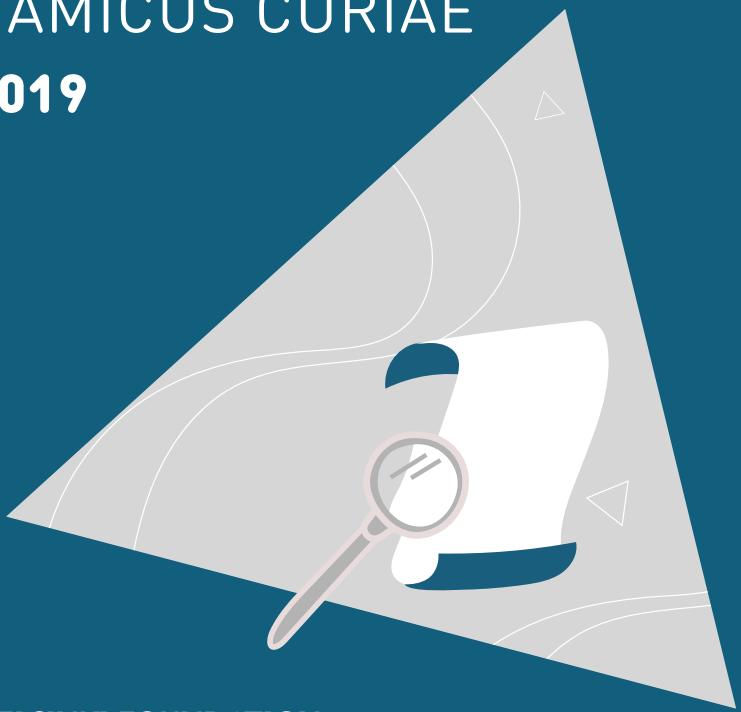
HELSINKI FOUNDATION FOR HUMAN RIGHTS

AS AN AMICUS CURIAE

2018–2019



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WARSAW, MAY 2020

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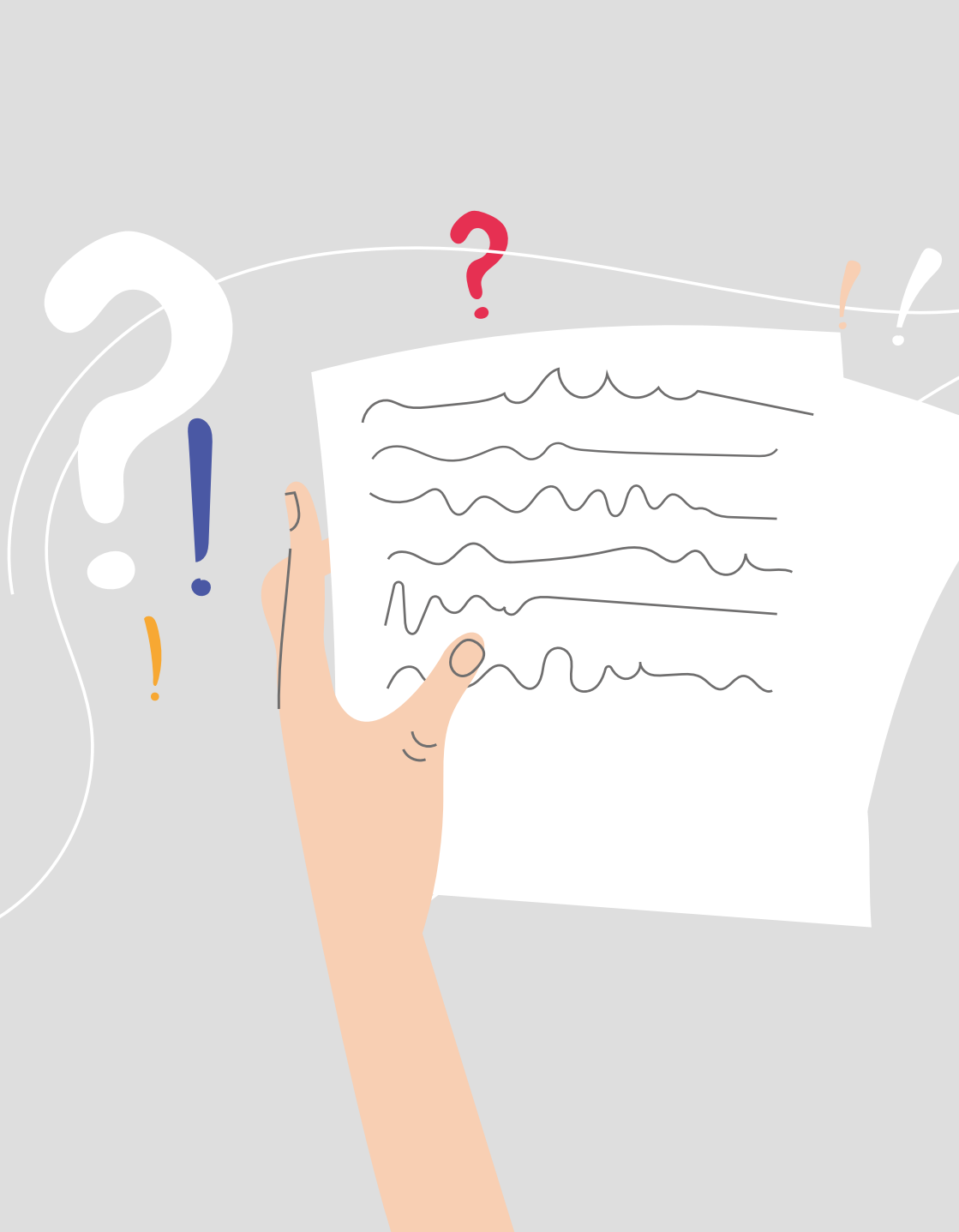


Who we are

The **Helsinki Foundation for Human Rights** (HFHR, the Foundation) was established in 1989, seven years after the founding of the underground Helsinki Committee in Poland, whose mission was to monitor the fulfilment by the Communist government of the obligations concerning human rights and freedoms set out in the CSCE Helsinki Final Act.

Following the change of the political system, the Committee members established the Foundation – an independent organisation whose mission is to participate in the building, strengthening and defending of standards of the rule of law, constitutional democracy and respect for human rights and freedoms in Poland and abroad.

What we do

The HFHR promotes the development of human rights standards through legal programmes, as well as monitoring and educational activities, and by participating in international research projects.

The HFHR is a leading organization involved in strategic human rights litigation in Poland. Over the years of its work, the Foundation has become known not only for its expertise but also for its willingness to take on new challenges. In 2004, the HFHR launched the **Strategic Litigation Programme** (SLP). Since then, the Foundation regularly brings, or engages in, strategically significant court and administrative proceedings. Through its participation in strategic litigation cases, the HFHR aims to obtain ground-breaking judgments, which change practices or laws on specific issues that raise serious human rights concerns.

The HFHR has also always been involved in promoting the concept of strategic litigation among human rights defenders operating in Poland and abroad. The international limb of strategic litigation work of the HFHR has been focused on education. A module on legal activities, including those related to strategic litigation, was a part of the curriculum of all seven **Advanced International Courses in Human Rights**. Moreover, the Foundation organized numerous training courses on conducting legal activities in countries of Eastern Europe and Central Asia.

HFHR as an amicus curiae

The amicus curiae brief is the basic tool used by the HFHR in the strategic litigation process. An amicus submission enables a non-governmental organization to express its views in judicial proceedings and draw the court's attention to human rights concerns.

As part of its activities, the HFHR submits amicus curiae briefs before Polish national authorities (common courts, administrative courts, the Supreme Court, the Supreme Administrative Court and the Constitutional Tribunal) and those of other countries (Kazakhstan, Kyrgyzstan, Tajikistan), as well as before international bodies, in particular, the European Court of Human Rights (ECtHR). So far, our ECtHR amicus submissions have concerned cases brought against Azerbaijan, Estonia, France, Iceland, Poland, Russia, Romania, Slovakia, Ukraine, United Kingdom, Hungary and Italy.

