

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

FOURTH SECTION

CASE OF KALICKI v. POLAND

(Application no. 46797/08)

JUDGMENT

STRASBOURG

8 December 2015

FINAL

08/03/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Kalicki v. Poland,

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

András Sajó, *President,*
Boštjan M. Zupančič,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 17 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 46797/08) 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, Mr Tadeusz Kalicki ("the applicant"), on 24 September 2008.

2. The applicant was represented by Ms M. Kożuch, a lawyer practising in Cracow. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicant complained of the ineffectiveness of the investigation into the circumstances of his brother's death.

4. On 13 February 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Wieliczka.

A. The investigation into the circumstances of J.K.'s death

6. The applicant's brother J.K. worked as a night guard at a bus terminus in Cracow. On 12 November 2003, at around 4 a.m., his clothes caught fire. Drivers at the station raised the alarm and managed to extinguish the fire.

J.K. was subsequently taken to hospital. However, because of his serious injuries he died on 26 November 2003.

7. On 31 December 2004 the Cracow district prosecutor discontinued the investigation into the circumstances of J.K.'s death. During the investigation it was established that J.K. must have either fallen asleep or fainted and that his clothes had caught fire when they came into contact with an electric heater. The prosecutor concluded that it had been an unfortunate accident and that no offence had been committed.

8. On 24 January 2005 the applicant appealed. He argued that the prosecution authorities had failed to establish the circumstances of his brother's death. He submitted that witnesses had given different versions of the events. In addition it had not been established how J.K's clothes could have caught fire and where the electric heater had been placed. He further stressed that J.K. had suffered from serious diabetes and should not have been allowed to work night shifts.

9. On 25 May 2005 the Chief Inspector of the Małopolska Regional Command, in reply to the applicant's complaint, stated that the investigation into the circumstances of J.K.'s death had indeed been too long. The officer in charge had already been disciplined.

10. On 22 August 2005 the applicant again complained to the Cracow Regional Prosecutor about delays in the proceedings. Subsequently, on 19 October 2005 he complained to the Cracow appellate prosecutor about the fact that he had not received any reply from the Regional Prosecutor.

11. On 21 November 2005 the Cracow appellate prosecutor confirmed that the proceedings had indeed been too long. He further informed the applicant that the Regional Prosecutor had been reproached for not having replied to his complaint in a timely manner.

12. On 29 November 2005 the Cracow district prosecutor reopened the investigation into the circumstances of J.K.'s death.

13. On 22 April 2005 the applicant complained about the actions taken by the police officers on 12 November 2003. He alleged that they had failed to perform their duties, to properly secure the place in which his brother had died and that they had fabricated false evidence in order to direct the prosecution against other persons and obstructed the proceedings.

14. Following the applicant's complaint referred to above, on 30 December 2005 the Cracow district prosecutor decided to sever the charges against the police officers responsible for securing the evidence on the day of J.K.'s accident and to deal with them in a separate set of proceedings (see section B).

15. On 28 November 2006 the district prosecutor replied to the applicant's complaint about the excessive length of the proceedings and found the complaint ill-founded. The prosecutor informed the applicant that prosecutors were independent in their work and it was up to them to make a decision about when the evidence had been collected and at which point the

investigation should be closed. The applicant was also informed that the prosecutor in charge had been promoted to the Regional Prosecutor's office and that a new prosecutor had inherited his cases.

16. On 21 September 2007 the proceedings were discontinued because it was found that no offence had been committed.

17. On 8 October 2007 the applicant lodged an appeal against this decision.

18. On 19 November 2007 the decision of 21 September was upheld by the Cracow-Śródmieście District Court.

B. Investigation concerning the police officers

19. On 22 April 2005 the applicant lodged a complaint about actions taken by the police on 12 November 2003. Following this complaint the original investigation was severed and it was decided to examine the charges against the police in a separate set of proceedings (see paragraphs 13 and 14 above).

20. On 14 June 2005 the applicant complained to the Chief of Police Force in Warsaw about the actions taken by the local police.

21. On 24 January 2006 the Cracow district prosecutor discontinued the investigation, finding that no offence had been committed. According to the prosecutor's findings, on the night of the accident at around 4 a.m. one of the bus drivers, J.Ł., heard a man screaming and calling for help. The man ran into the drivers' room; his clothes were on fire. J.Ł. extinguished the fire using a shower and called an ambulance and the police. The ambulance arrived first and subsequently, at around 4.30 a.m., the police arrived at the scene. The officers concentrated on helping J.K. They spoke to him about the incident and then he was taken to hospital. The detective, who arrived later, examined the room with the help of the company's health and safety inspector, S.S. The prosecutor referred to the applicant's arguments that the scene of the accident had not been properly secured; she stated that since the incident had not resulted in any fatalities, the police officers had not been required to secure the scene in any particular way.

