

End of the conscience clause? – Steen v. Sweden and Grimmark v. Sweden

Reference version

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Summary

The gloss concerns the decisions issued by the European Court of Human Rights in February 2020. The cases concerned midwives who were denied employment because they refused to participate in abortion procedures. The women accused potential employers – hospitals – of violation of religious freedom and discrimination. The European Court of Human Rights decided that there was a restriction of the midwives' freedom of thought, conscience and religion, but this was justified by Swedish law, which clearly states that the employee must perform all the duties specified by the employer. The interference with the nurses' freedom of religion was also justified by the protection of the health of women wishing to undergo termination of pregnancy. The Court held that there was also no discrimination against midwives. The author is of the opinion that the decision and its justification deserve approval. Taking into account the circumstances of the case and Swedish regulations, which are liberal concerning abortion law and does not provide the possibility for nurses and midwives to invoke the conscientious objection clause, the decision should be positively assessed. However, the Court's decision cannot be read as a breakthrough, because if the case concerned a different state of affairs, e.g. from Poland, the outcome might be completely different. It was emphasised that the situation in Poland after the judgment of the Constitutional Tribunal in 2015 concerning the doctors' conscience clause introduced legal confusion and unclear situation of nurses and midwives, who were not affected by this judgment.

Key words

conscience clause, nurses, abortion, freedom of religion

End of the conscience clause? – Steen v. Sweden¹ and Grimmark v. Sweden²

On 11 February 2020, the European Court of Human Rights³ delivered two decisions concerning the conscience clause for midwives. The Court ruled on two separate cases involving nurses who were denied employment because they refused to participate in abortion procedures carried out in medical facilities. The judges deemed the claims of the women – who alleged that the hospitals had violated their freedom of religion and discriminated against them by declining to employ as midwives candidates who refused to assist with abortion procedures – to be groundless. These judgments have sparked a wave of commentary, in Europe and in Poland, some of which is favourable⁴ – suggesting that medical staff would no longer be able to invoke a conscience clause when refusing to provide controversial healthcare services, and, on the other hand, others highly critical, emphasising that the fact that the Court had undermined the right of doctors and nurses to conscientious objection⁵.

This article will focus on an analysis of the ECtHR's decision and the arguments put forward by the Court. The issue of the conscience clause for nurses and midwives within the Polish legal system will also be discussed. Finally, the question will be raised as to whether the Court's decisions can indeed be regarded as groundbreaking in relation to the conscience clause and whether they have any impact on the legal situation of nurses and midwives in Poland.

¹ Judgment of the ECtHR of 11.02.2020, *Steen v. Sweden*, application no. 62309/17.

² Judgment of the ECtHR of 11.02.2020, *Grimmark v. Sweden*, application no. 43726/17.

³ Hereinafter referred to as 'the ECtHR' or 'the Court'.

⁴ *Lekarze nie mogą zasłaniać się klauzulą sumienia. Przelomowy wyrok Europejskiego Trybunału Praw Człowieka*, „Gazeta Wyborcza” of 18.03.2020, <https://www.wysokieobcasy.pl/wysokie-obcasy/7,163229,25799484,lekarze-nie-moga-zaslaniac-sie-klauzula-sumienia-przelomowy.html> [accessed: 10.07.2020], *Nie wykonujesz obowiązków służbowych? Klauzula sumienia ci nie pomoże*, „Krytyka Polityczna” of 17.03.2020, <https://krytyka-polityczna.pl/swiat/ue/klauzula-sumienia-europejski-trybunal-praw-czlowieka> [accessed: 10.07.2020].

⁵ *Skandaliczny wyrok w sprawie położnych przeciw Szwecji. Europejski Trybunał Praw Człowieka podważył prawo do sprzeciwu sumienia*, 16.03.2020, <https://www.pch24.pl/skandaliczny-wyrok-w-sprawie-polozonych-przeciw-szwecji-europejskiego-trybunal-praw-czlowieka-podwazyl-prawo-do-sprzeciwu-sumienia,74658,i.html#ixzz6RzTiV5Ao> [accessed: 10.07.2020]; *ETPC uderza w wolność sumienia. Można przymuszać położne do przeprowadzania aborcji*, 26.03.2020, <https://ordoiuris.pl/wolnosc-su-mienia/etpc-uderza-w-wolnosc-sumienia-mozna-przymuszac-polozne-do-przeprowadzania-aborcji> [accessed: 10.07.2020].

