



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

FOURTH SECTION

CASE OF MOJSIEJEW v. POLAND
(Application no. 11818/02)

JUDGMENT

STRASBOURG

24 March 2009

FINAL

24/06/2009

This judgment may be subject to editorial revision.

In the case of Mojsiejew v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 11818/02) 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, Ms Władysława Mojsiejew (“the applicant”), on 21 July 1999.

2. The applicant, who had been granted legal aid, was represented by Mr J. Gałkowski, a lawyer practising in Bielsko-Biała. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that her son Hubert Mojsiejew had been killed in a sobering-up centre and that the subsequent investigation and criminal proceedings had been ineffective.

4. On 26 April 2005 the Court declared the application partly inadmissible and decided to communicate the complaints about a breach of Article 2 of the Convention to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951 and lives in Bojszowy, Poland.

6. On 28 August 1999 the applicant's elder son, Hubert Mojsiejew, died at the age of twenty-five in the Tychy Sobering-Up Centre (*Izba Wyrzeźwienie*), where he had been detained at 4.50 a.m. that day.

7. On the same day the Tychy District Prosecutor and a forensic expert examined Hubert Mojsiejew's body. The prosecutor ordered an autopsy to be carried out by experts from the Śląska Medical Academy.

8. After an autopsy had been carried out on 30 August 1999 an opinion was submitted to the prosecutor on 3 September 1999. The expert established that a possible cause of death was asphyxiation resulting from pressure on the victim's neck and that Mr Mojsiejew had a blood alcohol level of 1.70 per mille.

9. The death certificate (*karta zgonu*) signed by Dr J.S., a forensic expert from the Śląska Medical Academy in Katowice, gave the following cause for Hubert Mojsiejew's death:

"Numerous effusions of blood in the soft tissue of the neck."

10. On 30 August 1999 the Tychy District Prosecutor opened an investigation in order to establish whether an offence prohibited by Article 155 of the Criminal Code (unintentional homicide) had been committed. The prosecutor interviewed several witnesses and ordered an examination of blood and other samples and the preparation of an expert opinion.

11. On 30 December 1999 the Tychy District Prosecutor discontinued the investigation. The prosecutor observed that Hubert Mojsiejew had been examined by a doctor at the time of his admission to the sobering-up centre. The examination showed that he had been intoxicated and that he had no injuries to his body. As Hubert Mojsiejew had uttered threats and had been aggressive, he had been tied up to a bed with belts. The room in which he had been detained had been inspected by an employee of the sobering-up centre at 7 a.m. and 7.45 a.m. When the same employee had come to the room at 8.45 a.m. he had noticed spots on Hubert Mojsiejew's skin and had called the doctor on duty. The doctor had examined Hubert Mojsiejew and had called an ambulance. The doctor who had arrived in the ambulance had examined Hubert Mojsiejew and had declared him dead. Furthermore, the prosecutor referred to an expert opinion prepared by the Śląska Medical Academy, which stated that Hubert Mojsiejew had died of asphyxiation. The prosecutor concluded that the evidence collected in the course of the investigation did not show that third persons had caused the death of Hubert Mojsiejew.

12. On 18 January 2000 the applicant lodged an appeal with the Tychy District Prosecutor against the decision to discontinue the investigation. She also requested that the prosecution service carry out a reconstruction of the crime scene, with the assistance of a medical expert. On 20 January 2000 the Tychy District Prosecutor informed the applicant that her request had been granted.

13. On 14 March 2000 a medical expert opinion was prepared by the Silesian Medical Academy in Katowice. The expert established that the possible cause of Hubert Mojsiejew's death had been asphyxiation due to immobilisation of his chest by belts which might have obstructed his breathing. However, the expert was unable to establish the origin of the injuries to Hubert Mojsiejew's neck.

14. On 14 March 2000 the Tychy District Prosecutor allowed the applicant's appeal of 18 January 2000 and resumed the investigation.

