Warsaw, 28 April 2021

415/2021/PSP

Ms Ksenija Turković
The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Przemysław Lalik against Poland*
Application No. 47834/19

Dear Ms President,

Pursuant to the letter of Ms Liv Tigerstedt, the Deputy Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 8 April 2021, granting leave to make written submission to the Court by 30 April 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Przemysław Lalik against Poland (application no. 47834/19).

On behalf of the Helsinki Foundation for Human Rights,

Sincerely Yours,

HELSIŃSKA FUNDACJA PRAW CZŁOWIEKA ★ 00-490 Warszawa ★

Helsińska Fundacja Praw Człowieka
PREZES ZARZĄDU
Danuta Przywara

Przemysław Lalik v. Poland
(application no. 47834/19)
Amicus curiae brief of the Helsinki Foundation Human Rights

Executive Summary

- The case of *Lalik v. Poland* involves crucial aspects of the right to a fair trial.
- International bodies, including the European Committee for the Prevention of Torture, the UN Committee against Torture or the Subcommittee against Torture, have been regularly pointing to problems concerning the provision of access to a defence lawyer that result from Polish legislation and the practice of criminal justice authorities.
- The Helsinki Foundation for Human Rights has noted in its reports that access to the assistance of a lawyer at the initial stages of criminal proceedings is still not fully available. Similar conclusions emerge from reports of the National Torture Prevention Mechanism, which constantly monitors this issue.
- According to many national bodies, provisions of the Polish Code of Criminal Procedure do not guarantee the full exercise of rights stipulated in the EU Access to a Lawyer Directive.
- Monitoring actions carried out by non-governmental organisations and international bodies also show that the currently applicable procedure for informing detained persons about their rights and obligations fails to adequately safeguard detainees' rights.

I. Introduction

1. 1. This third party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 8 April 2021.

2. Access to a lawyer is essential to ensure the fairness of the trial. Given the above, there is no doubt that immediate access to legal assistance at the earliest possible stage of criminal proceedings can contribute to the elimination of procedural errors that may affect the ultimate resolution of the case and to the prevention of torture, inhuman or degrading treatment. Accordingly, the present case and the judgment to be delivered by the European Court of Human Rights are of material significance. The judgment will allow for the assessment of how the right to a defence is practically implemented in Poland, and what changes, if any, should be implemented by the legislator and criminal justice authorities.

3. The ECtHR judgment will also provide an opportunity to evaluate the changes that have taken place after the judgment in the case of *Płonka v. Poland*[1].

4. Given the nature of the amicus curiae brief and the scope of the leave granted by the Court, we do not refer to the specific circumstances of *Lalik v. Poland*. The opinions presented below will focus on general access to a defence lawyer in Poland and the procedural consequences of a failure to ensure such access.

5. This brief is divided into four parts. The first one concerns domestic law. The second one presents the perspective of international bodies on access to a lawyer in Poland. The third part focuses on practical problems related to the exercise of the right to the assistance of a lawyer. In the fourth part, we will describe the process of the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[2] ("Access to a Lawyer Directive").

II. Domestic laws on access to a lawyer and the right to information

6. The basic guarantees of the right to a defence are laid down in Article 42 (2) of the Constitution of the Republic of Poland and Article 6 of the Code of Criminal Procedure ("CCP"). Article 42 (2) of the Constitution provides: *"Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court"*. The jurisprudence of the Polish Constitutional Court indicates that the constitutional right to a defence consists of several elements. One of those is the right to have, and benefit from, the assistance of a

[1] *Płonka v. Poland*, no. 20310/02, 31 March 2009.
[2] OJEU L 2013, No. 294, p. 1.

defence lawyer. In addition, the Constitution provides that an element of the right to a defence is also the possibility of obtaining the assistance of an ex officio defence lawyer – however, the scope of this right is specified in detail by a law. It is pointed out by legal scholars and commentators that Article 42 (2) of the Constitution of the Republic of Poland grants an individual the right to a defence at all stages of the proceedings. This means that the right to a defence exists from the moment the proceedings are initiated until their conclusion.

7. However, a detailed analysis of the problem at hand needs to be preceded by the clarification of the definitions of "the accused", "suspect" and "suspected person" under Polish law. Pursuant to Article 71 § 1 CCP, "a person shall be considered a suspect if a decision to present charges has been issued against them or they have been charged without such a decision in connection with them being questioned as a suspect". In accordance with Article 71 § 2 CCP the accused is a person: "... against whom a charge has been filed with a court, and also a person with respect to whom a public prosecutor has submitted a motion laid down in Article 335 § 1 or the motion for the conditional discontinuation of proceedings". Moreover, under Article 73 § 3 CCP, if the Code of Criminal Procedure: "... uses the term 'accused' in a general sense, the relevant provisions also apply to the suspect." On the other hand, the Code of Criminal Procedure establishes no definition of a "suspected person". However, according to legal scholars and commentators, the suspected person is a person who "... is suspected of having committed an offence (presumed to have committed an offence) but has not yet been charged.... The suspected person is not a party to criminal proceedings and therefore does not have the rights of a suspect...."[3]

