

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

FOURTH SECTION

CASE OF Z v. POLAND

(Application no. 46132/08)

JUDGMENT

STRASBOURG

13 November 2012

FINAL

13/02/2013

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



In the case of Z v. Poland,

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

Päivi Hirvelä, *President,*
Lech Garlicki,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 23 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 46132/08) 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, Ms Z ("the applicant"), on 16 September 2008. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Ms M. Gąsiorowska and Mrs B. Namysłowska-Gabrysiak, lawyers practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry for Foreign Affairs.

3. The applicant complained that her daughter had died as a result of medical negligence and that her rights under Articles 2, 8 and 14 of the Convention had been breached.

4. On 16 June 2009 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The parties replied in writing to each other's observations.

6. In addition, third-party comments were received from the International Reproductive and Sexual Health Law Programme, University of Toronto, Canada; Amnesty International and Global Doctors for Choice, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1951 and lives in Piła.

8. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Treatment of the applicant's daughter

1. Undisputed facts

9. On 5 May 2004 the applicant's daughter, Y, was informed that she was between four and five weeks pregnant. Prior to or early in her pregnancy she developed ulcerative colitis ("UC"). The applicant's daughter began experiencing the symptoms of UC, such as nausea, abdominal pains, vomiting and diarrhoea. Those symptoms were recurrent and caused pain and discomfort.

10. Y was repeatedly admitted to a number of hospitals. Y, accompanied by the applicant, attended the following hospitals in Poland: 18 to 19 May 2004, Specialist Hospital in Piła, Gynaecology and Obstetrics Department (*Szpital Specjalistyczny w Pile, Oddział Ginekologiczno-Położniczy*); 19 May to1 June 2004 and 4 to 8 June 2004, Specialist Hospital in Piła Internal Medicine Department (*Szpital specjalistyczny w Pile, Oddział Chorób Wewnetrznych*) ("Piła Hospital"); 8 June to 1 July 2004 and 19 to 28 July 2004, Clinic of Gastroenterology and Nutrition, Independent Public Teaching Hospital No. 2, H. Święcicki Medical Academy in Poznań *(Samodzielny Publiczny Szpital Kliniczny Nr 2 im. H. Święcickiego Akademii Medycznej w Poznaniu, Oddział Kliniczny Gastroenterologii, Żywienia Człowieka i Chorób Wewnętrznych*) ("Święcicki Hospital"); 13 to 15 July 2004 Obstetrics and Gynaecology Department III, Gynaecology and Obstetrics Teaching Hospital, Independent Public Medical Facility in Poznań (*Oddział Położniczo-Ginekologiczny III, Ginekologiczno-Położniczy Szpital Kliniczny Akademii Medycznej w Poznaniu*); 28 July to August 2004, Surgery Department of the Specialist Hospital in Piła (*Szpital Specjalistyczny w Pile, Oddział Chirurgiczny*); 17 August to 4 September 2004, Pirogow Regional Specialist Hospital in Łódź, General and Vascular Surgery Department (*Wojewódzki Szpital Specjalistyczny im. Pirogowa w Łodzi, Oddział Chirurgii Ogólnej i Naczyniowej*) ("Pirogow Hospital"); 4 September 2004, M. Madurowicz Regional Specialist Hospital in Łódź (*Wojewódzki Szpital Specjalistyczny*

im. M. Madurowicza w Łodzi); 4 to 29 September 2004, Intensive Care Department, Norbert Barlicki University Teaching Hospital No. 1 in Łódź (*Uniwersytecki Szpital Kliniczny Nr 1 im. N. Barlickiego Uniwersytetu Medycznego w Łodzi, Oddział Kliniczny Anestezjologii i Intensywnej Terapiii*) ("Barlicki Hospital").

11. The applicant's daughter was formally diagnosed with UC during her stay in Piła Hospital between 19 May and 1 June 2004. She underwent a number of tests, including an endoscopy and a fibro-sigmoidoscopic examination of the anus.

12. During the visits in the hospitals listed above, the applicant's daughter received some diagnostic tests and basic treatment. She was given pharmacological treatment (for example, intravenous and oral administration of steroids and antibiotics).

13. On 8 June 2004 Y was admitted to Swiecicki Hospital. Between 8 June and 1 July and 19 and 28 July 2004 she was an inpatient in that hospital. On 19 July 2004 she was diagnosed with an abscess.

14. On 28 July 2004 Y left the clinic.

15. The next day, 29 July 2004, she was admitted to Piła Hospital, where she underwent an operation to remove the abscess.

16. On 17 August 2004 Y was admitted to Pirogow Hospital due to a new abscess and rectovaginal fistula. On the same date she was operated on to remove the abscess. Medical files confirm that at the time Y was admitted to hospital the doctors were aware of Y's ulcerative colitis .

17. During the applicant's daughter's stay in Pirogow Hospital in August 2004 the doctor refused to perform a full endoscopy. In addition, no diagnostic imaging of the abdomen (*diagnostyka obrazowa jamy brzusznej*) was performed.