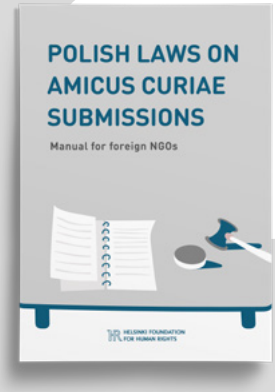
Amicus curiae briefs, 2018-2019

The impact of amicus curiae briefs in the practice of HFHR is confirmed by statistical data. Only in 2018-2019, the HFHR submitted **61 briefs**.

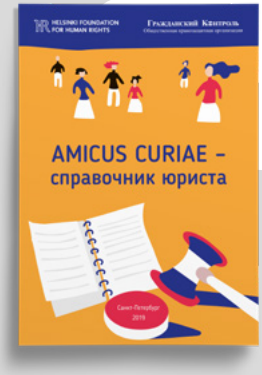
In view of the human rights problems currently faced by the people in the countries where we operate, as well as the rapid changes in the legal systems, our recent opinions have focused on the following issues:

- rights of persons deprived of liberty,
- right to an independent court and a fair trial,
- rights of refugees and migrants,
- freedom to act of civil society,
- freedom of expression,
- cases of discrimination,
- freedom from torture and its protection in selected countries,
- freedom of movement,
- nature of decisions issued by UN Treaty Bodies,
- right to fair compensation.

As part of our activities taken to promote and raise the awareness of the amicus submissions, we organized the international conference *Amicus Curiae – Achievements, Challenges, Perspectives*, which was attended by lawyers, human rights defenders and academics from Eastern Europe, Caucasus and Central Asia. We also prepared the manual *Amicus curiae – a lawyer's toolkit* which presents Polish and Russian experiences in using amicus curiae briefs and the relevant opportunities offered by UN Treaty Bodies. To promote amicus submissions, we made an animation in Russian, English and Polish. We have also prepared a handbook for international and foreign organizations that would like to submit amicus curiae briefs in proceedings before Polish courts.



Manual for foreign NGOs



Amicus curiae – a lawyer's toolkit

International conference "Amicus Curiae – Achievements, Challenges, Perspectives"

Our amicus curiae team

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AMICUS CURIAE BRIEFS SUBMITTED IN PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Freedom from torture

EFFECTIVENESS OF PROCEEDINGS IN CASES INVOLVING ALLEGATIONS OF THE ABUSE OF FORCE BY POLICE OFFICERS

Kuchta and Mętel v. Poland, application no. 76813/16

Case timeline

07.02.2015 The applicants are affected by a police raid 29.02.2016 A district prosecutor's office discontinues proceedings 20.07.2016 A district court upholds discontinuation 02.12.2016 Applicants lodge their application with the ECtHR 08.12.2017 The application is communicated to the Government of Poland 16.04.2018 HFHR submits an amicus curiae brief

Case summary

The case involves a violent assault on two men carried out by police officers during a police raid. The incident on which the application is based took place in 2015 in Kraków when the police raided an applicant's apartment on false intelligence that a suspect was hidden on the premises. According to the applicants, the police breached the door and deployed tear gas indoors despite

the presence of a five-month-old infant. The officers knocked the man to the floor and started beating him. The second applicant arrived at the scene shortly after he had learnt about the situation. He was also beaten by the intervening officers. Both men were arrested and brought to a police holding cell but were soon taken to hospital as their medical condition deteriorated. A prosecutor's office and the court did not find any grounds for launching an official inquiry into the alleged abuse of police powers.

Why did the HFHR get involved in this case?

The HFHR has always been particularly interested in addressing the problem of police violence. The Kuchta case is relevant to the ongoing national discussion on police violence. These proceedings also provide the ECtHR with another opportunity to consider whether the currently applicable law (in particular the provisions of the Criminal Code) are capable of effectively addressing violations of Article 3 of the European Convention on Human Rights (ECHR). The guidance provided in the upcoming ECtHR judgment may contribute to improving the efficiency of proceedings in other similar cases.

The HFHR's amicus curiae brief

Key points of the brief:

- International bodies (CPT, CAT, HRC) have noticed the problem of inhuman or degrading treatment by police officers in Poland and called for a reform of the Polish law and practice.
- According to the statistics obtained by the HFHR, more than 500 complaints alleging inhuman or degrading treatment or punishment are filed against the police each year.
- Lawyers surveyed by the HFHR confirmed that in their professional practice they had been in contact with clients reporting police mistreatment, which might satisfy the criteria established in Article 3 ECHR.

The amicus curiae brief is available in Polish at
https://www.hfhr.pl/wp-content/uploads/2018/04/Amicus_Kuchta_POL.pdf

Right to a fair trial

STATUS OF THE CRIMEA UNDER INTERNATIONAL LAW

Sentsov and Kolchenko v. Russia, application no. 29627/16

2016 — 02.04.2019

Case timeline

27.04.2016 Oleg Sentsov and Aleksandr Kolchenko file their application 19.11.2018 The ECtHR communicates the application 02.04.2019 HFHR submits an amicus curiae brief

Case summary

The applicants, Oleg Sentsov and Aleksandr Kolchenko, filed an application with the ECtHR complaining about several violations that occurred during the criminal proceedings conducted against them. Mr Sentsov complained about a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which resulted from the use of torture and other forms of ill-treatment by Russian security officials during the investigation and the absence of an effective procedure in that regard. Both applicants complained about a violation of Article 6 (1) ECHR, which resulted from their cases having been decided by a Russian court and them having been convicted based on evidence obtained through torture and

coercion, fabricated evidence (Mr Sentsov biological material on a firearm), and for political reasons. Mr Sentsov also complained about a violation of Articles 10 and 18 ECHR, alleging that his conviction was intended to intimidate those who oppose Russian policies.

Why did the HFHR get involved in the case?

Individual applications submitted to the ECtHR by inhabitants of the Crimea should be considered in the light of the current status of the Crimea as an occupied territory. Another reason for lodging the amicus curiae brief was the unprecedented severity of the sentences imposed on the applicants.

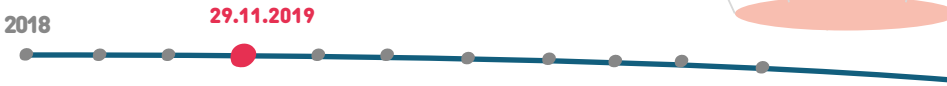
The HFHR's amicus curiae brief

In the amicus curiae brief submitted in this case, the Foundation focused on issues related to the status of the Crimea, providing an opportunity to answer the Court's question about whether the court hearing the applicants' case was "established by law" within the meaning of Article 6 § 1 ECHR. The brief highlighted that:

- Actions taken by the Russian Federation resulted in violations of international obligations and cannot be justified by any factual circumstances.
- Based on international law, the actions of the Russian Federation on the territory of the Crimea should be classified as an act of aggression and the annexation of the Crimea by the Russian Federation should be considered illegal.
- There are different international standards on the right of self-determination of nations and the rights afforded to national minorities.
- States and international organisations are prohibited from recognising the consequences of unlawful acts under relevant standards of international law.
- Under international law, the Crimea should be defined as a territory subject to military occupation, which means that the local population is subject to the guarantees of the Fourth Geneva Convention.
- The Foundation recalled the rules governing the application of the law and operation of courts in territories under belligerent occupation.

TERMINATION OF THE TERM OF OFFICE OF A MEMBER OF THE NATIONAL COUNCIL OF THE JUDICIARY AND THE RIGHT TO A COURT

Grzęda v. Poland, application no. 43572/18



Case timeline

6.03.2018 The term of office of then-sitting members of the NCJ is terminated 4.09.2018 The application is lodged with the ECtHR 9.07.2019 The case is communicated to the Polish Government 29.11.2019 HFHR submits an amicus curiae brief

Case summary

The applicant is a judge of the Supreme Administrative Court. In January 2016, he was elected a member of the National Council of the Judiciary. According to the Polish Constitution, his term of office should be four years, but in December 2017, the Sejm passed a law which terminated the mandate of all judges sitting on the NCJ. The new law introduced a completely different model for the election of judges to the NCJ – from that moment on, they were to be appointed not by other judges, but by the Sejm. As soon as new NCJ members were elected by the Sejm in March 2018, the terms of their predecessors, including the applicant, expired. Since the law did not provide the prematurely recalled members of the NCJ with any remedy against their dismissal, the applicant turned directly to the ECtHR, lodging an application in which he complained of a breach of Article 6 (1) and Article 13 ECHR.