The prosecutor concluded that the police officers had not failed to properly perform their professional duties and that all the relevant procedural rules had been followed.

22. On 27 February 2006 the applicant lodged an interlocutory appeal against this decision. He maintained that the detective had arrived at the scene six hours after the accident. In addition, he questioned the fact that the detective had been assisted by S.S., who was an employee of the company.

23. On 28 November 2006 the Cracow District Court allowed the applicant's appeal and returned the case to the prosecutor. In particular, it instructed the prosecutor to obtain evidence from S.S. and another witness,

W.D., and to verify the actions taken by the police in view of the applicable procedures.

24. On 23 January 2007 the Cracow district prosecutor again discontinued the investigation into the alleged failure of police officers to comply with their duties. The prosecutor had heard evidence from S.S. and W.D. She repeated the reasons given in the decision of 24 January 2006 and considered that the police actions had complied with the applicable procedures and that no offence had been committed.

25. On 5 February 2007 the applicant lodged an interlocutory appeal against this decision.

26. On 19 March 2007 the Cracow Regional Prosecutor quashed the decision of 23 January 2007 and returned the case to the district prosecutor to continue the investigation. He considered that the district prosecutor had failed to comply with the court's instructions of 28 November 2006 and had failed to analyse whether all officers involved, including the one who had taken the call notifying them of the incident and all the officers who had been present at the scene of the accident, had followed the applicable procedures.

27. On 16 October 2007 the district prosecutor heard evidence from R.P. – one of the police officers who had intervened on 12 November 2003 – in the presence of the applicant. The applicant asked the witness questions but the witness did not remember much of the incident in 2003.

28. On 31 January 2008 the district prosecutor discontinued the investigation. In an extensive reasoning of his decision the prosecutor referred to testimonies given by fifteen witnesses and to cross-examination of further two witnesses, S.S. and W.D. The prosecutor also relied on the report of the examination of the scene of the accident and on the case file. He concluded that no offence had been committed as regards the alleged breach of professional conduct on the part of the police officers and that there was not enough evidence to substantiate the allegations that the police officers had falsified any evidence.

The two policemen, S.P. and R.P., who arrived at the scene at 4.30 a.m. and who spoke to the applicant's brother, submitted that they had spoken to the victim directly after the incident; he had been conscious and informed them that he had fallen asleep and when he had woken up his clothes had been already burning.

As regards the applicant's allegations that the electric heater had been secured only six hours after the arrival of the police officers, the court found that (although this had not been not confirmed by any of the witnesses) the heater might have been moved before it was secured because several other persons had been in the room where the accident had happened before the arrival of the police. However, even if it had been moved, there were no grounds to suspect that this had been done in order to deflect suspicion onto

any particular person. Here the court again relied on the victim's statements that he had caught fire as a result of his own negligence.

29. The applicant appealed again. He maintained that the prosecutor had failed to properly establish the facts and hear all the necessary evidence. He demanded that witnesses A.M., S.S. and W.D. be cross-examined in order to clarify discrepancies between their statements. He also restated that the policemen who had conducted the investigation had failed to follow the relevant procedures, and in particular that the scene of the accident had not been properly secured. He lastly submitted that "his brother had been blamed for the accident" whereas in fact the real reason was that he had suffered a diabetic shock.

30. On 14 April 2008 the Cracow District Court upheld the prosecutor's findings and considered that the circumstances of the case had been established sufficiently to make a decision on the merits. As regards the applicant's request for cross-examination of certain witnesses the court submitted that the request had already been granted in part because S.S. and W.D. had been cross-examined. As regards the contradictions in the testimonies given by A.M., the court considered that they had been sufficiently cleared up by A.M. herself when she had given evidence for the second time and there had been no contradictions between her statements and the remaining evidence, so further examination would only lead to an unnecessary extension of the proceedings. As regards the applicant's arguments concerning the failure on the part of the policemen to follow the relevant procedures, the court found that the procedures relied on by the applicant had to be followed only in a case where there was a suspicion that a crime had been committed: in the present case there had been no evidence that any third person might have been involved in J.K.'s death. The court further held that the same applied to the requirement to secure the scene of the accident; the applicant's brother, who had been interviewed after the accident, admitted that his clothes had caught fire because of his carelessness *(w wyniku nieuwagi)*. This also demonstrated that the suspicion that a crime had been committed had been ill-founded.

II. RELEVANT DOMESTIC LAW

31. Article 155 of the Criminal Code reads as follows:

> "Whoever unintentionally causes the death of a human being [unintentional homicide] shall be liable to a custodial sentence of between three months and five years."