18. On 4 September 2004 Y's condition deteriorated. She was transferred to Madurowicz Hospital. Immediately following her admission she was sent for a surgical operation to establish the cause of the apparent sepsis. During the operation the doctors removed her appendix. Y's condition deteriorated, consequently immediately after the operation she was transferred to the intensive care unit of Barlicki Hospital.

19. On 5 September 2004 the doctors removed the foetus, which was dead. On 15 September 2004 the doctors removed Y's uterus. Altogether the applicant's daughter was operated on six times in Barlicki Hospital. On 29 September 2004 she died of septic shock caused by sepsis.

20. By letter, dated 30 September 2004, Y's brother asked the hospital not to perform an autopsy. He submitted that the cause of Y's death was known to him.

2. Facts in dispute

21. The Government maintained that on 28 July 2004 Y left the hospital at her own request due to a planned wedding ceremony. In this respect they submitted a copy of Y's medical file, which in its relevant part reads as follows:

> "27 July 2004 ...Due to a planned wedding ceremony, the patient is to be released tomorrow at her own request."

22. The applicant disagreed. She maintained that Y had not requested to leave the hospital, but had been sent home.

23. The applicant further submitted that during her daughter's stay in the surgical department of Piła Hospital the head of that department commented that "it is absurd to spend a whole week treating an abscess. [Y] is too busy with her bottom, instead of taking care of something else", referring to the pregnancy. The applicant stated that this comment and its context had humiliated and angered her and her daughter.

24. The Government argued that Piła Hospital maintained that no such comment had been made, either by the head of the department or by any other doctor of that hospital. Also, the Regional Agent for Disciplinary Matters in Poznań, in the course of disciplinary proceedings instituted against doctors who had treated Y, did not confirm the applicant's allegations.

25. The applicant also submitted that the doctor at Pirogow Hospital had justified not performing a full endoscopy (in August 2004) by referring to his fear of endangering the life of the foetus. The applicant submitted that the doctor had stated that "my conscience does not allow me", but had not formalised his objection or directed Y to another doctor.

26. The Government argued that during the investigation instituted by the Regional Agent for Disciplinary Matters in Łódź it had been established that none of the doctors at Pirogow Hospital had based their refusal to perform a full endoscopy on a "conscience clause" (*klauzula sumienia*). The decision not to perform a full endoscopy was taken because there were no medical grounds for such an examination, and not because of Y's pregnancy.

B. Criminal proceedings

1. Undisputed facts

27. On 6 December 2004 the applicant's lawyer asked the Łódź District Prosecutor to institute criminal proceedings in relation to the circumstances of the applicant's daughter's death. The lawyer submitted medical charts from three hospitals and asked the prosecutor to obtain full medical

documentation. The applicant was questioned by the prosecutor on 6 January 2005.

28. On 10 February 2005 the prosecution requested the Collegium Medicum in Kraków and the Medical University in Łódź to issue an opinion as to whether an exhumation would be possible in Y's case. Both universities replied that an exhumation of Y's body would not have enabled an opinion to be given on the cause of her death.

29. On 1 March 2005 the prosecutor opened an investigation of possible unintentional homicide of the applicant's daughter (Article 155 of the Criminal Code).

30. On 24 June 2005 the prosecutor decided to appoint an expert from the Forensic Medicine Department of the Collegium Medicum in Kraków, to evaluate the treatment provided to the patient, and to establish whether there was a direct causal link between any irregularities in Y's treatment and her death. However, Collegium Medicum informed the prosecutor that no autopsy was carried out following the applicant's daughter's death, and that exhumation of her body at a later stage would not have enabled an opinion to be given on the cause of death. A similar opinion was issued by the Medical University in Łódź.

31. On 20 July 2005 the Medical Academy in Gdańsk, on 22 July 2005 the Forensic Medicine Department in Szczecin, and on 19 July 2005 the Medical Academy in Warsaw refused to provide an opinion in Y's case due to their workload in other cases and lack of staff.

32. Meanwhile, on 14 June 2005 the Minister of Health convened a special expert committee to investigate Y's treatment and the circumstances of her death. The aim of the committee was to inquire in respect of all the hospitals involved in Y's treatment as regards their organisation and methods of treatment and the availability of those methods. On 15 November 2005 the committee concluded that the death had been directly caused by sepsis. The committee noted however, that during Y's stay in Pirogow Hospital, despite her history of inflammatory bowel disease the doctors failed to perform a diagnostic imaging test on her abdomen. In addition, an earlier diagnosis of sepsis and the establishment of its original cause in Pirogow Hospital (most probably Lesniewski-Crohn disease) and a possible decision about surgical treatment would have had an impact on Y's situation. The committee's report was signed by several national consultants in various fields of health care. Two members of the committee, who were not medical experts, did not sign the report: professor of criminal law E.Z., and W.N., the head of an NGO working in the field of reproductive rights.

33. On 8 August 2005 the prosecutor's office asked national consultants in gastroenterology, gynaecology and vascular surgery to submit opinions on Y's treatment.

34. On 12 December 2005 an expert gastroenterologist stated in her opinion that the original cause of sepsis could not be determined due to the fact that an autopsy had not been performed on Y's body.