Why did the HFHR get involved in the case?

The HFHR submitted an amicus curiae brief because of the significance of the case. The current composition of the NCJ raises serious concerns and, according to many experts, is incompatible with the Constitution and international standards. Such controversies also result in the uncertain legal standing of the judges appointed on nomination of the NCJ "reformed" in 2018. In Grzęda, the ECtHR will not assess the new model for the election of the NCJ members but may decide whether the early termination of their predecessors' term of office conformed to the Convention.

HFHR amicus curiae brief

In its brief, the Foundation presented the following observations:

- Neither the Constitution nor other laws applicable as of the date of the applicant's election allowed for the dismissal of a judge appointed to serve on the NCJ. Moreover, according to the jurisprudence of the Polish Constitutional Tribunal, a shortening of the term of office of a constitutional body is only allowed in exceptional cases.
- Dismissal of a judge from the NCJ, coupled with a failure to provide him with a judicial remedy, was incompatible with the principle of the rule of law because, alongside other changes introduced by the December 2017 law, it undermined the independence of the Council and affected the independence of the judiciary. This aspect was also highlighted by the Court of Justice of the European Union in its judgment of 19 November 2019.
- At present, the constitutional complaint cannot be considered an effective means of protection of individual rights and freedoms. This ineffectiveness is a consequence of a range of factors such as the problems caused by the presence of improperly appointed persons on the Tribunal's panels, the irregularities in case assignment and a significant decrease in the number of constitutional rulings.

The amicus curiae brief is available in English at:
http://www.hfhr.pl/wp-content/uploads/2019/11/Grzęda-p.-Polsce-amicus.pdf

ADJUDICATION BY A DEFECTIVELY APPOINTED JUDGE AS A VIOLATION OF ARTICLE 6 ECHR

Ástráðsson v. Iceland, application no. 26374/18

2018 — 30.12.2019

Case timeline

31.05.2018 The application is lodged 19.06.2018 The application is communicated to the Government of Iceland 12.03.2019 The ECtHR issues the chamber judgment 9.09.2019 ECtHR Grand Chamber accepts Iceland's referral request 30.12.2019 HFHR submits an amicus curiae brief 5.02.2020 ECtHR Grand Chamber holds a hearing.

Case summary

The applicant was convicted by a court judgment issued by a panel comprising a defectively appointed judge. The defectiveness resulted from, inter alia, a government minister's unlawful nomination of judge appointees who have been evaluated by an independent committee of experts as lesser-performing candidates. Two unsuccessful candidates sued Iceland, claiming compensation for the pecuniary and non-pecuniary damage resulting from the unlawful infringement of their rights. The case was finally decided by the Supreme Court of Iceland, which ruled for the claimants and concluded that the appointment procedure had indeed been unlawful. However, the defectively appointed judges continued to adjudicate cases, and one of them convicted the applicant. The man filed a cassation appeal with the Supreme Court, claiming that the ruling was made by an improperly constituted court, but his complaint was dismissed. The Supreme

Court decided that defects in the judicial appointments process did not affect the legality of decisions made by the defectively appointed judges, holding that these legal defects did not lead to the invalidity (non-existence) of the acts of judicial appointments. On 12 March 2019, a chamber of ECtHR ruled that the issuance of a judgment by a panel composed of a defectively appointed judge violated Article 6 of the ECHR (right to a court established by law). However, the Government of Iceland requested the case to be referred to the Grand Chamber, which accepted the referral request.

Why did the HFHR get involved in the case?

The HFHR decided to become involved in Ástráðsson because of the precedent nature of this case. This case offers the ECtHR an opportunity to clarify its case law on the right to a court established by law. Moreover, in view of the current situation of the judiciary, this decision may also be relevant to Poland.

The HFHR's amicus curiae brief

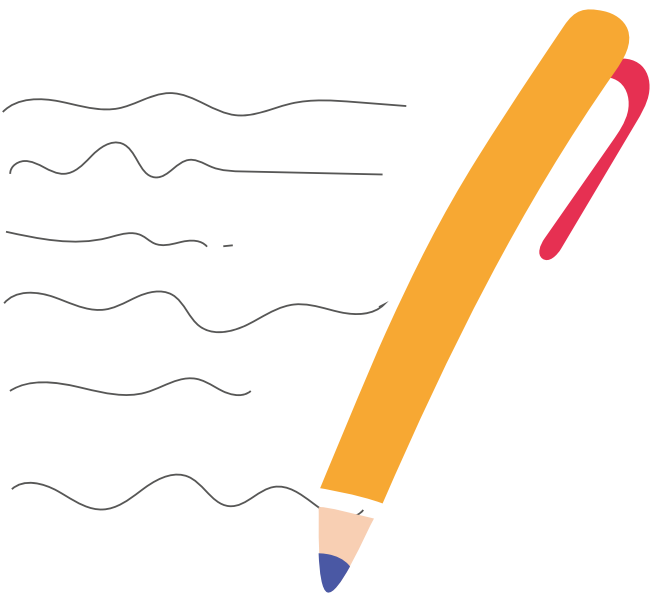
In the brief, the HFHR highlighted the following points:

- The *Ástráðsson* case is relevant to other countries of the Council of Europe, including Poland. Poland is a country affected by disputes over the lawfulness of election and appointments of certain judges, in particular, the three "double-judges" of the Constitutional Tribunal and several hundreds of judges appointed to sit on the Supreme Court and common courts on nomination of the National Council of the Judiciary composed of members elected under the law adopted on December 2017.
- In a state governed by law, members of the public must be sure that judges hearing their cases have been lawfully appointed. Otherwise, the functional legitimacy of the judiciary may be undermined.
- Serious legal violations in the judicial appointment process, and especially violations of laws designed to ensure that the procedure is objective and free from political interference, may have a negative impact on the right to a court. The proper formulation of the model of judicial appointments is recognised as a factor to be taken into account in the assessment of judicial

independence; accordingly, a breach of relevant laws may also affect the perception of courts as independent bodies.

- Irregularities in the judicial appointment process may also pose a threat to legal certainty since judgements handed down with the participation of judges with questionable legal standing may be challenged through ordinary or extraordinary remedies.
- The crisis of the Polish courts and the Constitutional Tribunal demonstrates that any legislative or executive tampering with the process of judicial appointments may lead to legal chaos.

The amicus curiae brief is available in English at https://www.hfhr.pl/wp-content/uploads/2020/01/HFPC_Amicus_Astradsson_Iceland.pdf



Right to respect for private and family life

TRANSCRIPTION OF THE BIRTH CERTIFICATES OF SURROGATE-BORN CHILDREN

French court's request under Protocol No. 16 (P16-2018-001)

Case timeline

12.10.2018 French Court of Cassation submits a request to the ECtHR 3.12.2018 A five-judge panel of the ECtHR Grand Chamber approves the request 31.01.2019 HFHR submits an amicus curiae brief 10.04.2019 The Grand Chamber issues an advisory opinion

Case summary

The French Court of Cassation asked the ECtHR for an advisory opinion in a pending case concerning the rights of surrogate-born children. It became unclear in that case how countries that do not allow surrogacy should deal with birth certificates issued for children born by surrogates in a jurisdiction where

the procedure is legal. In particular, it was not clear whether it is permissible to refuse to transcribe such a document and thus to enter it in a national civil registration system. The Court of Cassation asked whether, in the light of Article 8 ECHR (which guarantees the right to privacy), it is permissible to transcribe a birth certificate by recording the child's biological father as the "legal" father while describing the mother as "unknown". The Court also sought to ascertain whether the answer to the first question depends on whether or not the child is biologically related to the host mother (the donor of the subsequently fertilised oocyte). Besides, the court asked the ECtHR to determine whether, if such a partial transcription infringes Article 8 ECHR, that infringement may be rectified by permitting the host mother to adopt the child.