32. Article 231 § 1 of the Criminal Code reads as follows:

> "A public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest shall be liable to a custodial sentence of liberty for up to three years".

33. Article 2 of the Code of Criminal Proceedings, in so far as relevant, as follows:

> "§ 1. The purpose of this Code is to conduct criminal proceedings in a way which will ensure that:
>
> (1) the perpetrator of an offence is detected and punished, and that no innocent person is punished,
>
> (2) by the correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favoured the commission of the offence, the objectives of criminal proceedings are completed not only to combat the particular offences, but also to prevent them, as well as to consolidate the rule of law and the principles of community life,
>
> (3) the legally protected interests of the injured party are secured, and
>
> (4) determination of the case is achieved within a reasonable time."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

34. The applicant complained that the authorities had failed to take reasonable steps in order to clarify the circumstances of his brother's death as required by Article 2 of the Convention, which reads, in so far as relevant, as follows:

> "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 ..."

A. Admissibility

1. The Government's preliminary objections

(a) Abuse of the right of individual application

(i) The Government

35. The Government submitted that the present application should be found inadmissible on account of the applicant's abuse of his right of individual petition. In this connection they claimed that the applicant had not had any strong emotional ties with his late brother, he had not had any knowledge of his brother's state of health and had not arranged the formalities around his brother's funeral. The Government further pointed to inaccuracies in the applicant's submissions; according to them the applicant had been informed of the investigation before its discontinuance in December 2004, even though he had never officially had the status of an

auxiliary prosecutor in said investigation. The Government also submitted that it was untrue that the applicant had not had a chance to see the case file; on the contrary, his request of 1 February 2005 had been granted. However, on 26 and 29 August 2005 he had failed to appear in the prosecutor's office.

They concluded that the information submitted by the applicant constituted an abuse of his right of individual petition and that, consequently, the application should be found inadmissible under Article 35 § 3 of the Convention.

(ii) The applicant

36. The applicant submitted that the level of personal relationship with his brother was immaterial to his legal standing in the present case. He further submitted that indeed he was not given a status of auxiliary prosecutor in the investigation in question. However, as a close family member of the late J.K. he had had a right to participate in the proceedings and his rights had not been observed.

(iii) The Court

37. The Court considers that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts (see the *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 53-54; *I.S. v. Bulgaria* (dec.), no. 32438/96, 6 April 2000; *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Rehak v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004; and *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014).

38. The Court notes that in the present case the applicant's submissions as regards his status in the proceedings and about not being granted access to case file were indeed inaccurate. However these facts are not decisive for the alleged non-observance of the applicant's Convention rights and, as such, are immaterial to the overall assessment of the present case.

39. As regards the allegedly insufficient emotional ties between the applicant and his brother and the alleged conflict between them, the Court considers that the quality of relations between the brothers is immaterial to the exercise of the applicant's right as the closest family member of the deceased.

40. The Government's preliminary objection should therefore be rejected.

(b) Failure to comply with the six-month rule

(i) The Government

41. The Government further submitted that part of the present application had been lodged outside the six-month time-limit. In their view,

the investigation into the circumstances of J.K.'s death had been completed on 19 November 2007 when the Cracow District Court upheld the prosecutor's decision of 21 September 2007 discontinuing the proceedings. The applicant had lodged his application on 24 September 2008. Hence, with respect to this part of the domestic proceedings the application should be declared inadmissible for failure to comply with the six-month rule.

(ii) The applicant

42. As regards the alleged non-observance of the six-month rule, the applicant submitted that the core of his complaints were the proceedings against the police officers responsible for securing evidence on the day of his brother's accident. These proceedings had been terminated on 14 April 2008. Hence, according to the applicant, his application had been lodged within the required time-limit.

(iii) The Court

43. The Court notes that the original investigation into the circumstances of the applicant's brother's death was severed following the applicant's request of April 2005 (see paragraphs 13 and 14 above). The original investigation concerned the alleged offence referred to in Article 155 of the Criminal Code: unintentional homicide (see paragraph 31 above). It was indeed terminated on 19 November 2007 when the Cracow District Court upheld the decision of 21 September 2007 by which the proceedings were discontinued (see paragraph 18 above). It follows that the Government's objection as regards this set of proceedings is well-founded and that the present application, in so far as it concerns the proceedings in respect of the unintentional homicide of the applicant's brother, must be declared inadmissible for failure to comply with the six-month rule.

44. The Court is however competent to analyse the application as regards the proceedings against the police officers, which were terminated on 14 April 2008.

2. Conclusion as to admissibility

45. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

46. The applicant submitted that the investigation into the circumstances of his brother's death had not been of sufficient quality and therefore had been in breach of the requirements of Article 2 of the Convention.

