors, including stereotypes and

¹ Other relevant international instruments ratified or acceded to include: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, etc.

² O. Trocha, „Udział dzieci w postępowaniu o ograniczenie władzy rodzicielskiej – raport z badań aktowych, *Dziecko krzywdzone. Teoria, badania, praktyka* Vol. 14 Nr 4 (2015), available at: <http://fdn.pl/vol-14-nr-4-wysluchanie-dziecka-w-postepowaniu-cywilnym-0>.

³ See Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3> (accessed: 24 April 2017).

prejudices deeply embedded in societies and, thus, also in legal systems.⁴ In this context, the provisions of the Convention on the Rights of Persons with Disabilities (hereinafter: “CRPD”) concerning guarantees of access to justice seem to be among the most challenging to implement.

The right to an effective remedy, or access to justice, is a prerequisite for effective enjoyment of other rights and children with mental disabilities face challenges to their enjoyment of rights in many areas. The purpose of the current strategy is to catalogue areas where children with mental disabilities may suffer notorious violations, identify one priority area where strategic litigation could offer a valid solution to the problems and design a path which will lead to a desired court ruling and its subsequent implementation.

In the course of the project which formed basis for the development of this strategy, project partners from Mental Disability Advocacy Centre (hereinafter: “MDAC”) identified five such areas where children with mental disabilities face violations most often. These areas are: right to live in the community, right to education, right to healthcare, access to justice and freedom from abuse. Their selection was based on MDAC’s experience in litigation for the rights of children with disabilities in Europe, and experience of the Helsinki Foundation for Human Rights (hereinafter: “HFHR”) from current and previous projects, confirms that this choice is also relevant to the Polish context. Selected problems in relation to the rights of children with mental disabilities which have emerged in HFHR’s practice and in the course of the project are presented below.

1. Right to live in the community

The CRPD in Article 19 guarantees the equal right of all persons with disabilities to live in the community, with choices equal to others. The Constitution of the Republic of Poland in Article 52 recognises freedom of movement and the rights of all persons, including persons with disabilities, to choose their place of residence.⁵ In reference specifically to persons with disabilities, the Constitution establishes in Article 69 an obligation on the part of public authorities to provide aid, including in the area of subsistence and special health care.

In the course of its work, HFHR has noted a series of problems with respect to the right of persons with mental disabilities to live in the community. The problems relate, among others, to placement in psychiatric hospital based on the Act on the Protection of Mental Health (*Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego*).⁶ As a rule, placement in a psychiatric hospital is subject to the consent of the patient. With respect to minors, based on Article 22 (3) of the Act on the Protection of Mental Health, only the consent of the statutory representative is generally required. However, the Act provides for a certain exception. Based on Article 22 (4), if placement concerns a minor older than 16 and able to express consent, such consent is required to admit the person to the hospital. The legislator, thus, presumes that when a patient turns 16 they reach the intellectual and emotional maturity necessary to understand medical information and express informed, valid consent to treatment.⁷ For minors under 16, in

⁴ See for example Mental Disability Advocacy Centre (2015), Access to Justice for Children with Mental Disabilities. International Standards and Findings from Ten EU Member States, available at: www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws2_standards_and_findings_english.pdf (accessed: 24 April 2017).

⁵ Poland, Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*), available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁶ Poland, Act on Protection of Mental Health (*Ustawa z dnia 12 marca 2004 o pomocy społecznej*), 12 March 2002.

⁷ Judgment of the Constitutional Tribunal of 11 October 2011, case no. K 16/10.

the event of contradictory statements by the child and their statutory representative, consent to the child's admission is given by the guardianship court. Consequently, the consent of the child under 16 is not required, even if the child is able to express such consent. The constitutionality of the provisions which limit the requirement to obtain the child's consent only to children above 16 was questioned by the Commissioner for Human Rights before the Polish Constitutional Tribunal. Eventually, the Constitutional Tribunal considered these provisions to be in compliance with the Constitution.⁸ However, regardless of the Constitutional Tribunal's judgment, application of this provision without ensuring proper standards can lead to violations of the child's right to live in the community. Strategic litigation concerning cases arising from the application of this provision could lead to shaping proper judicial practice based on these provisions, e.g. concerning child hearings.

2. Right to education

The CRPD in Article 24 guarantees the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels. The Committee on the Rights of Persons with Disabilities interpreted this right and State Parties' obligations in its General Comment no. 4. However, the right of children with disabilities to education on an equal basis with others is not fully protected in Poland. A child with disabilities can choose to go to a public school (szkoła ogólnodostępna), integrated school (szkoła integracyjna) or a special school (szkoła specjalna). While children with mental disabilities have the right to inclusive education in public schools, availability of this education is often a problem which becomes more visible at later stages of education.

The results of research recently carried out by the Commissioner for Human Rights show that even though a number of children with disabilities start their education in public schools, it is almost certain that the child will complete their education in a special school.⁹ This is confirmed in a study conducted by the Institute of Educational Research concerning the educational paths of children with disabilities. The authors of the study suggest that this results from the lack of proper support in public schools arising from the historic development of the Polish educational system for children with disabilities. For years, the system has been dominated by special schools which, at this point, have enhanced capacity in terms of both equipment and staff to support children with disabilities.¹⁰ However, placement of children in such schools continues their segregation and impedes development of open and supportive attitudes towards persons with disability in society. It runs counter to the standards established by the CRPD and elucidated in General Comment no. 4. According to the General Comment, "[for] article 24 (2) (a) to be implemented, the exclusion of persons with disabilities from the general education system should be prohibited, including through any legislative or regulatory provisions that limit their inclusion on the basis of their impairment or the degree of that impairment, such as by conditioning

⁸ Judgment of the Constitutional Tribunal of 11 October 2011, case no. K 16/10.