Facts of the case

Ellinor Grimmark and Linda Steen are practising nurses working in Sweden who decided to complete a midwifery degree.

Whilst studying midwifery, the applicant, Ms Grimmark, received a monthly grant funded from public funds. As part of her studies, she was due to take up a summer job at the Hogland Women's Clinic. Before starting the job, she informed her employer that she would not assist with abortion procedures on the grounds of her beliefs and religious convictions. A few days later, the applicant was informed that she would not be able to take up a post at the hospital during the summer holidays or at a later date. It was then that she learnt that, due to the above situation, she would not be entitled to her grant during the final semester of her studies. The situation recurred when Ellinor Grimmark applied for a job at the Ryhov Women's Clinic, where she was also refused the post on the grounds of her refusal to participate in abortion procedures. It happened once again when she applied for a job at the Varnamo Clinic, where she also expressed her views on abortion. In the meantime, Ms Grimmark lodged a complaint with the Anti-Discrimination Ombudsman. The case came to public attention, and a local newspaper interviewed the applicant. When the newspaper article was published, she was informed by recruiters at Varnamo Hospital that she would not be able to be employed there. Later, during the court proceedings, Ellinor Grimmark claimed that, because of the interview she had given to the newspaper – in which she described her case and her views on abortion – she had been victimised and had been unable to secure employment. Despite the circumstances, she eventually obtained her midwifery licence.

In 2014, the Anti-Discrimination Ombudsman issued a decision stating that there had been no discrimination in the way Ellinor Grimmark had been treated by the hospitals. Furthermore, the Ombudsman emphasised that participating in abortion procedures forms part of the midwifery profession. He pointed out that the applicant was not in a situation comparable to that of midwives who were able to carry out all healthcare services. The Ombudsman also emphasised that, in the facts of the case presented, there had been no indirect discrimination. It was noted that the applicant's freedom of religion was protected by Article 9 of the Convention⁶; however, under Swedish law, an employer may require an employee to carry out all the professional

⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, hereinafter referred to as 'the Convention'.

duties that are normally part of the scope of a particular profession. The requirement to participate in the abortion procedure was therefore justified by law and necessary for the protection of health, as it ensured effective access to abortion services in Sweden. The Ombudsman also pointed out that the restriction on freedom of religion was proportionate and justified.

The applicant disagreed with the opinion expressed by the Anti-Discrimination Ombudsman and sought damages before the Swedish courts on the basis of the Convention. The Jönköping District Court and the Labour Court concurred with the arguments put forward by the Ombudsman. At the same time, they pointed out that every midwife who refused to carry out any other duty would have been treated in the same way as the applicant.

The applicant, Linda Steen, like Ellinor Grimmark, had embarked on publicly funded studies to train as a midwife. During her training, she also received a publicly funded grant and agreed to take up employment at the Nyköping Women's Clinic within two years of completing her studies. During her training, the applicant signed a contract with the maternity ward of the clinic and informed her employer that she would be unable to participate in abortion procedures. She was then informed that she would not be able to take up a post at the clinic unless she agreed to assist with abortion procedures. Ms Steen was, against her will, transferred back to her previous position as a nurse at the Malmköping clinic. Despite this situation, the applicant completed her midwifery studies. She also brought a case before the court, seeking compensation under the Convention.

The district court and the employment tribunal, as in the Grimmark case, did not uphold the allegations of discrimination and dismissed the complaints on the basis of similar arguments.

Following the unfavourable court rulings, Ms Grimmark and Ms Steen lodged complaints with the ECtHR, alleging that the hospitals had violated their freedom of thought, conscience and religion. The applicants argued that the restriction of their rights was unlawful, pointless and had been imposed in a discretionary and arbitrary manner. Furthermore, they pointed out that the infringement of their rights was disproportionate and unjustified in a democratic society. In addition, they emphasised in their applications that they had been subjected to discrimination and that their freedom of expression had been violated.