15. In May 2000 the prosecutor charged Z.K., an employee of the Centre, with the unintentional homicide of Hubert Mojsiejew. Three other employees of the centre were charged by the prosecutor in July 2000. On 14 July 2000 Z.K. was suspended from his duties at the Tychy Sobering-Up Centre.

16. On 28 September 2000 the prosecutor ordered the preparation of another expert medical opinion by the Śląska Medical Academy in Katowice. The opinion was inconclusive and did not rule out either the exertion of pressure on Hubert Mojsiejew's neck or his incorrect immobilisation by belts as possible causes of his death. The expert was also unable to establish precisely the time of his death.

17. In a supplementary expert opinion prepared in November 2000 the expert established that Mr Mojsiejew should have been released from the belts after an hour since he had ceased to be aggressive. Moreover, the staff had failed to supervise his state of health. The expert concluded that the death could have been caused by strong pressure on his chest and his lack of direct supervision for many hours.

18. On 11 December 2000 the Tychy District Prosecutor indicted four employees of the sobering-up centre before the Tychy District Court. They were indicted under Article 155 of the Criminal Code for the unintentional homicide of Hubert Mojsiejew. In particular, Mr Z.K. was accused of having incorrectly immobilised Hubert Mojsiejew on the bed and, in doing so, having exerted pressure on his neck. In consequence the respiratory movements of his chest had been limited to a large extent, which had led to his death by asphyxiation. Three other employees of the sobering-up centre were charged with unintentional homicide by failing in their duty to care for and supervise Mr Mojsiejew.

19. The applicant requested to join the proceedings as an auxiliary prosecutor.

20. The hearing scheduled for 24 July 2001 was adjourned as the parties had not been properly summoned to it. Afterwards, the trial could not start as on three occasions new reporting judges had to be assigned to the case. In consequence, the Tychy District Court held the first hearing on 17 April 2003. Subsequently, two hearings were scheduled for 9 June 2003 and 24 February 2004 but they were adjourned.

21. The trial court held a hearing on 10 May 2004, at which it examined the accused. Some hearings scheduled afterwards were adjourned for various procedural reasons. On 16 August 2004 an attempt by the applicant to challenge judges trying the case was dismissed.

22. The Tychy District Court held its next hearing on 10 December 2004 and examined some witnesses.

23. In 2005 the trial court held eleven hearings in total and scheduled them at regular intervals.

24. In 2006 the court held only two hearings, on 23 January and 4 April. On 28 April 2006 the court requested a new expert medical opinion from the Wrocław Medical Academy. The experts submitted their opinion on 15 November 2006. The opinion reads as follows:

“The above observations [from photographs and an inspection of the room in which Hubert Mojsiejew died] lead to a conclusion that the injuries to the deceased’s neck most probably did not occur prior to his arrival at the sobering-up centre, or as a result of his being tied to the bed by belts. In consequence, another means by which these injuries occurred needed to be examined.

The absence of external skin injuries and the presence of extensive internal injuries in the soft tissue of the neck indicate that a large amount of direct pressure had been applied with a blunt object of a substantial surface area. Such an object could have been, for example, an arm, or alternatively the elbow area between the forearm and arm, if somebody had applied the immobilisation technique called a headlock (*krawat*). In this hold the person applying it normally stands behind the person to be immobilised and forcefully puts his arm around the neck [... simultaneously pushing the head with the other hand ...]. This hold blocks breathing and hinders the access of blood to the brain, which in a short time leads to fainting. At the same time, if [the headlock] lasts long enough it may lead to death by strangulation or cardiac arrest. ... Cardiac arrest or respiratory failure occurs either immediately after [the headlock] has been applied or it can occur some time afterwards if the hold was applied for a long enough time to cause brain damage ...

It appears from medical and forensic practice that the [headlock] is sometimes used on intoxicated and aggressive patients at sobering-up centres. Such actions, where they do not cause death, expose the person to a direct danger of loss of life or serious bodily injury within the meaning of Article 160 of the Criminal Code.