⁹ Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*), *Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia*, available at: <https://www.rpo.gov.pl/pliki/13490881580.pdf>.

¹⁰ Instytut Badań Edukacyjnych (2014), *Realizacja badania ścieżek edukacyjnych niepełnosprawnych dzieci, uczniów i absolwentów – raport końcowy*, p. 13, available at: <http://eduentuzjasci.pl/badania/110-badanie/825-badanie-sciezek-edukacyjnych-niepelnosprawnych-dzieci-uczniow-i-absolwentow.html> (accessed: 24 April 2017).

inclusion on the extent of the potential of the individual or by alleging a disproportionate and undue burden to evade the obligation to provide reasonable accommodation.”¹¹

3. Right to healthcare

HFHR's experience shows that one of the areas in which safeguarding the right to healthcare is particularly difficult is the context of the juvenile justice system. The problem of access to psychiatric healthcare in youth educational centres (hereinafter "MOW", *młodzieżowy ośrodek wychowawczy*) and youth socio-therapy centres (hereinafter: "MOS", *młodzieżowy ośrodek socjoterapii*) was noted by the Commissioner for Patients' Rights.¹² In its intervention of 2014, the Commissioner quoted the results of interviews with personnel from 20 psychiatric hospitals in Poland and the opinions expressed by the National Consultant for Mental Health of Children. The Commissioner was concerned by frequent the hospitalisation of juvenile delinquents from MOW and MOS, and non-fulfilment of medical prescriptions after patients' release, which suggests a lack of proper, in-house psychiatric services. The data for 2013 quoted by the Commissioner showed that 7% of the people in psychiatric hospitals are in fact children from these institutions. The Commissioner also noted that hospitalisation is particularly frequent during winter and summer holidays. In the course of its monitoring of detention facilities for juvenile delinquents, HFHR noticed an increasing demand for psychiatric and psychotherapeutic services.¹³ The problem has not yet been resolved and children are hospitalised instead of receiving healthcare services in the centre or at community out-patient clinics.

Furthermore, in this regard, it is important to draw attention to Article 12 of the Act on Proceedings in Cases of Juvenile Delinquents (*Ustawa z dnia 26 października 1982 r. o postępowaniu w sprawach nieletnich*). As HFHR's experience shows, practice developed on the basis of this provision remains a problem which could be addressed, to an extent, by strategic litigation. According to Article 12, in the case when a juvenile is diagnosed with an intellectual disability or a mental illness etc., the family court can order placement of the juvenile in a psychiatric hospital or other appropriate medical facility. Application of such measures is subject to general conditions. It can thus happen when a juvenile delinquent displays symptoms of demoralisation or has committed a prohibited act (pl. *czyn karalny*). According to Article 25 § 2 of this Act, such placement also requires that the court obtain an opinion of the court advisory specialist team. However, the court can use an older opinion concerning the child if such an opinion was prepared within 6 months prior to the initiation of proceedings. In light of the fact that the measure presupposes significant interference with the child's freedom, one has to expect a stricter basis for placement under this article, in particular that the court will use the most up-to-date data concerning the child. What also raises concerns is that a person with an intellectual disability can be placed in a psychiatric hospital.

4. Right to a fair trial

¹¹ Committee on the Rights of Persons with Disabilities, General Comment No. 4, 25 November 2016, CRPD/C/GC/4, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en (accessed: 2 July 2017).

¹² Interventions available at: www.bpp.gov.pl/gfx/bpp/userfiles/_public/bip/wystapienia_rzecznika/rrzpp-41-15-2014-bw-19.11.2014.pdf (accessed: 12 April 2017).

¹³ M. Szwał, K. Wiśniewska, M. Wolny (2015), *Dzieci po drugiej stronie muru*, Helsinki Foundation for Human Rights, p. 130, available at: http://beta.hfhr.pl/wp-content/uploads/2015/10/HFPC_dzieci_po_drugiej_stronie_muru.pdf (accessed: 17 April 2017).

Under Polish law, a child can participate in criminal, civil and administrative as well as juvenile proceedings in various capacities. HFHR's experience shows that in each of these fields there are numerous legal and practical problems in protecting children's right to a fair trial. Furthermore, research and analysis show that, in general, access to justice for persons with intellectual disabilities can be extremely difficult. In 2013, the Polish Association of Persons with Mental Disabilities issued an open letter to MPs showing the problems which persons with mental disabilities face in contacts with the justice system. In its letter, the Association pointed out numerous problems, such as the lack of proper representation and assistance, lack of systemic solutions guaranteeing persons with disabilities the right to defence and lack of psychological support, as well as the lack of properly trained expert witnesses who can participate in proceedings.¹⁴ Similar problems were raised in the analysis carried out by the team at the Office of the Commissioner for Human Rights.¹⁵ There is, however, no comprehensive research or analysis pertaining to children with mental disabilities as "clients" of the justice system. Given the lack of such analysis, the problem of the right to a fair trial for children with mental disabilities is interpreted from the perspective of the general problems which may be faced by children, on the one hand, and by persons with disabilities in accessing the justice system, on the other.