Legal reasoning of the ECtHR

In both the *Grimmark* and *Steen* cases, the Court unequivocally declared the applications inadmissible as being manifestly ill-founded, and concurred with the reasoning of the Swedish courts.

With regard to the allegations of a violation of the right to freedom of thought, conscience and religion, the Court noted that the refusal to participate in abortion procedures on grounds of faith and belief did indeed constitute an expression of religious belief, protected by Article 9 of the Convention. The ECtHR explicitly stated that there had been an interference with the women's freedom of religion. However, it noted that the restriction on that freedom stemmed from provisions of Swedish law which unequivocally stipulate that an employee must perform all duties specified by the employer. Furthermore, the interference with the midwives' freedom of religion was justified on the grounds of protecting the health of women wishing to undergo an abortion. The Court also noted that the restriction was necessary in a democratic society and proportionate. As the judges pointed out, Sweden, which guarantees nationwide access to abortion services, has a positive obligation to organise its healthcare system in such a way that the exercise of freedom of religion by medical staff does not affect their patients' ability to access healthcare services. For this reason, the requirement imposed on all midwives – to perform all healthcare services – was neither disproportionate nor unjustified. The decision emphasised that Swedish employers have considerable discretion in how they organise work and the right to require an employee to perform all professional duties, which the employee agrees to when entering into a contract. In both the *Grimmark* and *Steen* cases, each of the women made a conscious decision to practise as a midwife and to apply for the job. This means that they must have been aware that the work of a midwife involves participating in abortion procedures. Significantly, despite being refused employment by the hospitals, the applicants were not left without work.

In both decisions, the Court also considered the issues of infringement of freedom of expression and discrimination. The applicants argued that their freedom of expression had been restricted in such a way that, because of their views on abortion, they had lost the opportunity to be employed. The Court agreed with the lower courts' reasoning on this point, namely that it was not their views on abortion that constituted the reason for non-employment, but their refusal to perform all their professional duties. The Court concluded that no violation had taken place, as it had not been proven that the applicants' views had had a negative impact on their lives, apart from the loss of a job offer. In its judgment in the *Grimmark* case, the Court emphasised that

the key factor was that, at the time the interview between the applicant and the Varnamo clinic was published, no binding contract had been concluded. The judges indicated that they agreed with the findings of the Swedish court in this regard, namely that it was not the interview that caused her to lose the opportunity for employment at the hospital, but her refusal to carry out all her professional duties.

Finally, in both cases, the Court addressed the allegations of discrimination raised by the women. In the *Grimmark* case, the applicant stated that she had been treated less favourably than other midwives because of her anti-abortion views. The Court argued that her situation was not comparable to that of other midwives who were willing to carry out all their duties. The applicant could not claim that she was in a comparable situation to midwives who did not share her views.

In the *Steen* case, the Court did not address the substance of the allegation of discrimination, as the applicant had not exhausted domestic remedies in this regard.

Assessment

The decisions in the *Grimmark* and *Steen* cases were hailed by liberal commentators as the beginning of the end of the conscience clause for members of the medical professions, whilst conservative commentators viewed them as an attack on the conscience of doctors and nurses. On analysing these decisions, one cannot help but get the impression that the Court did not decide to discard the conscience clause, but rather took all the circumstances of the specific cases into account in a balanced manner.

It should be emphasised that, in the past, the Court has repeatedly ruled on matters of conscientious objection, albeit in a different context – that of military service. The first case from 1966, which was brought before the European Commission of Human Rights, concerned a German Jehovah's Witness who sought a complete exemption from compulsory military service on religious grounds⁷. In that case, it was ruled that there had been no violation of the man's freedom on the grounds that the state had not provided for the possibility of invoking conscientious objection in relation to military service. The Committee of Ministers of the Council of Europe had previously indicated that any state may introduce legislation allowing

⁷ *Grandrath v. the Federal Republic of Germany*, application no. 2299/64.

for the refusal of military service on grounds of belief⁸. Currently, a conscientious objection clause in the context of military service is common in almost all countries that are parties to the Convention. In 2011, in a judgment, the Court ruled that the right to conscientious objection to military service derives directly from Article 9 of the Convention⁹.