8. Under Article 245 (1) CCP, "*[i]f a detainee so requests, they should promptly be allowed to contact a lawyer in a way that is feasible at a given time, and to talk to the lawyer directly...*". However, the law does not specify in what form this contact is to take place. Moreover, there is no effective legislation that could be applied in a situation where a detained person wishes to contact a lawyer but does not have the lawyer's contact details or has not yet appointed a lawyer. In practice, doubts also arise from the fact that the Code of Criminal Procedure does not specify a timeframe for granting access to a lawyer. The Code only refers to the notion of "promptness", which seems to be overly vague and blurred in relation to the problem at hand. In the decision of 13 October 2011 issued in case no. III KK 64/11, the Supreme Court held as follows: "*However, offering a prompt opportunity to contact a lawyer referred to in Article 245 § 1 CCP does not mean that such contact is to take place 'immediately', because the term 'promptly' must be interpreted on the facts of a given case, and above, take into account any practical possibilities and conditions resulting from applicable legal provisions, including those related to the appointment of an ex officio lawyer.*"[4]

9. At this point, attention should also be drawn to Article 308 § 2 CCP, which stipulates that in the case of criminal investigations conducted in cases of less serious crimes (Polish: *dochodzenie*), in urgent cases and to a necessary extent, criminal justice authorities may*: "... question a person suspected of having committed an offence as a suspect before issuing a decision to present charges, if the conditions for such a decision are satisfied. The questioning shall begin with the provision of information on the charge presented."*

10. Notably, the Code of Criminal Procedure provides for the *obligatory* appointment of a defence lawyer only in the situations specified in Article 79 CCP (when the suspect is a minor, is deaf, mute or blind, or if there is a reasonable doubt as to whether the suspect's capacity to understand the meaning of the offence or direct their conduct was non-existent or significantly limited at the moment when the offence was committed; or there is a reasonable doubt as to whether the suspect's mental state allows him or her to participate in the proceedings or conduct a defence in an independent and reasonable manner) and Article 80 (if the suspect is accused of a serious offence and their case is pending before a regional court). Apart from the above cases, the Code of Criminal Procedure does not set out the obligation to have a defence lawyer present during steps carried out during pre-trial proceedings or court proceedings. An example of such a situation is a questioning conducted under Article 301 CCP,

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[3] K. Eichstaedt, *Komentarz do art. 244*, in: D. Świecki (Ed.), *Kodeks postępowania karnego. Komentarz*, 3rd edition, Wolters Kluwer Polska 2017, published in LEX database.

[4] Decision of the Supreme Court of 13 October 2011, III KK 64/11, OSNKW (1) 2012, , item 9.

which will not be suspended if a defence lawyer fails to appear.[5] According to a scholarly argument, Article 301 CCP *"does not provide any detailed description of the lawyer's failure to appear, and therefore, pursuant to the* lege non distinguente *principle, it also extends to the non-appearance that has been sufficiently excused by the defence lawyer. This leads to the conclusion that very limited obligations with regard to ensuring the suspect's right to the assistance of a defence lawyer are imposed on criminal justice authorities conducting pre-trial proceedings. In principle, their duty merely involves the effective notification of a defence lawyer previously appointed by the suspect. But whether the defence lawyer is able to exercise a reasonable degree of care to participate in the questioning is of no concern to the legislator. In such a situation, it is often a necessity for a suspect to remain silent, although this may not be beneficial for him at all"*[6]. Furthermore, pursuant to Article 378a § 1 CCP, which entered into force on 5 October 2019, the court may conduct evidentiary proceedings in the absence of a defence lawyer if the defence lawyer has been properly notified of the date of the hearing, even if they have excused their absence. In such an event, the defence lawyer is notified of a new hearing date (Article 378a § 2 CCP) and has the right to submit, no later than on the next hearing date, a request to supplement the evidence that was taken in their absence (Article 378a § 3 CCP). A failure to timely submit an appropriate request results in the expiry of that right (Article 378a § 4 CCP). In the request to supplement the evidence, the defence lawyer must demonstrate that the manner of taking the evidence in the defence lawyer's absence infringed procedural guarantees, in particular the right to a defence (Article 378a § 5 CCP). The court may grant such a request, as a result of which the evidence will be re-taken solely to the extent to which the infringement of procedural safeguards, and specifically the right to a defence, has been demonstrated (Article 378 § 6 CCP).

