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

FOURTH SECTION

DECISION

Application no. 34215/11
Bożenna KOŁACZYK and Maciej KWIATKOWSKI
against Poland

The European Court of Human Rights (Fourth Section), sitting on 22 October 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Krzysztof Wojtyczek, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 24 May 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Bożenna Kołaczyk and Mr Maciej Kwiatkowski, are Polish nationals who live in Łódź and Warszawa. They are represented before the Court by Ms M. Wentlandt-Walkiewicz, a lawyer practising in Łódź.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

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

1. Circumstances surrounding the treatment of the applicants' daughter and wife

4. On 4 October 2001 A. Kwiatkowska, the first applicant's daughter and the second applicant's wife, was admitted to H. Jordan Hospital (*Szpital im. Jordana*) in Łódź as her waters had broken. She was examined at the hospital and concerns arose about the baby's condition. She was examined again in the early morning of 5 October 2001. It was then established that the baby was seriously distressed as its pulse was irregular. She was taken into the operating theatre before 9 a.m. At 10 a.m. she gave birth to a dead baby boy T. Attempts to resuscitate him failed.

5. After the delivery it was established that A. K. was suffering from shock caused by haemorrhaging and serious blood loss during the birth. Her condition was assessed by an anaesthesiologist as serious.

6. At 8.30 p.m. the same day she was again taken to the operating theatre as she had been bleeding heavily. Her condition worsened gradually. All efforts to stabilise it, including transfusion of blood and various blood replacement products, failed. Following the operation, A.K. died on 19 October 2001 of various complications originating in the heavy haemorrhaging on the day of delivery.

2. Criminal proceedings

7. On 18 October 2001 the second applicant submitted a complaint to the Łódź Regional Prosecutor about the manner in which the case had been handled.

8. The prosecuting authorities ordered that two expert reports be prepared for the purposes of the investigation. Two such reports were prepared by specialists in gynaecology and obstetrics. Both experts indicated that there had been serious shortcomings in handling the birth.

9. On 27 March 2003 the Łódź Regional Prosecutor filed charges with the Łódź District Court against M.N., the doctor responsible for handling the labour, who had been in charge of the duty round at the hospital on the critical day.

10. A further expert report was prepared for the purposes of the case.

11. By a judgment of 12 October 2007, the Łódź District Court, acquitted M.N. of the charge of causing the mother's death but convicted him of causing the baby's death, an offence punishable under Article 160 of the Civil Code. He was sentenced to a one-year term of imprisonment, the execution of the sentence being stayed for a probationary period of one year.

12. The court found that A.K. had been admitted to hospital on the evening of 4 October 2001 as her waters had broken, approximately two weeks before the due date. It had been established that the baby's pulse was irregular. A decision had been taken to monitor her condition closely and she had been taken to the labour room. The irregular pulse of the baby continued throughout the night. Certain medicaments had been given to A.K, but no improvement in the baby's condition occurred. Around 5 a.m. labour had started. Shortly after 7.30 a.m. a decision had been taken to carry out a caesarean section. However, no relevant steps were taken. The baby's distress continued. Ultimately, at 10 a.m. A.K. had given birth to a baby boy whose condition was assessed, on the Apgar scale, at 0 points. The expert reports agreed that his death had been caused by a failure to take steps enabling earlier delivery by caesarean section.

13. During the evening after the delivery, A.K. started to bleed profusely. All steps taken to stop the bleeding failed. Dr M.N. did not want to operate as the only option that would have stopped the bleeding would have been the removal of her uterus. He was repeatedly told by his colleagues that it was the only possibility of saving her life, but he refused to proceed. Ultimately, he decided to operate at 11.30 p.m. after the bleeding had continued for approximately three hours. As the bleeding did not stop, she was taken to another hospital in Łodz. She eventually died on 19 October as a consequence of the massive haemorrhaging she had suffered after giving birth.