The research carried out by the HFHR for the Fundamental Rights Agency on child-friendly justice revealed significant discrepancies between criminal and civil procedures, at the level of both law and practice.¹⁶

In general, the best legislation and practice in the context of a child's right to a fair trial has been developed in criminal proceedings. The Polish Code of Criminal Procedure (*Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego*) (hereinafter: "CCP") provides a special, child-friendly procedure for hearing children who are victims or witnesses of crimes. The procedure is composed of several elements that are supposed to protect a minor victim or witness from repeated victimisation and safeguard the best interests of the justice system. The child-friendly procedure provides that a child who suffered or witnessed specific types of crimes should be heard only once and in the presence of a psychologist. The hearing should be conducted in appropriately adjusted rooms, in the court or outside of the court. On the basis of the CCP, the Minister of Justice issued a regulation specifying how the hearing should be prepared and what conditions should be secured for the child.¹⁷ Additionally, informal guidelines – endorsed by the Minister of Justice and published on its website – were prepared by the Empowering Children Foundation.¹⁸

¹⁴ Polish Association for Persons with Mental Disability (Polskie Stowarzyszenie na rzecz Osób z Upośledzeniem Umysłowym), List otwarty z dnia 27 czerwca 2013 r., available at: http://niepelnosprawni.pl/files/www.niepelnosprawni.pl/public/pliki_do_pobrania/psouu_list_270613.pdf (accessed: 10 July 2017).

¹⁵ Commissioner for Human Rights (Rzecznik Praw Obywatelskich), Dostęp osób z niepełnosprawnościami do wymiaru sprawiedliwości. Analiza i zalecenia, Warsaw 2016, available at: <https://www.rpo.gov.pl/sites/default/files/Dost%C4%99p%20os%C3%B3b%20z%20niepe%C5%82nosprawno%C5%9Bciami%20do%20wymiaru%20sprawiedliwo%C5%9Bci.pdf> (accessed: 10 July 2017).

¹⁶ European Fundamental Rights Agency, Country reports for the comparative report on Children and Justice, available at: <http://fra.europa.eu/en/country-data/2015/country-reports-comparative-report-children-and-justice> (accessed 10 July 2017).

¹⁷ Regulation of the Minister of Justice of 18 December 2013 on the preparation of a hearing conducted on the basis of Articles 185a-185c of the Code of Criminal Procedure, Journal of Laws position no. 1642.

¹⁸ The guidelines are available at: <https://ms.gov.pl/pl/dzialalnosc/przeciwdzialanie-przemocy-wobec-dzieci/przyjazne-przesluchanie-dziecka/> (accessed: 19 April 2017).

In the Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego*) (hereinafter: “CCvP”), there are two main provisions which provide for the court’s obligation to hear a child. These are Article 216 and Article 576 § 2.¹⁹ The obligation is dependent on the court’s assessment of the child’s capacities. Thus, the court shall hear the child when their mental development, state of health and degree of maturity allow it, if it is possible taking into consideration their wishes. There are no specific provisions in the CCvP on the manner in which such a hearing should be conducted. The only specific guidelines on how to conduct the hearing are contained in the Rules of Operation of Common Courts (*Rozporządzenie Ministra Sprawiedliwości z dnia 23 grudnia 2015 r. Regulamin urzędowania sądów powszechnych*).²⁰ Paragraph 154 of the Rules states that, to the extent possible, a hearing should take place in a special, adjusted room. When such a room is not available in court, the hearing can be conducted outside of the court, in particular in cooperation with NGOs which protect children’s rights. The hearing should be documented in official notes.

When it comes to practice, case file research conducted by the Empowering Children Foundation in four district courts in Poland between 2015-2016 shows that not many children take part in the proceedings in any way. The research included analysis of 124 cases concerning limitation of parental responsibility. Altogether, the cases concerned 179 children. Only 49% of those children whose cases were analysed participated in the proceedings in some way, while 5% (9 children) had direct contact with the court.²¹ Those children who had direct contact with the court were all teenagers.

Finally, there are provisions on the participation of children in juvenile proceedings. This procedure is a mix of civil and criminal proceedings. In general, it is carried out on the basis of the CCvP, however it still allows for an application of detention measures which could be considered punitive (penal) in nature. The shortcomings of the fair trial standards were pointed out in two judgments concerning juvenile proceedings in Poland. In *Adamkiewicz v. Poland*,²² the European Court of Human Rights (hereinafter: “ECtHR”) found a violation of Article 6 of the European Convention on Human Rights (hereinafter: “ECHR”) due to the lack of proper access to a lawyer. In the same judgment, the ECtHR also ruled that the fact that the case was heard by the same judge both at the explanatory phase and at the trial phase was a violation of Article 6 ECHR. In the second ground-breaking decision concerning juvenile justice in Poland, the ECtHR ruled in a case of an applicant placed in a shelter for juveniles. His placement was extended for a period of five months without a specific court order. The ECtHR ruled that such a practice was a violation of Article 5 ECHR.²³

5. Freedom from abuse²⁴

¹⁹ Article 216 CCvP is applicable to adversarial proceedings and cases which relate to the child, while Article 576 § 2 is applicable to non-adversarial proceedings and cases which relate to the child or his/her property.

²⁰ Regulation of the Minister of Justice of 23 December 2015 on the Rules of operation of common courts, Journal of Laws position no. 2316.

