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TO THE EUROPEAN COURT OF HUMAN RIGHTS
(Application No. 15351/03)

ADAM Z. V. POLAND

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

31 January 2008

I. INTRODUCTION

1. These written comments are submitted by the Helsinki Foundation for Human Rights (hereinafter

referred to as the “HFHR”), with its seat in Warsaw, Poland at ul. Zgoda 11, pursuant to a leave granted to the HFHR by the President of the Chamber of the European Court of Human Rights (hereafter: the “Court”) under Rule 44 § 2 of the Rules of the Court.

2. These submissions do not include any comments on the facts or merits of the case and address only the following matters: (i) the prohibition of torture and other forms of ill-treatment under international law, focusing on its implications for the treatment of disabled prisoners; (ii) an assessment of the relevant legal standards and practice in Poland; (iii) an overview of legal standards in other jurisdictions.

3. While these comments take established international standards and the jurisprudence of this Court as their starting point, the focus is on presenting legal standards and practice in Poland as far as the treatment of disabled prisoners is concerned. These comments seek to present the situation of disabled prisoners in Poland in a broader context and indicate possible sources of existing problems.

II. INTEREST OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

4. The HFHR is a non-governmental organization that was established in 1989 by members of the Helsinki Committee in Poland in order to promote human rights and the rule of law, as well as to contribute to the development of an open society in Poland. The Articles of Association of the HFHR include legal actions undertaken in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, particularly within the framework of the Strategic Litigation Program. The aim of such submissions is to influence the process of changing laws and practices that the HFHR finds to be contrary to human rights standards.

5. Since its establishment, the HFHR has been promoting the standards of the European Convention on Human Rights (the “Convention”), including the protection of human rights established by Article 3 of the Convention. Among the HFHR's monitoring priorities are the guarantees of prisoners' rights, in particular humane treatment. In the light of the above, the case of Adam Z. v. Poland is of vital importance to the HFHR as it concerns systemic failings in the organisation of prisons and remand centres, which may result in the degrading and inhumane treatment of disabled persons.

III. PROHIBITION OF DEGRADING AND INHUMANE TREATMENT WITH RESPECT TO DISABLED PRISONERS

6. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments, including the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”). Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment in absolute terms and, unlike most of the substantive clauses of the Convention, makes no provision for exceptions.

7. This prohibition has been expressed in particularly strong terms with regard to the circumstances of imprisonment and detention as creating an increased threat of ill-treatment.¹ Safeguards for the proper implementation of this principle are contained in Article 11 of the UNCAT, which obliges states to monitor the conditions of detention and ensure that adequate standards of treatment are maintained. Moreover, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment explains that “[t]he term cruel, inhuman or degrading treatment or punishment should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental (...)”².

¹ Reinforcement of this principle in the prison context can be found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 6), the UN Standard Minimum Rules for the Treatment of Prisoners (Principle 27 *et. seq.*) and the preamble to the UNCAT.

² Explanatory note to Article 6

8. The international community has endorsed the necessity to promote higher standards than merely just prohibit torture and ill-treatment of prisoners. All chief human rights documents emphasize the right to human dignity. The UDHR reaffirms this right in its first Article. Article 10 of the ICCPR mandates: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Basic Principles for the Treatment of Prisoners and the Body of Principles contain similar provisions in their first Principle. Moreover, Principle 5 of the latter explicitly reaffirms that prisoners must not be deprived of their fundamental rights and freedoms, “except for those limitations that are demonstrably necessitated by the fact of incarceration”. Thus, the UDHR in declaring that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family”³ does refer to the physical and mental well-being of prisoners.

9. According to the UN Standard Minimum Rules for the Treatment of Prisoners (“SMR”), “imprisonment is afflictive by its very nature and shall not be aggravated”⁴. Deprivation of liberty implies deprivation of the right of self-determination. It is then an obvious responsibility of the government to ensure prisoners’ right to life, good health standards in prison and to guarantee living and working conditions, activities and treatment which are not detrimental to the health of prisoners or infringe their dignity. It is not tolerable for imprisonment to add sickness, physical or mental suffering to the punishment. Mental health affects physical health and vice versa. Living conditions in a prison are among the chief factors influencing a prisoner’s sense of self-esteem and dignity. Therefore, humane living conditions and a psychologically and socially stimulating treatment of prisoners are also matters of health⁵.