14. The court noted that the expert opinions essentially agreed that the fact that the defendant had taken a decision to remove the uterus after lengthy haemorrhaging was not open to criticism and could not be seen as an error of judgement amounting to malpractice. Because of its dramatic consequences, such a decision was always a difficult and delicate one to be taken and in the circumstances of the case it could not be accepted that the defendant had been at fault in trying to avoid it. The court therefore acquitted the defendant of the charge of causing A.K.'s death.

15. The court relied on the following evidence: the hospital records of the labour; results of the autopsy conducted in respect of A.K.; the defendant's submissions to the court; testimony given by twenty-one witnesses (members of the staff of the Jordan hospital who had been on duty on the day in question); and expert reports prepared by four expert witnesses, specialists in gynaecology and obstetrics from various hospitals in other towns in Poland.

16. The applicants, who were acting as subsidiary prosecutors in the case, appealed. They argued that the court had erred in law in that it should have convicted the doctor of the offence of inadvertently causing death, punishable under Article 155 of the Criminal Code, in respect of both the mother and the baby. The defendant also appealed.

17. On 19 February 2008 the Łódź Regional Court upheld the part of the judgment acquitting the defendant of the charge of causing the mother's death and quashed the part concerning responsibility for the child's death, remitting the case to the Łódź District Court.

18. By a judgment of 21 April 2010, the Łódź District Court found M.N. guilty of an offence punishable under Article 160 of the Criminal Code. The court found that he had failed to take appropriate steps before the delivery in order to properly establish the condition of the baby and that he had failed to carry out a caesarean section in time, which could have saved the baby's life.

19. The court relied on the following evidence: the hospital records of the labour; various notes and memos prepared in connection with the case by the hospital (*notatki służbowe*); a description of the defendant's duties and obligations in his post; the expert reports prepared by six different specialists in gynaecology and obstetrics, including one report which had been prepared for the purposes of the civil proceedings (see below); results of the autopsy conducted in respect of the child; the defendant's submissions before the court; the testimony given by fourteen witnesses (members of the staff of the Jordan hospital who had been on duty on the day in question), and testimony given by both applicants. The Court considered that the testimony given by expert Z.S. was particularly relevant for the case as it had highlighted the importance of having recourse first to less invasive therapy. The court further heard oral testimony from one of the experts who had prepared the report.

20. The public prosecutor and the defendant appealed against the judgment.

21. On 29 December 2010 the Łódź Regional Court upheld the contested judgment.

3. Civil proceedings

22. The first and second applicants instituted, on 27 February 2003 and an unspecified date respectively, civil proceedings against the hospital's insurance company claiming compensation in respect of damage resulting from their daughter's and wife's death. The first applicant claimed compensation in the amount of PLN 40,000.

23. On 28 February 2007 the Łódź Regional Court (*Sad Okregowy w Lodzi*) delivered judgment in the first applicant's favour. It allowed her claim in part and awarded her compensation in the amount of 30,000 Polish zlotys (PLN) with statutory interest as from 27 February 2003, for a substantial deterioration in her life situation and prospects resulting from her daughter's death. The court took into account the insurance contract between the hospital and the insurance company, based on the principle of strict liability. It found, having regard in particular to the expert opinions that the hospital staff had failed to meet their professional obligations and to

administer appropriate treatment to the applicant's daughter, in particular after she had been taken to the operating theatre on the evening of 4 October 2001. The diagnosis of her and the child's condition made at that time had been superficial. A number of factors of significance in relation to the therapeutic action to be taken had not been taken into consideration or had been overlooked. Certain results of the biochemical tests had been wrongly interpreted and certain tests of relevance for establishing the condition of the child had not been carried out. As a result, the actions taken in respect of the mother had been delayed. The doctors had failed to foresee properly the potential development of her condition and to take appropriate measures to address the possible deterioration and prevent it.

24. The court had regard, in particular, to the unequivocal conclusion of one of the experts, who stated that the doctors dealing with the case had not demonstrated sufficient skill to cope appropriately with the complicated obstetric situation which had arisen prior to labour and during it.

25. The court had regard to the strong emotional bonds between the first applicant and her daughter, the fact that the claimant suffered from depression, and the fact that her daughter had been helping her in her everyday life and had also assisted her financially on a regular basis.

