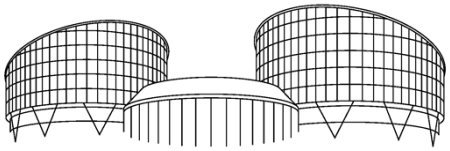

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF W.W. v. POLAND

(Application no. 31842/20)

JUDGMENT

Art 8 • Private life • Refusal to allow transgender person to continue hormone therapy in prison • Impugned decision touched on applicant's freedom to define her gender identity, one of the most basic essentials of self-determination • Strong elements before the domestic authorities indicating hormone therapy was an appropriate medical treatment for the applicant's state of health with a beneficial effect on her • Disproportionate burden placed on applicant to prove the necessity of the prescribed medical treatment by undergoing an additional medical consultation • Failure to strike a fair balance between the competing interests at stake • Applicant particularly vulnerable as an imprisoned transgender person undergoing a gender reassignment procedure, thus requiring enhanced protection from the authorities

Prepared by the Registry. Does not bind the Court.

STRASBOURG

11 July 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of W.W. v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 31842/20) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, W.W. ("the applicant"), on 29 July 2020;

the decision to give notice of the application to the Polish Government ("the Government");

the decision not to disclose the applicant's name;

the decision to indicate an interim measure to the Government under Rule 39 of the Rules of Court;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by Transgender Europe, Helsinki Foundation for Human Rights and the Polish Commissioner for Human Rights, which had been granted leave by the President of the Section to intervene as third parties;

Having deliberated in private on 9 April and 11 June 2024,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The applicant is a transgender prisoner. The case raises an issue under Article 8 of the Convention regarding the refusal to allow the applicant to continue hormone therapy in prison.

THE FACTS

2. The applicant was born in 1992. When lodging the present application she was detained in Siedlce Prison. She is a transgender person who, at the time the application was lodged, was legally recognised as male. Her request for legal gender recognition was granted on 19 March 2023 (see paragraph 21 below). She was granted legal aid and was represented by Ms A. Bzdyń, a lawyer practising in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak of the Ministry for Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant was assigned male at birth. She submitted that she had continuously identified herself as female since early childhood.

6. Since 25 November 2013 she has served several terms of imprisonment in male prisons (in connection with, among other offences, theft, robbery and burglary). The applicant's prison term ended on 5 May 2024.

7. The applicant submitted that since 2018 she had demonstrated self-harming behaviour. On 26 June 2018 she had performed a bilateral orchiectomy on herself, following which she was hospitalised. She submitted that the act had been motivated by psychological discomfort and distress arising from an incongruence between her gender identity and her sex characteristics. Subsequently, she had become aggressive, had attacked a prison guard and had been classified as a dangerous detainee.

8. The governor of Piotrków Trybunalski Prison (where the applicant was detained at the relevant time) requested an expert opinion on the applicant's condition. On 28 November 2018 the expert, M.M., a sexologist, stated that it was not possible to diagnose the applicant as a transgender person on the basis of one medical consultation. The expert further stated that the applicant had to consult with various specialists, for example, a sexologist, a psychiatrist, an endocrinologist, a gynaecologist or a urologist.

9. On 21 December 2018 a psychiatrist-sexologist, Dr D., issued an opinion on the basis of the applicant's hospital records and her consultation with the expert M.M. and recommended that she pursue hormone replacement therapy associated with gender reassignment. Dr D. prescribed her the medication and stated that the applicant required immediate and urgent hormone therapy. The lack of immediate provision of this treatment posed a serious health risk resulting in the significant deterioration of its effectiveness. The expert stated that such treatment would have positive effects on her life and health and it would help with the applicant's rehabilitation.

10. The applicant consulted with Dr D. on 23 January 2019.

11. In January 2019 the Piotrków Trybunalski Prison governor allowed the applicant to undergo the hormone treatment. The applicant bore the cost of the therapy herself. As a result of the therapy the applicant's appearance changed and her physical and emotional health improved. She continued the therapy in Radom Prison, where she was subsequently transferred.

II. SIEDLCE PRISON

12. On 12 May 2020 the applicant was transferred to Siedlce Prison. Initially, as she had a sufficient supply of the medication, she continued the hormone treatment.

13. On 28 May 2020 the applicant applied to the governor of Siedlce Prison for permission to be sent medication from outside the prison. The head of the medical unit in Siedlce Prison did not support her application. In a note of 28 May 2020 to the prison governor, the head of the prison's medical unit stated that the administration of female hormones to a man in a prison setting without a thorough psychological-psychiatric expert opinion and endocrinological tests recommended by a consultant endocrinologist was very risky. On 2 June 2020 the deputy governor noted on her application "I leave the request without examination pending an opinion of an endocrinologist".

14. The Government submitted that the authorities of Siedlce Prison had taken measures which had been aimed at ensuring necessary medical consultations for the applicant. The prison governor had requested Professors Z.M. and J.H. from the Institute of Psychiatry and Neurology in Warsaw to issue an opinion on the applicant's condition. Allegedly, a consultation with an endocrinologist had also been scheduled. The applicant disputed those submissions, asserting that they were not corroborated by any documents. She stated that she had been informed that she needed to have a consultation with an endocrinologist, however such an appointment could not take place in the prison on account of COVID-19 restrictions.

15. On 2 July 2020 the applicant's lawyer asked the Siedlce Prison governor to allow the applicant to continue hormone therapy in prison. In support of the request, medical opinions and the applicant's medical files were provided. In particular, in an opinion dated 30 June 2020, prepared by Dr D., the psychiatrist-sexologist, it was noted that the applicant had been undergoing a gender reassignment procedure. She had been undergoing hormone therapy since 23 January 2019 and the treatment was necessary for her. In the event that the therapy was interrupted, the applicant might suffer significant deterioration of her physical and mental health (including depression and self-harm).

16. On 6 July 2020 an expert opinion was issued by an endocrinologist-sexologist, Dr K.-N. It had been prepared on the basis of Dr D.'s opinions, at the request of a person close to the applicant. The endocrinologist prescribed the applicant hormone therapy, stressing that the treatment was essential for the applicant's physical and mental health. Furthermore, the hormone substitute therapy was necessary in view of the fact that the applicant had performed genital self-mutilation.

17. On 8 July 2020 the applicant's lawyer submitted the above-mentioned opinion to the Siedlce Prison governor. He also stated that Dr K.-N. was available for an online consultation with the applicant.