The absence of any external signs of injuries on the chest which could indicate that strong pressure had been applied by narrow belts limiting the respiratory movements of the chest ..., taking into account the above considerations, makes it very doubtful that the immobilisation of the chest was the cause of [Hubert Mojsiejew’s] death.

While the cause of death advanced by the Śląska Medical Academy cannot be totally ruled out, it is much more probable that the cause of the sudden death of [Hubert Mojsiejew] was strangulation (*uduszenie przez zadławienie*) by applying strong pressure with a blunt object to the neck, in the manner and circumstances described above.

It should be added that such extensive injuries to the front side of his neck could not have happened if [Hubert Mojsiejew] was trying to free himself from the belts while lying on his stomach. It is also impossible that such injuries occurred during convulsions...

A forensic examination of the body (*obdukcja sądowo-lekarska*), in the place in which it had been found, was not conducted, which makes it impossible to establish the exact time of death. Analysing *livor mortis* (*plamy pośmiertne*) [and other factors], one can only advance the hypothesis that about one to two hours had elapsed between his death and the time at which his body was found."

25. The Tychy District Court held a hearing on 23 January 2007 and on 30 January 2007 it gave its judgment. The court changed the classification of the offence and found all the accused guilty of having exposed Hubert Mojsiejew to an immediate danger of loss of life within the meaning of Article 160 § 2 of the Criminal Code. They were sentenced to two years' imprisonment, suspended for a probationary period of three years.

26. As regards the course of the events of 28 August 1999, the court established that during his arrest by the police, his transfer to the sobering-up centre and his stay in the centre, Hubert Mojsiejew had been calm and had not shown aggression. In the sobering-up centre, however, he refused to undress and became verbally abusive, which led the centre's staff to decide to put him in the special room with immobilising belts. At 4.55 a.m. Hubert Mojsiejew was put on the bed, on his stomach, and Z.K. tied his hands, legs and chest with the belts. During this, Mr Mojsiejew was calm and did not put up a struggle; he was mumbling incomprehensibly. After having been tied to the bed and examined by a doctor, Hubert Mojsiejew was left in his room. He was examined 20 minutes later but afterwards no employee from the shift that finished at 7 a.m., or from the following shift, came into the room in which Mr Mojsiejew had been immobilised and examined him. The employees occasionally observed him, looking mostly through a spy-hole in the door without entering the room, and were able to see his sides moving, from which they had concluded that he was still breathing.

At 8.45 a.m. one employee of the centre noticed through the glass in the door that the skin on Hubert Mojsiejew's hands was of an unnatural colour. He called a doctor on duty and together they came into the room. They untied Mr Mojsiejew. At 9.06 an ambulance came and the doctor established that Hubert Mojsiejew was dead.

27. As regards the cause of his death, the court noted that all medical opinions had found that Hubert Mojsiejew had died of asphyxiation. The court considered that the experts from the Śląska Medical Academy had

avoided answering the question of the origin of the injuries to Mr Mojsiejew's neck. Thus, the court accepted the conclusions reached by the experts from the Wrocław Medical Academy, who dismissed as highly improbable the hypothesis that the belts had been tied too tight and had obstructed the movement of his chest, since Mr Mojsiejew had not had any marks on his body indicating that pressure had been exerted by the chest belt. The court thus concluded that his death had been caused by strangulation (*zadławienie*) as pressure had been applied to Hubert Mojsiejew's neck. It had most probably happened when someone had put Mr Mojsiejew in a headlock. This immobilisation technique, if applied for a longer time, could lead directly to death, but if applied for a shorter period of time could cause brain damage, which affected breathing and after a certain time could also lead to death.

28. The court also considered that the failure to conduct a forensic examination of the body narrowed the evidence concerning the state of the body, its temperature and the state of *livor mortis*. Thus, the precise time of death could not be established.

