

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 27294/08
by Katarzyna KONCZELSKA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 20 September 2011 as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 24 May 2008,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Katarzyna Konczelska, is a Polish national who was born in 1979 and lives in Gliwice. She is represented before the Court by Mr J. Gałkowski, a lawyer practising in Bielsko-Biala. The Polish Government ("the Government") are represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

1. The criminal proceedings

3. In December 2002 the applicant visited Dr J.R. at his private practice and was registered as a pregnant patient. During her pregnancy she visited J.R. fourteen times and had four ultrasound scans which demonstrated that the foetus was developing normally.

4. During a visit on 23 July 2003 J.R. found that the delivery was imminent. At midnight the pains started. On 24 July 2003 the applicant was admitted to Zabrze District Hospital. The birth did not progress normally. After 11 hours of labour the applicant and her husband asked J.R. to proceed to a caesarean section. He refused.

5. The applicant's daughter, A., was born after 35 hours. She showed no signs of life and had to be resuscitated, which took over ten minutes. The child suffered from serious health problems (cerebral palsy), mostly of a neurological character and required permanent supervision and medical attention. She could not speak, see or walk.

6. The applicant believed that J.R. was responsible for her daughter's condition. On 10 October 2003 a criminal investigation was instituted at her request by the Zabrze District Prosecutor.

7. A medical expert opinion submitted to the prosecuting authorities on 21 March 2005 by specialists from the Warsaw Medical Academy established that there had been serious shortcomings in the manner in which the delivery had been handled. However, the experts concluded that there was insufficient evidence for a finding that the child's problems had been caused solely by the manner in which she was delivered.

8. On an unspecified date the Regional Medical Tribunal in Katowice found J.R. guilty of a breach of his professional obligations in that he had failed to monitor the child's condition properly during the second period of the delivery.

9. On 30 June 2005 the Zabrze District Prosecutor, referring to this opinion, discontinued the proceedings on the ground that no criminal offence of exposing the child to serious danger to life or limb, punishable under Article 160 of the Criminal Code, had been committed.

10. The applicant appealed, indicating shortcomings in the investigation. She submitted, in particular, that the prosecution had failed to take into consideration the case file relating to the professional liability proceedings conducted before the authorities of the Silesian Medical Board, and that the criminal proceedings had been conducted superficially. She requested that a number of witnesses be questioned. As a result, the facts of the case had not been established properly.

11. On 3 November 2005 the Regional Prosecutor allowed her appeal, quashed the decision and remitted the case. He observed that the evidence had to be completed by the questioning of the three witnesses requested by the applicant, and who had not been questioned so far; that complete and up-to-date medical records of the child had to be included in the file and examined; that the file from the medical liability proceedings had to be joined to the prosecutor's file; and that an additional medical opinion should be sought to complement the findings of the opinion referred to above.

12. By a decision of 3 April 2006 the Zabrze District Prosecutor asked the Department of Forensic Medicine of the Warsaw Medical Academy to complete its earlier expert opinion. It was submitted on 14 July 2006. In their opinion the experts stated that there was a causal link between the medical error committed by J.R. in his handling of the applicant's delivery and her daughter's condition.

13. On 29 December 2006 the Zabrze District Prosecutor filed an indictment against J.R. with the Zabrze District Court. He was charged with an offence punishable under Article 156 § 1 (i) and 2 of the Criminal Code by failing to monitor the labour properly.

14. On 11 January 2007 the applicant and her daughter declared their intention to become auxiliary prosecutors in the proceedings.

15. On 28 February 2007 the court held a session with a view to organising a hearing (the Zabrze District Court, II Criminal Division, II K 25/07). Subsequently, hearings were scheduled for 15 March, 13 April and 18 May 2007. Because J.R. failed to attend any of the hearings and none of them was actually held because of his absence, on 13 April and 18 May 2007 the court ordered that he be brought to the courtroom. However, apparently no steps were taken to do so. On one occasion J.R. was admitted to a psychiatric hospital one day before the date of the hearing.

16. The hearing scheduled for 5 June 2007 was adjourned, also because of his absence.

17. At a hearing held on 20 June 2007, the court read a letter from a psychiatric hospital in T. Having regard to the doubts which had arisen as to whether J.R. was able to participate in the proceedings, it ordered that an additional expert opinion be prepared in this respect. An opinion was submitted to the court on 13 July 2007. The experts found that J.R. suffered from reactive depression accompanied by alcohol abuse and, as a result, was unable to participate in the judicial proceedings for a period of three months.