²¹ O. Trocha, „Udział dzieci w postępowaniu o ograniczenie władzy rodzicielskiej – raport z badań aktowych, *Dziecko krzywdzone. Teoria, badania, praktyka* Vol. 14 Nr 4 (2015), available at: <http://fdn.pl/vol-14-nr-4-wysluchanie-dziecka-w-postepowaniu-cywilnym-0>.

²² European Court of Human Rights, *Adamkiewicz v. Poland*, Application no. 54729/00.

²³ European Court of Human Rights, *Grabowski v. Poland*, Application no. 57722/12.

²⁴ With respect to violations of the right to freedom from abuse, there have also been reported instances of abuse towards children with mental disabilities in social care houses (*domy pomocy społecznej*). For more see for example: www.gazetakrakowska.pl/magazyn/a/co-sie-dzialo-za-drzwiemi-domu-pomocy-spoecznej,10658769/ (accessed: 17 April 2017).

The provisions of the Act on the Protection of Mental Health facilitate violations of the child's freedom from abuse. Article 18 of this Act permits the use of restraint measures against persons with mental disorders while performing activities set forth in the Act. Their use is permitted in three types of situations: (1) assault on life or health (patient's own or that of another person) or on public safety, (2) violent destruction of property in their surroundings, or (3) when a patient seriously interferes or hinders the functioning of an institution offering mental healthcare services or an institution of social assistance. The use of force is allowed without regard to age. In 2016, in its remarks to amendments to the Act on the Protection of Mental Health, HFHR underlined a need to provide separate provisions for the use of restraint measures against children under 16, noting, in line with the European Committee for the Prevention of Torture, that such measures should, in fact, be eliminated altogether, and, if this is not possible, limited to holding a person until he/she calms down.²⁵ However, until today such provisions have not been introduced and the grounds for using restraint measures, in particular the third permitted ground, remain vague. In light of this fact, development of a proper judicial standard, ensuring higher safeguards for children through strategic litigation could make up for the inadequate legal framework.

Additionally, the complaints received from the Commissioner for Patients' Rights suggest that the conditions prevalent in hospitals are very poor, the interiors are dilapidated, the bedding overused, there are no lockers or toilet paper, the rooms are overcrowded, and the food is also a problem. Strategic litigation in this respect, for example based on a lawsuit for protection of personal interests, could lead to the improvement of these conditions.

Methodology

The following strategy was developed as part of the international project "Innovating European Lawyers to Advance Rights of Children with Disabilities" coordinated by MDAC on the basis of three main elements – HFHR's experiences in working with the rights of children and persons with disabilities, the Polish results of the above-mentioned project and targeted desk research including consultations with experts.

HFHR has extensive experience related to the rights of children and the rights of persons with disabilities which includes thematic strategic litigation, but also research and monitoring projects on child-friendly justice and juvenile justice. In the years 2012-2015, HFHR – as the National Focal Point for the EU Agency for Fundamental Rights – conducted research on the rights of children in civil and criminal proceedings, with particular focus on the right to information and the right to be heard. In the course of this research, individual interviews were conducted with legal and non-legal professionals involved in the justice system, but also with children who came into contact with courts. In the years 2013-2014, HFHR also conducted monitoring of detention facilities for juvenile delinquents, paying particular attention to conditions in the facilities, relations between children and carers, contacts with the outside world, the right to privacy, CCTV, restraint measures, healthcare services and complaints procedures. The results of the research on child-friendly justice and of monitoring in detention facilities for children in conflict with the law were used in the selection of areas of interest from the perspective of strategic litigation on the rights of children with mental disabilities.

²⁵ Helsinki Foundation for Human Rights (2016), *Opinia HFPC do rządowego projektu ustawy o ochronie zdrowia psychicznego oraz niektórych innych ustaw*, available at: www.hfhr.pl/wp-content/uploads/2016/11/Opinia-HFPC-nowelizacja-u.o.z.p..pdf (accessed: 17 April 2017).

In 2016, HFHR carried out the Polish part of the project “Innovating European Lawyers to Advance Rights of Children with Disabilities” coordinated by MDAC. The project was composed of three main stages. The first stage included a pilot training on the rights of children with mental disabilities directed to practicing lawyers. During this training, MDAC together with HFHR tested in practice the training materials, but also gauged the opinions of training participants as to possible directions for future strategic litigation on the rights of children with mental disabilities. The culmination of the project was a two-day training on the rights of children with mental disabilities combined with elements of strategic planning.

The training was followed by the third stage of the project – the National Legal Innovation Strategy Day. The event gathered representatives of key stakeholders, including practicing lawyers specialising in cases concerning children’s rights, representatives of the Office of the Commissioner for Human Rights and Commissioner for Children’s Rights, and NGOs protecting and advocating for the rights of children. In the course of the vivid discussion, participants focused on two areas – education and access to justice, in particular the misuse of public resources earmarked for support for education of children with disabilities, lack of reasonable accommodation and the lack of practice in hearing children in civil proceedings.

In order to create a comprehensive catalogue of needs with respect to enforcement of the rights of children with mental disabilities, a desk review was also conducted to identify previous research on the issue. Publications and statistical data were sought on the websites of NGOs that deal with children with mental disabilities and public institutions such as the Commissioner for Human Rights, Commissioner for Children’s Rights, the Main Statistical Office, etc. Additionally, experts were consulted on their views as to identify possible directions for strategic litigation on the rights of children with mental disabilities.