III. Access to a lawyer in Poland – the perspective of international bodies

11. Although many of the above-mentioned provisions establish relevant guarantees, problems with appropriate access to a lawyer in Poland, as well as those relating to the provision of inadequate information to detainees about this right, have been repeatedly noted in recent years by international bodies operating within the framework of the Council of Europe and the United Nations. This brief will focus on the conclusions of the reports published over the last six years. We use December 2015 as the cut-off date because the Committee of Ministers of the Council of Europe decided at that time to close the examination of the execution of *Płonka v. Poland*, which was undoubtedly an important reference point for the recent reforms and development of the Polish criminal procedure[7].

12. Despite the above decision of the Committee of Ministers, international bodies still notice problems in this area. The need to ensure access to a lawyer without undue delay and to guarantee the confidentiality of client-lawyer communication was highlighted by the UN Human Rights Committee in November 2016. The Committee recommended that Poland ensure that all detainees, including juveniles, have "unhindered, prompt and adequate access to the lawyer of their choice or free legal aid from the outset of the detention", and that all communication between the defence lawyer and the accused is confidential[8].

13. On the other hand, the UN Committee against Torture (CAT)[9] argued in its 2019 report that detainees still do not have access to a lawyer before the initial questioning and that the prosecutor may decide that a suspect can be questioned without the participation of their defence lawyer. For this reason, CAT recommended that Poland should take the necessary steps to ensure that all detained

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[5] Article 301 CCP: *"The suspect should be questioned, upon request, with the participation of an appointed defence lawyer. A failure of the defence lawyer to appear shall not stop the questioning."*

[6] S. Steinborn, "Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", *Europejski Przegląd Sądowy,* (1) 2019.

[7] Council of Europe's Committee of Ministers, Resolution CM/ResDH(2015)235, Execution of the judgment of the European Court of Human Rights, *Płonka against Poland* (final resolution), https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-159695%22]}.

[8] UN Human Rights Committee (HRC), *Concluding observations on the seventh periodic report of Poland*, 23 November 2016, CCPR/C/POL/CO/7, paras. 33-34.

[9] Committee against Torture, *Conclusions and recommendations of the Committee against Torture,* 29 August 2019, CAT/C/POL/CO/7, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr0yVMLY8Itqp7elpaWy9%2fzgK85rCNbhNbl9H5MRxZAXmuNhsk4JqsXXRXi0lJSmNO2LTxqrAW4v8kVPp6X0aQ98sIsGb0Rh%2bGPf2PnHH%2fbX.

persons have access to legal assistance before the initial questioning. At the same time, CAT recommended taking steps to bring national legislation and practice "into line with international instruments", including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[10] and the Access to a Lawyer Directive.

14. In a report published in early 2020, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT or "the Sub-Committee"), stated that it was *"concerned that many detainees the delegation spoke to had not had the chance to consult a lawyer, especially in the first stage of proceedings. The Subcommittee is further concerned at the lack of an appropriate system of legal aid in Poland for those who could not afford a private lawyer. The Subcommittee recommends that the State party take effective measures to guarantee that all persons deprived of their liberty are afforded, in law and in practice, from the time they are arrested, the right to have prompt access to an independent lawyer and, if necessary, to legal aid in accordance with international standards. Poland should take measures to introduce the list of legal counsellors to all police stations."*[11]

15. Issues related to access to a lawyer was also noted in the latest report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of 2020[12], which was drafted after the CPT's visit to Poland in September 2019. The CPT argued that "as for the access to a lawyer in police custody, the delegation concluded that it remained highly exceptional, even for juveniles; in practice, it was only available to the few apprehended persons who were wealthy enough to have their own lawyer and lucky enough to have their lawyer's name and telephone number with them at the moment of apprehension. It also pointed out that "despite its long-standing recommendations, there was still no access to ex officio lawyer before the court proceedings started (and in many cases, such access was delayed for much longer periods). Further, the delegation observed once again that, even in the rare cases when the lawyer did come to see his/her client at a police establishment, the confidentiality of client-lawyer conversations was virtually never guaranteed. In the Committee's view, Poland has not only failed to implement the CPT's recommendations concerning access to a lawyer but also failed to transpose into its national law the requirements of the EU Directive on access to legal aid. Notably, problems with access to a lawyer were also signalled in previous CPT reports. In the report from the 2017 visit, CPT pointed out that "*as regards the fundamental safeguards against ill-treatment advocated by the CPT – namely the right to notify one's detention to a third party, the right of access to a lawyer and to a doctor, and the right to be informed of the above-mentioned rights – the Committee very much regrets the absence of any real progress in their application since the CPT's previous visits. The delegation heard numerous allegations of delayed or even denied notification of custody; access to a lawyer in police custody remained highly exceptional in practice.*"

IV. Procedural safeguards in practice

Information on rights and obligations

16. Similar conclusions are also drawn from the studies and monitoring reports prepared over the last six years. A survey conducted by the HFHR in late 2015 and early 2016 found that, on many occasions, detainees or suspects have been informed about their rights and obligations in a way that impeded their effective understanding of their procedural situation. The majority of the surveyed persons indicated that they had enough time to read the letter of rights and obligations but noted that the problem was situational stress which prevented them from understanding the letter's wording[13].