29. Although the court was unable to establish beyond doubt who had applied the headlock on the applicant's son, it considered that all the accused had failed in their duty of care for Hubert Mojsiejew by having exposed him to an immediate danger of loss of life. In particular, the employees of the centre had been obliged to carry out constant supervision of the rooms in which intoxicated persons were detained. Under domestic law, patients immobilised by belts should be examined and checked every 15 minutes. If patients stayed calm and there were no other indications for the use of belts, they should be released; it should also be ensured that the patient did not need to use the toilet. However, Hubert Mojsiejew had not been examined every 15 minutes. He had been properly examined only once, about 20 minutes after he had been immobilised by the belts. Moreover, immobilisation by belts should not have been applied to him in the first place. The accused had thus deliberately failed in their obligation to protect Hubert Mojsiejew's life. Moreover, they had been completely unaware of the rules governing the manner in which care was to be provided to immobilised patients. In particular one of the accused, who was a doctor, had believed that a patient could be kept immobilised for 24 hours without being released.

30. The accused and the applicant appealed against the judgment.

31. On 13 November 2007 the Katowice Regional Court quashed the judgment and remitted the case to the lower court. The court considered premature the first-instance court's conclusions relating to the manner in which Mr Mojsiejew's death had occurred. It found that the accused had been correct in submitting that the exact time of the events and Mr Mojsiejew's death should have been specified since the accused had been responsible for providing care to him at different times. It also

indicated that other evidence needed to be taken, in particular from the expert witnesses from the Wrocław Medical Academy who had prepared the most recent opinion.

32. The case was transferred to the Tychy District Court which held a first hearing on 10 December 2007. In May 2008 the case was still pending before that court.

II. RELEVANT DOMESTIC LAW

33. The relevant provisions of the Criminal Code provide as follows:

Article 155

“Anyone who unintentionally causes the death of a human being shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.”

Article 160

“1. Anyone who exposes a human being to an immediate danger of loss of life, serious bodily injury, or a serious impairment of health shall be subject to the penalty of deprivation of liberty for up to 3 years.

2. If the perpetrator has a duty to take care of the person exposed to danger, he shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.”

34. Section 16 of the Ordinance of the Minister for Health and Social Welfare of 23 October 1996 on the procedure for dealing with intoxicated persons, the organisation of sobering-up centres and the scope of health care and rules on assessing the fees connected with admittance to and stays in sobering-up centres (*Rozporządzenie Ministra Zdrowia i Opieki Społecznej w sprawie trybu doprowadzania osób w stanie nietrzeźwości organizacji izb wytrzeźwień i zakresu opieki zdrowotnej oraz zasad ustalania opłat związanych z doprowadzeniem i pobytem w izbie wytrzeźwień*) states that direct coercion may be applied in accordance with the rules laid down in section 18 of the 1994 Protection of Mental Health Act, which provides in particular that direct coercion can consist of immobilisation, among other methods. Section 16 of the above-mentioned Act further refers to the Ordinance of the Minister for Health and Social Welfare of 23 August 1995 on the form of application of direct coercion (*w sprawie sposobu stosowania przymusu bezpośredniego*), which determines the manner in which direct coercion may be applied.

The latter ordinance provides, in so far as relevant:

“9 (2) A doctor shall recommend application of direct coercion in the form of immobilisation or isolation for a period of no longer than four hours. If necessary, the doctor, after personal examination of the patient, may extend the use of immobilisation for subsequent periods of six hours.

13 A nurse on duty shall check the state of the immobilised or isolated person no less frequently than every 15 minutes, including when the person is asleep. The state of the person shall be recorded on the [patient’s] card without delay.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

35. The applicant submitted that her son Hubert Mojsiejew had been unjustifiably killed by State agents and that there had been no effective investigation into the circumstances of his death. She relied on Article 2 of the Convention, which provides:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

36. The Government contested that argument.

A. Admissibility

37. The Government first submitted that the applicant had not exhausted the remedies available under Polish law in that she had lodged the application with the Court without waiting for the outcome of the criminal proceedings concerning her son’s death, thus the application was premature. Secondly, they argued that if the applicant considered that the criminal proceedings against the persons allegedly responsible for her son’s death had been unduly protracted, it was open to her to lodge a complaint with a

domestic court about their unreasonable length. The Government also maintained that it had been open to the applicant to join the criminal proceedings as a civil party in order to seek compensation. A claim for compensation could also be lodged by her after the end of the criminal proceedings.