35. The investigation of the death of the applicant's daughter was extended several times. It was then suspended, on 26 May 2006. The prosecutor referred to the need to obtain expert opinions and the fact that the waiting time for such opinions was at least twelve months.

36. Subsequently six medical opinions were submitted to the prosecutor's office on 12 March, 10 April, 10 May, 4 June, and 27 September 2007, and 25 April 2008. Altogether the prosecution obtained opinions from eight medical experts. The experts were subsequently heard by the prosecutor.

37. During the investigation, there were several changes of prosecutor: at least six prosecutors handled the investigation at different stages.

38. On 10 May 2007 M.K, an expert gastroenterologist, considered it surprising that Y had not undergone an ultrasonographic examination of the abdomen. He further stressed that she could have had an MRI (magnetic resonance imaging) to determine the cause of the abscess. Lastly, an autopsy would have allowed the original cause of the sepsis to be determined. In an additional opinion of 25 April 2008 M.K. considered that in both hospitals, Piła and Pirogow, the doctors failed to do an MRI. However, he stressed that the lack of adequate examination in Y's case should be treated not as medical malpractice but as lack of due diligence.

39. On 11 June 2008 the District Prosecutor resumed and discontinued the investigation. The prosecutor concluded that on the basis of the experts' opinions there was no ground for any doubts or objections as to the treatment received by the applicant's daughter. Failure to conduct an MRI should be considered a lack of due diligence and not medical malpractice. It could no longer be said that an earlier operation would have saved Y's life. Consequently, no direct link had been established between the treatment and the death of the applicant's daughter.

40. The applicant appealed.

41. On 5 September 2008 the Lódz District Court upheld the prosecutor's decision. The court referred to the complicated nature of the case and the fact that no autopsy was performed, and therefore it was impossible to establish whether Y suffered from Lesniewski-Crohn's disease. The court considered that there were no grounds for continuation of the investigation of Y's death.

2. Facts in dispute

42. The applicant stated that the prosecutor had not obtained the necessary information, such as full medical records, to assist experts in forming their opinions. The Government maintained that the prosecutor had

obtained full medical records from all the hospitals attended by the applicant's daughter in Piła, Poznań and Łódź.

43. The applicant also stated that the prosecutor had failed to address the critical issue of whether in the circumstances of the case it had been advisable to perform a colonoscopy. The investigation was instead focused on whether an abortion was necessary to provide appropriate treatment to the applicant's daughter. The Government argued that the prosecutor had examined the issue of colonoscopy and the investigation had been focused on Y's cause of death: in particular, on the question whether her treatment had been adequate to the diagnosis and whether further tests, such as a full endoscopy and a diagnostic imaging test, could have prevented Y's death.

44. The applicant claimed that the two members of the special expert committee (see paragraph 32 above) who had not signed the report of 15 November 2005 had not been allowed to participate in the committee's discussions and therefore did not have access to the medical files. The Government disagreed. They drew the Court's attention to the fact that all the medical specialists had signed the report.

C. Disciplinary proceedings

45. On 20 June 2005 the Łódź Regional Agent for Disciplinary Matters (*Okregowy Rzecznik Odpowiedzialnosci Zawodowej*) ("Disciplinary Agent") instituted disciplinary proceedings against the doctors who had treated Y. After consulting several experts and hearing witnesses, he concluded that there was no evidence of medical malpractice. During the proceedings the applicant and Y's fiancé refused to testify before the Disciplinary Agent. The proceedings were discontinued by a decision of 25 October 2006.

46. In late May 2005 the Poznań Disciplinary Agent instituted disciplinary proceedings against the doctors who had treated Y. On 6 December 2006 three specialists from the Wrocław Medical Academy issued a medical opinion, that there was no evidence of medical malpractice. The proceedings were discontinued by a decision of 8 January 2007.

47. The applicant did not appeal against the Poznan and Lodz Disciplinary Agents' decisions to the Chief Agent for Disciplinary Matters in Warsaw (*Naczelny Recznik Odpowiedzialnosci Zawodowej*).

D. Civil proceedings

48. In September 2007 the applicant had brought a compensation claim in the Łódź District Court against Pirogow Hospital.

49. On 7 April 2009 the applicant modified her claim and asked for 300,000 Polish zlotys (PLN) in compensation. Consequently, the case was transferred to the Łódź Regional Court.

50. On 17 March 2011 the Łódź Regional Court dismissed the applicant's claim for compensation. The applicant did not appeal against this judgment. In addition, none of the parties asked to be served with the written reasoning of the judgment.

E. Access to the medical files

1. Uncontested facts

51. There is no indication in the medical files of Y's stay in Piła Hospital (19 May-1 June 2004) that she had given permission for third parties to have access to these files. For these reasons, in 2004 the hospital refused the applicant access to the medical files

52. Medical files of Y's stay in Swiecicki Hospital (8 June to 1 July 2004 and 19-28 July) indicate that Y specified that the applicant was entitled to obtain documentation on her stay in the hospital. The hospital granted access to these files to the Lodz District Prosecutor (on 14 March and 9 May 2005 and 27 February 2006) and to the Ministry of Health on 27 June 2005.