18. The applicant ran out of medication on 18 July 2020 and her hormone treatment was interrupted as of that date.

19. On 24 July 2020 the applicant asked to be allowed to have a private medical consultation with an endocrinologist. The consultation took place on 5 August 2020, after an interim measure had been issued by the Court (see paragraph 23 below) and the applicant was prescribed hormone therapy.

20. By a letter of 28 August 2020, the Regional Director of the Prison Service informed the applicant that her representatives' complaints were ill-founded.

21. In separate proceedings, on 2 March 2023 the Olsztyn Regional Court gave a judgment based on Article 189 of the Code of Civil Procedure, granting the applicant's request for legal gender recognition.

III. INTERIM MEASURE INDICATED BY THE COURT

22. Meanwhile, on 29 July 2020 the applicant's representative lodged a request for an interim measure under Rule 39 of the Rules of Court, requesting that the Court order the provision of hormones prescribed by her endocrinologist to the applicant.

23. On 30 July 2020 the Court applied the interim measure in accordance with Rule 39, indicating to the respondent Government: "to administer the applicant ... with hormones prescribed by her endocrinologist (Lutein and Estrofem) in doses prescribed, at her own expense, until otherwise decided by an endocrinologist".

24. According to the information provided by the parties, the applicant received the medication on 31 July 2020.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Code of Execution of Criminal Sentences

25. Under Article 6 of the Code of Execution of Criminal Sentences (*Kodeks Karny Wykonawczy*), a convicted person is entitled to lodge applications, complaints and requests with the authorities enforcing that person's sentence.

26. Article 7 §§ 1 and 2 provides that a convicted person may challenge before a court any decision given by a judge, a prison judge, the governor of a prison or a remand centre, a regional director or the Director General of the Prison Service, or a court probation officer. Article 7 § 1 of the Code states

that such a decision may be challenged on grounds of its "non-compliance with the law" unless otherwise provided for by law.

27. The remainder of Article 7 reads as follows:

> "3. Appeals against decisions [mentioned in paragraph 1] shall be lodged within seven days of the date of the delivery or the service of the decision; the decision [in question] shall be delivered or served with a reasoned opinion and instructions regarding the right [to lodge an appeal and] the deadline and procedure for [doing so]. An appeal shall be lodged with the authority that delivered the contested decision. If [that] authority does not [allow] the appeal, it shall refer it, together with the case file and without undue delay, to the relevant court.
>
> 4. The court that has jurisdiction to examine the appeal may suspend the enforcement of the contested decision ...
>
> 5. Having examined the appeal, the court shall decide either to uphold the contested decision or to quash or vary it; the court's decision may not be subject to an interlocutory appeal."

28. Article 102 § 10 guarantees a convicted person the right to lodge applications, complaints and requests with other relevant authorities, such as the management of a prison or remand centre, heads of units of the Prison Service, prison judges, prosecutors and the Ombudsman.

29. Article 115 concerns medical care in detention facilities and provides, in so far as relevant, as follows:

> "1. A sentenced person shall receive medical care, medication and sanitary items free of charge.
>
> ...
>
> 4. Medical care shall be provided primarily by healthcare establishments for persons serving prison sentences.
>
> ...
>
> 6. In particularly justified cases, the governor of the prison may allow the prisoner, at his or her own expense, to be treated by a doctor of his or her choice, by a provider other than that referred to in paragraph 4, and to receive additional medication and other medical equipment."

B. Civil Code

30. Article 23 of the Civil Code contains a non-exhaustive list of "personal rights" (*dobra osobiste*) and states as follows:

> "The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as], inventions and improvements shall be protected by civil law regardless of the protection laid down in other legal provisions."

31. Article 24 provides means of redressing infringements of personal rights. In accordance with that provision, a person whose rights are at risk of being infringed by a third party may seek an injunction, unless the activity is

not unlawful. In the event of infringement, the person concerned may, *inter alia*, require the party who caused the infringement to take the necessary steps to eliminate the consequences of the infringement, for example by making a relevant statement in an appropriate form or asking the court to award an appropriate sum for the benefit of a specific public interest. If an infringement of a personal right caused financial loss, the person concerned may seek damages under Article 448.

C. Code of Civil Procedure

32. Under Article 730 of the Code of Civil Procedure, a party may apply to a court for an interim order for the purpose of securing a claim. This provision states, in so far as relevant, as follows:

> "1. The granting of an interim order may be requested by any party or participant in the proceedings if he or she substantiates the claim and the legal interest in granting the measure."

D. Patients' Rights Act

33. Section 31 of the Law of 6 November 2008 on patients' rights and the Patients' Rights Ombudsman (*ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta* – "the Patients' Rights Act") provides, in so far as relevant, as follows:

> "1. The patient or his or her statutory representative may raise an objection to an opinion or decision (*orzeczenie*) referred to in section 2(1) of the [the Medical Profession Act] if the opinion or decision affects the patient's rights or obligations under the law.
>
> 2. The objection shall be submitted to the Medical Commission attached to the Patients' Rights Ombudsman through the Patients' Rights Ombudsman within thirty days from the date of issuance of the opinion or decision by the doctor who [has] evaluate[d] the patient's condition.
>
> 3. The objection shall require a justification, including an indication of the provision of law from which the rights or obligations referred to in subsection 1 derive.
>
> 4. If the requirements set out in subsection 3 are not met, the objection shall be returned to the person who submitted it.
>
> 5. The Medical Commission shall, on the basis of medical records and, where necessary, after examining the patient, issue a ruling without delay, but no later than within thirty days from the date on which the objection was submitted.
>
> 6. The Medical Commission shall issue a ruling by an absolute majority of votes, in the presence of all its members.
>
> 7. There shall be no appeal against the decision of the Medical Commission.
>
> 8. The provisions of the Code of Administrative Procedure shall not apply to proceedings before the Medical Commission..."

E. Medical Profession Act

34. Section 41(1) of the Law of 5 December 1996 on the Medical Profession (*ustawa o zawodach lekarza i lekarza dentysty* – "the Medical Profession Act") provided at the material time, in so far as relevant, as follows:

> "A physician shall decide on the state of health of a particular person after first examining him or her in person or ... by means of telecommunication systems or after analysing the available medical records of that person."