Selection of the right

On the basis of HFHR’s experiences, the results of the project “Innovating European Lawyers to Advance Rights of Children with Disabilities,” further desk research and consultations with experts, we have decided to select the right to an effective remedy or – as expressed in the Convention for the Rights of Persons with Disabilities – **access to justice, in particular the right to a fair trial in the context of juvenile proceedings**, as the main focus for future strategic litigation with respect to the rights of persons with disabilities. There are four reasons justifying this decision.

Firstly, as with other problems regarding the protection of children’s rights, the problems with access to justice are exacerbated in the case of children with mental disabilities. In general, the Polish justice system is not ready to address the needs of persons with disabilities. While participating in court proceedings, persons with mental disabilities face numerous problems – from a lack of specially trained professionals through to a medically-oriented perception of disability and problems in recognising the autonomy of persons with mental disabilities to make decisions.²⁶ In this context, the problems of children with mental disabilities are not properly recognised and addressed in the course of either criminal or civil proceedings.

The second reason for selecting this area is the lack of proper recognition of the needs of children with mental disabilities in the functioning of the juvenile justice system. This is particularly

²⁶ Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*), Dostęp osób z niepełnosprawnościami do wymiaru sprawiedliwości. Analiza i zalecenia. available at: <https://www.rpo.gov.pl/sites/default/files/Dost%C4%99p%20os%C3%B3b%20z%20niepe%C5%82nosprawno%C5%9Bciami%20do%20wymiaru%20sprawiedliwo%C5%9Bci.pdf> (accessed: 19 April 2017).

problematic as children with mental disabilities are, in general, “disproportionately represented as defendants in juvenile justice systems.”²⁷ Not only are the provisions regulating juvenile proceedings insufficiently adjusted to the needs of children with mental disabilities, but in general they do not create a comprehensive and fair system. The Act on Proceedings in Cases of Juvenile Delinquents (*Ustawa z dnia 26 października 1982 r. o postępowaniu w sprawach nieletnich*) was adopted in 1982 and, despite many amendments, still has not been fully aligned with modern standards. According to the original intent of its creators, the Act was to comprehensively regulate instances where juvenile delinquents commit acts prohibited by criminal law or are engaged in antisocial and delinquent behaviour. From the very beginning, this objective was impossible to achieve since the Act applies two very different legal judicial procedures - criminal or civil - depending on the type of the procedure concerned (guardianship and educational proceedings, or correctional proceedings). For years, this procedural dualism has given rise to a complex set of interpretative problems (two of the main problems were mentioned above under the right to a fair trial). In this regard, the fact that the civil court can apply measures which should be considered as criminal punishment is considered to be one of the biggest problems from the point of view of the right to a fair trial. In 2013, HFHR carried out case file reviews concerning the right to a fair trial in juvenile proceedings. The review of 105 cases revealed that the juvenile was represented by a defense lawyer in only a small number of juvenile cases which were concluded relating to guardianship and educational proceedings. Furthermore, the juveniles did not always receive accurate information about their rights. Moreover, parents or guardians were not always notified of the child’s detention.²⁸

Thirdly, in the course of its activities, HFHR has identified numerous human rights violations in regard to juvenile justice. HFHR’s research and monitoring activities helped to identify problems related not only to the right to a fair trial but also to right to personal liberty, right to privacy and access to healthcare services for juveniles.²⁹ For example, HFHR’s monitoring of detention facilities for juvenile delinquents revealed a systemic lack of proper access to psychiatric and psychological aid provided to children staying in these facilities.

Last but not least, the research carried out for this strategy revealed a lack of comprehensive, detailed and disaggregated data regarding the participation of children with mental disabilities in juvenile proceedings. Apart from monitoring results from previous years, there have also recently been several media reports pointing to violations of the human rights of children with mental disabilities in juvenile proceedings. For example, at the beginning of 2017, the media reported a case of a child with a mental disability who was apprehended by the police in the classroom and escorted to the police station where he was heard without the presence of his legal guardian.³⁰ Although the law does allow for a child to be heard in the presence of a school psychologist, as occurred in this case, or a person closest to the child, this possibility should still be treated as an emergency option and the legal guardian of a child should be contacted first in such a situation. This case also showed an absolute lack of any child-protection measures

²⁷ Mental Disability Advocacy Centre (2015), Access to Justice for Children with Mental Disabilities. International Standards and Findings from Ten EU Member States, available at: www.mdac.org/accessing-justice-children (accessed: 19 April 2017).

²⁸ Jasiński W., Pietryka A., Fairness in juvenile justice proceedings - findings of case file research, available at: [http://www.bghelsinki.org/en/media/uploads/documents/reports/special/bhc_\(2014\)_children_deprived_from_liberty_en.pdf](http://www.bghelsinki.org/en/media/uploads/documents/reports/special/bhc_(2014)_children_deprived_from_liberty_en.pdf) (accessed: 19 April 2017).

²⁹ M. Szwał, K. Wiśniewska, M. Wolny (2015), *Dzieci po drugiej stronie muru*, Helsinki Foundation for Human Rights, p. 130, available at: http://beta.hfhr.pl/wp-content/uploads/2015/10/HFPC_dzieci_po_drugiej_stronie_muru.pdf (accessed: 17 April 2017).

³⁰ Available at: <http://wyborcza.pl/1,75398,21086608,policjanci-zabrali-niepelnosprawnego-chlopca-z-lekcji-nie-powiadomili.html?disableRedirects=true> (accessed: 24 April 2017).

adopted by the police and a complete failure to adjust the proceedings to the needs of a child with mental disabilities. Given the absence of necessary legal frameworks, there is a distinct possibility that this case was not an isolated example.