An analysis of the cited judgments reveals that the Court seeks to broaden the scope for invoking the conscience clause in certain respects, particularly where military service is concerned. At the same time, the judgments emphasise that states should ensure that the duty to defend the country can be fulfilled in another form¹⁰. It should be noted that broadening the scope for invoking conscientious objection in the context of military service is linked to a restrictive interpretation of freedom of conscience and religion in the professional sphere¹¹.

For example, in 2001, in a landmark case, the Court ruled that a refusal by pharmacy owners to sell contraceptive pills on the grounds of their own religious beliefs was not protected by Article 9 of the Convention¹². The judgment emphasised that pharmacists could not give priority to their private views over their professional duties as long as the sale of contraceptive medicines is legal in France and possible only in a pharmacy.

Returning to the conscience clause applicable to midwives, it is worth noting that Sweden has one of the most liberal legal frameworks regarding abortion in the world. Any woman up to the 18th week of pregnancy, or in exceptional cases up to the 22nd week – for example, if there is a likelihood that the foetus is suffering from a serious illness – may undergo a termination of pregnancy entirely free of charge¹³. A crucial fact, which was not highlighted in the Court's rulings, is that Swedish law does not provide for the possibility of healthcare professionals invoking a conscience clause at all¹⁴. This means that Swedish law does not grant doctors or nurses the freedom to refuse to provide a medical service where it conflicts with their views or religious beliefs. The nature of the treatment – whether it be an abortion, the prescription of contraceptives or a blood transfusion – is irrelevant here, as is the reason for such a refusal.

⁸ Resolution of the Committee of Ministers of the Council of Europe of 29 June 1967.

⁹ Judgment of the ECtHR of 20.07.2011, *Bayatyan v. Armenia*, application no. 23459/03.

¹⁰ See judgment of the ECtHR of 10.12.2017, *Adyan and others v. Armenia*, application no. 75604/11.

¹¹ See judgment of the ECtHR of 15.01.2013, *Eweida and others v. the United Kingdom*, application nos. 48420/10, 59842/10, 51671/10, 36516/10; judgment of 02.10.2001, *Pichon and Sajous v. France*, application no. 49853/99.

¹² *Pichon and Sajous v. France*, op. cit.

¹³ Section 1 of the Abortion Act, SFS 1974:595 (as amended).

¹⁴ Ch. Munthe, *Conscientious refusal in health care: the Swedish solution*, "Journal of Medical Ethics" 2016, vol. 42, <https://jme.bmj.com/content/43/4/257> [accessed: 10.07.2020].

The decisions handed down in the Grimmark and Steen cases should be viewed positively as examples of an appropriate resolution to the conflict between the midwives' freedom of conscience and the patients' right to healthcare services, in the context of the facts presented.

Undoubtedly, there was an infringement of the midwives' freedom of religion in the cases in question; however, this was justified by legal provisions aimed at protecting the health of women seeking access to abortion services. The restriction on freedom was justified in a democratic society and proportionate. In particular, it is worth noting that, by choosing to work as midwives, the women must have been fully aware of the restrictions imposed on them by Swedish law regarding their ability to express their religious beliefs in the midwifery profession. It is difficult to believe that the women were unaware that working as a midwife involves participating in abortion procedures. It is also worth noting the national context in which both decisions were made. The cases in question concerned facts that took place within the legal framework of Sweden. They might have been resolved in a completely different manner by the Court had the State – a Party to the Convention – granted members of the medical professions the right to conscientious objection.

Every State Party to the Convention enjoys a *margin of appreciation* in determining the restrictions on freedom of religion and belief that are necessary in a democratic society. Such restrictions on individual freedoms must have a value-based justification and be imposed for the purpose of protecting another value of comparable importance. This means that, as a general rule, there is freedom to manifest one's religious beliefs; however, the State may consider that, in certain circumstances, this freedom may be restricted in order to protect another, equally important value. In the case of doctors or nurses, the State may, within the limits of its discretion, restrict the freedom of religion of this professional group in order to ensure that patients have access to all healthcare services.