II. RELEVANT INTERNATIONAL MATERIAL

A. United Nations

35. The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment addressed the healthcare needs of transgender people in its eighth annual report of 26 March 2015 (CAT/C/54/2), which stated as follows:

> "68. In particular, the Subcommittee notes with concern the situation of complete abandonment of transgender women and men in detention ...
>
> ...
>
> 71. Ill-treatment also occurs on the part of health professionals and in health care settings, and it includes denial of gender-appropriate medical treatment, verbal abuse and public humiliation, psychiatric evaluations, sterilization, and hormone therapy and genital normalizing surgeries under the guise of so called 'reparative therapies'...
>
> 72. The Subcommittee encourages States parties to develop and implement public health policies aimed at providing gender-appropriate care, an obligation that extends, particularly, to the satisfaction of the highly particular needs of transgender women and men and of intersex persons."

36. Subsequently, in its ninth annual report of 22 March 2016 (CAT/C/57/4), the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated as follows:

> "72. Strengthening the protection of people deprived of their liberty requires the adoption of legislative, administrative and judicial measures. To be adequate, such measures require diligent risk assessment, including the identification of causes, forms and consequences of violence and discrimination ..."

37. The United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules"), A/RES/70/175, as the global key standards for the treatment of prisoners adopted by the United Nations General Assembly on 17 December 2015, in so far as relevant, as follows:

> "Rule 7
>
> No person shall be received in a prison without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner:

(a) Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender.

..."

B. Council of Europe

1. Committee of Ministers

38. The Recommendation adopted by the Committee of Ministers on 31 March 2010 (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity, provides, in so far as relevant:

"4. Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons."

39. The European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers to member States, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), as applicable at the relevant time and in so far as relevant, read as follows:

"15.1 At admission, the following details shall be recorded immediately concerning each prisoner:

a. information concerning identity;

..."

40. In its revised and updated Commentary to the European Prison Rules, the Council of Europe Committee on Crime Problems addressed the issue of gender identification of prisoners. The relevant part of the Commentary reads as follows:

"Note that, for Rule 15.1.a to fulfil its purpose sufficient information should be collected to establish the unique identity of the prisoner, including his or her self-perceived gender (see Rule 7.a of the Mandela Rules). The general approach to this issue is spelt out in Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity."

2. Council of Europe Commissioner for Human Rights

41. In October 2009 the Council of Europe Commissioner for Human Rights published an Issue Paper entitled "Human rights and gender identity" in which he stated the following with respect to access to hormone therapy for transgender prisoners (p. 16 note 60):

"Similar problems are faced by transgender people in prison who may face periods of time without hormone therapy. This may result in a long time without treatment and may cause serious health problems, such as the development of osteoporosis in transsexual men, and irreversible physiological changes to take place such as the development of baldness in transsexual women. Transsexual people will frequently face difficulties in accessing assessment, hormone therapies, or surgery as many prisons or prison systems feel they do not have the facilities to manage transsexual prisoners, or in some cases they are seen as [forgoing] their right to such treatments because of their conviction."

3. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

42. The CPT standards concerning healthcare services in prisons, the 3rd General Report (CPT/Inf (93) 12), published on 4 June 1993, provide as follows:

"38. A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.

There should be appropriate supervision of the pharmacy and of the distribution of medicines. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.)."

43. The CPT has also made a number of findings specifically concerning access to hormone treatment in prison, following visits to prisons in the Council of Europe's member States. In particular, the relevant part of the Report to the Austrian Government on the visit to Austria carried out from 22 September to 1 October 2014 (CPT/Inf (2015) 34), published on 6 November 2015, reads as follows:

"116. Thirdly, the delegation met one inmate who indicated that she was transgender. She stated that she was allowed to wear women's clothes inside her cell when the door was closed, although when she was in the company of others, she had to wear men's clothes. She said that she had come out as a woman two years before and had not had any trouble with other inmates. She had now stopped therapy as her therapist had allegedly refused to discuss her gender identity issue. She said that she wanted to have a legal gender reassignment, hormone therapy and gender reassignment surgery, but had been told that she could not start cyproterone acetate and oestrogen treatment in prison, and that surgical and legal reassignment would be completely out of the question. This statement was confirmed by staff.

The CPT notes that gender reassignment procedures such as hormone treatment, surgery and psychological support are available to transgender persons in Austria. In addition, there are procedures in place for changing the name and sex of a transgender person on identity cards and other official documents. In the CPT's view, persons deprived of their liberty should not be excluded from benefiting from these treatments and legal procedures provided for by law for transgender persons in Austria.

The Committee recommends that the Austrian authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed

institutions) have access to assessment and treatment of their gender identity issue and, if they so wish, to the existing legal procedures of gender reassignment. Further, policies to combat discrimination and exclusion faced by transgender persons in closed institutions should be drawn up and implemented."

44. In addition, the relevant parts of the Report to the Greek Government on the visit to Greece carried out from 8 to 11 November 2022 (CPT/Inf (2023) 24), published on 31 August 2023, read as follows:

"42. The Prison Law (2776/1999), as amended by Law no. 4895/2022 of 28 October 2022, now prohibits discrimination based on gender or gender identity and sexual orientation, and advocates special treatment for prisoners for reasons of gender where required (see Article 3). This is a welcome step forward in recognising that prisoners may have different needs and that there should be an equality in the treatment of persons in prison.

However, there remains a need to develop a clear framework for the treatment of transgender persons who are detained in prison, in accordance with Principle 9 of the 2017 Yogyakarta Principles plus 10 [footnote omitted]. Such a framework should address both the policies towards the placement and management of transgender persons in prison and should include clear protocols with regard to such issues as searches, use of force, staffing, healthcare and treatment (hormone or gender affirming surgery) and association and access to activities together with cisgender prisoners. Further, prison staff should be offered programmes of training and awareness raising on working with transgender persons in prison.

...

47 ... In particular, the CPT recommends that the Greek authorities:

– develop a clear policy framework for transgender persons in prison in accordance with the Yogyakarta Principles, which should include protocols on such issues as searches, use of force, staffing, healthcare and treatment (hormone and/or gender affirming surgery) and association and access to activities together with cisgender prisoners; ..."

45. Most recently, in its report published on 13 December 2023 (CPT/Inf (2023) 35) following a periodic visit to Portugal carried out from 23 May to 3 June 2022, the CPT noted the following:

"101. Regarding access to specialised healthcare, women were able to continue or start any hormonal treatment while in prison, but surgical interventions had to be deferred until after release. Two of the women said that they met with the prison psychologist, at least occasionally. One had allegedly not yet met a psychologist in the prison since her admission two months ago.