18. By a letter of 27 July 2007 the applicant's lawyer drew the court's attention to the fact that the experts had failed to address the issue of whether J.R. had himself contributed to his inability to participate in the proceedings. He further submitted that the provisions on criminal procedure allowed for a hearing to be held in the defendant's absence when it had been

shown that he or she had made himself or herself unable to participate in hearings. In the present case the accused had failed to comply with all the summonses and had thereby effectively boycotted the proceedings. On one occasion he had been admitted to a psychiatric hospital just one day before the date of the last hearing, which cast doubt on the credibility of the medical certificates he had submitted so far in the case. The applicant's lawyer further requested that the defendant's ability to participate be examined by doctors from outside the Silesia region. This would, in the applicant's view, ensure their impartiality.

19. The court allowed his request on 15 October 2007 and appointed new experts, tasking them with establishing the defendant's ability to participate in the proceedings.

20. On 21 October 2007 J.R. died.

21. On 30 November 2007 the court discontinued the criminal proceedings. The applicant appealed against this decision in so far as it concerned costs. The court dismissed the appeal by a decision of 4 February 2008, served on the applicant on 14 February 2008.

22. On 16 May 2008 the applicant's child died.

2. The disciplinary proceedings

23. On 5 September 2003 the applicant lodged a complaint against J.R. with the Regional Officer for Disciplinary Matters (*Okręgowy Rzecznik Odpowiedzialności Zawodowej*) at the Katowice Medical Board. On 27 April 2005 the Agent, having completed the investigation, transferred the complaint for examination to the Katowice Regional Medical Tribunal.

24. On 30 January 2006 that court found J.R. guilty of a breach of his professional obligations in that he had failed to monitor the child's condition properly during the second period of the delivery and had failed to notice that the applicant had had an infection during her pregnancy. The court confirmed the fact that large-scale damage to the child's brain had been caused during the labour.

25. On 27 March 2007 the Supreme Medical Tribunal in Warsaw upheld the first-instance judgment in so far as it concerned the inappropriate monitoring of the child's condition during the second period of the delivery. The court further concluded that there was insufficient evidence to hold that J.R. had failed to diagnose the infection.

3. The civil proceedings

26. On 6 December 2004 the applicant, acting on her own behalf and on behalf of her daughter A., sued Zabrze District Hospital for damage and suffering caused as a result of medical malpractice during A.'s birth. The applicant claimed 20,000 Polish zlotys (PLN) for non-pecuniary damage and a monthly pension of PLN 1,800 for her inability to work caused by the

fact that she had to take care of her daughter. In respect of her daughter the applicant claimed PLN 200,000 for non-pecuniary damage and a monthly pension in the same amount.

27. On 21 January 2009 the Gliwice Regional Court found the legal successor of the Zabrze District Hospital, which had in the meantime changed hands, civilly liable for the applicant's child's condition as a result of medical malpractice during the applicant's labour. It established that the child was totally and permanently incapacitated, required round-the-clock attention and care. It awarded the applicant and her daughter, jointly, compensation in the amount of PLN 258,847.

28. On 20 January 2010 the Katowice Court of Appeal, having examined the applicant's appeal, increased the amount of compensation to PLN 408,847, plus interest. The court observed that the child had been totally physically incapacitated as a result of cerebral palsy resulting from brain damage caused by the negligent handling of her birth. However, her mental faculties had most likely been intact. She had therefore been locked within her own body which could not but be seen as causing her acute and continuous suffering for not being able to either express herself or to attend to her simplest needs. Her condition necessitated constant care and attention. She had been fragile and often suffered from additional ailments. The court was of the view that the enormity of the child's infirmity and the applicant's suffering it caused justified increasing the compensation to be paid by the defendant to PLN 408,847. The court held that while compensation for damage to one's health could not be unduly high so as to cause unfair enrichment, the respect for priceless values such as life and physical integrity dictated that it should be sufficiently elevated so as to offset the negative psychological consequences of medical malpractice.

B. Relevant domestic law

29. Article 156 § 1 of the Criminal Code of 1997 provides that a person who causes grievous bodily harm shall be sentenced to between one and ten years' imprisonment.

COMPLAINT

30. The applicant complained that the investigation and judicial proceedings concerning criminal responsibility in connection with the medical care she received when giving birth to her daughter lasted too long and were ineffective.

THE LAW

31. The applicant complained that the proceedings concerning criminal responsibility in connection with the medical care she received lasted too long and were ineffective.

The Court would not exclude that in cases such as the instant case involving human suffering arising out of medical malpractice the appropriate approach would be to examine the impugned circumstances from the standpoint of Articles 3 and 8 of the Convention. However, given that the instant case was communicated under Article 2 of the Convention and that the parties made their submissions with reference to that Article, the Court will examine the applicant's complaints against the background of that provision, which, in so far as relevant, reads:

> "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."