38. The applicant submitted that she had used all existing remedies in order to obtain the prosecution and punishment of those responsible for her son's death. However, the authorities had been trying to conceal the truth and had failed to conduct a thorough and effective investigation into her son's killing. Thus, the existing remedies had proved to be ineffective.

39. The Court firstly observes that the Polish legal system provides, in principle, two avenues of recourse for victims alleging illegal acts attributable to the State or its agents, namely a civil procedure and a request to the prosecutor to open a criminal investigation.

40. The Court notes that the applicant is actively involved in the criminal proceedings brought against four employees of the Sobering-up Centre. Those proceedings are still pending. In so far as the Government argue that the applicant's Article 2 complaint is premature, the Court considers that that contention is a matter which is indissociable from the applicant's allegation that the State has failed to comply with its procedural obligations under Article 2, in particular to carry out an effective investigation into the circumstances surrounding the death of Hubert Mojsiejew. The Government's objection should therefore be joined to the merits of the case.

41. As regards the Government's argument that the availability of civil proceedings provided the applicant with a remedy of which she has yet to avail herself for the purposes of Article 35 § 1 of the Convention the Court recalls in this connection that the obligations of the State under Article 2 of the Convention to conduct an investigation capable of leading to the identification and punishment of that responsible cannot be satisfied merely by awarding damages (see *Kaya v. Turkey*, 19 February 1998, § 105, *Reports* 1998-I). The Court further reiterates that, even assuming that the applicant had brought a civil claim and had been successful in recovering civil damages from a State body on account of negligent acts or omissions leading to Mr Mojsiejew's death, this would still not resolve the issue of the procedural obligations arising under Article 2 of the Convention.

Consequently, the applicant was not required to bring the civil proceedings in question and the preliminary objection concerning proceedings of that nature is unfounded (see *Yaşa v. Turkey*, 2 September 1998, § 75, *Reports* 1998-VI).

42. Finally, in so far as the Government invoke the provisions of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time ("the 2004 Act") in the context of the complaint made under Article 2 of the Convention, the Court observes in this

connection that the 2004 Act introduced remedies, of both a remedial and compensatory character, concerning specifically the right to have one's case examined within a reasonable time within the meaning of Article 6 § 1 of the Convention. It has held that these remedies are effective in respect of the excessive length of pending judicial proceedings (see *Charzyński v. Poland* (dec.), no. 15212/03, 1 March 2005). However, in the present case it is not merely the excessive length of criminal proceedings which is in issue, but the question whether in the circumstances of the case seen as a whole, the State can be said to have complied with its procedural requirements under Article 2 of the Convention (see *Byrzykowski v. Poland*, no. 11562/05, § 90, 27 June 2006. The Court reiterates that the requirement of promptness is implicit in the procedural limb of Article 2 of the Convention and the authorities are required to conduct of their own motion a thorough and effective investigation into potential breaches of Article 2.

43. In the light of the above, the Court joins the Government's plea of inadmissibility based on the premature nature of the applicant's application to the merits of the case and dismisses the remainder of the Government's preliminary objections.

It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

1. The submissions made to the Court

(a) The applicant

44. The applicant submitted that her son, Hubert Mojsiejew, had been killed in the sobering-up centre and that his right to life protected by Article 2 of the Convention had therefore been violated. The legal regulations in force had proved to be ineffective and theoretical as they had not afforded effective protection of Hubert Mojsiejew's life. It was beyond doubt that Mr Mojsiejew had died at the hands of employees of the sobering-up centre, who had abused their power by using an immobilisation technique or otherwise causing his death. Therefore, the employees of the sobering-up centre should have been prosecuted for murder and not unintentional homicide.

45. As regards the investigation into these allegations, the applicant maintained that there had been obvious errors and omissions on the part of the prosecuting authorities. The authorities had failed to investigate speedily and diligently. The bill of indictment and judgments of the courts indicated that the authorities had not been interested in discovering the truth and punishing those who had killed Hubert Mojsiejew.