53. Medical files in Pierogow Hospital do not indicate that Y allowed third-party access to her medical files. For this reason the hospital refused the applicant access to these files.

2. Facts in dispute

54. The Government maintained that the applicant had not requested the Swiecicki hospital to give her access to Y's files. The applicant disagreed. She submitted, without specifying any details, that she had twice asked the hospital for these files but had not been granted access.

55. The Government submitted that on 1 March 2005 the prosecutor's office requested the relevant hospitals to provide files on Y's treatment. In this connection they submitted copies of the prosecutor's decisions.

56. The applicant disagreed: she claimed that the relevant files were requested only in February and April 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Conscientious objection

57. Under section 39 of the Medical Profession Act of 1996 (*ustawa o zawodzie lekarza i lekarza dentysty*) ("the 1996 Act"), as applicable at the material time, a doctor may refuse to carry out a medical procedure, citing her or his objections on the ground of conscience. He or she is obliged to inform the patient where the medical procedure concerned can be obtained and to register the refusal in the patient's medical records. Doctors employed in health-care institutions are also obliged to inform their supervisors of their refusal in writing.

B. Autopsy

58. Sections 24-26 of the Health-Care Institutions Act of 1991 (*ustawa o zakładach opieki zdrowotnej*), as applicable at the material time, specified situations in which an autopsy is to be performed. In general, when a person died in a hospital, the authorities might carry out an autopsy unless that person's statutory representative objected or the patient expressed such a wish whilst alive. However, an autopsy was obligatory if the cause of the patient's death could not be unequivocally established or in situations specified in the code of criminal procedure.

C. Access to medical records

59. Under section 41 of the 1996 Act and the ordinance of 2001 on types of individual medical documentation, keeping them and detailed conditions of granting access to them (*Rozporzadzenie Ministra Zdrowia w sprawie rodzajów indywidualnej dokumentacji medycznej, sposobu jej prowadzenia oraz szczegółowych warunków jej udostepniania*) as applicable at the material time, a doctor was obliged to grant access to individual medical files to a patient, his statutory representative or a person authorised by the patient; to another doctor or person authorised to conduct the patient's treatment; other organs under separate legislation (such as courts or a prosecutor's office).

D. The Civil Code

60. Under Article 417 of the Polish Civil Code, the State is liable for damage caused by its agents in the exercise of their functions. There is established case-law of the Polish courts to the effect that this liability of the

State also includes liability for damage caused by medical treatment in a public system of medical care, run either by the State or by the municipalities.

E. The Criminal Code

61. Article 155 of the Criminal Code of 1997 provides that a person who unintentionally causes the death of another human being shall be liable to a sentence of imprisonment between three months and five years

F. Disciplinary proceedings

62. The Chambers of Physicians Act of 1989 (*ustawa o izbach lekarskich*) ("The 1989 Act") no longer in force, established Chambers of Physicians. The disciplinary responsibility of physicians for professional misconduct may be determined in proceedings before organs of the Chambers, agents for disciplinary matters and disciplinary courts. Agents and members of the courts for each region are elected by members of a local chamber. The Chief Agent for Disciplinary Matters and the Principal Court are elected by the National Congress of Physicians, composed of delegates of local chambers.

63. Pursuant to Article 42 of the Act, the following penalties may be imposed in disciplinary proceedings: a warning, a reprimand, suspension of the right to practise medicine for a period from six months to three years, and being struck off the register of physicians.

64. The agent for disciplinary matters must investigate the matter if he obtains credible information that the rules of professional conduct have been infringed. When investigating such a complaint, the agent may question a physician charged with professional misconduct, may appoint experts and question witnesses and take such other evidence as he or she sees fit. A physician charged with professional misconduct is entitled to make any submissions which in his or her opinion are relevant.

65. The agent shall discontinue proceedings if he concludes that the material gathered in the case does not suffice for drawing up a motion for a penalty to be imposed.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION ON NON-EXHAUSTION

66. The Government in their observations of 4 December 2009 raised a preliminary objection that the applicant had failed to exhaust the available domestic remedies. They stressed that the case concerned medical malpractice, and therefore the applicant's complaints relating to the death of her daughter should have been made first to a civil court. They submitted several judgments of domestic courts awarding compensation to victims of medical malpractice (damage sustained during delivery and infection with hepatitis C).

67. The Government submitted that the Polish legal system provided two avenues of recourse for victims alleging illegal acts attributable to the State's agents a civil procedure and a request to the prosecutor for an investigation to be opened. In their opinion, in the instant case there was no need to institute criminal proceedings because civil proceedings initiated by the applicant would have enabled her to establish the liability of doctors concerned and to obtain full redress for damage resulting from the doctors' alleged negligence. They stressed that not every instance of death in a hospital, although always tragic and traumatic for relatives, would engage criminal responsibility on the part of doctors.