The Committee recommends that the Portuguese authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed institutions) have access to assessment and treatment in the same conditions as in the community. Access to counselling and psychological support should also be systematically offered to transgender persons in prisons."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

46. The Government raised several preliminary objections. They argued that the applicant could not be considered a victim of the alleged violations and that she had not exhausted domestic remedies.

A. Alleged lack of victim status of the applicant

1. The parties' submissions

47. The Government submitted that the duration of the period during which the applicant had been denied the hormone therapy had been very short, from 18 to 31 July 2020, that is, fourteen days. Before 18 July 2020 and after 31 July 2020 the applicant had undergone the therapy in question. In the Government's view, there were no acts or omissions attributable to the State which would have entitled the applicant to claim to be a victim of a breach of the Convention.

48. The applicant submitted that she had been directly affected by the interruption of the hormone treatment. She stated that it had only been because of the Court's interim measure of 30 July 2020 that she had been able to receive the medication.

2. The Court's assessment

49. The Court finds that the question whether the applicant can be regarded as a "victim" relates to the substance of her complaints. It therefore considers that this particular objection raised by the Government should be joined to the merits of the case.

B. Non-exhaustion of domestic remedies

1. The parties' submissions

50. The Government submitted, firstly, that the applicant had failed to make use of the remedy provided in Article 7 of the Code of Execution of Criminal Sentences (see paragraph 26 above). She should have lodged an interlocutory appeal with the post-sentencing court against the prison governor's decision of 28 May 2020. In the Government's view, had the applicant lodged such an appeal she could have been granted access to hormone therapy without the Court's intervention.

51. Secondly, the Government argued that since the head of the medical unit in Siedlce Prison had not supported the applicant's request to be sent medication from outside prison, she could have appealed against the doctor's

decision to the Medical Commission under section 31(1) of the Patients' Rights Act (see paragraph 33 above).

52. Lastly, the Government argued that the applicant could have brought an action under Articles 23 and 24 of the Civil Code, seeking compensation for infringement of her personal rights (see paragraphs 30 and 31 above). They also submitted that it had been possible for her to apply for an interim measure under Article 730 of the Code of Civil Procedure in order to secure her claim. She could have also brought a civil claim against Siedlce Prison under Article 448 of the Civil Code (see paragraph 31 above), seeking compensation in respect of non-pecuniary damage sustained on account of an infringement of her personal rights.

53. The applicant disagreed with the Government. She submitted, firstly, that they had failed to provide any examples of a successful use of an appeal under Article 7 of the Code of Execution of Criminal Sentences in circumstances similar to those in her case. She stressed that the annotation made on her request to receive medications on 28 May 2020 had expressly stated that the request would be left unexamined until an endocrinologist had given an opinion (see paragraph 13 above). Since the deputy governor of Siedlce Prison had explicitly written that he would not decide on the applicant's request, in the applicant's view, such annotation could not have been regarded as a decision which was subject to appeal under Article 7 of the Code of Execution of Criminal Sentences. Furthermore, the annotation had not been reasoned, the applicant had never been informed that it constituted a decision amenable to appeal and she had not been instructed on any appeal rights. In her view, it could not be stated that she had failed to use a remedy under domestic law since there had been no decision against which she could have appealed. In any event such an appeal would have been ineffective in her case, as an appeal under Article 7 could only be lodged on grounds of unlawfulness and not with reference to the facts of the case. It was thus doubtful whether the post-sentencing court would have examined her appeal since the issue in the present case was whether it had been necessary to provide her with prescribed medication from outside of prison in order to secure her life, health and well-being.

54. As regards the civil remedies provided under Articles 23, 24 and 448 of the Civil Code, the applicant submitted that since these were purely compensatory remedies, they would not have provided her with necessary relief, since her grievances had essentially concerned the speedy administration of hormone medication. A civil action for compensation and infringement of personal rights would not have prevented the deterioration of her mental and physical health caused by the sudden interruption of the hormone therapy. Furthermore, the request for an interim measure under Article 730 of the Code of Civil Procedure would not have constituted an effective remedy in her case. She submitted that the Government had failed to provide current statistics indicating the average length of the proceedings

for securing a claim. According to the statistics from 2006 to 2010 it had taken at least one month and, in some cases, almost one year to deliver a decision on an interim measure.

2. Third party's submissions

55. The Commissioner for Human Rights of the Republic of Poland ("the Commissioner"), third-party intervener, expressed doubts as to the availability and effectiveness of the remedy under Article 7 of the Code of Execution of Criminal Sentences. The Commissioner submitted that decisions made by the governor of a penal institution relating to prisoners' healthcare were based on an opinion from the prison's medical unit and subject to control by the post-sentencing court pursuant to Article 7 of the Code of Execution of Criminal Sentences. However, since such decisions were based on medical opinions, they were rarely overturned.

56. The Commissioner stated that prison judges only examined the lawfulness of such decisions and did not verify the factual basis on which the decision had been issued, nor did they appoint experts. Thus, in the Commissioner's view, the appeal procedure at the relevant time did not constitute an effective remedy for prisoners denied certain medical treatments and the possibility of an inmate's successfully appealing against a governor's decision which had been issued on the basis of a prison doctor's opinion was illusory.

3. The Court's assessment

57. The Court notes that the general principles on the exhaustion of domestic remedies were reiterated in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

58. It further notes that in terms of the burden of proof, it is up to the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, among many other authorities, *Scoppola v. Italy (no.2)* [GC], no. 10249/03, § 71, 17 September 2009). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Vučković and Others*, cited above, § 77).

59. In the present case, the Government pleaded, in general terms, that an appeal under Article 7 of the Code of Execution of Criminal Sentences constituted an effective remedy. The Court observes that under that provision any decision issued by a prison governor may be challenged on grounds of its "non-compliance with the law" (see paragraph 26 above). It further notes that

the applicant disputed whether the annotation on her request could have been considered a "decision" for the purposes of Article 7 of the Code of Execution of Criminal Sentences (see paragraph 27 above). She argued that the annotation had expressly stated that the request would be left unexamined pending an opinion of an endocrinologist, it had not been reasoned and she had not received any instructions regarding the right to lodge an appeal (see paragraphs 13 and 47 above).