10. The main standard-setting document at the Council of Europe level, the European Prison Rules of 2006 (“EPR”), reiterates the same principles of unconditional respect for dignity and prohibition of ill-treatment as being applicable to all prisoners. In addition, in its Part V, the EPR obliges states to use all available measures to account for the particular needs of special categories of prisoners, such as mentally or physically disabled persons.

11. The imperative of humane treatment stems from the very principles underlying the penitentiary system. The purpose and justification of a sentence of imprisonment is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, as far as possible, that upon his/her return to society the former offender is not only willing but able to lead a law-abiding and self-supporting life. To this end, as expressed in the SMR, “the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners”.

12. It follows from the above that according to existing international standards, states must not only ensure that prisoners are not subjected to cruel or inhumane treatment but must also strive to minimize any differences between prison life and life at liberty which tend to lessen the respect due to them as human beings. Moreover, the physical and mental health of prisoners is a responsibility not only of the government and the prison administration, but also of all prison staff engaged in the treatment of prisoners. Attention may be drawn to the U.N. Code of Conduct for Law Enforcement Officials. It states in Article 6 that: “law enforcement officials shall ensure the full protection of health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.”

13. The above principles gain particular importance with regard to disabled prisoners since, because of their increased vulnerability, the lack of necessary provisions for the individual needs of a disabled person may lead directly to inhuman and degrading treatment. This line of reasoning has been developed in numerous judgements of this Court. In *Matencio v France*⁶, the Court noted that Article 3 of the Convention imposed a general obligation on a state to protect the physical integrity of detainees, which included the right for all prisoners to maintain their dignity, and not to be subjected to greater distress or

3 Article 25 of the UDHR

4 Rule 57 of the SMR

5 Penal Reform International, "Making standards work: an international handbook on good prison practice", 1st edition, 2001

6 Application no. 58749/00

hardship than that which arose as a result of their imprisonment. In *Huseyin Yildirim v Turkey*⁷, the Court held that the constant feelings of anguish, inferiority and humiliation caused by dependency on supervision and assistance of fellow prisoners amounted to "degrading treatment" within the meaning of Article 3⁸. Finally, in *Vincent v. France*,⁹ the Court established a violation of Art. 3 on account that the prison building was not adjusted to enable wheelchair access, in particular that it had been impossible for the applicant to move around the prison autonomously.

14. In the view of the above, whenever detention or imprisonment is ordered for a disabled person, a state is under the unconditional obligation to ensure minimum living conditions for such persons as required by the principle of human dignity and the prohibition of cruel and degrading treatment. These conditions include unrestricted access to sanitary facilities, adequate medical care, necessary rehabilitation care, and ability to move around and leave the cell without seeking assistance from in-mates.

15. The prison service is under a positive obligation to use all available means to ensure that the basic needs of the disabled are met. Even existing infrastructural restrictions and the lack of appropriate architectural adjustments in prison buildings cannot justify their failure to do so. It is necessary to provide an appropriately higher level of care and assistance with regard to disabled prisoners so that they are not placed in a discriminatory position. In particular, a situation of dependency of disabled prisoners on the good will and sympathy of their in-mates must not be tolerated.

IV. RELEVANT POLISH LAW AND PRACTICE

16. Polish legal regulations applicable to prisoners and disabled persons in general reflect basic international standards. The Executive Penal Code¹⁰ ("Code"), providing the main regulation on the conditions of imprisonment and detention, endorses the fundamental principle of respect for human dignity and unconditional prohibition of cruel or degrading treatment¹¹. Article 4 (2) of the Code expressly provides that every prisoner retains his/her civil rights and freedoms and any limitation thereof can be inflicted only by the means of a legal act or a lawful sentence. This reference to "civil rights and freedoms" includes Polish constitutional safeguards as well as ratified international treaties (e.g. the UNCAT and the ICCPR). The Polish Constitution sets out an unconditional standard of humane treatment in providing that: "No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited."¹²In compliance with international human rights standards, Polish law does not provide for any exceptions from this fundamental principle. Thus, the situation of imprisonment or detention does not deprive a person of his/her fundamental rights, such as the right to adequate living conditions and access to basic facilities¹³.