68. The applicant contested the Government's arguments. She submitted that she was entitled to choose a remedy that addressed her grievance best, and also that a civil remedy was not an effective remedy in the present case. In this respect the applicant pointed out that she had made use of the criminal remedy available to her. On 30 November 2004 she had made an application to the prosecutor for an investigation to be instituted in respect of Y's death. She had further appealed against the decision to discontinue the proceedings in 2008. The applicant maintained, referring to *Zdebski, Zdebska and Zdebska v. Poland* (*Zdebski, Zdebska and Zdebska* v. Poland (dec.), no. 27748/95, 6 April 2000, unreported) that her request to the prosecutor for a criminal investigation satisfied the exhaustion requirement and that it was irrelevant whether the civil proceedings were pending.

69. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the

appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI, and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports* 1996-IV,).

70. The Court 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.

71. With regard to the criminal investigation of the applicant's daughter's death, the Court notes that the applicant initiated criminal proceedings directly after Y's death. The prosecutor discontinued the investigation and this decision was upheld by the District Court on 5 September 2008. The applicant and the Government disagree as to the effectiveness of this investigation. The Court will return to that issue at the merits stage.

72. As regards a civil action to obtain redress for the damage sustained through alleged illegal acts or unlawful conduct on the part of State agents, the Court notes that the applicant brought a civil claim against the Poznan hospital before the domestic courts; however, it was dismissed by the Regional Court on 17 March 2011.

73. Although the applicant failed to lodge an appeal against the above-mentioned decision of the Regional Court, and the Court will revert to that matter in the context of Article 8 (see paragraph 127 below), it finds that in the particular circumstances of the case the applicant cannot be faulted for having used the criminal remedy as her primary means of redress. She should therefore be considered as having exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention (see *Baysayeva v. Russia*, no. 74237/01, § 109, 5 April 2007, and *Dzieciak*, cited above). For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

74. The applicant complained that the doctors treating her daughter failed to provide her with adequate treatment. She also complained that no effective investigation was conducted which would have allowed the establishment of responsibility for her daughter's death. Lastly, referring to the law governing objection on grounds of conscience, she maintained that the State had failed to adopt a legal framework which would have prevented the death of her daughter. She cited Articles 2 and 13 of the Convention. Article 2 of the Convention provides, in so far as relevant:

> "1. Everyone's right to life shall be protected by law ..."

A. Effective investigation

1. The scope of the case

75. With regard to any possible substantive aspect of the applicant's complaint under Article 2 of the Convention, the Court observes that the applicant did not in any way allege or imply that her daughter had been intentionally killed by the doctors responsible for her care and treatment at the material time. She averred, on the other hand, that the doctors treating her had not administered treatment adequate to her condition. She further complained under Article 13 of the Convention alleging lack of a competent and thorough investigation.

76. Admittedly, the first sentence of Article 2 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, among other authorities, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III, and *Jasińska v. Poland*, no. 28326/05, § 57, 1 June 2010). The Court accepts that it cannot be excluded that acts and omissions by the authorities in the field of health-care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision to secure high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as an error of judgment on the part of a health professional or failure to coordinate by health professionals in the treatment of a particular patient, assuming such negligence to have been established, are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

77. Having regard to the above, the Court considers that the applicant's grievances are more appropriately examined from the angle of the procedural requirement implicit in Article 2 of the Convention

2. Admissibility

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

3. Merits

(a) The parties' submissions

(i) The applicant

79. The applicant submitted that the State had violated its procedural obligations under Article 2 of the Convention by failing to carry out an effective investigation of the circumstances surrounding the applicant's daughter's death. Even if a civil remedy would have been an appropriate remedy in this case, the flawed investigation carried out after Y's death rendered a possible civil remedy ineffective.

80. The applicant maintained that the investigation was extended several times and suspended on 29 May 2006. The prosecutors responsible for the case changed numerous times with at least six different prosecutors being involved over the course of the investigation. The authorities failed to conduct an autopsy after Y's death, which would have been necessary to determine the errors made in treatment she had received. In addition, inappropriate questions had been directed at experts during the investigation focusing not on the cause of Y's death but on whether an abortion had been necessary to treat her. Lastly, the applicant had not been properly informed about its progress.

81. With reference to the disciplinary proceedings, she submitted that they could not be regarded as an effective remedy against a breach of the Convention. They were conducted by a physicians' chamber, which was not an independent body but consisted solely of doctors.

82. She concluded that the failure to carry out an autopsy at all, together with other shortcomings of the investigation, "undermined any attempt" to determine liability on the part of the doctors and hospitals responsible for Y's care and ultimate death.

(ii) The Government

83. The Government claimed that the doctors' allegedly inadequate treatment of the applicant's daughter could not amount to a breach of the State's duty to protect the right to life. They maintained that the applicant's daughter received treatment in various specialised hospitals and underwent various medical tests. In their opinion it would have been difficult to conclude that the quality and promptness of the medical care provided to the applicant's daughter during her stay in hospitals put her health and life in danger.

84. In respect of the failure to conduct an autopsy, the Government submitted that according to Polish law there were no compelling reasons to carry out an autopsy. Despite that, the hospital management asked the

family their opinion, and Y's brother requested the hospital not to perform an autopsy on his sister's body.