Why did the HFHR get involved in the case?

This case should be considered landmark for two reasons. The first one is procedural in nature: this was the first time when the procedure laid down in Protocol No. 16 to the ECHR has been applied. The other reason relates to the substance of the case, namely transcription of the birth certificates of surrogate-born children. Although the case concerns France, the ECtHR's judgment in this case may also affect the situation in Poland.

The HFHR's amicus curiae brief

In the brief, the HFHR highlighted the following points:

- Referring to the status of surrogacy under the Polish law and the latest jurisprudence of administrative courts in this area, the HFHR noted that Poland does not directly prohibit surrogate motherhood, however, according to the Family and Guardianship Code, only the woman who gave birth to a child is considered this child's mother. Furthermore, it is recognised that all surrogate mother contracts contravene basic principles of the Polish legal order and are therefore void by law. For this reason, in the past, the courts refused to transcribe foreign birth certificates of children born by surrogate mothers. However, the more recent case law of the Supreme Administrative Court has contributed to a significant evolution in the ap-

proach to the matter at hand. In several judgments delivered in 2018, the Supreme Administrative Court took the view that it is unacceptable to refuse to transcribe the birth certificate of a child born by a surrogate as such a refusal would violate the rights of the child guaranteed by the Constitution and international law, including the right to citizenship and the right to obtain identity documents.

- During the execution of these judgments, several practical problems have arisen, in particular concerning the method of "partial transcription" proposed by the French court, which involves recording only the biological parent in the national civil registration system.
- The legal and ethical doubts about surrogacy cannot justify taking an action that would jeopardize the interests of the child.
- The principles of dignity and equality prohibit discrimination against a child on the grounds of the method of the child's conception and birth. The child cannot, therefore, be punished for the behaviour of their parents or treated as a means to achieve the goal of discouraging the conclusion of surrogate contracts.

The HFHR took the view that if a child was brought up by the biological father and the host mother from birth, the emotional bond arising between them is as strong as that existing in biological families, there is a foreign birth certificate stating that the child was born by a surrogate mother and legally registered abroad, and also if a refusal to recognise the motherhood of the host mother is not justified by the best interests of the child, the certificate should be transcribed in full, i.e. include the particulars of both the father and the host mother.

ECtHR's judgment

On 10 April 2019, the European Court of Human Rights issued its first advisory opinion under Protocol No. 16 to the European Convention on Human Rights. In response to questions from the French Court of Cassation, the ECtHR held that under Article 8 ECHR (the right to privacy and protection of family life) domestic law must provide a possibility of the recognition of the relationship between a

child born by a surrogate mother and the woman registered in a foreign birth record as his intended, or legal, mother. However, such recognition does not have to take the form of registering the intended mother in a birth record. States may use other recognition mechanisms, such as enabling the adoption of the child by the intended mother, provided that they are effective, expeditious and implemented in line with the best interests of the child.

The ECtHR has strongly emphasised that the best interests of the child must always be a primary consideration in cases involving children.

The amicus curiae brief is available in English at
https://www.hfhr.pl/wp-content/uploads/2019/02/Opinia-do-ETPC-w-sprawie-transkrypcji-aktow-urodzenia-dzieci-urodzonych-przez-surogatki.pdf

Freedom of speech

FREEDOM OF EXPRESSION DURING ARMED CONFLICTS

Lefter and Others v. Ukraine and Russia, application no. 30863/14

Case timeline

23.04.2014 Sergiy Lefter submits his application 24.04.2014 Irma Krat submits her application 05.05.2014–01.07.2014 The remaining applicants submit their applications 09.01.2018 The ECtHR communicates the case 02.05.2018 HFHR submits an amicus curiae brief

Case summary

Between 23 April 2014 and 1 July 2014, the ECtHR received 5 applications from persons detained and imprisoned by separatists from the so-called Donetsk People's Republic. The applicants complained about a violation of Article 3 ECHR, alleging having been subjected to torture (Siergiy Lefter), improper and degrading treatment and detention in inhumane and degrading conditions. They also relied on Article 5 ECHR, complaining about unlawful detention. Also, the two applicants who are journalists (Siergiy Lefter and Irma Krat), alleged to have

been victims of the violations of Article 8, in connection with an unauthorised search of their telephones and laptops, and Article 10 of the Convention, in connection with having been persecuted for expressing pro-Ukrainian views.

Why did the HFHR get involved in the case?

The Foundation wanted to contribute to the development of ECtHR guarantees for war correspondents. The special status of war correspondents is protected by both humanitarian law and human rights law. The Foundation's opinion presented the standards developed in those systems, which, in accordance with the existing case law of the ECtHR, intersect with each other.

The HFHR's amicus curiae brief

As two of the applicants were journalists, the HFHR drew attention to a specific aspect of the case, namely an interference with the freedom of expression. In its amicus curiae brief the Foundation focused on the following aspects of the case:

- During armed conflicts, the role of journalists is to inform the international community about the actual nature and course of the conflict and to document any violations of international law.
- The statistics on the attacks against journalists in Ukraine illustrate a worrying trend of deteriorating safety of journalists in the country.
- The standards of protection of journalists during armed conflicts enshrined in international humanitarian law and international human rights law are a prerequisite for the exercise of the journalistic profession and the right to freedom of expression.
- The guarantees of protection of the reporter's privilege are an essential element of the freedom of the media and a condition for the exercise of their function of a public watchdog given the substantial risks faced by the journalists' sources of information in times of armed conflicts.

The amicus curiae brief is available in English at
https://www.hfhr.pl/wp-content/uploads/2018/06/LEFTER-v.-UKRAINE-AND-RUSSIA-amicus-02.05.2018-1.pdf

DEFAMATION AS A RESTRICTION OF THE FREEDOM OF EXPRESSION

Cieśla v. Poland, application no. 70345/17

Case timeline

24.10.2014 Wojciech Cieśla submits his application to the ECtHR 13.09.2018 The case is communicated to the Polish Government 20.12.2018 HFHR submits an amicus curiae brief 22.10.2019 Poland acknowledges violations.

Case summary

The case of *Cieśla v. Poland* concerns a criminal defamation conviction of a journalist. In accordance with Article 212 (2) of the Criminal Code, a journalist convicted of defamation may be sentenced to imprisonment for up to one year. The accusation was brought against Mr Cieśla in the wake of his article, in which he described the practice of granting sizeable severance payments by a state-owned company. National courts found him guilty of defamation and ordered him to pay a fine. The Helsinki Foundation for Human Rights attempted to intervene in the domestic proceedings, but its request was denied by the court.

Why did the HFHR get involved in the case?

The HFHR decided to submit an amicus curiae brief because defamation proceedings are the most common form of exerting pressure on journalists and, in our opinion, are intended to produce the so-called chilling effect. They are used as an instrument for restricting the freedom of expression by national and local politicians.

The HFHR's amicus curiae brief

In the brief, the HFHR highlighted the following points:

- According to the well-established case law of the ECtHR, the penalty of imprisonment for speech (other than hate speech or incitement to a crime) is considered a disproportionate penalty.
- According to statistics of the Polish Ministry of Justice, in 2014-2017, the number of final convictions under Article 212 (2) of the Criminal Code doubled (from 58 to 137). These statistics illustrate a trend of criminal measures being the remedy most commonly used by persons seeking to protect their reputation.
- The defamation procedure infringes the principle of the presumption of innocence since it is the accused (and not the person filing the private indictment) who must bear the burden of proving that they have not committed the offence.
- According to settled case law, a journalist is not obliged to report the facts without error but should be able to demonstrate that they have acted in accordance with the principles of journalistic integrity, in particular with respect to the vetting of sources.
- National courts should give a broad interpretation to the notion of journalists "acting in the public interest". This notion should be understood to include reporting on matters related to the operations of state-owned companies.