17. It is beyond doubt that these fundamental principles apply to all categories of prisoners, including those physically disabled. In addition to general legal safeguards, the situation of disabled prisoners falls under the scope of Polish disability regulations. The most important one is the Act on Rehabilitation and Employment of Disabled Persons ("Rehabilitation Act")¹⁴. On these grounds, every disabled person in conditions of detention or imprisonment is entitled to demand adequate living conditions and the level of care necessary to ensure humanitarian treatment, protection of dignity and non-discrimination. Under the Rehabilitation Act, public bodies should endeavour to provide equal access to employment and any forms of social or professional activity for the disabled, which imposes analogous obligations on the prison service with regard to disabled prisoners.

7 Application no. 2778/02

8 Similar observation were made in *Farbtuhs v. Latvia* (2002) and *Vincent v. France* (2003).

9 Application no. 6253/03

10 Code dated 6 June 1997 (Journal of Laws 97.90.557).

11 Art. 4 (1)

12 Section 40

13 Prisoner's rights are specified in Article 102 of the Code.

14 Rehabilitation Act dated 27 August 1997 (Journal of Laws 97.123.776)

18. The Code contains legal safeguards preventing deprivation of health and abandonment of prisoners that may require specialist treatment. Physically disabled prisoners requiring specialist therapy should be referred to therapeutic divisions¹⁵. Moreover, if – for the sake of a mental or physical condition – it is not possible to administer the punishment of imprisonment or detention order in a humane manner, the court is obliged to defer or suspend the punishment¹⁶. Consequently, if it appears impossible to ensure minimum living conditions and the necessary standard of health care for a disabled person within a penitentiary system, the court should release such a person.

19. Unless the court has already ordered that a prisoner be provided special conditions or referred to a therapeutic division, it is for the prison administration to decide what conditions should be created in the case of each prisoner. The Code also provides for a standard examination procedure that allows the prison service to examine the physical and mental condition of every prisoner. Every prisoner upon arrival is placed in a temporary cell for a period of 14 days in order for standard examinations to be carried out and to familiarize the prisoner with his/her rights and obligations¹⁷. In addition, the prisoner is obliged to present documents confirming his/her state of health, including a declaration of disability if held. This procedure – involving the prison medical service and psychologists – should enable it to be determined whether a given person requires special adjustments or assistance in order to function independently and have his/her basic needs secured.

20. The decision regarding the living conditions offered to each prisoner is made by the Penitentiary Commission. The prisoner concerned can appeal against the Commission's decision to the penitentiary court if he/she considers this decision unjust or contrary to the law (including general legal safeguards contained in the Code and the Rehabilitation Act). If, in the course of serving a sentence, a prisoner considers that his/her fundamental rights are being violated by inadequate living conditions or the lack of necessary assistance, it is possible to make complaints. If the complaint is rejected or neglected by the prison administration, the complainant always has the right to appeal to a penitentiary court (Art. 7 of the Code). Notably, the Supreme Court ruled in the recent case of Adam Dradrach that prisoners are entitled to claim damages from the state for cruel and degrading treatment suffered in the course of imprisonment, on the grounds of infringement of their personal interests.¹⁸ While this particular case arose in relation to the problem of overcrowding and alarming sanitary conditions in the prison, the same reasoning could be applied to the violation of disabled prisoners' rights on the grounds of inaccessibility of basic prison facilities and being placed in a degrading position.

21. While legal safeguards pertaining to humanitarian treatment of prisoners, including the disabled, may appear sufficient, their implementation in practice seems far less satisfactory. Research conducted by HFHR shows that the most serious, systemic problem is the lack of resources, infrastructural and budgetary constraints faced by the great majority of prisons and remand centres¹⁹.