85. As regards the effectiveness of the investigation, the authorities took all reasonable steps to establish the identity of those responsible for the alleged medical malpractice and bring them to justice. The prosecutor ordered eight expert opinions, and voluminous evidence was gathered. Doctors responsible for Y's treatment were questioned and the agent for disciplinary matters carried out extensive investigations. The investigation was focused on the cause of death of Y: in particular, whether her treatment was adequate to the diagnosis and whether further diagnostic tests with full endoscopy and computer scan could have prevented Y's death.

86. As regards the number of prosecutors who had dealt with the investigation, the Government noted that it was in compliance with the Code of Criminal Procedure. They stressed that there were questions of territorial jurisdiction, and also that the Regional Prosecutor's Office had exercised its supervisory function.

87. They stressed that the applicant had not been hindered from taking part in the proceedings

88. In addition, both sets of proceedings (criminal and disciplinary) ended without criminal or disciplinary responsibility of doctors who treated Y being established. In this respect the Government again underlined that in the framework of civil proceedings the court could have examined all the circumstances surrounding the applicant's daughter's death.

(iii) Third parties

(α) The International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto

89. The International Reproductive and Sexual Health Law Programme in its observations of 28 October 2009 submitted that access to comprehensive maternal care was an essential component of women's right to health.

90. They maintained that the rights of pregnant women in protection of life and physical integrity were recognised to prevail over foetal interests.

(β) Amnesty International

91. Amnesty International submitted in its observations of 27 November 2009 that regardless of whether doctors in the present case had in fact refused information, diagnosis or treatment for reasons of conscientious objection, effective legal and policy guidelines were not in place to ensure that doctors were transparent in disclosing their reasons when they refused a patient treatment.

(γ) Global Doctors for Choice

92. Global Doctors for Choice submitted observations on 11 September 2009. Their comments addressed medical standards concerning the treatment of pregnant women who have ulcerative colitis. They stressed that any suggestion of a conflict between maternal treatment and foetal well-being in cases of UC was unfounded.

(b) The Court's assessment

(i) Relevant principles

93. As the Court has held on several occasions, the procedural obligation of Article 2 requires the States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among other authorities, *Calvelli and Ciglio*, cited above, § 49, and *Powell v. the United Kingdom,* cited above). The Court reiterates that this procedural obligation is not an obligation of result but of means only (*Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

94. Even though the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Calvelli and Ciglio*, cited above, § 51, and *Vo*, cited above, § 90).

95. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital to the maintenance of public confidence in their adherence to the rule of law and to the prevention of any appearance of collusion in or tolerance of unlawful acts (see *Paul and Audrey Edwards*, cited above, § 72). The same applies to Article 2 cases concerning medical negligence. 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

Calvelli and Ciglio, cited above, § 53; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Byrzykowski*, cited above, § 117).

96. Lastly, apart from concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services (see *Šilih v. Slovenia* [GC], no. 71463/01, § 192-96, 9 April 2009).

(ii) Application of the above principles in the instant case

97. Turning to the facts of the present case, the Court notes that the applicant's daughter died in hospital on 29 September 2004.

98. It further observes that following her death, on 6 December 2004 the applicant's lawyer asked the District Prosecutor to institute an investigation. Shortly afterwards the prosecutor instituted an investigation on 1 March 2005.

99. In the course of the investigation the prosecutors heard evidence from the applicant, doctors treating Y and further relied on eight expert reports. The experts established that the death of the applicant's daughter had been directly caused by sepsis. With regard to the treatment administered, the experts concluded that there had been no grounds for any doubts. Failure to conduct certain examinations should have been considered a lack of due diligence and not medical malpractice (see paragraphs 27, 36 and 39 above).

100. In so far as the applicant alleged that the authorities failed to conduct an autopsy after Y's death the Court observes that the hospital merely complied with the applicant's brother's request (see paragraphs 20 and 84 above). The Court further notes that the prosecutor raised the issue of possible exhumation with experts (see paragraph 28 above). However due to the time elapsed exhumation would not have enabled an opinion to be given on the causes of Y's death.

101. By a decision of 11 June 2008 the District Prosecutor discontinued the investigation, considering, in the light of all the evidence and, in particular, the conclusions of the experts' opinions, that there had been no direct link between the treatment and the death of the applicant's daughter. The prosecutor's findings were subsequently fully endorsed by the District Court on 5 September 2008 (see paragraph 39 and 41 above).

102. In this respect, the Court also notes that in 2005, two sets of disciplinary proceedings were conducted before the Poznań and Łódz Disciplinary Agents (see paragraphs 45, 46 above). Both agents concluded that there was no evidence of medical malpractice. While indeed it has not

been shown that such proceedings before the Disciplinary Agent would have afforded an effective remedy at the material time, the Court sees no reason to doubt the thoroughness and correctness of the disciplinary proceedings.

103. The Court considers that the investigation succeeded in elucidating the circumstances which were relevant to the issue of determining any responsibility on the part of the medical personnel for the death of the applicant's daughter. It does not find any grounds to contest the findings of the investigation. Further, the results of the investigation cannot be undermined by the fact that, as submitted by the applicant, six different prosecutors were consecutively in charge of it. In this respect, the Court accepts the Government's argument that changes were inevitable as there were some issues of jurisdiction (see *a contrario*, *Šilih,* cited above § 212).