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[10] Journal of Laws (JL) of 1989, No. 63, item 378.

[11] UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Poland undertaken from 9 to 18 July 2018: recommendations and observations addressed to the State party, Report of the Subcommittee,*
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fPOL%2fROSP%2f1&Lang=en.

[12] CPT, *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 16 September 2019*, CPT/Inf (2020) 31, https://rm.coe.int/1680a024c5.

[13] HFHR, *Jak informować by poinformować. Polskie prawo i praktyka a standardy europejskie*, https://www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa_ca%C5%82o%C5%9B%C4%871.pdf.

17. Similar conclusions emerge from a survey published by the HFHR in 2018.[14] The interviewed respondents have repeatedly pointed out that the letters were incomprehensible. According to the respondents, people who have not previously dealt with the criminal justice system most often do not exercise the rights described in the letter. The survey report emphasises that "in practice, detained or questioned persons access the content of the letter of rights in different ways. The problem is compounded by the stress associated with, for example, detention, which further limits the capacity to properly understand the letter. Reading comprehension may prove to be an additional challenge. Persons who have had contact with the criminal process are usually well acquainted with the content of the letter. However, as noted in the report, in many cases "*no one reads the letter, or even tries to read it*". The respondents also revealed a belief that the faster a detainee signs the letter, the faster they would be released from detention.

18. Similar conclusions follow the reading of a report published in 2019 by the European Union Agency for Fundamental Rights. Among other things, the report establishes that "*[t]he experience of defendants in Poland highlights the issue of authorities fulfilling their legal obligation to inform defendants about their rights, but in a way that does not allow effective understanding, matching what many professionals say on this issue. For example, three out of the six defendants interviewed did not read the document they received outlining their rights, as their level of stress was too high for them to concentrate. In one case, the interviewee did not read the information provided to him regarding his rights, as he did not believe that these rights had any applicability in practice.*"[15]

19. The results of monitoring actions conducted in recent years by the National Mechanism for the Prevention of Torture (NMPT) also confirm that practical problems exist. As the report on the NMPT's activities in 2019 indicates, *"[d]uring some visits, persons interviewed in confidence by members of the NMPT delegation said that the officers had not informed them of their rights in a comprehensible manner. The interviewees only received a record of arrest and a printout of the letter of rights for detainees in criminal proceedings but were unable to fully understand the meaning of their rights. Some of the detainees mentioned that they had not had enough time to read the record of arrest, and being in police custody, they felt pressured and were afraid to ask additional questions, so as to prevent a conflict situation.*"[16]

20. Apart from its comprehensibility and linguistic accessibility, the scope of the letter of rights is also extremely important. The letter of rights for suspects does not contain explicit information about the possibility of waiving the right to a defence lawyer, as well as about the right to withdraw the waiver. This is due to the fact that the Code of Criminal Procedure does not provide for detailed rules on waiving the right to a defence lawyer. The record of a suspect's arrest/questioning includes information about whether the suspect requests contact with a defence lawyer or the appointment of an ex officio defence lawyer. As pointed out in a 2014 opinion of the Criminal Law Codification Commission, the Polish criminal law does not require that a party must make an explicit statement to waive any of its rights; a waiver may be implied since "*the fact that a party does not exercise any of its rights implicitly indicates that they do not intend to invoke that right.*" The HFHR subscribes to the argument that a detainee or suspect signs the record of arrest and questioning, which contain general disclaimers confirming their familiarity with the letter of rights, the officers are no longer required to ask if the detainee wishes to receive the assistance of a defence lawyer. Accordingly, the detainee's or suspect's failure to explicitly indicate their wish to receive the assistance of a defence lawyer results in an implied waiver of their right to a defence lawyer.[17] Legal scholars and commentators also claim that *"[i]n the light of the standard of the right to a defence set by the Strasbourg jurisprudence, the absence of rules that would govern the waiver of a suspect's right to have a defence lawyer present*

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[14] HFHR, *Wzmocnienie praw procesowych w postępowaniu karnym*, https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Wzmocnienie-praw-procesowych-w-postepowaniu-karnym-29-03.pdf.

[15] FRA, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf.

[16] Polish Ombudsman Office, *Raport Rzecznika Praw Obywatelskich z działalności Krajowego Mechanizmu Prewencji Tortur w 2019 r.*, https://www.rpo.gov.pl/sites/default/files/Raport_RPO_z_dzialalnosci_KMPT_2019.pdf.