The State may also grant members of the medical profession the right to invoke a conscience clause if the healthcare service they are required to provide conflicts with their beliefs. However, in such a situation, the State must ensure that all persons have equal access to all guaranteed healthcare services that may be provided in that country, even those considered controversial, such as abortion or euthanasia (provided they are in accordance with national law). When considering a case involving precisely such a situation, the Court would have to assess whether patients' access to medical services has been sufficiently ensured in the event of a refusal by a doctor or nurse to provide them. Another potentially significant issue would

be to consider, depending on the circumstances of the case, a possible restriction on the group of people who may invoke conscientious objection.

If a similar case were brought before the Court under Polish law, there are legitimate doubts as to whether it would be decided in a similar manner to the Swedish cases. Firstly, unlike in Sweden, termination of pregnancy is illegal in Poland except in specific situations provided for by law¹⁵. Secondly, the regulations governing the professions of doctors and nurses (and midwives) explicitly allow these professional groups to invoke a conscience clause when providing medical services. This means that, under the current legal framework, a midwife could refuse to participate in a pregnancy termination procedure; however, she would have to state the reason for her decision, and the refusal would have to be recorded in writing¹⁶. Furthermore, a midwife would not be able to invoke the conscience clause if a delay in providing the service could result in an emergency health risk to the patient¹⁷. The midwife should also inform the patient of the refusal and indicate realistic options for obtaining this service from another nurse, midwife or at another healthcare facility¹⁸. It is important to note that the midwife is obliged to inform the patient in advance of any refusal to provide a service, so that the patient can obtain the service elsewhere. Provisions concerning the conscience clause for nurses and midwives are also set out in the Code of Professional Ethics for Nurses and Midwives of the Republic of Poland¹⁹, which states that members of these professions have the right to refuse to participate in medical procedures and biomedical experiments that conflict with their ethical standards²⁰.

Similar provisions²¹ apply to doctors wishing to refuse to provide a healthcare service that conflicts with their conscience. Like midwives and nurses, doctors may refrain from providing healthcare services that are contrary to their conscientious beliefs, subject to cases where a delay in providing assistance could result in a risk of loss of life, serious bodily harm or serious health impairment²². A provision imposing an obligation on a doctor to indicate realistic options for

¹⁵ Act of 07.01.1993 on family planning, the protection of the human fetus and the conditions for the admissibility of termination of pregnancy (Journal of Laws of 2001, No. 154, item 1792), Article 4a.

¹⁶ Act of 15.07.2011 on the professions of nurse and midwife (Journal of Laws 2011 No. 174, item 1039, as amended), Article 12(2).

¹⁷ Ibid., Article 12(1).

¹⁸ Ibid., Article 12(3).

¹⁹ Resolution No. 9 of 09.12.2003 adopted by the 4th National Congress of Nurses and Midwives.

²⁰ Ibid., Part II, point 6.

²¹ Article 39 of the Act of 05.12.1996 on the professions of physician and dentist (Journal of Laws 2020, item 567) (hereinafter 'the Medical Act'). The Medical Act was amended by the Act of 16 July 2020 amending the Act on the professions of physician and dentist and certain other acts (Journal of Laws 2020, item 1291).

²² Article 30 of the Medical Act.

obtaining a healthcare service which the doctor has refused to provide from another doctor or at another healthcare provider, and to perform a healthcare service contrary to their conscience in ‘other cases requiring urgent action’, was deemed inconsistent with the Constitution of the Republic of Poland²³ by a judgment of the Constitutional Tribunal of 2015²⁴. The Constitutional Tribunal emphasised at the time that the right to conscientious objection derives directly from the constitutional freedom of conscience and religion, the source of which is the inherent and inalienable dignity of the human person. The right to conscientious objection, as indicated, applies regardless of whether there are specific statutory provisions introducing it, which means that a doctor, even if Article 39 of the Medical Act did not exist, would have the right to refuse to provide a service contrary to his or her conscience.

In its judgment, the Constitutional Tribunal concurred with that part of legal doctrine which holds that the conscience clause contained in Article 39, read in conjunction with Article 30 of the Medical Act, defines the limits of a doctor’s lawful exercise of freedom of conscience in their dealings with patients²⁵.