22. Access to specialist therapy for physically disabled prisoners is severely restricted because of the lack of therapeutic divisions designed for this category of prisoners. Therapeutic divisions are created for mentally disabled prisoners and drug or alcohol addicts. Moreover, it appears that there are not enough places created even for these categories of prisoners. There is only one therapeutic division in Poland where the physically disabled can receive specialist treatment, located in Łódź (*Zakład Karny Łódź nr 1*), and one designed for blind prisoners, located in Bydgoszcz (*Zakład Karny Bydgoszcz - Fordon*). The Prison Medical Service confirms that, as a rule, physically disabled prisoners are referred to regular cells and treated on an equal footing with able prisoners. By way of a justification for the existing situation, it is argued that there is no need to isolate physically disabled prisoners by placing them in therapeutic divisions, which could in itself be deemed discriminatory. This position deserves approval and could,

15 See Article 96 of the Code.

16 See Article 150 *et seq.* of the Code.

17 See Article 79b of the Code.

18 Supreme Court judgement of 28 February 2007 (V CSK 431/2006)

19 A. Rzepliński and K. Wilamowski eds, "Places of Detention in Poland, Report on the visit of a delegation of human rights NGOs to places of detention Poland on 24 – 26 October 2005", International Helsinki Federation for Human Rights, Sofia, Vienna, Warsaw, October 2006

indeed, be regarded as a positive tendency towards equal treatment and integration of the disabled only if regular cells were adjusted at least to meet their basic needs. This, however, is not always the case.

23. There are numerous problems faced by prison administrations in their attempts to ensure accessibility of prison cells and sanitary facilities for the disabled, for wheelchair users in particular. Of 156 prisons and remand centres functioning at present, 96 establishments (64.5%) were built before World War I. Only 36 of them were created after World War II²⁰. This situation poses considerable architectural and infrastructural constraints on any general reforms of existing conditions. Due to the size of the cells and location of sanitary facilities (usually in the corner right next to the door of the cell), it is often impossible to ensure wheelchair access to sanitary facilities. Moreover, making regular cells and prison buildings, in general, wheelchair accessible must seem inconceivable because of severe budgetary constraints. With a view to these constraints, the fact that the physically disabled constitute a relatively small proportion of the prison population – while prisoners, in general, suffer from very poor living conditions – is used as an additional justification for refraining from carrying out general adjustments in prison establishments. Another difficulty in making prison facilities more accessible stems from the fact that it is impossible to predict how many physically disabled prisoners will be received by a given establishment and when the need to move a given prisoner to a different cell or establishment may arise. Prisoners' mobility is high due to various factors, such as criminal proceedings pending in other locations or the need to prevent conflicts and abuse among prison in-mates.

24. The only feasible solution to ensure accessibility of prison facilities, in particular for wheelchair users, is to build specially designed cells. Fully accessible cells have been created in a few modern prisons, which are also able to provide rehabilitation care and appropriate medical services for the disabled (e.g. a prison establishment in Łowicz). However, the availability of these facilities is definitely insufficient taking into account the estimated number of physically disabled prisoners. According to information obtained by HFHR from the Prison Medical Service, in the Warsaw prison district alone on average 60 prisoners per year are classified as disabled (however, this number may include physically disabled who do not need accessible cells or other infrastructural adjustments). Moreover, since the availability of fully accessible cells is limited to a few modern establishments, physically disabled prisoners may be forced to move to distant locations. Very often, prisoners are ready to accept far worse living standards in order to stay close to their friends and relatives. For the same humanitarian reasons as well as with regard to fundamental rehabilitation objectives, prisoners should not be forced to choose between humane living conditions and regular contact with their families.