[16] *Ibid.*

[17] Polish Ombudsman Office, *Raport Rzecznika Praw Obywatelskich z działalności Krajowego Mechanizmu Prewencji Tortur w 2019 r.*, https://www.rpo.gov.pl/sites/default/files/Raport_RPO_z_dzialalnosci_KMPT_2019.pdf.

during the questioning should be regarded as a defect of the Polish criminal procedure. This legislative loophole practically prevents the proper assessment of the silence of a suspect who did not request access to a defence lawyer in connection with the questioning. Without any mention in the record of the questioning, it is usually difficult to determine whether the silence is the result of the suspect's ignorance of this right or a consequence of their informed decision."[18]

Access to a lawyer

21. As regards practical concerns, particular attention needs to be paid to the issue of access to a lawyer. It follows from the 2017 HFHR report that lawyers admitted the unwillingness of police officers to help detainees find a defence lawyer, especially at and around the moment of taking a detainee into police custody. If they only have the name of a lawyer, the police are unwilling to, and do not, take steps to assist a detainee to find the lawyer's phone number. One of the surveyed lawyers described a situation where a police officer said that if the lawyer named by a detainee did not answer the phone, they would not call the next one. Lawyers also described situations in which a detainee who admitted not having a lawyer was told by police officers that they "have no one to call". The lawyers unanimously stressed that such situations resulted from a lack of a lawyers rota that would be available at police stations so that detainees could find their lawyer or phone a lawyer of their choice if they did not already have one. In addition, it was suggested that a system of duty lawyers would be a good idea. In that case, the person concerned could call a designated number requesting representation by a lawyer on duty[19].

22. According to the report, *"lawyers emphasised that in their opinion the police were in no hurry to provide information about the arrest. In larger cities where there are more police stations, lawyers have difficulty finding out exactly which station their client is kept. This is because police officers do not provide such information or the family who notify the lawyer of the detention of the person concerned do not know the exact name of the police station. One of the lawyers claimed that police officers deliberately delayed making contact because: "they want to get as much information from the detainee as possible".* Another defence lawyer noted that this kind of a protracted approach was a *"'procedural ploy', the aim of which was to prevent the determination of a line of defence, as this could 'disrupt the case built by the police and the prosecutor's office', and the presence of a lawyer from the very beginning of the proceedings could be inconvenient and hinder the steps taken".*

23. Problems related to access to a lawyer were also indicated in the above NMPT reports. One of them highlighted, among other things, *that "[n]ot every detained person has, in practice, access to a lawyer from the beginning of their detention (e.g. due to lack of money). On the other hand, a request for an ex officio defence lawyer can only be submitted after a detained person's first questioning as a suspect and not immediately after the arrest. Police officers carry out official steps involving the detainee (e.g. questioning, preliminary interviews) before the first contact between the defence lawyer and the client. This situation creates a high risk of torture, in particular where police procedures are not recorded, rooms are not monitored, no third party is involved and the law does not provide for a compulsory medical examination upon detention."*[20]

Informal questionings

24. Another element that may affect the practical exercise of the right to a defence is the practice of informal questionings. As stated in a report of the Agency for Fundamental Rights, "[i]n some Member States, authorities sometimes question people without making it clear what their status is, for example whether they are considered a witness or a suspect. Lawyers interviewed in Bulgaria refer to 'informal intelligence talks', in Greece to 'the grey zone' and in Poland and Romania to 'informal questionings'. These are situations when police ask 'a person of interest' questions, recording their answers in 'police memos', but without entering this information into official case files. The obligation to inform defendants about their rights takes effect from the moment the person is aware that they might be suspected of committing an offence. By contrast, witnesses do not enjoy the protection offered to suspects: they are obliged to tell the truth, although they cannot be forced to incriminate themselves. The majority of the lawyers interviewed from Poland refer to the so-called

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[18] S. Steinborn, "Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", *Europejski Przegląd Sądowy,* (1) 2019.

[19] HFHR, *O (nie)dostępnym dostępie do adwokata,* https://www.hfhr.pl/wpcontent/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf.

[20] *Ibid.*

'police official memos' (*notatka służbowa*), which can capture the content of defendants' statements made in the course of unofficial questioning/conversations before the official opening of the criminal proceedings As one lawyer explained, in theory, such memos cannot be used instead of testimonies given on record. However, the majority of lawyers noted that the police have found ways to bypass this prohibition. In particular, police officers testify as witnesses on account of defendants' statements made during informal questioning. In addition, if the memo's author testifies during the proceedings, the memo can be admitted as evidence. If the memo's author does not testify, the memo still remains in the case file and the judge can access it. As an interviewee notes, such memos are not a full transcript of what the suspect stated in an informal setting, but instead are a summary, and the police encourage suspects to sign such documents[21]. The procedural situation of a suspected person must be distinguished from the aforementioned circumstances.