26. The court based its decision on Article 446 § 3 of the Civil Code.

27. The first applicant appealed, challenging the amount of the compensation.

28. By a judgment of 28 September 2007 the Łódź Court of Appeal (*Sąd Apelacyjny*) allowed her appeal and amended the contested judgment, increasing the amount of compensation to PLN 40,000. It had regard, above all, to the severity of the trauma suffered by the applicant and the fact that she had lost her only daughter, on whose reliable assistance, both financial and emotional, she had been able to depend in the past.

29. On 21 April 2009 the Łódź-Śródmieście District Court (*Sąd Rejonowy dla Łodzi-Śródmieścia*) discontinued the proceedings instituted by the second applicant, having regard to a settlement concluded earlier before that court between the applicant and the hospital's insurance company. The insurance company agreed to pay him, within fourteen days, PLN 50,000 plus statutory interest in the event of delay in payment, for the substantial deterioration in his life situation as a result of his wife's death.

COMPLAINTS

30. The applicants complained, referring to Articles 6 and 2 of the Convention, that the domestic courts had erred in law in that they had acquitted the doctor of the charge of causing the death of their wife and daughter and had convicted him only in respect of the death of the second applicant's son. They submitted that the courts had breached Article 2 by dealing with the case in a routine manner, failing to have due regard to the

fact that the case concerned the right to life, and that it should therefore have been examined with particular diligence and thoroughness.

31. They argued that the criminal courts had wrongly assessed the evidence, and had relied on an expert report which was more lenient towards the doctor while disregarding two others which pointed to his responsibility and emphasised his failure to act correctly.

32. In their view, the courts had failed to take into consideration the evidence before them in its entirety, in particular by failing to refer to the witness testimonies which were to the defendant's detriment.

33. They were of the view that in their cases the courts had breached the substantive domestic law, the applicable procedural regulations and the obligations originating in Article 2 of the Convention

THE LAW

34. The applicants complained of a violation of the right to life under Article 2 of the Convention which, in so far as relevant, reads as follows:

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

35. The Government submitted that the applicants could not claim to be victims of a breach of the substantive obligations arising in situations of alleged medical negligence under Article 2 of the Convention. The Government referred to the fact that the applicants had received compensation in civil proceedings in respect of damage resulting from the death of their daughter and wife.

36. The Government further submitted that the applicants had failed to exhaust relevant domestic remedies and to lodge the application with the Court within the six-month time-limit provided for by Article 35 § 1 of the Convention.

37. The applicants disagreed. They submitted that, regard being had to the amount of compensation awarded to them, they should be regarded as victims. The referred to the case of *Ciorap v. Moldova (no. 2)*, no. 7481/06, 20 July 2010, where the Court had held that the applicant retained his victim status because the compensation he had received was considerably lower than the minimum generally awarded by the Court in similar cases. The redress offered in the present case was, in the applicants' view, neither appropriate nor sufficient. In particular, the compensation awarded to the first applicant was too low.

38. The Court must first consider whether the applicants can continue to claim to be victims of a violation of Article 2 within the meaning of Article 34 of the Convention. It observes, with regard to any possible substantive aspect of the applicants' complaint under Article 2 of the Convention, that they do not in any manner allege or imply that their

daughter and wife and grandson and son, respectively, were intentionally killed by the doctors responsible for their care and treatment at the material time. They argue that the responsible medical staff failed to administer treatment adequate to the situation.

39. 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; *Jasińska v. Poland*, no. 28326/05, § 57, 1 June 2010; and *Z v. Poland*, no. 46132/08, § 76, 13 November 2012). The Court accepts that it is impossible to exclude acts and omissions by the authorities in the field of health care policy in certain circumstances engaging their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of patients' lives – which was not contested in the present case – it cannot accept that matters such as errors of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient - assuming such to have been established - are sufficient in 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).

40. The Court further emphasises that it falls first to the national authorities to redress any alleged violation of the Convention. The question as to whether a person may continue to claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an *ex post facto* examination of his or her situation. A decision or measure taken by the domestic authorities in favour of the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. The question of whether the applicant has received reparation for the damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue. It is the Court's settled case-law that where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention (see, among many other authorities, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-181, ECHR 2006-V).