The amicus curiae brief is available in English at
http://www.hfhr.pl/wp-content/uploads/2020/03/2018_12_Ciesla.pdf

Freedom of assembly and association

RESTRICTIONS ON THE ACTIVITIES OF CIVIL SOCIETY

Levada v. Russia, application no. 16094/17

Case timeline

21.02.2017 Levada Centre submits an application to the ECtHR 19.06.2018 The ECtHR communicates the case to the Government of Russia 13.11.2018 HFHR submits an amicus curiae brief

Case summary

The *Levada* case concerns a Russian law on non-governmental organisations. According to this law, all non-governmental organisations that "engage in political activities" and receive foreign funding must register as "foreign agents". Moreover, all materials published by such organisations must be identified as originating from a "foreign agent". The organisations in question also need to fulfil many other additional administrative obligations.

Why did the HFHR get involved in the case?

The HFHR decided to submit the brief because the ECtHR's judgment in this case may be relevant not only to Russia, but also to entire Europe. The ruling that the Strasburg Court is to make in Levada may contribute to the strengthening of standards on the protection of freedom of association and, consequently, discourage other countries from enacting similar laws.

The HFHR's amicus curiae brief

In the brief, the HFHR highlighted the following points:

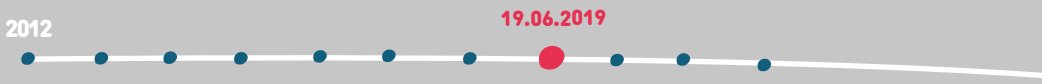
- Laws designed to curb NGO activities interfere with two closely related freedoms, namely the freedom of association and freedom of speech, which are guaranteed under international law. For this reason, laws restricting NGOs' ability to raise funds have been subject to extensive criticism by many international bodies.
- Similar restrictions were introduced in several countries including Hungary, where they also caused controversy. The HFHR noted that proponents of limiting NGO access to foreign funding often invoke the example of the US Foreign Agents Registration Act (FARA). In practice, however, the narrow interpretation given to that Act prevents it from being applied against NGOs engaged in human rights advocacy or the promotion of the rule of law; instead, FARA is used to regulate organisations, often of a commercial nature, engaged in political lobbying to promote interests of foreign countries.
- In Poland, where an equivalent law on foreign agents has not yet been adopted, NGOs receiving funding from abroad have been targeted by a smear campaign conducted by the state-owned television and subjected to certain measures by public authorities that adversely affect the freedom of NGO activity.

The amicus curiae brief is available in English at
http://www.hfhr.pl/wp-content/uploads/2018/11/Amicus-skan.pdf

Procedural guarantees concerning the removal of foreign nationals

PROCEDURAL GUARANTEES IN CASES INVOLVING THE EXPULSION OF FOREIGNERS CONSIDERED A THREAT TO NATIONAL SECURITY

Muhammad and Muhammad v. Romania, application no. 80982/12



Case timeline

12.2012 Foreign nationals are considered a security risk and deported from Romania 19.12.2012 The application is lodged with the ECtHR 10.07.2015 The ECtHR communicates the case 27.02.2019 The case is referred to the Grand Chamber of the ECtHR 19.06.2019 HFHR and ALI submit an amicus curiae brief 25.09.2019 ECtHR Grand Chamber holds a hearing

Case summary

In December 2012, Romanian authorities expelled the applicants (who are foreign nationals) considering them "a security risk". They received no information on the factual basis of the expulsion decision, as the relevant materials have been classified and provided exclusively to the court hearing the case. In their application lodged with the ECtHR, the foreign nationals complained that the Romanian authorities had violated Article 1 of Protocol No. 7 to the Convention by failing to observe the procedural guarantees described in that provision and by failing to inform them of the reasons for their expulsion.

Why did the HFHR get involved in the case?

Muhammad is a landmark case because it demonstrates a systemic problem, which also appears in Poland. The problem is that foreigners are not informed in any way of the reasons for considering them a security risk or the evidence supporting this conclusion, which deprives them of the possibility to mount an effective defence. Although the case concerns Romania, the ECtHR's judgment in Muhammad may also affect the situation in Poland.

The HFHR's amicus curiae brief

In their brief, the HFHR and the Association for Legal Intervention made the following observations:

- According to the case law of the ECtHR, the person concerned should have at least a limited opportunity to learn about the factual basis of the expulsion decision to be able to respond to the arguments raised by the authorities.
- An approach similar to the above has been expressed in the case law of the Court of Justice of the European Union and opinions presented by UN bodies.
- The HFHR and ALI argue that the procedural safeguards under Article 1 of Protocol 7 to the Convention were not satisfied in a situation where only judges have access to classified documents that have not been disclosed to the foreign nationals concerned.

The amicus curiae brief is available in English at
https://www.hfhr.pl/wp-content/uploads/2019/06/Muhammad-v-Rumunia-amicus.pdf

HFHR'S AMICUS CURIAE BRIEFS SUBMITTED TO POLISH COURTS

Right to life, liberty and security of a person

THE CASE OF CONDITIONAL PRE-TRIAL DETENTION

M.L., case no. IV Kz 282/19

Case timeline

15.03.2019 A district court issues a decision on the conditional pre-trial detention of M.L., ordering to replace detention by a non-custodial preventive measure upon the payment of financial surety 15.03.2019 A prosecutor files an interlocutory appeal against the decision, requesting the suspension of its execution 16.03.2019 Financial surety is paid 18.03.2019 The prosecutor drafts and signs a receipt of acceptance of financial surety but M.L. remains in custody 18.03.2019 The district court issues a decision in which it orders the execution of the 15 March decision to be suspended until the appeal is heard 19.03.2019 The prosecutor orders the return of the financial surety 2.04.2019 HFHR submits an amicus curiae brief 3.04.2019 A regional court issues a decision upholding the 15 March decision; M.L. is released from custody

Case summary

On 15 March 2019, M.L., CEO and shareholder of a company publishing two national weeklies, was charged with a criminal offence and put in pre-trial detention. In the pre-trial detention order, the District Court in Wrocław decided that M.L.'s detention would be lifted upon the payment of the financial surety. Although the whole amount of the surety has been paid, which was confirmed in a receipt issued by a prosecutor's office, the man's pre-trial detention was not revoked. Instead, the court issued a decision suspending the execution of the imposed measure pending the resolution of the interlocutory appeal filed by the prosecutor's office, which, given the then-current procedural status of the case, was clearly unlawful as the suspension was ordered already after the financial surety receipt had been given.

Why did the HFHR get involved in the case?

Pre-trial detention has always been a focal point of the Foundation's work. Our amicus curiae briefs on pre-trial detention usually concern the extensive length of this most severe preventive measure. However, the HFHR has also frequently addressed the practice of suspending the execution of the measure known as "conditional pre-trial detention". In 2013, we requested the Ombudsman to exercise his statutory powers and present the Supreme Court with a legal question concerning, among other things, the possibility of suspending the enforceability of a decision on conditional pre-trial detention following the payment of financial surety. Further to the HFHR's request, the Ombudsman referred the legal question to the Supreme Court.

On 26 February 2016, the Supreme Court refused to adopt a resolution on the referred legal question, holding that the Ombudsman did not demonstrate sufficient jurisprudential discrepancies in his request. Although the Court refused to issue a resolution, it offered obiter comments on the issue in the verbal reasoning for the refusal. The Supreme Court noted that provision of a financial surety and the actual payment of the surety's amount are two different things. According to the Supreme Court, the financial surety is provided upon the

drafting of the receipt of its acceptance together with all the required elements that should be included in the receipt. Only from that point on, a conditional pre-trial detention order may not be suspended.

The case of M.L. is the first and, so far, the only proceedings, in which a suspect remained in custody despite the prosecution's documented acceptance of financial surety.