V. EU directives and the Code of Criminal Procedure

25. The practical observations described above must be compared with legal standards. Currently, the starting point for assessing the implementation of procedural guarantees in European Union countries are, in addition to the European Convention on Human Rights, the provisions of EU directives.

26. The Access to Information Directive, as per its Article 11(1), was to be implemented by the Member States of the European Union by 2 June 2014. The key purpose of the Directive was to oblige the Member States to draw up in simple and accessible language the letter of rights for, among other persons, suspects, detainees or persons detained on remand. Despite the fact that almost 7 years have passed since the obligation to implement the Access to Information Directive became effective, Polish authorities have failed to prepare a letter of rights for persons detained and put in pre-trial detention which would be drafted in simple and accessible language. The letter of rights for detainees[22] was introduced by the Regulation of the Minister of Justice of June 2015 and since then its form has not been simplified. The same situation applies to the letter of rights for persons put in pre-trial detention[23], which is also drafted in a legalistic language and has been in force since April 2016. It should be noted that the legislator decided to amend the scope of the letter of rights for suspects. Since September 2020, a new regulation[24] has been in place that modifies the language of the letter of rights and addresses the need to simplify the language used to convey information provided in the letter.

27. In view of the issue to be assessed by the Court, it is also necessary to pay particular attention to the provisions of the Access to a Lawyer Directive. Adopted by the Parliament and the Council in 2013, the Directive, according to its Article 15 (1), was to be implemented by the Member States of the European Union by 27 November 2016.

28. The Ministry of Justice has consistently recognised that the national laws currently in place[25], based on the Constitution of the Republic of Poland of 2 April 1997[26], the Code of Execution of Criminal Sentences of 6 June 1997[27], the Code of Criminal Procedure of 6 June 1997, the Code of Procedure for Administrative Offences[28] of 24 August 2001 and the Regulation of the Minister of Justice of 11 June 2015 on the determination of a model Letter of Rights for detainees under the European Arrest Warrant29 implements the standard of the Directive.

29. In addition, the implementation of the Access to a Lawyer Directive is to be evidenced by the introduction, from 8 February 2018, of a reference to the Code of Criminal Procedure pursuant to Article 1 (1) of the Act of 10 January 2018 amending the Code of Criminal Procedure and certain

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[21] FRA, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf.

[22] Regulation of the Minister of Justice of 3 June 2015 on the determination of a model letter of rights for persons detained in criminal proceedings, Journal of Laws of 2015, item 835.

[23] Regulation of the Minister of Justice of 13 April 2016 on the determination of a model letter of rights for persons put in pre-trial detention in criminal proceedings, Journal of Laws of 2015, item 513.

[24] Regulation of the Minister of Justice of 14 September 2020 on the determination of a model letter of rights and obligations for suspects in criminal proceedings, Journal of Laws of 2020, item 1618.

[25] EUR-Lex, a database of European Union legislationhttps://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32013L0048&qid=1513170927543.

[26] Journal of Laws of 1997 No. 78, item 483 as amended.

[27] A consolidated text published in Journal of Laws of 2020, item 523, as amended.

[28] A consolidated text published in Journal of Laws of 2020, item 729, as amended.

[29] Journal of Laws of 2015, item 874.

other acts,[30] which reads as follows: *"This Act, within the scope of its application, implements the provisions of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJEU L 294, 6.11.2013, p.1)."* However, the Act did not introduce any changes to the Code of Criminal Procedure provisions on access to a lawyer.

30. Article 3 (2) (c) of the Access to a Lawyer Directive provides that: *"Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest: ... without undue delay after deprivation of liberty*". At the same time, recital 28 of the Access to a Lawyer Directive stipulates that the assistance of a lawyer must be arranged for a person deprived of liberty unless they have waived that right. Such assistance, as is apparent from the recital above, could be ensured precisely by drawing up a list of available lawyers, "lists of lawyers", from which the detainee could choose the lawyer he or she wishes to contact. However, as indicated above, no such lists have been created in Poland to date.

31. Article 301 CCP reads as follows: *"The suspect should be questioned, upon request, with the participation of an appointed defence lawyer. A failure of the defence lawyer to appear should not stop the questioning."* The Access to a Lawyer Directive sets a stronger standard in this respect because, in accordance with its Article 3 (2) (a), access to a lawyer should be ensured without undue delay before questioning by the police, another law enforcement or judicial authority. Furthermore, the lawyer may be absent only in certain cases referred to in Article 8(1) of the Access to a Lawyer Directive. At the same time, it should be pointed out that initial questioning usually takes place immediately after a person is detained, therefore any standards described above should also apply to the person to be questioned by the law enforcement authorities or the court.