The conscience clause in the Medical Act constitutes a restriction on freedom of conscience, establishing positive and negative conditions for its exercise. Opponents of the view expressed in the judgment of the Constitutional Tribunal take the position that the conscience clause allows doctors to act in accordance with their moral and religious convictions, despite the fact that they are bound by professional duties to which they consciously consented when choosing a particular profession and specialisation. Closely linked to doctors’ duties is the patient’s right to receive healthcare services²⁶. In a dissenting opinion to the judgment of the Constitutional Tribunal, Judge S. Wronkowska-Jaśkiewicz emphasised that ‘the guarantee provided by [the conscience clause – author’s note] is expressed through the fact that, in the event of a conflict between an obligation imposed on a doctor by applicable legal norms and the doctor’s conscience calling upon them not to perform a mandatory procedure, it authorises them not to fulfil that obligation. The clause itself is therefore intended to remove the restriction on freedom

²³ The Constitution of the Republic of Poland of 02.04.1997.

²⁴ Judgment of the Constitutional Tribunal of 07.10.2015, ref. K 12/14 (hereinafter ‘the judgment of the Constitutional Tribunal’).

²⁵ See, for example, O. Nawrot, *Commentary on the judgment of the Constitutional Tribunal of 7 October 2015, K 12/14*, „Przegląd Sejmowy” 2016, no. 4, p. 146; A. Zoll, *Klauzula sumienia* [in:] *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, eds. P. Stanisławski, J. Pawlikowski et al., Sopot 2015, p. 120; L. Bosek, *Klauzula sumienia – czy ustawa o zawodach lekarza i lekarza dentysty jest zgodna z konstytucją?*, „Medycyna Praktyczna” 2014, no. 1, pp. 105–107.

²⁶ J. Różyńska, *Klauzula sumienia* [in:] *System prawa medycznego*, vol. II, part 1, *Regulacja prawna czynności medycznych*, eds. M. Boratyńska, P. Konieczniak, p. 653.

of conscience arising from the applicable legal norms; and by making use of it, the doctor is not taking the patient's best interests into account, but is expressing their deep personal convictions'²⁷.

With regard to the obligation to indicate a realistic possibility of obtaining a healthcare service – which was deemed unconstitutional by the Constitutional Tribunal – the judges emphasised that this obligation is disproportionate. This requirement was deemed to unduly restrict freedom of conscience, as the provision, in its current form, does not protect the individual from acting contrary to their conscience, since it indirectly leads to an unacceptable moral consequence²⁸.

The greatest difference in the structure of the conscience clause for doctors and nurses lies in its material scope. Doctors may refuse to perform generally defined healthcare services. Nurses and midwives, on the other hand, may refuse to carry out a doctor's instruction, to provide another service, or to provide a service that falls outside the scope of their qualifications. This distinction stems from the different nature of the work carried out by nurses and doctors, as nurses, on the one hand, are subordinate to the supervising doctor, whilst at the same time enjoying a certain degree of autonomy. Furthermore, a nurse wishing to invoke the conscience clause must immediately inform the patient of their decision. No such obligation is *explicitly* imposed on a doctor. The difference also becomes apparent when a refusal to provide treatment is not possible. A nurse cannot invoke the conscience clause in a situation involving an immediate threat to health. A doctor, on the other hand, cannot do so in a situation where there is a risk of loss of life, serious bodily harm or serious impairment of the patient's health. The key point is that, although the judgment of the Constitutional Tribunal has removed the doctor's obligation to identify realistic possibilities for obtaining the service, this obligation continues to apply to nurses and midwives²⁹.

The current regulations concerning the conscience clause in relation to doctors and nurses give rise to systemic inconsistencies and discrepancies. On the one hand, the provision imposing a duty on doctors to indicate a realistic possibility of obtaining the service has been deemed unconstitutional by the Constitutional Tribunal. On the other hand, however, a similar provision continues to apply to nurses and midwives. This situation may give rise to considerable doubts

²⁷ Dissenting opinion of S. Wronkowska-Jaśkiewicz on the judgment of the Constitutional Tribunal, p. 68.

²⁸ Reasons for the judgment of the Constitutional Tribunal, part III, point 6.2.1., cf. M. Świeca, *Klauzula sumienia – jako rozwiązanie kolizji norm prawa stanowionego z normami światopoglądowymi*, „Prawo i Medycyna” 2013, no. 3–4, pp. 52–53.