(b) The Government

46. The Government maintained that the authorities had complied with their positive obligation under Article 2 of the Convention to secure the applicant's son's right to life and that they could not be held responsible for his death, which had been a tragic incident. They referred to legal regulations which had been put in place in order to ensure the safety of patients in sobering-up centres. The manner and circumstances in which means of physical coercion could be applied to patients were also specified by domestic law. The employees of the Tychy Sobering-Up Centre had received relevant training, the centre was properly equipped and there was a continuous presence of a doctor. No evidence of intentional killing had so far been disclosed. Since the criminal proceedings against four employees were still pending before the domestic courts it would be premature to assess the conduct of the employees of the centre during the events in question.

47. The Government further argued that the prosecuting authorities had initiated an investigation of their own motion immediately after the applicant's son's death had been discovered. Thus, in the Government's opinion, the authorities had complied with the procedural obligation stemming from Article 2 of the Convention. The Government pointed to the diligence and expedition of the prosecutor's investigation, which had resulted in the bringing against four employees of the centre of serious charges of unintentional homicide and failure in their duty of supervision. Nevertheless, the Government conceded that there had been delays at the judicial stage of the proceedings owing to the resignation of one of the judges and the heavy workload of the Tychy District Court during the material time. Moreover, there had been other events, such as illnesses of witnesses and the accused, which had caused the hearings to be rescheduled. The criminal proceedings had guaranteed the necessary element of public scrutiny in that the applicant had been involved as a party in both the investigative and the judicial stage.

48. In sum, the Government submitted that the investigation and the criminal proceedings had been effective and thorough. The Convention did not provide for a right to have someone convicted on a specific charge and the outcome of the proceedings would depend on the ruling of the domestic courts.

2. The Court's assessment

(a) General principles

49. Article 2 ranks as one of the most fundamental provisions in the Convention. It enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human beings

require that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see, among many other authorities, *Anguelova v. Bulgaria*, no. 38361/97, § 109, ECHR 2002-IV).

50. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports 1998-III; *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports 1998-VIII; and *Paul and Audrey Edwards*, no. 46477/99, § 71, ECHR 2002-II).

51. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni*, cited above, § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (see *Keenan v. the United Kingdom*, no. 27229/95, § 91, ECHR 2001-III, and *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII).

52. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman*, cited above, § 100, and also *Çakıcı*, cited above, § 85, and *Ertak v. Turkey*, no. 20764/92, § 32, ECHR 2000-V).

53. The Court also considers it necessary to reiterate the principles which govern the authorities’ duty to investigate deaths occurring in the State’s custody or as a result of use of force (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 57, 20 December 2007):

(a) Article 2 imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, § 115; *Mastromatteo v. Italy* [GC], no. 37703/97,

§§ 67 and 89, ECHR 2002-VIII; and *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V).

(b) Compliance with the State's positive obligations under Article 2 requires the domestic legal system to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

(c) The effective investigation required under Article 2 serves to maintain public confidence in the authorities' maintenance of the rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts, to secure the effective implementation of the domestic laws which protect the right to life and the right not to be subjected to ill-treatment and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see, among many other authorities, *McKerr v. the United Kingdom*, no. 28883/95, §§ 111 and 114, ECHR 2001-III; and *Paul and Audrey Edwards*, cited above, §§ 69 and 72).

(d) The requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004-XII; *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII; and *Türkmen v. Turkey*, no. 43124/98, § 51, 19 December 2006).

(e) A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-04, *Reports* 1998-VI; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, § 139).