32. Furthermore, Article 8 (1) of the Access to a Lawyer Directive states that temporary derogations from the application of Article 3 of that Directive: *"(a) shall be proportionate and not go beyond what is necessary; (b) be strictly limited in time; (c) not be based exclusively on the type or the seriousness of the alleged offence; and (d) not prejudice the overall fairness of the proceedings"*. At the same time, the recitals of the Access to a Lawyer Directive specify in which situations such derogations could be admissible. Recital 30 of that Directive provides as follows: "*Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, Member States should arrange for communication via telephone or video conference unless this is impossible"*. Other situations are listed in recitals 31 and 32 of the Access to a Lawyer Directive, which indicate that Member States should be able to apply temporary derogations from the right of access to a lawyer in the pre-trial phase: *"... when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person*" or "*... where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses"*. At the same time, for both recitals, the Directive stipulates that, where a temporary derogation is applied on the basis of the above two grounds, suspects or accused persons may be questioned without a lawyer being present: „*... provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence."* As indicated above, Polish laws, in particular the Code of Criminal Procedure, do not specify in any way when a temporary derogation in relation to the presence of a lawyer is admissible and this is based only on the general premises of the said Code. The national laws set out no relevant grounds such as those presented in the recitals of the Access to a Lawyer Directive.

33. Moreover, domestic regulations do not provide for an *"effective judicial review and remedies in cases where access to a lawyer is denied"*. Although pursuant to Article 246 CCP, a detainee may

[30] Journal of Laws of 2018, item 201.

lodge an appeal against the arrest, only the issues of legality, legitimacy and correctness of the arrest are examined as part of such proceedings. Thus, in the context of this review, courts do not assess whether the detainee has been allowed contact with a lawyer. In addition, the restriction of access to a lawyer may only be appealed to a directly superior prosecutor as laid down in Article 302 § 2 CCP. This means that existing measures cannot be considered to meet the requirements of Article 8 (2) of the Access to a Lawyer Directive, and any decision by law enforcement authorities to restrict access to a lawyer is not subject to judicial review.

34. Likewise, Polish law does not provide for the remedy referred to in Article 12 (1) of the Access to a Lawyer Directive. The 2018 HFHR Report indicates that "[i]n the opinion of defence lawyers, it is currently very difficult to effectively remove materials collected in pre-trial proceedings without the participation of a defence lawyer at further stages of court proceedings. Attempts to argue at the stage of court proceedings that there were deficiencies during initial questioning are, in the opinion of lawyers, dismissed with statements, e.g., that the accused is an adult and knew what he was saying during initial questioning. Sometimes courts allow the accused to be questioned again, but in the event of their refusal to testify, the accused's testimonies from the pre-trial proceedings are read out (Article 389 CCP)"[31]. The lack of a defence lawyer during procedural steps is analysed primarily in the context of Article 439 (10) CCP regarding the absence of a defence lawyer during court proceedings in a situation where the grounds for mandatory defence exist. Article 438 (2) CCP, which provides that: *"[t]he ruling shall be revoked or amended in the event of establishing: ... an infringement of rules of procedure, if it could affect the content of the ruling..."* cannot be treated as a provision creating a remedy. According to Article 168a CCP, the evidence cannot be deemed inadmissible solely on the grounds that it was obtained in violation of the rules of procedure. In such a situation, in accordance with a national practice, a violation of the rules on access to a lawyer will not, on their own, constitute an independent ground of appeal. In order for an appeal to be effective, it would be necessary to demonstrate the effect that the violation had on the content of the ruling (judgment). Consequently, Polish law does not meet the standard of the Access to a Lawyer Directive, which provides that there must be an effective remedy available without the need to demonstrate a link between a lack of access to a lawyer and the content of the decision or the fairness of proceedings in general.

Assessment of the conformity of national regulations with the Directive

35. The above concerns have been repeatedly expressed by legal scholars and practitioners. The Ombudsman has written to the Ministry of Justice inquiring about the work undertaken to implement the Access to a Lawyer Directive. The first and second written inquiry, sent on 29 April 2016[32] and 25 January 2017[33], respectively, contained questions regarding the provision of access to a lawyer to detainees immediately after their arrest, in accordance with the above Directive. According to the Ministry of Justice's reply to the inquiries, dated 17 February 2017, Polish legislation meets the requirements of the Access to a Lawyer Directive, as confirmed by experts of the Ministry of Foreign Affairs.[34] The Ministry of Justice provided the Ombudsman with the same answer on 18 October 2018[35], following three further Ombudsman's submissions[36] with questions on the implementation of

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[31] HFHR, *Wzmocnienie praw procesowych w postępowaniu karnym*, https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Wzmocnienie-praw-procesowych-w-postepowaniu-karnym-29-03.pdf.

[32] Ombudsman, letter of 29 April 2016, ref. II.5150.9.2014.MM, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20ws.%20rekomendacji%20Komitetu%20ONZ%20Przeciwko%20Torturom.pdf.