104. As regards the applicant's allegations of delays in the investigation, the Court observes that the only delay in the investigation occurred when the medical academies in Gdansk, Szczecin and Warsaw refused to prepare medical opinions due to lack of time and resources (see paragraph 31 above). It is true that between 26 May 2006 and 11 June 2008 the proceedings remained stayed (see paragraphs 35 and 39 above). However, during that time the prosecutor's office obtained six medical opinions and also heard evidence from several experts (see paragraph 36 above). The Court accepts that the medical questions involved in the case were of great complexity and required thorough analysis. Consequently, in the context of the present case, the period of two years and four months during which the case remained stayed does not seem substantial.

105. Having regard to the above background, the Court considers that the domestic authorities dealt with the applicant's claim arising out of her daughter's death with the level of diligence required by Article 2 of the Convention. Consequently, there has been no violation of Article 2 in its procedural aspect.

B. Alleged absence of legal framework

1. Admissibility

(a) The parties' submissions

(i) The applicant

106. The applicant submitted that the State's regulations and provisions were lacking in that they did not clearly set out the rights of a pregnant woman *vis-à-vis* the foetus, and did not regulate the conscientious objection clause in a sound manner. She further claimed that the prioritisation of the

foetus's life over the life of her daughter was exacerbated by Poland's complete lack of a regulatory system to monitor the practice of conscientious objection. In this respect she pointed out that the State failed to properly implement and monitor the conscientious objection provisions.

107. In conclusion she submitted that the State's failure to prioritise the woman's life over the foetus, together with its stringent and unclear abortion laws and lack of oversight of its laws governing conscientious objection, created a situation which facilitated refusal of legal and necessary treatment to the applicant's daughter. After the doctors refused to perform the necessary medical services, she was unable to access alternative medically necessary treatment, and this led to her death.

(ii) The Government

108. The Government submitted that the medical case file of the applicant's daughter did not state that any of the doctors treating her had refused a full endoscopy on the basis of the conscience clause. In addition, the applicant had not raised this issue at any stage of the domestic proceedings.

(b) The Court's assessment

(i) The findings of fact

109. The Court observes at the outset that the parties gave somewhat differing accounts of certain matters concerning the application of the conscience clause in the present case. The applicant submitted that her daughter was refused a full endoscopy on moral grounds (see paragraph 25 above), whereas the Government's argument referred to the findings of the disciplinary courts that this examination was refused on medical grounds (see paragraph 26 above). No additional evidence in support of the applicant's claims was submitted to the Court. Consequently, on the material before it, the Court cannot find that the applicant's allegation that her daughter was refused a medical examination on the ground of conscientious objection has been substantiated.

(ii) The relevant principles and its application to the present case

110. The Court notes that the applicant expressly challenged the adequacy of the domestic legal framework, in particular the law governing conscientious objection as the principal shortcoming of that framework. It further reiterates that it had already held in the case of *Tysiąc* (*Tysiąc v. Poland*, no. 5410/03, ECHR 2007-IV). that Polish law did not contain any effective procedural mechanisms capable of determining whether the conditions existed for obtaining a legal abortion on the grounds of danger to the mother's health which the pregnancy might present, or of

addressing the mother's legitimate fears (see *Tysiąc* , cited above, §§ 119-24).

111. However, contrary to the *Tysiąc* case, it has not been established that this was a case of conscientious objection. In this respect the Court reiterates that its task is not to review the relevant domestic law and practice *in abstracto*, but only in relation to the specific application of such laws to the particular circumstances of an applicant's situation (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B)

112. Having regard to the above considerations, the Court concludes that the applicant's complaints concerning the regulatory framework must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

113. The applicant complained that she could not have prompt access to her daughter's medical records. She also alleged that the doctors did not provide her and her daughter with reliable and appropriate information about her daughter's health and the treatment options available to her, having regard in particular to the fact that she was pregnant. She cited Article 8 § 1 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicant

114. The applicant submitted that the authorities failed to provide her with timely access to her daughter's medical records. The prosecutor only requested Y's files in February and April 2006, that is one and a half years after Y's death and one year after the institution of criminal proceedings. She further stressed that as she was not able to get access to the medical records herself, but only within the scope of legal proceedings, the prosecutor's failure to request them promptly was particularly significant.

115. The applicant submitted that the doctors' failure to provide her and her daughter with adequate information about her daughter's health and the treatment options available to her, in particular in view the continuation or termination of her pregnancy, violated her daughter's right to autonomy, and in particular to take decisions regarding her own physical health. She also maintained that because her complaint involved fundamental values a civil, compensatory remedy was not effective in her case.

116. Lastly, she stressed that since the information had concerned the health of her daughter, whose rights she had been trying to vindicate, the matter was linked to her private life within the meaning of Article 8 of the Convention.

2. The Government

117. The Government submitted that there was no interference with the applicant's private and family life, as she could, and in fact did, obtain access to her daughter's medical records during the criminal proceedings.

118. They further pointed that the applicant could only have been granted access to her daughter's medical records with her daughter's express consent. Since Y authorised her mother to access her files on only one occasion, she was not entitled to see them on all the other occasions.