The HFHR's amicus curiae brief

In the brief, the HFHR noted the following:

- In accordance with Articles 266-270 of the Code of Criminal Procedure, upon the drafting of a receipt of financial surety, conditional pre-trial detention transforms into financial surety, which is governed exclusively by the provisions applicable to this preventive measure.
- In a situation where an appellate court reviews the interlocutory appeal against the order for the conditional extension of pre-trial detention after the condition set out in the original conditional detention order has already been met, the need for revoking the condition recognised by the appellate court must result in the suspect being issued another pre-trial detention order, which will also be subject to appeal.
- In Baranowski v. Poland, the ECtHR stressed that any limitations of the admissibility of interferences with the liberty of a person require the observance of the proportionality principle. In the Soumare v. France, the ECtHR clarified that Article 5 (4) ECHR requires that a person deprived of their liberty must have the actual opportunity to have the lawfulness of their detention reviewed by a court and that the review should be capable, at least potentially, of securing their release or a declaring, in the case of an ex-post review, that the deprivation of liberty was unlawful.

Regional Court's decision

On 2 April 2019, the Helsinki Foundation for Human Rights submitted an amicus curiae brief to the Regional Court. At a hearing held on 3 April 2019, the Regional

Court in Wrocław examined the prosecution's appeal against the decision of 15 March 2019. The court ruled to uphold the decision of the first instance court and M.L. was released.

The amicus curiae brief is available in Polish at
http://www.hfhr.pl/wp-content/uploads/2019/04/1270_001.pdf

Freedom of expression

INSULT OF RELIGIOUS FEELINGS

The case of Jerzy Urban and God is dying of old age, an article in the weekly magazine NIE (case no. VIII K 517/13)

Case timeline

08.2012 The offence of insulting religious feelings is reported to a prosecutor's office 22.10.2018 Jerzy Urban is ordered to pay a fine of 120,000 zloty 23.02.2019 HFHR submits an amicus curiae brief 12.03.2019 A regional court remits the case for re-examination by the first-instance court

Case summary

Having seen a drawing published in a weekly magazine, on 17-23 August 2012, six persons filed a notification of an offence under Article 196 of the Criminal Code with a prosecutor's office, claiming that their religious filings have been insulted. On 22 October 2018, a district court convicted the magazine's editor-in-chief, Jerzy Urban, for the offence charged and sentenced him to a fine of 120,000

zloty. The court ruled that "an insult to religious feelings should be understood to mean such perpetrator's behaviour which, both objectively and subjectively, as perceived by a particular person or group of persons, is regarded as offensive and belittling their religious feelings." According to the court, Mr Urban acted with the oblique intention of committing the offence as he was aware that the publication was capable of offending the religious feelings of others. The HFHR submitted its amicus curiae brief in appellate proceedings. On 12 March 2019, a regional court remitted the case for re-examination.

Why did the HFHR get involved in the case?

The offence of insulting religious feelings has long been criticised by international institutions such as the Council of Europe and the OSCE because of the severe criminal sanctions involved and its wide scope of application. In countries with a dominant religion, including Poland, criminal proceedings in the cases of insult of religious feelings are mostly initiated by followers of that religion. Article 196 of the Criminal Code is rarely used to protect minority religions.

The HFHR's amicus curiae brief

In the brief, the HFHR noted the following:

- Satire is a defence that should exclude the responsibility for insulting religious feelings. The defendant's statements are satirical and cartoonish in nature. They are intended to creatively raise a point in the discussion on the shrinking number of practising Christians and as such, they are not constitutionally unjustified and are not merely aimed at teasing others.
- Article 54 (1) of the Constitution protects deeply shocking statements. Article 53 of the Constitution does not guarantee freedom from criticism on religious matters; on the contrary, this provision, read in conjunction with Article 54 (1) of the Constitution, guarantees a pluralism of world views.
- Article 53 of the Constitution does not prohibit the holding of scandalous or iconoclastic beliefs as long as they are not forcefully imposed on people with dissimilar beliefs.
- The sentence imposed by the court of the first instance constitutes a disproportionate interference with the defendant's freedom of expression.

The amicus curiae brief is available in Polish at http://www.hfhr.pl/wp-content/uploads/2019/03/Opinia-przyjaciela-s%C4%85du-HFPC_JU.pdf

Freedom of assembly

The case of the ban of the Equality March in Rzeszów, case no. Ns 185/19

Case timeline

23.05.2019 Rzeszów Municipal Office receives a notification of a public assembly scheduled to take place on 22 June 2019 5.06.2019 The Mayor of the Rzeszów bans the holding of the assembly 6.06.2019 The organizer appeals against the Mayor's decision to the Regional Court in Rzeszów 7.06.2019 HFHR submits an amicus curiae brief 8.06.2019 Regional Court revokes the decision to ban the assembly 22.06.2019 Equality March is held in Rzeszów

Case summary

On 23 May 2019, a notice of a public assembly scheduled for 22 June 2019 was submitted to the Municipal Office of Rzeszów. The Equality March was to be held on the streets of Rzeszów to draw attention to discrimination against LGBTQ persons. By a decision issued on 5 June 2019, the Mayor of Rzeszów banned the holding of the assembly. The decision was justified by the arguments that the holding of the assembly in question "may pose a threat to human life or health and the risk of considerable damage to property". The decision emphasised that the public authorities are obliged to maintain security and order. The organizer appealed against the mayor's decision to the Regional Court in Rzeszów.

Why did the HFHR get involved in the case?

The theme of freedom of assembly and protection of members of sexual minorities against discrimination falls within the statutory objectives of the HFHR. The Foundation has been issuing many amicus curiae briefs in cases involving bans on peaceful public assemblies in Poland. We have been reiterating in our submissions that freedom of assembly plays an invaluable role in a democratic state ruled by law and significantly contributes to the development of civil society.

The HFHR's amicus curiae brief

In the brief, the HFHR noted the following:

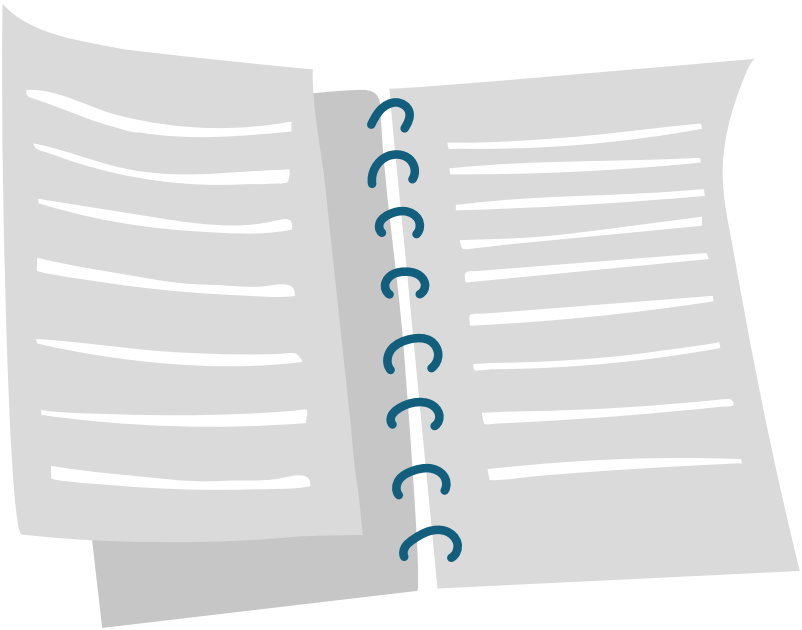
- Freedom of assembly guarantees that citizens can effectively participate in social and political life and is necessary to enable individuals to express their views and influence the public sphere.
- Freedom of assembly is protected by the Constitution and international law, so any restriction of this freedom should be an absolute exception, assessed in the light of the principle of proportionality.
- Public authorities are obliged to ensure that groups organising and participating in demonstrations are adequately protected; only in this way can freedom of assembly be realistically guaranteed, regardless of the degree of the controversy of publicly expressed views and opinions.