60. The Court accepts the applicant's argument that the annotation to her written request cannot be regarded as a "decision" amenable to appeal and for that reason considers that an appeal under Article 7 of the Code on Execution of Criminal Sentences would not have been effective in the present case. It notes that while in the specific circumstances of a previous case against Poland (see *Lesław Wójcik v. Poland*, no. 66424/09, §§ 85-87, 1 July 2021) the remedy in question was found to be effective, in that case the governor's decisions, even though made by means of handwritten notes added to the applicant's requests, included a clear "refused" ruling (ibid., §§ 26-28). Conversely, in the present case, there was no ruling as such and the request was left unexamined. The Court also points out that the Government failed to produce any examples of domestic practice indicating that in similar circumstances – where a prisoner's request for a certain medical treatment was left unexamined – an appeal to the post-sentencing court had been successful. Thus, the effectiveness of that remedy for the purposes of Article 35 § 1 of the Convention has not been demonstrated. Consequently, in view of the considerations above and given the absence of any examples in domestic practice, the Court is unable to accept the Government's objection and considers that the applicant was not required to avail herself of this legal avenue.

61. The Government further asserted, in general terms, that a complaint under section 31 of the Patients' Rights Act was an effective remedy that could have put right the alleged violation. However, they failed to explain how it could have specifically remedied the applicant's grievances, in the sense of remedying the state of affairs directly and providing her with the requisite redress for the purposes of Article 35 § 1 of the Convention (see *Vučković and Others*, cited above, § 77, and *Juszczyszyn v. Poland*, no. 35599/20, § 241, 6 October 2022).

62. As regards civil remedies, the Court observes that they were exclusively of a compensatory nature and could only lead to an *a posteriori* award of monetary compensation. In that context, the Court reiterates that no civil action against a prison or a prison doctor can offer a detainee reasonable and timely prospects of securing more adequate medical care or his or her release from detention (see *Normantowicz v. Poland*, no. 65196/16, § 71, 17 March 2022, and the cases cited therein). As regards medical care in prison, the Court has already held that remedies of a purely compensatory nature can be regarded as effective only in respect of applicants who have

either been released or placed in conditions that meet Convention standards (see *Orchowski v. Poland*, no. 17885/04, §§ 108 and 109, 22 October 2009). In view of these considerations, the Court fails to see how the civil remedies mentioned by the Government could have been effective in the specific circumstances of the present case.

63. The Government's objection of non-exhaustion of domestic remedies must therefore be dismissed.

C. Overall conclusion on admissibility

64. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

65. The applicant complained under Article 3 of the Convention that the refusal to allow her to continue hormone therapy in Siedlce Prison had amounted to inhuman and degrading treatment. She further alleged that the refusal in question also constituted a violation of Article 8 as it had breached her right to respect for her private life and to self-determination. The relevant provisions read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Legal characterisation of the complaints

66. The Court finds that the refusal to allow the applicant to continue hormone therapy in Siedlce Prison may raise issues under both Articles of the Convention relied upon, namely Articles 3 and 8. However, being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), and in the specific circumstances of the

present case, the Court considers it more appropriate to examine the case solely from the standpoint of Article 8 of the Convention.

B. Merits

1. The parties' submissions

(a) The applicant

67. The applicant submitted that she had suffered from gender dysphoria since early childhood. In 2018 she had performed genital self-mutilation. During the six months' hospitalisation that had followed that act, she had been denied hormone treatment. She had refused to take male substitute hormones and had not received hormone replacement therapy associated with gender reassignment. She maintained that during that period she had experienced a lot of pain and suffering, which in her view had amounted to torture. Thus, when in May 2020 the Siedlce Prison doctor had informed the applicant that she should stop the hormone treatment as it might cause cancer, she had been terrified. She had asked for permission to continue receiving the medications from outside of prison. However, the prison authorities had refused her request on the ground that an opinion from an endocrinologist was required. At the same time, the Siedlce Prison governor had failed to organise an urgent appointment with an endocrinologist, even though the applicant had had very little medication left and the authorities had been aware that she would run out of it on 7 July 2020. For that reason, as of beginning of July 2020, she had started to take half of the prescribed dose of medications as she believed that she would not receive the treatment soon.

68. In the applicant's view, the prison authorities had failed to provide her with adequate medical care in prison. They had failed to organise a speedy consultation with an endocrinologist. The consultation that had taken place on 5 August 2020 had been the result of the interim measure applied by the Court. The authorities had also failed to provide her with appropriate, non-transphobic psychological help.

69. The applicant further submitted (relying on the Court's case-law in *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV; and *Y.T. v. Bulgaria*, no. 41701/16, 9 July 2020), that the threshold for the States' positive obligation to provide requisite medical assistance to transgender prisoners should be set differently than that set out in *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI). Moreover, in her view, the medical care of transgender prisoners should also respect the principles relating to the right to personal development and to physical and moral security.

70. Referring to the Court's case-law and in particular the case of *Van Kück* (cited above), the applicant submitted that elements such as gender identification, name and sexual orientation and sexual life fell within the

personal sphere protected by Article 8. However, her right to self-determination had been repeatedly denied by the psychologists and doctors. The authorities in Siedlce Prison had taken the decision to stop her treatment before she could consult with an endocrinologist and a psychiatrist, and before it could be established whether the withdrawal of hormone therapy would be safe for her health and well-being. She also maintained that the decision to withdraw the hormone treatment could not be seen as pursuing any legitimate aim. In her view, the decision had been taken to deny her gender identity and right to self-determination, and to debase and humiliate her.

71. With reference to the research conducted by Transgender Europe which was referred to by the Helsinki Foundation for Human Rights (see paragraph 76 below), the applicant maintained that healthcare providers in Poland were not trained on how to treat transgender people. She also submitted that the same conclusion could be drawn from the observations of the Commissioner (see paragraphs 78 and 79 below).

(b) The Government

72. In the Government's view, there had been no intention on the part of the domestic authorities to humiliate or debase the applicant as a transgender person. The fact that the applicant was a transgender person had not been disregarded by the Siedlce Prison authorities. On the contrary, the acts of the domestic authorities had been aimed at obtaining a diagnosis from the appropriate medical entities.

73. The Government stressed that the applicant had been afforded the requisite medical assistance in the form of medical consultations. She had also been allowed to undergo hormone treatment, save for a short period between 18 and 31 July 2020. Moreover, when on 24 July 2020 the applicant had asked to have a private medical consultation with an endocrinologist, that consultation had been set for 5 August 2020. Following the consultation, the doctor had prescribed the applicant hormone therapy, even though at that time she had not yet undergone all the necessary medical examinations and consultations.

74. The Government further stated that that in the event that the Court should find that the Siedlce Prison governor's decision to refuse to continue the applicant's hormonal treatment amounted to an interference with the applicant's private life within the meaning of Article 8, such an interference had been prescribed by section 42(1) of the Medical Profession Act (see paragraph 34 above). In addition, it had been necessary in a democratic society for the protection of the applicant's health.