For these reasons, strategic litigation aiming at increasing the standards of the right to a fair trial in cases involving children with mental disability will have an impact resonating not only on the position of children with mental disabilities in proceedings, but also on the entire juvenile justice system in Poland.

Overview of the legal remedies

In general, strategic litigation on the rights of children with mental disabilities can be conducted through three main avenues – civil, criminal and administrative proceedings. Ultimately, there is an extraordinary complaint procedure available before the Constitutional Court that may result in pronouncing as unconstitutional the legal provision which formed basis of the final decision in a given case. The choice of a particular path depends on the right that was violated and the circumstances of the given case.

6. Civil proceedings

In civil proceedings, victims of human rights violations can rely on provisions for the protection of personal interests in Articles 23 and 24 of the Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny*) (hereinafter: “CC”).³¹

According to Article 23 CC, personal interests are protected under civil law irrespective of other laws. The catalogue of personal interests is not exhaustive. It includes health, liberty, dignity, freedom of conscience, name and pseudonym, secrecy of correspondence, inviolability of abode, etc. The development of the list beyond statutory personal interests can largely be ascribed to the activity of the courts.

In case of a violation, Article 24 CC entitles the victim to demand cessation of the activity which threatens their interest unless it is not illegal. Where a violation is established, a victim can demand restitution, compensation or payment of a sum for a selected social purpose. If the violation resulted in damage, the victim can demand its mitigation on general terms.

These provisions apply to various types of violation, including in cases of abuse in an institution, violations of the right to healthcare or refusal to admit a child to public school, etc. The claim should be filed with the regional court which is the court of first instance for these types of claim. An appeal lies to the appellate court. The last, extraordinary measure in civil proceedings is a cassation appeal which can be filed with the Supreme Court. According to Article 398 CCvP, a cassation appeal can be submitted by a party to the proceedings, the Human Rights Commissioner or the Prosecutor General. Pursuant to Article 398 CCvP, a cassation appeal must challenge a violation of substantive law through incorrect interpretation or application, or a violation of procedural law if it has had a significant influence on the outcome of the case.

In general, children cannot directly participate as parties in civil proceedings and should be represented by their legal guardians. However, CCvP allows for two possible instances in which a child should be heard directly by a judge. According to Article 216, the court shall hear the

³¹ Civil Code of 23 April 1964.

child in cases which concern the child's person ("w sprawach dotyczących osoby małoletniego dziecka") while under Article 576 § 2,³² the court shall hear the child in cases concerning their person or property. The obligation contained in both articles is dependent on the court's assessment of the child's capacities. Thus, the court shall hear the child when their mental development, state of health and degree of maturity allow it, if it is possible taking into consideration their sensible wishes. There are no specific provisions in CCvP on the manner in which such a hearing should be conducted apart from the fact that it should take place in a specially adjusted room in the court or outside the court.

7. Criminal proceedings

In criminal proceedings, victims of human rights violations can notify the police of a crime. The victim of a crime has several rights in the course of the investigation, such as e.g. the right to be heard, the right to be informed and the right to apply to have specific evidence secured. Furthermore, once the investigation is finished and the case is directed to the court, the victim can also act as an auxiliary prosecutor (pl. *oskarżyciel posiłkowy*). Also, it is important to note that if the investigation is repeatedly discontinued or there is a refusal to initiate an investigation, the victim has the right to submit a subsidiary act of indictment to the court (pl. *subsydiarny akt oskarżenia*). As in civil proceedings, there are two instances in criminal proceedings. There is also the opportunity to submit a cassation appeal, however it is an extraordinary appeal measure. A cassation appeal must challenge a violation of substantive law through incorrect interpretation or application, or a violation of procedural law.

In criminal proceedings, children can act as witnesses and victim-witnesses. Under the general procedure contained in Article 177 CCP, a child can be called as a witness numerous times during the course of the investigation and the trial. This procedure does not provide any specific measures of protection for the child – the child can be heard in the presence of the perpetrator, and both the prosecutor and defence lawyer can question the child directly.

However, separately from the general procedure, the CCP does make provision for a special, child-friendly procedure for hearing children's evidence in specific circumstances. Its application depends on the type of crime, the child's age and the child's status as a victim-witness or witness. If a child under 15 is a victim or witness to any crimes against health or life or to sexual crimes, they should be heard under Articles 185a and 185b CCP that provide special protective measures. Such a hearing should be conducted only once, in the presence of a psychologist and without the presence of the perpetrator or his defence lawyer in the room. Furthermore, the hearing should be carried out outside the courtroom in a specially adjusted facility. A child-victim older than 15 can also be heard in such circumstances, while a child witness older than 15 does not have this option, but can, for example, be heard remotely (under Article 177 § 1a CCP).

In general, the legal framework and practice in hearing children in criminal proceeding is well established and, despite some aspects that still require further development, provide quite a comprehensive system for protecting children's interests in the course of the proceedings.

8. Administrative proceedings

³² Article 216 CCvP is applicable to adversarial proceedings and cases which relate to the child, while Article 576 § 2 is applicable to non-adversarial proceedings and cases which relate to the child or his/her property.