25. Notably, neither the Prison Medical Service nor the Central Administration of the Prison Service monitors the number of physically disabled prisoners and detainees in Poland²¹. The only data available is the number of prisoners who applied for and were granted disability certificates and/or disability-related pensions during their stay in prison. The lack of statistical data is given as justification for the fact that the very concept of 'disability' is vague and the prison service has no authority or resources to perform detailed medical examination of all prisoners, which would be necessary to ensure the full reliability of such data. While this argument can be partly accepted, it seems that at least the number of prisoners who were recognized as disabled at the stage of an initial medical examination (as described above) should be recorded and aggregated at national level. Moreover, experience gained by HFHR during interventions in the cases of particular prisoners shows that at times the prison administration is not aware it has a disabled prisoner with special needs under its supervision. These observations suggest there may be insufficient communication between the prisoners concerned, their direct supervisors or guards and general prison administration and that failures or negligence may occur during standard medical examinations performed on prisoners.

26. For the picture of the situation of disabled prisoners to be complete, it is necessary to account for poor living conditions that affect all prisoners and the problem of overcrowding in Polish prisons in particular.

20 Report of the Helsinki Foundation for Human Rights concerning the implementation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment dated 26 November 1987

21 HFHR requested this statistical information from the Prison Medical Service and the Central Administration of the Prison Service, but neither was able to provide us with the relevant data.

According to HFHR's research, an average congestion rate in prison cells, especially in cells for more than one inmate, might be even higher than the officially reported 118%, which would mean that one person lives on 2-2.5 sqm. In some prisons in Poland, the congestion rate reaches or even exceeds 150% (e.g. prisons in Warszawa-Służewiec, Grodków, Bielsko Biała and Racibórz). Furthermore, it is not unusual for a prisoner to spend 23 hours a day in the cell because the common rooms and educational rooms are occupied. However this dramatic picture by no means provides a valid justification for the inhumane treatment of disabled prisoners and it sets a broader context for the lack of necessary adjustments and basic facilities for the disabled. In reality, similar limitations and inhumane living conditions affect all prisoners in overcrowded and dilapidated establishments²².

27. HFHR in its activity within Strategic Litigation Program in 2007 dealt with the case of Rafał N., a detainee in Warszawa-Mokotów Remand Centre, Warsaw. Rafał N. is a paraplegic with severe kidney and spine disease. He has to use a wheelchair and has problems getting up and moving about unaided. After the observation of the court session during which, despite Rafał N.'s health problems, the court decided to prolong temporary arrest, the representatives of HFHR decided to intervene at the Remand Centre. Rafał N. complaining that the Remand Centre was not adjusted to the needs of a disabled person like him. The Director of Warszawa-Mokotów Remand Centre permitted a visit to Rafał N.'s cell to check its suitability for his needs. Adam Bodnar and Maciej Bernatt on behalf of HFHR visited Warszawa-Mokotów Remand Centre on 29 August 2007. The cell was too small to move about in naturally in a wheelchair (approx. 3 sqm per person); there were two other inmates in the cell. Moreover, because of spine problems Rafał N. had to spend most of the daytime lying in his bed, which exacerbated the level of discomfort caused by the size of the cell. It was impossible for the detainee to access the toilet without assistance since the door space was too narrow for a wheelchair. Notably, prison officers had not been providing Rafał N. with any help, which placed him in a position of complete dependency on other inmates. The shower was also inaccessible because the water tap in the shower was situated at a height of 1.80 m. Rafał N was provided with a very limited scope of physical rehabilitation care of 25 minutes a day, comprising only basic types of exercise. After their visit, HFHR's representatives sent a report to the Director of Warszawa-Mokotów Remand Centre and the Central Administration of the Prison Service, in which they concluded that the conditions at Warszawa-Mokotów Remand Centre violated Rafał N.'s human dignity and his right to privacy. In reply, the Prison Service justified the situation by citing limited financial resources. However, it was acknowledged that Warszawa-Mokotów Remand Centre planned to build cells adjusted to the needs of disabled detainees. On the basis of the reply received by HFHR and the visit to Warszawa-Mokotów Remand Centre, it may be concluded that the Central Administration of the Prison Service has no general policy with regard to physically disabled prisoners.