[33] Ombudsman, letter of 25 January 2017, ref. II.5150.9.2014.MM, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20Stanis%C5%82awa%20Trociuka%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20zatrzymanego%20do%20pomocy%20prawnej.pdf.

[34] Ministry of Justice, letter of 17 February 2017, ref. DL-III-072-29/16, https://www.rpo.gov.pl/sites/default/files/pismo%20MS%2017022017.pdf.

[35] Ministry of Justice, letter of 18 October 2018, ref. : DL PK II 053-1/18, https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2018.10.2018.pdf.

[36] Ombudsman, letter of 5 June 2017, ref. II.5150.9.2014, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf; Ombudsman, letter of 4 July 2018, ref. II.5150.9.2014.MM,

the Access to a Lawyer Directive, which also noted that no laws had been passed to transpose the Directive[37].

36. President of the Supreme Court addressed the Access to a Lawyer Directive in the 2017 Comments on Detected Irregularities and Loopholes in Law[38], which indicate that the transposition of the Directive was abandoned because of the failure to adopt legislation that would aim to perform the implementation obligation[39]. In the Comments, the President of the Supreme Court argued that: *"... concerns have arisen with regard to the lack of precise rules governing the possibility for a suspect to consult their defence lawyer before the initial questioning as part of the procedure of presentation of charges. It seems that the obligation of a criminal justice body to immediately question a suspect after announcing a decision to present charges, which arises under Article 313 § 1 CCP, combined with the lack of a provision that would require that a consultation with a lawyer be carried out before the commencement of the questioning, violates the right of access to a lawyer 'before questioning' specified in Article 3 (2) (a) of the Directive. Article 301 CCP provides for the right of a suspect to be questioned in the presence of a defence lawyer, but only the one that has already been 'appointed' in the case. It does not refer to enabling the suspect to consult their defence lawyer before the questioning takes place.... Notwithstanding the requirements of the Directive, legal scholars and commentators have long drawn attention to the incorrect regulation of access to a defence lawyer in the context of the initial questioning under Article 301 CCP."*[40] Furthermore, as the President of the Supreme Court emphasized in the 2018 Comments on Detected Irregularities and Loopholes in Law, it was difficult to agree with the lawmakers that the Access to a Lawyer Directive had been effectively implemented, despite the introduction of the relevant reference[41] to the Code of Criminal Procedure pursuant to Article 1 (1) of the Act of 10 January 2018 amending the Code of Criminal Procedure and certain other acts. At that occasion, the President of the Supreme Court noted: *"While it can be argued that the requirements of the Directive are partially met by the applicable provisions of criminal procedure – primarily in relation to the rights of the suspect and accused person – a legislative action is still necessary."*[42]

V. Conclusion

37. In the view of the Helsinki Foundation for Human Rights, the current legislative framework of access to a defence lawyer in Poland is affected by many serious shortcomings, which undermine the effective exercise of the right to a defence in criminal trials. Among these shortcomings, problems with the effective communication of the right to a lawyer and the provision of an opportunity to contact a lawyer at the initial stages of proceedings are particularly significant. All these obstacles, both practical and legal, may lead to a situation where the right to a lawyer in a particular case is effectively non-existent. The above means that the judgment delivered by the Court will be of particular importance for the system of procedural guarantees in Poland and the effective practical implementation of these guarantees.

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https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20wprowadzenia%20dyrektywy%20gwarantuj%C4%85cej%20m.in_.%20prawo%20zatrzymanego%20do%20adwokata.pdf; Ombudsman, letter of 27 September 2018, ref. KMP.570.3.2017.RK, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20ws.%20zapewnienia%20dost%C4%99pu%20do%20obro%C5%84cy%20ju%C5%BC%20od%20chwili%20zatrzymania%20.pdf.

[37] See also: Letter from the Ministry of Justice of 15 September 2020, ref. DLPK-II.070.45.2020, https://www.adwokatura.pl/admin/wgrane_pliki/file-dlpk-ii070452020-ms-do-nra-dostep-do-adwokata-dla-osoby-zatrzymanej-30198.pdf., HFHR, *HFPC pyta o wdrożenie dyrektywy o dostępie do adwokata. Ministerstwo Sprawiedliwości: polskie prawo jest zgodne z przepisami dyrektywy, 3 lutego 2020*, https://www.hfhr.pl/hfpc-pyta-o-wdrozenie-dyrektywy-o-dostepie-do-adwokata-ministerstwo-sprawiedliwosci-polskie-prawo-jest-zgodne-z-przepisami-dyrektywy/.

[38] Pierwszy Prezes Sądu Najwyższego (President of the Supreme Court), *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa 2017, http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2017.pdf.

[39] *Ibid.*, p. 86.

[40] *Ibid.*, p. 87.

[41] President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie w 2018 roku*, Warszawa 2019, p. 100, http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki%20w%20prawie-2019.pdf.

[42] *Ibid.*, p. 100.