The administrative procedure in Poland has two stages – proceedings before administrative bodies which issue decisions (in the first and second instance) and proceedings before administrative courts which examine administrative decisions on formal grounds. The administrative path could be suitable for pursuing strategic litigation with respect to a child's right to inclusive education. In such a case, the school principal would issue a decision in the first instance and the Schools' Superintendent in the second. Such a decision could be challenged before the regional administrative court in the first instance. A possible appeal from a judgment of the regional administrative court would be directed to the Supreme Administrative Court, which is the court of second instance.

There are neither specific provisions nor practices regulating children's participation in administrative proceedings. In general, the Act on the Proceedings Before Administrative Courts (*Ustawa z dnia 30 sierpnia 2002 r. o postępowaniu przed sądami administracyjnymi*) states that a person with limited capacity to carry out legal actions can participate in proceedings which concern those legal actions which she/he can undertake on her/his own. In practice, this provision causes numerous problems in determining in which cases a minor can act on their own. Recently, the Supreme Administrative Court ruled that a 14-year old child has a right to apply for the civil status documents concerning him and his family. The Supreme Administrative Court reversed the decision of the lower instance court which ruled that a minor does not have such a right. This case shows in a nutshell the biggest problems in recognising children's right to participate in administrative proceedings.³³

9. Proceedings before the Constitutional Court

Pursuant to the Constitution, everyone whose constitutional freedoms or rights have been infringed has the right to appeal to the Constitutional Tribunal for judgment on the constitutionality of a statute or other normative act upon which a court or organ of public administration has based its final decision (Article 79 of the Constitution). According to the Constitution, judgments of the Constitutional Tribunal are binding and final.

Since 2015, Poland has faced a constitutional crisis that has severely undermined the independence and effectiveness of the Constitutional Tribunal. As a result of legislative actions and disrespect towards the Constitutional Tribunal's jurisprudence, three persons who were appointed without a valid legal basis were assigned to cases in the Constitutional Tribunal. As a consequence, there is a high risk that a judgment could be issued by a person who is not a judge. This situation may lead to serious problems in protecting the coherence of jurisprudence in Poland and severe uncertainty of the law. In this context, the Constitutional Tribunal should not be recognised as an effective measure for strategic human rights litigation.³⁴

Case selection

As stated above, strategic litigation would be carried out in the field of access to justice, in particular the right to a fair trial in the context of juvenile justice proceedings. Our main goal would be to achieve a decision of a national or international court confirming a violation of the right to a fair trial of a child with a mental disability on the basis, among others, of failure to

³³ Dziennik Warto Wiedzieć, Małoletni stroną w postępowaniu administracyjnym, available at:

<http://wartowiedziec.org/index.php/start/aktualnosci/31938-maoletni-strona-w-postpowaniu-administracyjnym>.

³⁴ See more on the origins and course of the constitutional crisis in Poland: Szuleka M. et al., *Kryzys konstytucyjny w Polsce 2015-2016*, Helsinki Foundation for Human Rights, Warsaw 2016, available at: <http://www.hfhr.pl/wp-content/uploads/2016/09/HFPC-Kryzys-konstytucyjny-w-Polsce-2015-2016.pdf> (accessed: 3 July 2017).

provide satisfactory opportunities for a defence in the course of the trial or reasonable accommodations in the course of the child's hearing or ordering measures which could be considered to amount to criminal punishment.

The possible risks related to such a case can be divided into three main groups – client-related, legal and strategic risks. Client-related risks are connected to the individual child with mental disabilities and to their parents, but also to the particularities of a given case. They may arise from numerous aspects. For example, the child or parents' behaviour in the course of the proceedings may raise concerns, including as to their good faith. They may potentially, in terms of character and attitude, not be the "best clients" to head strategic litigation in the area of juvenile justice. They may also be too afraid, tired or resigned to give their name to a particular legal issue or may withhold media attention. Statutory representatives of the child may also refuse to cooperate with HFHR for fear that the organisation's intervention in the proceedings would be perceived as pressuring the court and may negatively influence the court's final decision. Potential problems may also be encountered when it comes to receiving instructions from the client if he or she has significant difficulties in communicating.

When it comes to legal risks, they may include a situation when HFHR receives information on the case when it is already too late for any meaningful participation at the national or international level. Conversely, there is also a risk that the case reaches HFHR at a fairly early stage and the human rights violations are mitigated at later stages of proceedings, which would limit the possibility of raising a challenge to the decision. Last but not least, litigation may take a lot of time, in particular if a case reaches the ECtHR or if it transfers into civil proceedings after another type of proceeding. In such situation, the clients may be discouraged by the long wait and a lack of immediate tangible results.

When it comes to strategic risks, they include a couple of possible situations. First, there is a possibility of positive law reform such that litigation loses its strategic value. If no legal changes occur, the court may issue a judgment which is favorable for the client, but without unambiguously finding a violation of the right to a fair trial. This would preclude the possibility of submitting an application to the ECtHR. On the other hand, the judgment of the national court may be not favour of the client, thus setting a lower standard of protection. This would allow for an application to the ECtHR, however the ECtHR may consider that the Polish Constitutional Tribunal is operative to a sufficient degree to constitute an available domestic remedy and proclaim the application inadmissible if the client has not attempted to exhaust it. Even if the ECtHR considered the application admissible, the clients may reach a settlement with the Government or the case can be resolved through unilateral declaration. Even though this would confirm the violation, in strategic terms it would not have the same impact as a judgment.

The potential risk of litigating the right to a fair trial in juvenile justice proceedings should be assessed as moderate and weighed against the moderate potential benefit of a judgment.