32. The Government first submitted that the applicant could no longer claim to be a victim of the alleged violation of her rights since the violation had been recognised and remedied at the national level. Three separate sets of proceedings, criminal, disciplinary and civil, had been conducted concerning the responsibility of the persons who had handled the birth of the applicant's daughter. The authorities had conducted an investigation into the alleged offence of causing grievous bodily harm and ultimately the bill of indictment against Dr J.R. had been lodged with the court. The criminal proceedings had not been terminated with a final judgment only because the defendant had died. The applicant had been allowed to participate in the proceedings as an auxiliary prosecutor and she had actively availed herself of her procedural rights. During the investigation all data relevant for establishing the facts surrounding the applicant's labour and the birth of her daughter had been established. The applicant had been granted access to files of another criminal case against Dr J.R., concerning similar circumstances. The death of the accused did not justify the conclusion that the authorities had failed to meet their procedural obligations under Article 2 of the Convention. In any event, the Convention does not guarantee a right of private revenge.

33. The Government further submitted that the applicant had obtained redress for non-pecuniary damage which she had suffered as a result of her daughter's serious condition caused by the mishandling of her labour in the amount of PLN 408,847, plus interest. This amount was commensurate with amounts granted in similar cases by the Polish courts, which ranged from PLN 200,000 to 900,000.

34. The applicant disagreed. She argued that civil and criminal proceedings had entirely different purposes. The latter served the purposes of establishing the identity of a perpetrator of an alleged criminal offence

and the facts and circumstances relevant for his or her criminal responsibility. They were further aimed at ensuring the legal protection of the victim's interests and at giving a judicial decision on the merits of the case within a reasonable time. None of these purposes had been attained in the present case. As a result of the criminal proceedings having been conducted excessively slowly and with numerous delays, owing in particular to the State's inefficiency at finding experts competent to prepare their opinions for the purposes of the investigation, no conviction was ultimately made in respect of the perpetrator. The applicant had chosen to institute criminal proceedings because her daughter, born with a serious condition, needed intensive therapy and medical treatment. She was completely helpless and needed constant attention and full-time medical care. As the necessary equipment and therapy had been very expensive, the applicant had had no choice but to have recourse to civil proceedings. As a result of the judgment given in the civil proceedings, it had ultimately become possible for her to cover the costs of her daughter's medical treatment.

35. The Court reiterates that the acts and omissions of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. This provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the patients' rights is properly implemented and any breaches of these rights are repressed and punished. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient 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 (*Powell v. the United Kingdom*, no. 45305/99, dec. 4 May 2000; *Nitecki v. Poland*, no. 65653/01, dec. 21 March 2002; and *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006).

36. The positive obligations require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up 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, *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999, and *Powell*, cited above).

37. In the present case the Court's task is to examine whether there was an adequate procedural response on the part of the State to the infringement of Article 2 of the Convention. It observes, in this connection, that the authorities instituted disciplinary proceedings in which the medical court found the doctor guilty of a breach of his professional obligations.

38. In the criminal case against the doctor a bill of indictment was brought before the court. Ultimately the proceedings were discontinued on 30 November 2007 because the defendant had died. However, by a judgment of 20 January 2010 the civil court awarded compensation to the applicant for non-pecuniary damage suffered as a result of her daughter's condition.

39. In this respect the Court reiterates that, according to its case-law, the applicant may lose the status of "victim" in instances where "the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention" (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the specific context of establishing State liability for breaches of Article 2, it has previously found that successful civil or administrative proceedings were sufficient to deprive the applicant of his or her victim status (see *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I; *Murillo Saldias and Others v. Spain* (dec.), no. 76973/01, 28 November 2006; and, more recently, *Salatkhanovy v. Russia*, no. 17945/03, §§ 75-78, 16 October 2008).

40. In the present case the courts found the hospital civilly liable as a result of medical malpractice. They further assessed that condition as being very severe and held that her life prospects were extremely limited. They acknowledged the necessity of round-the-clock care and the considerable efforts the applicant had to make in order to take care of her daughter. In the end, the courts awarded her PLN 408,000.

41. An applicant's status as a victim of a breach of the Convention may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court (see *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001, and *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003). The adequacy of that redress falls to be assessed in the light of all the circumstances of the case seen as a whole (see, *mutatis mutandis*, *Dubjaková v. Slovakia* (dec.), no. 67299/01, 19 October 2004).

42. The Court has had regard to the amounts of just satisfaction in respect of non-pecuniary damage which it has awarded in similar cases against Poland (compare with *Byrzykowski v. Poland*, no. 11562/05, § 127, 27 June 2006; *mutatis mutandis*; *Mrozowski v. Poland*, no. 9258/04, § 48, 12 May 2009; *Tysiąc v. Poland*, no. 5410/03, § 152, ECHR 2007-I).

43. The Court is therefore of the view that, having regard to the circumstances of the case, the amount awarded by the Polish civil courts can be regarded as financial redress commensurate with the nature of the damage alleged by the applicant.

44. Accordingly, the Court considers that the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention. It follows that the application must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Lawrence Early Registrar	Nicolas Bratza President