47. The Government refrained from taking a position on the merits of the present case.

1. General principles

48. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has died in suspicious circumstances. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see, for example, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 321, ECHR 2007-II).

49. For an investigation into a suspicious death to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. 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 measure of effectiveness (see, for example, *Ramsahai v. the Netherlands,* cited above, § 321). The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays (see *Šilih v. Slovenia* [GC], no. 71463/01, § 195, 9 April 2009).

50. The Court observes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009). The obligations under Article 2 of the Convention are not confined to cases where it has been established that the death was caused by an agent of the State. On the contrary, the mere fact that the domestic authorities have been informed of the death will give rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances in which it occurred (see, for example, *Vasîlca*

v. the Republic of Moldova, no. 69527/10, § 28, 11 February 2014, *Emars v. Latvia*, no. 22412/08, § 75, 18 November 2014). What is more, a breach of a procedural obligation under Article 2 has been alleged in the absence of any complaint as to the substantive aspect of Article 2 (see *Byrzykowski v. Poland*, no. 11562/05, §§ 86 and 94-118, 27 June 2006).

51. The absence of any direct State responsibility for the death of an individual does not exclude the applicability of Article 2. The procedural obligations flowing from that Article require that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be, *inter alia*, thorough, impartial and careful. It must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimonies, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of any clinical findings, including the cause of death. In all cases the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest (see, for example, *Byrzykowski*, cited above, § 95, *Oğur v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III).

2. Application of the general principles to the present case

52. Turning to the circumstances of the present case, the Court notes that the domestic proceedings which sought to examine the possible involvement of third persons in the applicant's brother's death terminated on 19 November 2007 (see paragraphs 18 and 43 above). However, in the course of these proceedings the applicant raised complaints concerning the quality of the investigation. In particular, he alleged that the police officers who had arrived at the site of the applicant's brother's accident had failed to carry out their professional duties properly. The evidence concerning these complaints was excluded from the original proceedings and a separate set of proceedings was opened. The Court considers that this set of proceedings was capable of uncovering the circumstances of the applicant's brother's death.

53. The Court further notes that J.K. died on 26 November 2003, some fourteen days after the incident complained of (see paragraph 6 above). After the incident on 12 November 2003 J.K. was conscious and was interviewed by police officers. During the interview he informed them that he had fallen asleep and that his clothes had caught fire from the electric heater because of his own carelessness (see paragraphs 21 and 30 above). The Court considers that these facts are relevant for the assessment of the quality of the investigation since they influenced the necessary activities of

the police officers after their arrival at the scene of the accident; the victim himself reported the events and there was no reasonable grounds to suspect the involvement of any third persons in the accident in question.

54. Nevertheless, the investigation was opened at the request of the applicant; the circumstances of the case were examined by the prosecutor and the court. The applicant was also allowed to exercise his procedural rights in the investigation. In particular, he lodged appeals against every decision of the prosecutor (see paragraphs 22, 25 and 29 above). From the documents which he produced it appears that he was also present at the questioning of R.P. – one of the witnesses – and was allowed to ask him questions (see paragraph 27 above). The requirement of the applicant's involvement in the proceedings and safeguarding his procedural rights was thus fulfilled. The case was remitted to the prosecutor twice when it was found that the investigation needed to be conducted further and only when it was found that the facts of the case had been sufficiently established was the decision to discontinue the proceedings approved by the court (see paragraphs 23, 26 and 30 above).

55. The Court considers that the domestic authorities have thoroughly examined the circumstances of J.K.'s death. In particular, a number of witnesses were interviewed including the bus driver who assisted J.K. and extinguished fire on his clothes, other persons present at the scene of the accident and police officers involved in the investigation (see paragraph 28 above). The prosecutor ordered the cross-examination of two witnesses (S.S. and W.D.) whose testimonies had contradicted each other. Furthermore, the contradictions in the statements of another witness, A.M. were clarified when A.M. was questioned for the second time (see paragraph 30 above).

56. The Court further notes that the arguments raised by the applicant in his appeals had been properly addressed by the prosecutor and the court. In particular, the domestic authorities convincingly replied to his allegations that the electric heater had not been properly secured (see paragraph 28 above). They also addressed the applicant's arguments as regards the necessity of hearing further testimony from witnesses and as regards the alleged contradictions in some of their testimonies (see paragraph 30 above).

57. The foregoing considerations are sufficient to enable the Court to conclude that the investigation complained of fulfilled the standard required in the Court's case-law in that it was thorough, impartial and careful.

It follows that there has been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint as regards the proceedings which terminated on 19 November 2007 inadmissible;

2. *Declares* the remainder of the application admissible;

3. *Holds* that there has been no violation of Article 2 of the Convention.

Done in English, and notified in writing on 8 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
Deputy Registrar	President