28. In light of the above observations, it can be concluded that the source of the problem lays not so much in inadequate legal standards as in the lack of budgetary resources and political will to implement the law. As a consequence, standards established in the jurisprudence of the Court are not adequately implemented. It can be argued that disabled prisoners in Poland are notoriously subjected to "greater distress or hardship than that which arose as a result of their imprisonment", thus the standard established in *Matencio v. France*²³ is violated. As envisaged by the example quoted above and by the general infrastructural constraints affecting the Polish prison system, it is common for disabled prisoners not only to be unable to move around prison buildings autonomously but also to lack free access to basic facilities such as toilets and showers. Such a situation may clearly amount to degrading treatment within the meaning of Article 3, as established in cases *Vincent v. France*²⁴ and *Price v. the United Kingdom*²⁵. Finally, the average standard of medical assistance, in particular rehabilitation care, actually provided to disabled prisoners often fails to prevent the physical and psychological suffering of the persons concerned and the further deterioration of their health, not to mention their well-being, and thus it violates the standard reinforced in *Yildirim v.*

22 A. Rzepliński and K. Wilamowski eds, "Places of Detention in Poland, Report on the visit of a delegation of human rights NGOs to places of detention Poland on 24 – 26 October 2005", International Helsinki Federation for Human Rights, Sofia, Vienna, Warsaw, October 2006

23 Application 58749/00

24 Application 6253/03

25 Application 3394/04

Turkey.²⁶

III. RELEVANT STANDARDS IN OTHER STATES

29. Development of law and practice in other countries shows increasing awareness of the necessity to ensure adequate standards of treatment for disabled prisoners. Accessibility of basic facilities for the disabled is predominantly framed in terms of respect for the principle of humane treatment, prohibition of torture and non-discrimination. The practice in other countries should be an example for the Polish authorities on how to resolve the problem of the treatment of disabled prisoners.

1. United Kingdom²⁷

30. Disabled prisoners are protected by the Disability Discrimination Act 1995 ("DDA") and by the Prison Service Order ("PSO")²⁸. It is the Prison Service's policy, in line with developing legislation, that disabled prisoners are not discriminated against in any aspect of prison life. The Commission for Equalities and Human Rights established in 2007 was endowed with powers to supervise the implementation of the DDA and the PSO. The Commission may serve compliance notices on public bodies in order to enforce these acts. From November 2006, all public bodies have a legal duty to promote equality of opportunity for prisoners with disabilities. This means that the number of disabled prisoners received into prison must be recorded and monitored. Prison Governors and Senior Management Teams need to be kept advised of the numbers of disabled prisoners being held and also the types of disabilities.

31. Prisoners with disabilities need to be given the opportunity to declare their disability at the earliest opportunity, or otherwise as they wish²⁹. Prison Governors and staff need to use all available means to make reasonable adjustments³⁰ for prisoners with disabilities and to document instances where this is not possible. Under the PSO, it is important not to make assumptions in respect of prisoners' needs, but to find out what is actually required. If reasonable adjustments are not made for a prisoner with a disability, Prisoner Governors are vulnerable to legal challenge. Prisoners with disabilities need to be allocated to accommodation suitable for their needs. It is recommended, whenever possible, that prisoners with disabilities should not be routinely accommodated within healthcare departments, but that they should be referred to appropriately adjusted, regular cells. It is recommended that adapted accommodation should be checked regularly to ensure that it is serviceable, and that the findings should be recorded in writing and up-to-date information about changes that have been made should be kept. A disabled prisoner has the right to retain any form of aid to mobility (or to sensory perception), including wheelchairs, crutches, sticks etc, unless there is a good (and defensible) reason for him/her not to. If Prison Service members are concerned that there may be a security risk involved, a risk assessment needs to be carried out and a suitable alternative provided.

32. The Prison Service is obliged to treat all prisoners with disabilities with decency and without discrimination as regards all aspects of prison life. In particular, prisoners with disabilities must be offered equal opportunity to address their offending behaviour and be treated in a safe and secure environment. All staff are responsible for ensuring that any discriminatory practices towards any persons with disabilities within the establishment are stopped. Moreover, there should be a prison strategy to ensure that all complaints by persons with disabilities are investigated seriously and that the appropriate remedies are implemented. Information about their rights and the functioning of the Commission for Equalities and Human Rights should be made available to staff, prisoners and visitors.