Litigation plan

10. Client intake process

The client intake process would be conducted simultaneously through various channels. Weekly, HFHR receives dozens of letters from persons who claim that they have been victims of human rights violations. Even if many of those claims prove unfounded upon further inquiry, the letters have been a source of cases for strategic litigation for many years. Apart from this "passive"

intake, HFHR would also actively seek cases where the child's right to a fair trial in juvenile proceedings has been violated. This would be done through HFHR's website and Facebook where an advertisement would be published inviting clients to contact the litigation team and through regular monitoring of media reports concerning juvenile justice. Additionally, HFHR litigation team members would include information on the case intake when presenting on the radio and on television. Finally, HFHR would also initiate cooperation with organisations that offer support to juvenile delinquents and their families.

11. Litigation route

The litigation route would be dependent on the stage at which the case is brought to HFHR's attention. The first avenue would naturally be juvenile proceedings where HFHR would litigate the right to a fair trial in the course of proceedings at second instance. There is no possibility of filing a cassation appeal in juvenile proceedings³⁵ and, in any event, the Constitutional Tribunal is ineffective. In the case of an unfavorable decision, HFHR would submit an application to the ECtHR.

In a case with facts similar to those described above where a boy was removed from the classroom by police officers and taken for questioning without his parents, HFHR would also litigate infringement of personal interests under the civil law, for example dignity, health and emotional well-being. This would offer a possibility for the courts to set a proper standard of treatment for juvenile delinquents, in particular children with mental disabilities.

12. Key partners

For the purpose of strategic litigation on this issue, HFHR would look for strategic partnerships. Possible partners could include:

- The Commissioner for Human Rights;
- The Commissioner for Children's Rights;
- NGOs such as the Empowering Children Foundation, Polish Association for Persons with Intellectual Disabilities, Court Watch, Polish Association of Anti-Discrimination Law etc.;
- Professional associations, such as the Polish Psychologists' Association etc.; and
- Media.

13. Risk management plan

Certain client-related risks stemming from the client's personal circumstances can be mitigated by careful selection of the case before engagement, including through conducting thorough interviews with the child and their parents. This could also mitigate some of the legal and strategic risks, for example, the possibility of the client choosing to settle with the Government for financial compensation, etc.

Client-related risks that may arise in the course of proceedings, in turn, can be mitigated by close cooperation with the client and their parents, including systematic provision of information on what has occurred in the proceedings and what may be the next steps. Additionally, the client

³⁵ Decision of the Supreme Court of 27 February 2013, no. IV CZ 1/13.

can be supported throughout the litigation and protected from suffering negative consequences as a result of protracted proceedings by contact with a network of support, either of a more formal nature or completely informal.

14. Follow up activities

Strategic litigation in itself is often the beginning of orchestrated efforts to further the implementation of a ruling. The follow-up activities can be of various types, but, in the current context, HFHR believes that national advocacy and training are of particular importance.

As part of advocacy at the national level, HFHR would initiate discussion on necessary changes to the Act on Proceedings in Cases of Juvenile Delinquents, emphasising the punitive character of the procedure, in particular correctional proceedings, and the need to enshrine in the Act appropriate safeguards for the child's right to defence, including, in particular, the right to a lawyer. It would also advocate for a review of the law's compliance with standards of protection for children with mental disabilities, considering that these children – as MDAC notes – are disproportionately represented among juvenile delinquents.

Finally, the strength of a judgment is measured by how often it is quoted and applied as a standard. HFHR would initiate educational actions in order to promote the judgment and other human rights standards pertaining to juvenile justice (e.g. ECtHR judgments) among family law judges. This could be effected through a series of targeted trainings for judges, prepared and conducted by HFHR experts in cooperation with other NGOs. For this purpose, HFHR could seek partnerships with the such organisations as the Association of Family Judges in Poland (*Stowarzyszenie Sędziów Rodziny w Polsce*), Association of Family Judges Pro Familia (*Stowarzyszenie Sędziów Rodziny Pro Familia*) Judges' Association "Themis" (*Stowarzyszenie Sędziów Themis*) or Association of Polish Judges (*Stowarzyszenie Sędziów Polskich Iustitia*).

In addition to the above-mentioned follow-up activities, HFHR would also like to initiate certain monitoring and research activities. The participants of the National Innovation Strategy Day agreed that there is a lack of comprehensive data on observance of the rights of children with mental disabilities in institutional settings, such as psychiatric hospitals and social care homes. There have been media reports suggesting various irregularities and abuse, however no coordinated and systematic monitoring has been carried out. This monitoring could be an opportunity not only to describe the situation as it really is, but also to select cases for further strategic litigation.

Resources

The time necessary for the case to reach a final decision, including client intake and preparation for litigation would oscillate around two years. The litigation team expected to conduct such litigation should include:

- HFHR's strategic litigation team (composed of lawyers and a PR officer);
- A pro bono lawyer; and
- An expert psychologist.

The costs of such litigation will include:

- Court fees;
- Travel expenses;
- Expert analyses; and
- Client support.

The legal costs can be covered through various arrangements, including pro bono cooperation with lawyers or law firms. Over the years, HFHR has successfully cooperated with law firms and individual lawyers to provide pro bono representation to the Foundation's clients, creating a network of over a hundred legal professionals committed to human rights protection. The costs of support for the client can be limited through cooperation with NGOs which offer support to juveniles and their families as part of their activity or through the organisation of an informal support network.