²⁹ It can be assumed that, should a similar case be brought before the Constitutional Tribunal in the future, the provisions in question would be deemed unconstitutional.

and practical difficulties. Under Article 4a of the Act on Family Planning, Protection of the Human Foetus and Conditions for the Admissibility of Termination of Pregnancy³⁰, only a doctor may perform a termination of pregnancy. A midwife who participates in a pharmacological or surgical abortion procedure forms part of the therapeutic team over which, as indicated by the Supreme Court, the doctor has supervisory authority³¹. In my view, despite this structure of the regulations governing nurses and midwives, they do, within the framework of the supervision exercised, enjoy a certain degree of discretion, depending on the situation, the healthcare services provided or their experience³². A midwife who was instructed to administer a medicinal product intended to induce a medical abortion could invoke the conscience clause to refuse to participate in the procedure. Similarly, a midwife could refuse to assist with a gynaecological procedure to terminate a pregnancy. However, it is unclear how a midwife would formally indicate a realistic possibility of obtaining the service in such a situation³³. If a midwife were to decide to invoke the conscience clause, she would have to notify her supervisor or the person who commissioned the service – depending on the situation, either a doctor or a supervising nurse. The midwife would then have to refer the patient to another midwife or healthcare provider where she could receive the service. Nurses and midwives are under no obligation to be aware of the moral beliefs of other staff working on the ward, which means that the midwife to whom the patient is referred could also refuse to provide the service on the grounds of her own beliefs. If all midwives and nurses on the ward were to invoke the conscience clause, it could lead to a situation where the service could not be provided in practice, even if the doctor personally did not refuse to provide it. In such a situation, the patient would effectively be deprived of any real possibility of receiving such a service.

How would the issue of potential professional and civil liability of the midwife and the doctor be determined in such a situation – would the doctor be liable as the supervising party, or would each midwife be liable individually? Given the structure of the legislation granting specific powers to doctors and nurses, it appears that the midwife would be personally liable for any

³⁰ Act of 07.01.1993 on family planning, the protection of the human fetus and the conditions for the admissibility of termination of pregnancy.

³¹ Judgment of the Supreme Court of 27.03.2000, I PKN 150/99, OSNPC 2001, No. 16, item 505.

³² See A. Sieńko, *Klauzula sumienia a samodzielność wykonywania zawodu pielęgniarki – refleksja prawna*, „Pielęgniarstwo i Zdrowie Publiczne” 2018, no. 8(4): pp. 319-323 – the issue of nurses’ and midwives’ autonomy in the context of the conscience clause.

³³ This is highlighted by, for example: M. Sadowska, *Komentarz do art. 12* [in:] W. Lis, M. Sadowska, *Ustawa o zawodach pielęgniarki i położnej. Komentarz*, Warszawa 2019; D. Karkowska, *Wskazanie możliwości uzyskania świadczenia zdrowotnego u innego podmiotu* [in:] D. Karkowska, C. Włodarczyk, *Prawo medyczne dla pielęgniarek*, Warszawa 2013.

negligence on her part³⁴. Reversing the situation to one in which a doctor refuses to perform a termination of pregnancy, the question arises as to whether, in such a situation, a midwife who does not share the doctor's views could independently assist the woman – relying on her degree of independence from the doctor and her professional experience. Applying these considerations to the currently applicable Article 4 of the Act on Family Planning, Protection of the Human Foetus and Conditions for the Admissibility of Termination of Pregnancy – would imply a negative answer. In view of the above, nurses and midwives wishing to invoke the conscience clause face the challenge of resolving a moral conflict concerning a dual loyalty – to the patient seeking help on the one hand, and to their supervising doctor on the other³⁵.