(b) Application of the general principles in the present case

(i) Concerning the procedural obligation under Article 2 of the Convention

54. Turning to the circumstances of the instant case, the Court notes that the applicant's son died in the State's custody, in the Tychy Sobering-Up Centre, on 28 August 1999. Following this incident the public prosecutor ordered that a post-mortem examination be conducted, witnesses be

interviewed and other investigative steps be taken. The investigation into Hubert Mojsiejew's death was opened on 30 August 1999 and concluded on 11 December 2000, when the prosecutor indicted four employees of the centre for unintentional homicide (see paragraphs 10 and 18 above). The applicant took part in the investigation and appealed against the prosecutor's decision to terminate the investigation. Following the indictment, the trial court remained practically inactive during 2001 and 2002; thus, the trial started on 17 April 2003, over two years after the bill of indictment had been submitted to the court. After a single hearing on the latter date the trial court adjourned two subsequent hearings scheduled for 9 June 2003 and 24 February 2004. It remained inactive between these dates. The applicant was examined for the first time at the next hearing held on 10 May 2004, almost five years after the events of 28 August 1999. In spite of this extraordinary delay, and notwithstanding the particularly serious subject matter of the case, the court displayed only limited activity up until 10 December 2004, when it started holding hearings at regular intervals (see paragraphs 20–23 above).

55. The circumstances of the case show that there were a number of other delays, in particular between 4 April 2006 and 23 January 2007, while the trial court waited for an expert opinion to be prepared by the Wrocław Medical Academy. In the context of the case, which required promptness, this period should be considered substantial, in particular since there is no appearance that the court took any action to discipline the experts. The trial court failed to examine these experts, although they came to important conclusions regarding the cause of Hubert Mojsiejew's death, a shortcoming which was the major ground for the quashing of the judgment by the Regional Court on 13 November 2007. Lastly, the Court notes that the case has again been pending before the Tychy District Court since 13 November 2007 and no judgment has been delivered yet. In consequence, four employees of the centre were charged with unintentional homicide; however, only at first instance were they convicted of having exposed Hubert Mojsiejew to an immediate danger of loss of life, and sentenced to two years' imprisonment, suspended for two years.

56. Moreover, it appears from the expert's and the District Court's findings that the failure to examine Hubert Mojsiejew's body at the place where it had been found made it impossible for the experts to establish the time of his death, a circumstance which in the present case might have had a decisive impact on establishing the personal responsibility of each of the accused (see paragraphs 24 and 28 above).

57. Regard being had to the overall length of the period which has elapsed since the death of the applicant's son and other shortcomings discerned above, the Court is of the view that it cannot be said that the procedures applied in order to elucidate the applicant's allegations that the

State had been responsible for the death of Hubert Mojsiejew resulted in an effective examination into the cause of death in the present case.

58. The Court concludes that the authorities did not take the measures required in the circumstances of the case and they failed to carry out a prompt and effective investigation into the circumstances surrounding Hubert Mojsiejew's death.

There has therefore been a procedural violation of Article 2 of the Convention. It follows that the Government's preliminary objection based on the premature nature of the application (see paragraphs 40 and 43 above) must be dismissed.

(ii) Concerning the alleged responsibility of the State for the death of Hubert Mojsiejew

59. It is undisputed that Hubert Mojsiejew died in the Tychy Sobering-Up Centre, and thus in the custody of the State authorities. The parties disagreed on the issue whether Mr Mojsiejew's death was merely a tragic incident or an intentional killing by agents of the State (see paragraphs 44 and 46 above).

60. It appears from the facts, in so far as they had been established by the domestic authorities, that Hubert Mojsiejew was arrested by the police and taken to the Tychy Sobering-Up Centre in good health, without pre-existing injuries or obvious illnesses. He was under the influence of alcohol. At about 9 a.m. on 28 August 1999 he was found dead in a room in which he had been immobilised by belts four hours before. The only injury established by experts was an internal injury to the soft tissues of his neck. The cause of Hubert Mojsiejew's death was asphyxiation. As regards the origin of Hubert Mojsiejew's internal injuries to his neck the Court notes that two groups of experts advanced different hypotheses. The first one, submitted by the Śląska Medical Academy, considered that the immobilising belt across Mr Mojsiejew's back could have been tied too tight, limiting his breathing and leading to his asphyxiation. The second medical opinion prepared by the Wrocław Medical Academy provided another explanation, noting that there had been no detection of any injury which could indicate that substantial pressure had been exerted on the area where the chest belt had been tied. They considered that Hubert Mojsiejew had been held in a headlock, probably while somebody had been tying him up with the belts, which could explain the injuries to his neck that had led to his death.