41. In the present case, the first applicant claimed compensation of PLN 40,000 before the civil court. The domestic courts examined her claim and acknowledged that there had been serious shortcomings in the manner in which the hospital had handled her daughter's labour and coped with the

complications which developed during it. They concluded that the medical staff had not demonstrated sufficient skill to cope appropriately with the complicated obstetric situation which had arisen during the labour. The courts took into account the strong emotional links between the first applicant and her daughter. Consequently, her compensation claim was ultimately awarded in the full amount she had claimed.

42. The Court therefore accepts that the courts had regard to the first applicant's plight and that they acknowledged that her rights had been breached.

43. The second applicant concluded a settlement with the insurance company before the civil court and obtained PLN 50,000 in respect of damage caused by his wife's death.

44. Against this background, the Court finds that the applicants obtained adequate redress for the alleged violation of their rights under Article 2 of the Convention. Accordingly, for the purposes of Article 34, the applicants can no longer claim to be victims of a violation of Article 2 under its substantive limb (see, for similar circumstances in the context of medical malpractice, *Konczelska v. Poland* (dec.), 27294/08, 20 September 2011). This part of the application is therefore manifestly ill-founded within the meaning of Article 35 § 4 of the Convention (see *Morby v. Luxembourg* (dec.), no. 27156/02, ECHR 2003-XI, and *Tamás Kovács v. Hungary*, no. 67660/01, § 26, 28 September 2004).

45. In so far as the applicants' complaint also concerns the procedural obligations of the State arising under Article 2 of the Convention, the Court reiterates that even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said on a number of occasions that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law (see, among other authorities, *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III).. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. 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 liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (*Calvelli and Ciglio v. Italy*, no 32967/96, § 51, ECHR 2002-I).

46. The procedural obligation under the Article 2 requires 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 held accountable (see, among other authorities, *Calvelli and Ciglio,* cited above, *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII; and *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009).

47. A requirement of promptness and reasonable expedition is implicit in this context (see *Šilih*, § 195, cited above). Furthermore, 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 (see, among other authorities, *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006).

48. The Court observes that the fact that criminal proceedings were pending at that time did not prevent the applicants from pursuing civil claims in connection with A.K.'s death. Under Polish law, nothing prevents the victim of a criminal offence or his/her relatives from claiming damages before a civil court concurrently with the criminal proceedings or after a decision has been given in such a case, regardless of its outcome (see *Rajkowska v. Poland* (dec), no. 37393/02, 27 November 2007, cited above; *Karpisiewicz v. Poland* (dec); no. 14730/09, 11 December 2012; and, *mutatis mutandis*, *Vakrilov v. Bulgaria* (dec.), no. 18698/06, 9 October 2012).

49. The Court notes that the judicial system in place proved effective in the circumstances of the applicants' case. The applicants had recourse to civil proceedings enabling any responsibility of the doctors or hospital concerned to be established and appropriate civil redress to be obtained. The applicants had the benefit of adversarial proceedings and they were duly represented during those proceedings and had ample opportunities to advance all arguments which they regarded as pertinent for the outcome of the case (*Trzepałko v. Poland* (dec.), no. 25124/09, 13 September 2011 § 28).

50. In conclusion, the Court finds that the action for damages in the civil courts was an effective remedy that enabled the applicants to obtain redress (cf. *Vo v. France,* cited above*,* § 91). Therefore it is not necessary to assess the effectiveness of the criminal investigation carried out in the present case. There is no doubt that the procedural obligation under Article 2 was complied with in the present case.

51. Furthermore, in respect of the second applicant, the Court reiterates that in agreeing to settle during ongoing court proceedings before a decision has been obtained, an individual waives his or her right to have the issue of the liability of the national authorities determined by a court. When an applicant accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a

victim in respect of the circumstances surrounding the administered treatment or with regard to the investigation carried out (*Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; see also *Hay v. the United Kingdom* (dec.), no. 41894/98, ECHR 2000-XI).

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President