75. The Government stressed that all the actions taken by the authorities in the present case had been appropriate and proportionate. The hormone therapy in question had been prescribed by Dr D., who was a sexologist, whereas an endocrinologist was competent in relation to hormonal treatment.

In accordance with the relevant domestic provisions, an endocrinologist was authorised to carry out an examination of a patient's hormone levels. In conclusion, the Government was of the view that the Polish authorities had fulfilled their obligations under Article 8 of the Convention and had taken all necessary steps which could have been required to respect the applicant's right to personal development with regard to her physical and psychological integrity as a transgender person.

2. Third-party interveners' submissions

(a) Helsinki Foundation for Human Rights

76. The Helsinki Foundation for Human Rights submitted that there was a lack of research on access to medical care for transgender prisoners. The intervener referred to the results of the research conducted by Transgender Europe ("Overdiagnosed but Underserved, 2017; Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey", TGEU 2017, pp. 38-39), according to which only 35.5% of respondents among healthcare professionals in Poland had any training on working with trans people. Furthermore, there were no specific regulations in relation to the situation of LGBTI persons in places of deprivation of liberty. Therefore, the treatment of transgender prisoners was based on general principles and depended on the understanding of the prison administration and the approach of the prison staff.

77. Referring to several reports, recommendations and opinions issued by non-governmental organisations, scholars, and UN and Council of Europe bodies (see the international law cited in paragraphs 35-38 and 43 above) the Helsinki Foundation for Human Rights stated that there was growing consensus among human rights organisations and scholars that transgender persons constituted a particularly vulnerable group of prisoners and their healthcare needs (including gender affirming treatment) should be recognised and adequately safeguarded, as the lack thereof might lead to serious consequences for the mental and physical health of such prisoners.

(b) The Commissioner for Human Rights of the Republic of Poland

78. The Commissioner submitted that the States' obligations to meet specific health needs of transgender detainees could be derived from Articles 8 and 3 of the Convention. Referring to the World Health Organization's recommendations and the recommendations of the Committee of Ministers of the Council of Europe (CM/Rec(2010)5 – see paragraph 38 above) the Commissioner noted the need to provide effective access to appropriate medical care to transgender persons. The Commissioner also mentioned the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Expression and Sex Characteristics, which explicitly confirmed the need to provide

access to hormone or other therapy for transgender detainees. In the Commissioner's view the prison administration's obligation to protect the prisoners' health included ensuring access to hormone therapy when transgender prisoners needed it and especially when it was administered under doctor's orders. The legal basis for providing medical treatment to prisoners was set out in Article 115 of the Code of Execution of Criminal Sentences (see paragraph 29 above).

79. The Commissioner further stated that scientific studies had confirmed that the lack of gender affirming actions had raised the risk of self-harm including suicide. Refusal of hormone therapy for transgender prisoners exacerbated their gender dysphoria which, when combined with deprivation of liberty and the specific vulnerability of transgender persons within the prison population, might lead to inhuman or degrading treatment.

(c) Transgender Europe

80. Transgender Europe (TGEU) pointed to the relevant case-law of the Court with respect to transgender individuals' rights under Articles 3, 8 and 14 of the Convention. The third-party intervener also stressed the particular vulnerability of transgender persons in the custodial context. It also provided an overview of key developments with respect to healthcare issues specific to transgender individuals. Lastly, it provided a comparative perspective relating to transgender detainees in the United States and their access to trans-specific healthcare in terms of relevant jurisprudence and official policy, including empirical evidence.

81. It was concluded that transgender inmates, in particular transgender women, shared a distinct set of health needs and heightened vulnerability in terms of health outcomes, especially when incarcerated. Hormone treatment in prison for them was potentially essential to the safety and maintenance of their mental and physical health. Many transgender persons could not be mentally healthy without access to specific healthcare including hormone therapy.

3. The Court's assessment

(a) General principles

82. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (see, in particular, *Van Kück,* cited above*,* § 69 and *Schlumpf v. Switzerland*, no. 29002/06, § 77, 8 January 2009, and the references cited therein).

83. The Court further reiterates that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). This has led it to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination (see *Van Kück*, § 69, and *Schlumpf*, § 100, both cited above), of which the freedom to define one's sexual identity is one of the most basic essentials (see *Van Kück*, cited above, § 73).

84. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (see, among many other authorities, *Evans v. the United Kingdom* [GC], no. 6339/05, § 75, ECHR 2007-I). When it comes to balancing the competing interests, the Court has emphasised the particular importance of matters relating to one of the most intimate parts of an individual's life, namely the determination of an individual's gender (see *Schlumpf*, cited above, § 104).

(b) Application of those principles in the present case

(i) Interference or positive obligation

85. The Court has previously considered a number of cases relating to medical treatment for transgender persons to fall within the sphere of possible positive obligations. Those cases mainly concerned the reimbursement of the costs of gender reassignment surgery (see *Van Kück* and *Schlumpf,* both cited above)

86. However, in the present case, the applicant, a prisoner, was initially allowed to undergo hormone replacement therapy associated with gender reassignment. She underwent that therapy for nearly one and half years in two prisons in which she was previously detained and was refused it only when she was transferred to Siedlce Prison (see paragraphs 11 and 13 above). Thus, the applicant has not complained of inaction on the part of the domestic authorities, but rather of the fact that the Siedlce Prison authorities prevented her from continuing the treatment which she had initially been allowed to undergo.

87. The Court is therefore prepared to approach the case as one involving an interference with the applicant's right to respect for her private life (compare *Diaconeasa v. Romania*, no. 53162/21, §§ 50 and 51, 20 February 2024, and *Y.Y. v. Turkey*, no. 14793/08, § 66, ECHR 2015 (extracts)).

(ii) Compliance with Article 8 § 2

88. Such an interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

89. The Court notes that the applicant did not make any comments as regards the legal basis for the interference. The Government, for their part, asserted that the interference had been based on section 42(1) of the Medical Profession Act (see paragraphs 34 and 74 above). The Court, however, refers to the third-party intervener's submissions on this point who noted the legal basis for providing medical treatment to prisoners and finds that it was rather Article 115 § 6 of the Code of Execution of Criminal Sentences (see paragraphs 29 and 78 above) that served as the legal basis for the interference at issue, which was therefore "in accordance with the law". The Court also accepts that the interference pursued a legitimate aim, namely the protection of the applicant's health (see paragraph 74 above).