Decision of the Regional Court in Rzeszów

On 8 June 2019, the Regional Court decided to revoke the decision banning the assembly. Municipal authorities have not appealed against the ruling in question. The Equality March in Rzeszów took place as scheduled, on 22 June 2019. In the statement of reasons for its decision, the court relied on the guarantees of freedom of assembly under international law and the Polish Constitution. The court emphasised that "freedom is a fundamental value of a democratic state ruled by law. An essential attribute for this freedom the ability to express one's views in public and to assemble for this purpose." In the court's view, this ability "allows citizens to participate in public life and allows them to exercise other rights and liberties." The ruling further reads that "any restriction of the

freedom of assembly must pass the test of necessity and proportionality and should be treated as an absolute exception." The court also noted that "while assessing whether a notified assembly poses a threat to the life or health of people or a risk of a considerable loss to property, public authorities should anticipate the behaviour of the organisers and participants of the assembly and not that of third parties attempting to thwart the conduct of the demonstration."

The amicus curiae brief is available in Polish at
https://www.hfhr.pl/wp-content/uploads/2019/06/Marsz-R%C3%B3wno%C5%9Bci-w-Rzeszowie_opinia-HFPC.pdf



HFHR'S AMICUS CURIAE BRIEF SUBMITTED TO A KYRGYZ DOMESTIC COURT

THE NATURE OF THE DECISION OF THE HUMAN RIGHTS COMMITTEE AND THE RIGHT TO FAIR COMPENSATION

The case of T. Akmatov, a Kyrgyz national (№-ГД-839/18БЗ)

Case timeline

07.04.2011 A complaint is submitted to the UN Human Rights Committee 29.10.2015 HRC issues a decision 29.01.2018 A civil claim is brought against the Ministry of Finance 24.09.2018 HFHR submits an amicus curiae brief 16.10.2018 A domestic court enters the judgment 24.07.2019 The Supreme Court enters the judgment

Case summary

S. Akmatov filed a complaint with the Human Rights Committee, in which he alleged violations of Article 6 (1) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) committed against his son, T. Akmatov. The complainant argued that his son had been arrested and severely beaten by police officers. The son died from his injuries in the evening of the day he was arrested. In the decision issued in this case, the UN Human Rights Committee found a violation of Articles 6(1) and 7 ICCPR and obliged the Kyrgyz authorities to conduct a fair, independent and effective investigation into the causes of the victim's death, hold the perpetrators accountable and ensure adequate compensation. Due to Kyrgyzstan's failure to implement the HRC recommendations, the victim's brother filed an action for adequate compensation. The Kyrgyz Ministry of Finance responded to the lawsuit indicating the non-mandatory nature of the Committee's recommendations.

Why did the HFHR get involved in the case?

In some countries where the HFHR operates, there is a worrying tendency to deny the binding force of the HRC decisions towards a State Party to the ICCPR. Such decisions are treated only as confirmation of established facts and a recommendation to the State, and not as a commitment to take a specific action. This is all the more worrying given that in Central Asian countries the UN protection system is the only mechanism available to victims of human rights violations.

The HFHR's amicus curiae brief

In its brief, the HFHR highlighted a number of aspects linked to the nature of HRC decisions. The Foundation emphasised that these decisions are conclusive, and not recommendatory, and are therefore enforceable by the State Party concerned. The amicus curiae brief also noted that:

- The Kyrgyz Republic is bound, under international and national law, to respect its obligations under international agreements.
- The Kyrgyz Republic has assumed certain obligations arising from the ratification of the ICCPR and the First Optional Protocol to the Covenant.
- The right to fair compensation is enshrined in international standards.
- International standards define a state' s responsibility for the death of a person deprived of their liberty and the ensuing obligations of the state.

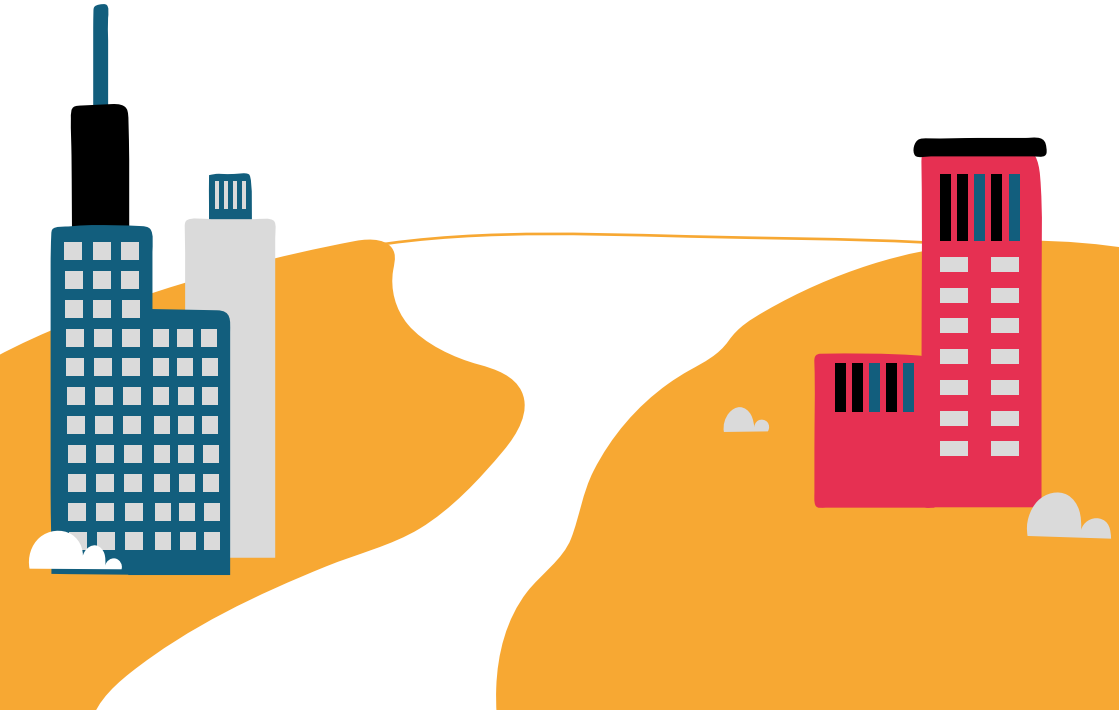
Decisions of domestic courts

A landmark judgment has been issued in this case, in which the victim's family was awarded compensation despite the parallel pendency of the criminal proceedings and the fact that the perpetrators have not been brought to justice. In the judgment, the court indicated that by ratifying the ICCPR and the First Optional Protocol, the Kyrgyz Republic has agreed to respect and comply with the recommendations issued by the HRC following the examination of individual complaints. According to the court, the improper conduct of criminal proceedings in this case, including the repeated resumption of the proceedings, was a sign of callous treatment of the victim's family and undermined all the state's

efforts to protect the rule of law and citizens' trust in the state. The judgment was upheld on appeal to the Supreme Court.

The above judicial decisions paved the way for the families of other victims named in HRC decisions to receive fair compensation. On 21 October 2019, a court issued a similar ruling in the case of R. Ernazarov. In the Ernazarov case, the HFHR also submitted an amicus curiae brief.

The amicus curiae brief is available in Russian at
https://www.hfhr.pl/wp-content/uploads/2018/10/Amicus-curiae-T.A._zanonimizowany.pdf



THE REMAINING AMICUS CURIAE BRIEFS SUBMITTED BY THE HFHR IN 2018-2019

Briefs submitted in ECtHR cases:

Cases with a Polish element

- *Alina Dłużewska v. Poland*, application no. 39873/18, themes raised: the pre-trial detention of elderly suspects, freedom from torture, inhuman and degrading treatment or punishment, https://www.hfhr.pl/wp-content/uploads/2019/08/amicus-curiae_en.pdf
- *A.K. v. Poland*, application no. 904/18, themes raised: protection of victims of domestic abuse, https://www.hfhr.pl/wp-content/uploads/2019/01/A.-K.-p.-Polsce-amicus_EN.pdf
- Segev Schlittner-Hay and Matan Schlittner-Hay v. Poland, applications nos. 56846/15 and 56849/15, themes raised: refusal to confirm the citizenship of a child of an LGBT couple, discrimination, the right to respect for private life, https://www.hfhr.pl/wp-content/uploads/2019/08/Schlittner-Hay_Amicus-Brief_FINAL_PDF.pdf
- Tomasz Łuczkiewicz and Others v. Poland, applications nos. 1464/14 and seq., themes raised: access to benefits for carers of persons with disabilities, right to property, the prohibition of discrimination, http://www.hfhr.pl/wp-content/uploads/2018/09/%C5%81uczkiewicz-p.-Polsce-amicus_PL_FINAL.pdf
- *K. T. and Z. K. v. Poland*, themes raised: cases of torture, including politically-motivated torture, in Tajikistan.