When analysing a hypothetical case concerning a Polish midwife's refusal to participate in a termination of pregnancy procedure on the grounds of the conscience clause, which could be brought before the Tribunal, the judges would have to take into account the Polish provisions set out above. Denying the midwife the right to invoke the conscience clause would undoubtedly result in a violation of her freedom of conscience and religion. However, the restriction imposed on the midwife could be deemed unlawful, as the Act explicitly guarantees the right to invoke the conscience clause. Nevertheless, doubts might arise when considering whether the conscience clause restricts patients' ability to access all the healthcare services guaranteed by the State. The analysis would have to focus on balancing two conflicting rights – the midwife's right to conscientious objection and the patients' right to receive the guaranteed healthcare service. An analysis of the Court's past judgments suggests that the ECtHR might rule that, by granting doctors, nurses and midwives the right to invoke the conscience clause, the State is acting within the limits of the discretion afforded to it by the Convention. However, there is no doubt that the Court, as in the cases of *P. and S. v. Poland*³⁶ and *R.R. v. Poland*³⁷, could also emphasise that, in the event of a refusal to provide a service, the State has a duty to ensure that the patient has a genuine opportunity to obtain that service. As the ECtHR noted in the above-mentioned judgments, States Parties to the Convention have a duty to organise their healthcare systems in such a way as to effectively enable patients to access the healthcare services to which they are entitled in situations where medical staff exercise their right to freedom of conscience³⁸. This means that the key issue in this hypothetical case would be to

³⁴ See A. Sieńko, op. cit.

³⁵ This issue was highlighted by B. Dobrowolska and P. Cegielko, *Instytucja klauzuli sumienia w zawodzie pielęgniarki i położnej*, http://www.ptb.org.pl/pdf/dobrowolska_cegielko_klauzula_1.pdf [accessed: 10.07.2020].

³⁶ Judgment of the ECtHR of 09.10.2012, *P and S. v. Poland*, application no. 57375/08.

³⁷ Judgment of the ECtHR of 26.05.2011, *R.R. v. Poland*, application no. 27617/04.

³⁸ *P. and S. v. Poland*, op. cit., para. 106, and *R.R. v. Poland*, op. cit., para. 49.

determine whether, despite the invocation of the conscience clause, the patient had a genuine opportunity to receive the disputed treatment.

Unfortunately, the Polish judgment of the Constitutional Tribunal has only served to further complicate the situation for women seeking to access these controversial healthcare services. The responsibility for identifying a realistic possibility of accessing such services has been shifted onto nurses and midwives, who are under no obligation to possess the necessary knowledge in this regard. At the same time, the question of their potential liability towards patients, superiors and those commissioning the service remains entirely unclear. It is the state that should bear the unequivocal obligation to provide information on the realistic possibilities of accessing all healthcare services that are funded from public funds. However, despite many years having passed since the judgments in the cases mentioned above were handed down, no support for patients in this regard has been established in Poland.

Furthermore, when analysing historical rulings, one might be tempted to conclude that the Tribunal could apply a subjectively restrictive interpretation of the conscience clause. As in the case of the French pharmacists³⁹, the Tribunal could have held that the right to refuse to provide a service on grounds of moral conviction in professional contexts should be limited, for example, to doctors, nurses and midwives only, rather than extended to members of other healthcare professions, such as paramedics or physiotherapists.

Summary

The Court's decisions in the Grimmark and Steen cases should be viewed positively. The judges rightly found that the restriction on midwives' freedom of religion stemmed from the law and was intended to protect the health of women seeking access to a legal abortion. The requirement for midwives to perform all their professional duties constitutes a proportionate and justified restriction on their freedom of conscience.

It should be emphasised that the Court ruled on the basis of the specific facts of the case, which took place in Sweden. This means that if a similar case were to come before the courts under Polish law, the Court might find that, by providing a conscience clause for doctors, nurses and midwives, Poland had acted within its margin of discretion. The ECtHR would, however,

³⁹ *Pichon and Sajous v. France*, op. cit.

undoubtedly have considered whether it was realistic to obtain healthcare in a situation where a member of the medical staff invoked conscientious objection.

Taking all this into account, it should be noted that it is too early for commentators to suggest that the judgments in the *Grimmark* and *Steen* cases mark the beginning of the end of the conscience clause. The judgement was delivered on the basis of specific facts in Sweden, a country which has denied medical staff the right to conscientious objection and where some of the most liberal laws on abortion exist. Had the case taken place in Poland, given the Polish legal and cultural contexts, the outcome might have been entirely different.

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