90. It therefore remains to be determined whether the interference resulting from the impugned decision can be regarded as "necessary in a democratic society".

91. The Court notes that the applicant is a transgender person who, prior to the events in the present case, had been undergoing hormone replacement therapy associated with gender reassignment. It further finds that the decision in the present case, which concerned access to hormone treatment, touched upon the applicant's freedom to define her gender identity, one of the most basic essentials of self-determination (see *Van Kück*, cited above, §§ 73 and 75). In that regard, the Court also notes the impact of the prison authorities' decision on the applicant's right to sexual self-determination. It has repeatedly held that given the numerous and painful interventions involved in gender reassignment and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo such a procedure (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 81, ECHR 2002-VI, and *Van Kück*, cited above, § 59; see also the relevant international documents cited in paragraphs 36-39 above).

92. The Court further observes that the applicant was diagnosed with gender dysphoria after she had performed genital self-mutilation. She was

subsequently prescribed hormone replacement treatment, which, according to the medical reports, had beneficial effects on her physical and mental health (see paragraphs 9, 11, 15 and 16 above). The Court notes that the doctors who prescribed the hormone replacement therapy to the applicant considered it to be necessary (see paragraph 9 above). In December 2018 Dr D. stated that the applicant required immediate and urgent hormone therapy. In July 2020 he found that the interruption of the treatment would pose a serious health risk (see paragraph 15 above). Furthermore, an endocrinologist, Dr K.-N., confirmed, albeit only on the basis of Dr D.'s written opinions, that such treatment was essential for the applicant's physical and mental health (see paragraph 16 above).

93. The Court cannot but note, therefore, that the domestic authorities had strong elements before them indicating that hormone therapy was an appropriate medical treatment for the applicant's state of health. This therapy was provided to the applicant in the prisons in which she was previously detained and had had a beneficial effect on her, as was noted by medical professionals. The Court notes that the prison governor justified his refusal to grant the applicant's request solely by stating that an endocrinologist's opinion was required. At the same time, the treatment was interrupted before the applicant could be consulted by an endocrinologist (see paragraphs 13 and 19 above). In the Court's view, the burden placed on the applicant to prove the necessity of the prescribed medical treatment by undergoing an additional consultation with an endocrinologist (see paragraph 13 above) appears disproportionate in the circumstances of the present case (compare *Van Kück*, cited above, §§ 55 and 56). In any event, the applicant submitted to the prison authorities an opinion prepared by an endocrinologist confirming the necessity of the hormonal therapy (see paragraph 16 above). Nevertheless, this did not result in her request being granted.

94. At the same time, the Court observes that Government did not refer to any detrimental effects which the therapy might have had on the applicant's physical and mental health. Nor did they maintain that allowing the applicant to continue the therapy would have caused any technical and financial difficulties for the prison authorities. In that regard, the Court points out that the applicant bore the cost of the medications herself, thus imposing no additional costs on the State (see paragraph 11 above).

95. It is true that the applicant's hormone treatment was interrupted only for a relatively short period, between 18 July and 31 July 2020. However, the Court notes that the applicant submitted that since the beginning of July 2020 she had been taking half of the prescribed dose of medication (see paragraph 67 above). Most importantly, the applicant received the medication on 31 July 2020, not because of a sudden change of approach on the part of the authorities, but as a consequence of the Court's indication of interim measures under Rule 39 of the Rules of Court (see paragraphs 22-24 above).

96. In the light of the foregoing considerations, the Court concludes that the authorities failed to strike a fair balance between the competing interests at stake, including the protection of the applicant's health and her interest to continue the hormone therapy associated with gender reassignment. In so concluding, the Court bears in mind the applicant's particular vulnerability as an imprisoned transgender person undergoing a gender reassignment procedure, which required enhanced protection from the authorities (see, *mutatis mutandis*, *Stasi*, cited above, § 91, and *Fenech v. Malta*, no. 19090/20, § 137, 1 March 2022; see also, in that context, the Committee of Ministers' Recommendation of 31 March 2010 stating that measures should be taken so as to adequately protect and respect the gender identity of transgender prisoners, cited in paragraph 38 above).

97. There has accordingly been a violation of Article 8 of the Convention. Consequently, the Court dismisses the Government's preliminary objection relating to the applicant's victim status.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

98. Lastly, the applicant complained under Article 2 of the Convention that the interruption of the hormone treatment in Siedlce Prison had caused her emotional distress which had put her at risk of committing suicide. She also alleged a violation of Article 13 of the Convention, complaining that she had not had access to an effective domestic remedy for her complaints under Articles 3 and 8 of the Convention. Lastly, under Article 8 in conjunction with Article 14, she complained that the refusal in question had been motivated by discrimination. The Government contested these allegations.

99. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has dealt with the main legal questions raised by the case and that there is no need to examine the remaining complaints (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. RULE 39 OF THE RULES OF COURT

100. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

101. In view of the information provided by the parties that the applicant has received the necessary medical treatment since 31 July 2020 (see paragraph 24 above), the Court considers that the indication made to the

Government under Rule 39 of the Rules of Court (see paragraph 23 above) should be lifted.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

103. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

104. The Government argued that the applicant's claims in respect of non-pecuniary damage were unfounded and unsubstantiated.

105. The Court finds that the applicant undoubtedly sustained damage of a non-pecuniary nature on account of the breach of Article 8 and it therefore awards her EUR 8,000 in that connection.

B. Costs and expenses

106. The applicant, who was represented by a lawyer of her choice and was granted legal aid, also claimed 13,837.50 Polish zlotys (PLN) (approximately EUR 3,217) in respect of costs and expenses. The applicant submitted a document listing the tasks undertaken by the lawyer (forty-five hours of work at PLN 250 per hour) and two pro-forma invoices, one of 29 July 2020 in the amount of PLN 2,152.50 (approximately EUR 500) and the other of 8 December 2021 in the amount of PLN 10,762.50 (approximately EUR 2,503).

107. The Government argued that the claim was exorbitant.

108. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 3,003, less EUR 850 received under the Court's legal-aid scheme, plus any tax that may be chargeable to her, for the costs and expenses incurred before the Court.