²⁶ Application 2778/02

²⁷ This section is based on the information and explanatory comments provided in the following documents:
Her Majesty's Prison Service, "Prisoners with physical, sensory and mental disabilities", 2003

Her Majesty's Prison Service, Prison Service Order: Prisoners with Disabilities, Issue No. 241.

²⁸ The PSO incorporates amendments made in the Disability Discrimination Act 2005 towards prisoners with disabilities and includes recommendations to encourage the development of good practice towards prisoners with disabilities.

²⁹ Under the DDA, such declaration is voluntary, and it is important not to label prisoners who do not regard themselves as disabled.

³⁰ "Reasonable adjustment" is not defined in the DDA, but will be interpreted by the courts.

33. It is stressed that prisoners with disabilities should be able to access parole, where appropriate. It is regarded best practice to seek advice from and to involve outside agencies as early as possible and to organise access to social service benefits and visits during the resettlement stage of the sentence. Prisoners with disabilities who are seeking employment in the community need to be provided with information about the Guaranteed Interview Scheme and assisted with their attendance at interviews. Prison Governors need to ensure that systems such as peer support or support from state officers are in place to support disabled prisoners in completing application forms.

2. USA

34. Disabled prisoners are protected by § 504 of the Rehabilitation Act of 1973³¹ (“Rehabilitation Act”) and by Title II of the Americans with Disabilities Act³² (“ADA”).³³ If the ADA applies, it should be interpreted to give disabled people at least as many rights as the earlier Rehabilitation Act³⁴. Title II of the ADA states: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” To bring a lawsuit under the ADA and/or the Rehabilitation Act, disabled prisoners must show that: (i) they are disabled within the meaning of the statutes, (ii) that they are “qualified” to participate in the program, and (iii) that they are excluded from, are not allowed to benefit from, or have been subjected to discrimination in the program because of their disability. Under the Rehabilitation Act, prisoners must also show that the prison officials or the governmental agency named as defendants receive federal funding.

35. Disabled prisoners may also make claims for relief based on the United States Constitution. The Eighth Amendment prohibits any form of cruel or unusual punishment. It has been held that federal or state prison officials violate the Eighth Amendment when staff members are deliberately indifferent to the serious medical needs of prisoners, including the special requirements of disabled inmates.³⁵ The Fifth and Fourteenth Amendments prohibit government officials from depriving persons of life, liberty or property without “due process” of law, and the Fourteenth Amendment requires that all citizens receive the “equal protection” of the law.³⁶ Thus, prison officials may violate the Constitution if they discriminate against disabled inmates on the basis of their disabilities.³⁷

36. The Supreme Court held in *Goodman v. Georgia*³⁸ that Title II of the ADA validly abrogates state sovereign immunity – at least insofar as it creates a private cause of action for damages for conduct that actually violates the Fourteenth Amendment. In the prison context, this means that a disabled prisoner who is incarcerated in a state prison may sue the state for monetary damages under the ADA based on conduct that independently violates the Due Process Clause of the Fourteenth Amendment.

37. There is a vast amount of case law illustrating how the standard of humane treatment and non-

31 29 U.S.C. § 794(a)

32 42 U.S.C. § 12131 *et seq.*

33 The Rehabilitation Act was created to apply to federal executive agencies, including the Bureau of Prisons, and to any program that receives federal funding. The ADA was created to regulate state and local government programs, even those that do not receive federal funding.

Compare cases: *Pennsylvania Dept of Corrections v. Yeskey*, 524 U.S. 206 (1998) (ADA); *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (Rehabilitation Act); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (Rehabilitation Act).

34 Compare *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998). To bring a lawsuit under the ADA and/or the Rehabilitation Act, disabled prisoners must show that: (i) they are disabled within the meaning of the statutes, (ii) that they are “qualified” to participate in the program, and (iii) that they are excluded from, are not allowed to benefit from, or have been subjected to discrimination in the program because of their disability. Under the Rehabilitation Act, prisoners must also show that the prison officials or the governmental agency named as defendants receive federal funding.