61. The criminal proceedings against the employees of the centre are pending before the domestic authorities and the issue of their guilt is a matter for the jurisdiction of the Polish criminal court alone (see *Avşar v. Turkey*, no. 25657/94, § 404, ECHR 2001-VII (extracts), and *Nikolova and Velichkova*, cited above, § 61). However, whatever the outcome of the domestic proceedings, the conviction or acquittal of the centre's employees

does not absolve the respondent State from its responsibility under the Convention (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336).

62. As in other cases regarding death in custody, the burden rests on the State to provide a satisfactory and plausible explanation of how Hubert Mojsiejew's death was caused (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 113, ECHR 2001-III).

63. In this connection the Court notes that the Government considered that Hubert Mojsiejew's death was a tragic event and referred to the criminal proceedings which would establish the criminal responsibility of each of the accused. Such an account can hardly be considered a satisfactory explanation of the injuries and death of Hubert Mojsiejew in the Tychy Sobering-Up Centre. In the particularly grave circumstances of the case, in which the applicant's son died under the exclusive control of the Polish authorities, the obligation on the Government to provide plausible explanations was particularly stringent.

Moreover, the Court considers that the Government's explanations should have been provided within a reasonable time. Postponing them further until the resolution of the criminal case, even though over nine years have elapsed since the events in question, shows that the State is unable to provide a plausible explanation in the present case and to satisfy the burden of proof.

The Government also failed to provide a convincing explanation as to whether the centre's employees had carried out periodic checks on Mr Mojsiejew and had complied with domestic regulations aimed at protecting the health and life of persons admitted to sobering-up centres, particularly those immobilised by belts (see paragraph 34 above, and contrast *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

64. The Court's examination of whether the circumstances of a case engage the State's responsibility under the material limb of Article 2 of the Convention can be precluded by an ongoing investigation before the domestic authorities. However, it has already established that there had been serious delays and shortcomings in the investigation and the judicial stage of the proceedings, giving rise to the finding that the authorities failed to carry out a prompt and effective investigation into the circumstances surrounding Hubert Mojsiejew's death (see paragraph 58 above). The Court reiterates that, on that account, the applicant is dispensed from awaiting the conclusion of the proceedings and her application cannot therefore be considered premature.

At the same time the Court would emphasise that its decision is limited to the circumstances of this case and must not be interpreted as a general statement to the effect that a criminal investigation and trial is never a remedy which must be used in the event of an allegation of death or

ill-treatment of an individual within the custody of the State (see *Selmouni*, cited above, § 81).

Consequently, this part of the Government's preliminary objection based on the premature nature of the application should also be rejected.

65. Having regard to the overall length of the period which has elapsed since the death of the applicant's son and also to the conclusion above that the Government failed to satisfy the burden of proof lying on them to provide a satisfactory and convincing explanation as regards Hubert Mojsiejew's death, the Court finds that he was deprived of his life in circumstances engaging the responsibility of the respondent State under the Convention.

There has accordingly been a substantive breach of Article 2 of the Convention on account of Hubert Mojsiejew's death.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed 51,198 Polish zlotys (PLN) in respect of pecuniary and PLN 400,000 in respect of non-pecuniary damage.

68. The Government contested those claims.

69. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. On the other hand, it awards the applicant 20,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

70. The applicant, who was represented by a lawyer and was granted legal aid from the Council of Europe, did not claim reimbursement of any costs and expenses.

C. Default interest

71. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection that the application is premature and *declares* the application admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out a prompt and effective investigation into the circumstances of Hubert Mojsiejew's death;
3. *Holds* that there has been a substantive violation of Article 2 of the Convention in respect of the death of Hubert Mojsiejew;
4. In consequence of the above *dismisses* the Government's preliminary objection;
5. *Holds*
 - (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, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President