Cases concerning other state members of the Council of Europe

- *Azad Mursaliyev and Others v. Azerbaijan*, application no. 66650/13, themes raised: the situation of human rights defenders, freedom of movement, https://www.hfhr.pl/wp-content/uploads/2018/12/Mursialiyev-v.-Azerbaijan_final.pdf
- *Aynur Ganbarova and Others v. Azerbaijan*, application no. 1158/17, themes raised: freedom of speech, freedom of movement, http://beta.hfhr.pl/wp-content/uploads/2018/01/Amicus-Ganbarova.pdf
- *Oksana Fonina v. Ukraine*, application no. 66264/14, themes raised: freedom from torture, illegal detention facilities in the so-called Donetsk People's Republic and Lugansk People's Republic, https://www.hfhr.pl/wp-content/

uploads/2018/10/Fonina-and-others-v.-Ukraine-and-Russia.pdf

- *Laura Kövesi v. Romania*, application no. 3594/19, themes raised: prosecutors' independence, the right to a court, https://www.hfhr.pl/wp-content/uploads/2019/06/1332_001_1106.pdf
- *M.C. v. Romania*, application no. 44654/18, themes raised: access to education for children with disabilities, discrimination, the right to respect for private life, the right to education, https://www.hfhr.pl/wp-content/uploads/2019/07/amicus-curiae_mcprumunia.pdf

Briefs submitted in cases pending before national courts:

Cases heard by Polish courts

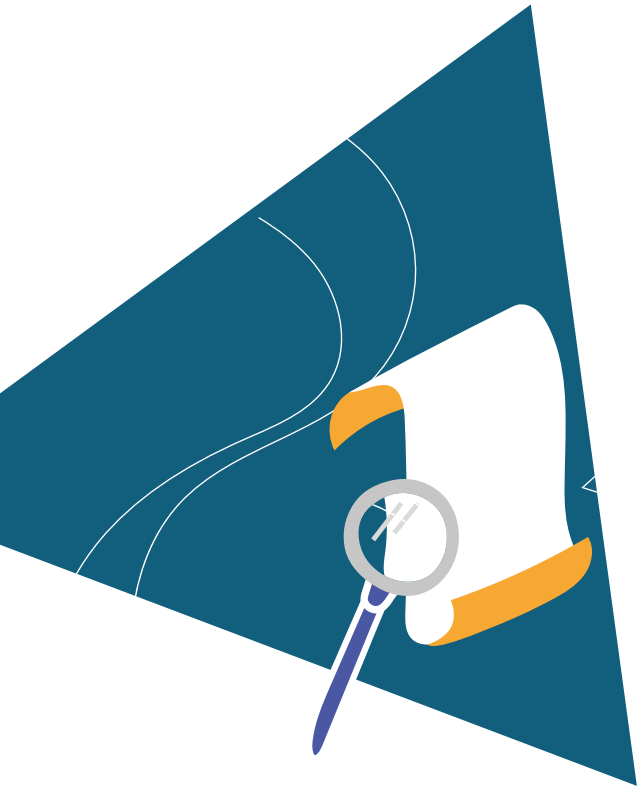
- *Equality March in Gorzów Wielkopolski*, Regional Court in Gorzów Wielkopolski, themes raised: the right to peaceful assembly, the prohibition of discrimination.
- *A.K.*, Regional Court in Kielce, themes raised: protection of employment of state administration employees, the right to respect for private life.
- *E.R., P.S., G.M.*, District Court for the Śródmieście district in Warsaw, themes raised: protection of employment of state administration employees, the right to respect for private life.
- *M.T.*, Regional Court in Łódź, themes raised: protection of employment of judges, discrimination based on age, the right to respect for private life.
- *Z.K.*, District Court in Grodzisk Mazowiecki, themes raised: rules guiding the placement of persons in nursing homes, the protection of personal liberty under the ECHR.
- *X.X.*, Supreme Court, themes raised: the right to respect for private life, the right to fair compensation for victims of paedophilia in the Church.
- *W.R.*, Regional Court in Lublin, themes raised: reductions of rights and privileges of security and law enforcement officers made as part of the so-called "settlement with the past", the right to respect for private life, right to property.
- *Equality March in Kielce*, Regional Court in Kielce, themes raised: the right to peaceful assembly, prohibition of discrimination.

- *R.K.*, Court of Appeal in Poznań, themes raised: the effectiveness and efficiency of EU law, rule of law, effective judicial protection, the prohibition of discrimination (the legal effectiveness of judgments of the Constitutional Tribunal issued with the participation of persons unauthorised to adjudicate (appointed to already occupied posts on the Tribunal's bench).
- *A.J.*, Court of Appeal in Łódź, themes raised: the effectiveness and efficiency of EU law, rule of law, effective judicial protection, the prohibition of discrimination (the legal effectiveness of judgments of the Constitutional Tribunal issued with the participation of persons unauthorised to adjudicate (appointed to already occupied posts on the Tribunal's bench).
- *A.S.*, Supreme Court, themes raised: the possibility of banning an assembly, freedom of assembly (a resolution of the Supreme Court on the possibility of considering an appeal against the substitute order of a province governor banning an assembly following the expiry of the scheduled date of the assembly).
- *Independence March*, Court of Appeal in Warsaw, themes raised: the right to peaceful assembly, restrictions of the freedom of speech.
- *A.B.*, Provincial Administrative Court in Warsaw, themes raised: the necessity of assessing a violation of the prohibition of torture in the case of the removal of a foreign national, procedural guarantees concerning the removal of foreign nationals.
- *J. Sz.*, District Court for the Mokotów District in Warsaw, themes raised: access to benefits for carers of persons with disabilities, the liability of the State Treasury for a legislative tort.
- *B.W.*, District Court for the Śródmieście District in Warsaw, themes raised: protection of sustainable employment relationships, the right to equal treatment.
- *Tomasz Zimoch v. Polskie Radio*, unlawful suspension of a journalist employed by a public broadcaster, a brief submitted to the District Court for the capital city of Warsaw.
- *Kamil Dąbrowa v. Polskie Radio*, unlawful termination of employment, a brief submitted to a Regional Court.

- *Grażyna Bochenek v. Polskie Radio Rzeszów*, disciplinary sanctions imposed on a journalist employed by a public broadcaster, a brief submitted to the District Court in Rzeszów.
- *Dorota Nygren v. Polskie Radio*, workplace discrimination, District Court in Warsaw.
- The case of the abuse of police powers against P.H., related to the right to record a police arrest, a District Court in Wrocław.
- Piotr Żytnicki, the waiver of reporter's privilege, District Court in Poznań.
- Grzegorz Rzeczkowski, an interim injunction against publication, a brief submitted to the Court of Appeal in Warsaw.
- Mariusz Zielke, an interim injunction against publication, a brief submitted to the Court of Appeal in Warsaw.
- Paweł Figurski, the obstruction of a journalist's reporting of a demonstration, a brief submitted to the Regional Court in Warsaw.

Cases heard by foreign courts:

- The case of S.Y., a Kyrgyz national, theme raised: freedom from torture.
- The case of S.Y., a Tajik national, themes raised: freedom from torture, a state' s responsibility for the death of a person deprived of their liberty.
- The case of R.E., a Kyrgyz national, themes raised: freedom from torture, right to fair compensation, state's obligation to implement decisions of the Human Rights Committee.
- The case of D.R., a Kazakh national, themes raised: a failure to provide adequate medical assistance to a person deprived of their liberty, right to fair compensation, obligation to implement a decision of the Human Rights Committee.



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