FOR THESE REASONS, THE COURT

1. *Joins*, unanimously, to the merits the Government's preliminary objection concerning the applicant's victim status and *dismisses* it;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

4. *Holds*, unanimously, that there is no need to examine the complaints under Article 2, Article 13 in conjunction with Articles 3 and 8, and Article 8 in conjunction with Article 14 of the Convention;

5. *Decides,* unanimously, to lift the indication of the interim measure to the Government under Rule 39 of the Rules of Court;

6. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,153 (two thousand one hundred and fifty-three euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 July 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Marko Bošnjak President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

DISSENTING OPINION OF JUDGE WOJTYCZEK.

1. I respectfully disagree with the view that Article 8 has been violated in the instant case.

2. The case raises some important procedural issues.

Firstly, a rational assessment of the facts in the instant case requires expert knowledge in medicine, which the Court does not have. Without such expert knowledge it is impossible to assess rationally whether the authorities struck – or failed to strike – a fair balance between the competing interests. However, the majority decided to take their own stance on medical issues, apparently following their intuitions.

Secondly, the assessment of the facts in this case is particularly difficult as different physicians involved expressed divergent views concerning the appropriate therapy for the applicant. Moreover, as noted by the applicant, the facts of the instant case occurred during the Covid-19 pandemic, which caused obstacles to prompt access to medical consultations and services in Poland, not only in prisons but also outside the prison context. The legal conclusions adopted by the majority do not appear to be based upon a sufficiently thorough examination and assessment of all relevant factual circumstances and especially the divergence of views between different physicians.

Thirdly, in the instant case the Court indicated an interim measure under Rule 39 of the Rules of Court, dictating a detailed treatment to be administered (see paragraph 23). In my view, it is problematic to issue such measures without consulting any experts. Furthermore, the measure was imposed in spite of an explicit previous warning, issued by a physician, of possible serious risks of such a treatment (see point 3 below), and in the context of the subsequent assessment by other physicians that one of the medicines indicated by the Court (*Luteina*) was inappropriate for the applicant (see point 3 below). There is a risk that interim measures prescribing medical treatments without a thorough and comprehensive medical assessment of the patient's situation may cause irreparable harm.

3. In the instant case, different experts have expressed divergent views concerning the appropriate treatment for the applicant.

Firstly, some doctors have expressed the view that the applicant should be treated with *Estrofem* and *Luteina*. Such views were expressed, in particular, in medical certificates dated 21 December 2018 and 30 June 2020.

Secondly, an expert opinion dated 28 November 2018 (see paragraph 8) pointed to the necessity of an extensive examination for the purpose of diagnosing the applicant's transsexuality. In the expert's view, on the sole basis of one medical consultation and without extensive examinations carried out by several specialists, including a sexologist, a psychiatrist, and

endocrinologist, a gynecologist and a urologist, it was impossible to diagnose transsexuality and to choose the appropriate therapy. A similar view was expressed in the note of the Director of the Prison Health Centre, dated 28 May 2020 (see paragraph 13), stressing that treatment with female hormones without a thorough psychological and psychiatric examination and without prescribed endocrinological examinations was "very risky". The doctor pointed, in particular, to the risk of cancer (page one of the note). It is therefore not correct to state the following in paragraph 93: "The Court notes that the prison governor justified his refusal to grant the applicant's request solely by stating that an endocrinologist's opinion was required".

Thirdly, a physician issued a note dated 6 July 2020 advising the applicant to take *Estrofem*, without mentioning *Luteina*. Moreover, the medical information dated 5 August 2020 (mentioned in paragraph 19) contains advice to continue taking *Estrofem*, but explicitly excluding *Luteina* as inappropriate in the applicant's case. These medical opinions seem to partly call into question the therapeutic strategy which was initially drawn up by the doctor trusted and relied on by the applicant and subsequently relied on by the majority. They also implicitly call into question the rationality of the interim measure decided by the Court.

The majority express the following view in paragraph 93: "The Court cannot but note, therefore, that the domestic authorities had strong elements before them indicating that hormone therapy was an appropriate medical treatment for the applicant's state of health". For the reasons explained above, it would be more justified to say that the authorities had strong elements before them indicating that the situation was not clear.

The majority further state the following in paragraph 93:

> "In the Court's view, the burden placed on the applicant to prove the necessity of the prescribed medical treatment by undergoing an additional consultation with an endocrinologist (see paragraph 13 above) appears disproportionate in the circumstances of the present case (compare *Van Kück*, cited above, §§ 55 and 56)."

This triggers four remarks. Firstly, it does not reflect accurately the content of the note written by the Director of the Prison Health Centre, which stated the necessity not of "an additional consultation with an endocrinologist" but of a thorough psychological, psychiatric and endocrinological examination. Secondly, both the statement in the reasoning and an assessment of its validity would require specialist medical knowledge, which I do not have. Thirdly, the reasoning implies nonetheless that the initial treatment was correct, whereas the two divergent views expressed by other doctors and presented above were not. Fourthly, a consultation with an endocrinologist took place on 5 August 2020 and the doctor partly called into question the prescribed medical treatment.

4. In the instant case, following the note of the Director of the Prison Health Centre, dated 28 May 2020, the applicant was not allowed for some

time to have a new delivery of *Estrofem* and *Luteina* and was prevented from taking these two medicines for almost two weeks.

It transpires from its text that the medical note dated 28 May 2020 was based on the principle of precaution and the need to obtain a thorough picture of the applicant's health before engaging in any potentially damaging treatment. There are no reasons to call into question the good faith of its author or the conformity with medical art of the above-mentioned indications and, in the case file, there are no mentions of any procedural steps taken in order to rebut these two assumptions (good faith and observance of the medical rules). I note that the majority's reasoning nonetheless implicitly calls into question the medical rationality of the note (among others by suggesting that it placed a disproportionate burden on the applicant – see above) but this assessment is not accompanied by any persuasive argument and, in particular, it is not supported by expert opinion.

Under such circumstances, it is not possible to blame the prison authorities for not allowing the applicant to obtain a new delivery of the desired medicines before a thorough medical examination. They had no other option than to follow the indications issued by a doctor and they could not call them into question without relying on expert knowledge based on further extensive medical examinations. While it is correct to say that the administration of both *Estrofem* and *Luteina* was interrupted between 18 July and 31 July 2020, it is not accurate to say that such a situation amounted to an interruption of treatment because the measure applied was based upon a clear indication issued by a physician, while the applicant continued to remain under medical care.

5. To conclude, in the circumstances of the case, the prison authorities sought to follow the advice given by the doctors. In my view, there are no sufficient grounds to conclude that the interruption, which followed medical advice, in the administration of *Estrofem* and *Luteina* from 18 July to 31 July 2020 amounted to a violation of the applicant's rights protected by Article 8.