35 *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to prisoners’ serious medical needs constitutes cruel and unusual punishment); *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (prison officials violated the Eighth Amendment by failing to provide disabled inmate with needed physical therapy and adequate access to facilities)

36 The Fourteenth Amendment governs actions by state governments and the Fifth Amendment governs actions by the federal government.

37 See, e.g., *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (federal inmate could not bring employment discrimination claim under Rehabilitation Act, but could do so under Fifth Amendment).

38 42 U.S.C. § 12131 (2004)

discrimination has been developed with regard to disabled prisoners to encompass the whole array of prison facilities and services. Disabled prisoners have successfully sued to be able to use prison showers and toilets and to be protected from injury or the risk of injury³⁹. Further challenges concerned inadequate medical care and prison officials' failure to provide them with medical supplies or devices such as wheelchairs or canes⁴⁰. These cases may combine ADA claims with arguments that prison officials have violated the Eighth Amendment of the U.S. Constitution by being deliberately indifferent to prisoners' serious medical needs⁴¹. Disabled prisoners have also challenged their confinement in isolation and segregation units under the ADA and the Rehabilitation Act.⁴² In one case, for example, the Seventh Circuit ruled that prison officials discriminated against a quadriplegic prisoner in Indiana who was housed in an infirmary unit for over one year and was thereby denied access to the dining hall, recreation area, visiting, church, work, transitional programs and the library⁴³. In *Armstrong v. Wilson* - a judgement given as early as 1997 - the Court ruled that the state of California was obliged to provide the same range of vocational and educational programs for disabled inmates throughout the correctional system⁴⁴.

VI. CONCLUSIONS

37. The judgment of the Court in the case of *Adam Z. v. Poland* might set a proper standard concerning the treatment of disabled persons in prisons and remand centres. Not only Poland but also other Council of Europe countries have practices that fail to meet fundamental international standards, in particular the prohibition of cruel and degrading treatment. It is important to reiterate that not only the government and central prison administration but also all members of prison staff are under a positive obligation to ensure humane treatment and adequate living conditions for the disabled.

38. It has been suggested that a dramatic shortage of resources as well as architectural and infrastructural constraints are the main source of existing problems and should be urgently addressed by the government. Moreover, Poland could be encouraged to add specific provisions to the Code obliging the prison administration to pay particular attention to the needs of disabled prisoners and monitor their situation. Making existing legal obligations more explicit could play an important, motivational role and help raise awareness of the problem among prison staff.

On behalf of the Helsinki Foundation for Human Rights:

On behalf of the Helsinki Foundation for Human Rights these written comments were also prepared by

39 *Gorman v. Easley*, 257 F.3d 738 (8th Cir. 2001) (injury during transportation by police in vehicle without wheelchair restraints); rev'd on other grounds, *Barnes v. Gorman*, 536 US 181 (2002); *Kaufman v. Carter*, 952 F.Supp. 520, 523-24 (W.D. Mich. 1996) (failure to provide access to bathrooms and showers)

40 *Saunders v. Horn*, 960 F. Supp. 893 (E.D. Pa. 1997) (failure to provide orthopaedic shoes and cane); *Herndon v. Johnson*, 970 F.Supp. 703 (E.D. Ark. 1997)

41 See, e.g., *Kaufman*, 952 F.Supp. 520

42 *Carty v. Farrelly*, 957 F.Supp. 727, 741 (D.V.I. 1997) (prison officials violated ADA by housing an inmate not suffering from mental illness with mentally ill prisoners because his cane was considered a security threat)

43 *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996)

44 See, e.g., *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), appeal after remand, *Onishea v. Hopper*, 126 F.3d 1323 (11th Cir. 1997), rev'd, 171 F.3d 1289 (11th Cir. 1999) (upholding the policy of segregation and exclusion of HIV-positive prisoners in Alabama from programs under the Rehabilitation Act)

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