119. Furthermore, apart from Pierogow Hospital, the applicant had not asked to see her daughter's medical records held in other hospitals where Y had been treated. Nor had she raised the issue of lack of access before any of the domestic authorities.

B. The Court's assessment

1. Access to documents

(a) Findings of fact

120. The parties gave partly different descriptions of certain of the events in relation to the applicant's access to her daughter's medical records (see paragraphs 54-56 above).

121. The applicant claims that despite the fact that Y authorised her mother to see her medical files the hospital twice refused to disclose them to the applicant. The Government disagreed. In addition, the applicant claimed that the relevant medical records were requested by the prosecutor only in February and April 2006. However, according to copies of the prosecutor's decisions submitted by the Government, it is clear that these decisions were issued on 1 March 2005.

(b) The Court's assessment

122. The Court reiterates that Article 8 § 1 of the Convention can be understood to denote a positive obligation on the authorities to make a full, frank and complete disclosure of the medical records of a deceased child to the latter's parents (cf. *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). The Court further considers that the complaint in issue concerns the exercise by the applicant of her right of effective access to information concerning her daughter's health and is linked to the applicant's private and family life within the meaning of Article 8 (see also *K.H. and Others v. Slovakia*, no. 32881/04, § 44, ECHR 2009). It follows that the instant complaint falls within the scope of Article 8 of the Convention.

123. The Court further observes that it has not been unequivocally established that the applicant had no access to any of her daughter's medical files. On the contrary, she had a possibility to consult Y's medical records within the scope of criminal proceedings (see paragraph 117).

124. Consequently, the Court considers that the applicant failed to substantiate her allegation that Article 8 of the Convention had been breached. Therefore, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

125. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Access to information

126. In so far as the applicant alleged that the doctors' failure to provide her and her daughter with adequate medical information violated their right to autonomy, and in particular to take decisions regarding her daughter's physical health in full knowledge of possible risks to her and her unborn child, the Court notes, contrary to what the applicant asserts, that this grievance would have been most appropriately addressed in the civil proceedings which the applicant initiated (see paragraph 48 above). However, the Court observes that she failed to pursue her civil claim, as she did not appeal against the first-instance judgment (see paragraph 50 above).

127. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

128. Lastly, the applicant complained under Article 14 of the Convention, in conjunction with Articles 2, 3 and 8, that her daughter had been discriminated against on the basis of her pregnancy. This complaint

falls to be examined under Article 14 in conjunction with Article 2 and 8 of the Convention.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The applicant

129. The applicant claimed that her daughter's doctors had not provided her with the standard of care that would have been given to a non-pregnant woman or to a man with ulcerative colitis, amounting to differential treatment based on her pregnancy, which constituted sex discrimination.

130. The applicant submitted that there were no "weighty reasons" or "objective and reasonable justification" for the discriminatory treatment her daughter received and which violated her personal autonomy and right to life.

131. She further maintained that her daughter had been subjected to discriminatory treatment because of various aspects of the Polish legal system, in particular the restrictive abortion laws, the unregulated practice of conscientious objection and the right to life given to the foetus.

2. The Government

132. The Government maintained that Y's pregnancy had not constituted a ground for discrimination under Article 14 of the Convention. They stressed that her pregnancy was not a main determinative factor for her medical treatment. She had been treated in the same matter as other patients diagnosed with UC. She had had fibro-sigmoidoscopy, histopathology and a bacteriological test. She had been hospitalised in clinics which specialised in combating this particular disease.

B. The Court's assessment

133. Noting that the Court has found that Articles 2 and 8 of the Convention applied in the instant case (see paragraphs 77 and 123 above), it observes that the applicant in the instant case failed to submit precise data to substantiate her allegation that her daughter had been discriminated against.

134. Even if there had been a difference in the treatment of the applicant's daughter due to her pregnancy, the Court observes that it cannot be excluded that that difference may have arisen for medical reasons. In

particular, there is no convincing evidence which would indicate that Y was deliberately refused proper medical treatment on the ground of her pregnancy (*see, mutatis mutandis, Moskal v. Poland*, no. 10373/05, § 100, 15 September 2009).

135. In consequence, this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

136. The applicant also complained that her daughter had been subjected to inhuman and degrading treatment as a result of the doctors' deliberate failure to provide the necessary medical treatment.

137. While the Court has not doubt that the applicant's daughter's illness caused her inordinate pain, it notes that she had received treatment in various specialised hospitals and was subject to various medical tests (see paragraphs 10 and 12 above). In this respect the Court observes that it is not its function to question the doctors' clinical judgment as regards the seriousness of Y's condition or the appropriateness of the treatment they proposed (see, *mutatis mutandis Glass v. the United Kingdom*, no. 61827/00, § 87, ECHR 2004-II). Lastly, it cannot be said that the quality and promptness of the medical care provided to Y had put her health and life in danger (see, *a contrario, Dzieciak v. Poland*, no. 77766/01, § 101, 9 December 2008).

138. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under the procedural limb of Article 2 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 2 of the Convention in its procedural limb.

Done in English, and notified in writing on 13 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Päivi Hirvelä
President