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

FOURTH SECTION

DECISION

Application no. 6738/12
Jacek Stanisław and Katarzyna WYGODA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 22 November 2016 as a Committee composed of:

Nona Tsotsoria, *President,*
Krzysztof Wojtyczek,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 24 January 2012,

Having regard to the declaration submitted by the respondent Government on 16 May 2016 requesting the Court to strike the application out of the list of cases and the applicants' reply to that declaration,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicants, Mr Jacek Stanisław Wygoda and Ms Katarzyna Wygoda, are Polish nationals, who were born in 1965 and 1971 respectively and live in Lubień. They were represented before the Court by Mr P. Kładoczny and Mr I.C. Kamiński, lawyers practising in Warsaw and Cracow.

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

3. On 28 April 2005 the second applicant gave birth in Ujastek hospital in Cracow to a baby girl, M. The child's condition was assessed at ten points on the ten-point Apgar scale. On 30 April 2005 her condition worsened. She was transferred to a specialised paediatric hospital Prokocim in Cracow. She was not admitted to that hospital. She was finally admitted only on 11 May 2005. No recommendation for an operation was made and

no definitive diagnosis was established. On 11 May 2005 M. fell into a coma and was transferred to the intensive care unit. On 16 May 2005 she was diagnosed as suffering from a life-threatening condition. She was operated on 19 May 2005. As a result of her condition, M. could not develop normally. She could neither walk nor talk.

4. On 12 January 2006 the Cracow District Prosecutor instituted, at the applicants' request, an investigation of charges of causing immediate danger to M.'s life by failure to make a timely diagnosis. On 15 September 2006 the prosecutor appointed an expert in neonatology. In her opinion submitted at a later date she indicated that a medical expert from abroad should be appointed in the case to ensure that a completely impartial opinion be prepared.

5. From September 2007 until January 2008 the prosecuting authorities tried to find an expert abroad, to no avail. On 11 January 2008 the prosecutor requested the Gdańsk Medical University to submit another expert opinion. The applicants applied for the expert of this University to be disqualified, indicating that he had professional links with the chief doctor of the Prokocim paediatric ward. This request was dismissed. Their subsequent requests to appoint an expert from abroad were also dismissed.

6. In March 2008 the Gdańsk Medical University informed the prosecutor that the preparation of the expert report could last six to twelve months. On a number of occasions in 2008 the prosecuting authorities prompted the University to speed up the preparation of the opinion.

7. On 11 December 2008 the case was taken over by the Piotrków Trybunalski District Prosecutor. Regard was had to the fact that the first applicant had been, until March 2007, working as a prosecutor in Cracow.

8. In May 2009 the prosecution was informed by the Gdańsk Medical University that the preparation would start on an unspecified date in summer 2009. On 22 June 2009 the prosecutor stayed the proceedings, having regard to the delay in the preparation of the expert opinion. The applicants appealed. On 4 September 2009 the Cracow District Court allowed their appeal. The investigation was subsequently resumed.

9. On 1 December 2009 the applicants lodged a complaint with the Cracow Regional Court under the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time. This complaint was dismissed on 17 February 2010.

10. In the meantime, on 16 December 2009, the professor of Gdańsk Medical Academy charged with preparation of the report requested the prosecution to release him from this obligation, referring to the fact that he knew well the chief physician of the cardiology ward in Prokocim. On 11 May 2010 the opinion prepared by another doctor from the Gdańsk Medical University was submitted. He did not provide any view on the quality of care given to M. after her birth. On 31 May 2010 the investigation was discontinued. The applicants appealed.

11. Apparently, after the applicants had submitted their appeal, another expert was assigned to the case. On 24 March 2011 the Supreme Court ordered that the applicants' appeal be examined by the Lublin District Court, allowing the Cracow District Court's request to this effect.

12. On 25 August 2011 the Lublin District Court quashed the decision to discontinue the investigation. It was of the view that the opinion prepared for the purposes of the case had entirely failed to address crucial questions. A new expert opinion should be prepared to assist the prosecuting authorities in establishing relevant facts. The investigation was subsequently resumed. On 5 December 2011 another expert submitted a supplementary report. On 13 February 2012 the applicants lodged another complaint with the Cracow Regional Court about a breach of their right to have their case heard within a reasonable time. On 11 May 2012 the court dismissed the complaint.

13. On 14 February 2013 the applicants' daughter died.

14. On 29 March 2013 the Piotrków Trybunalski District Prosecutor discontinued the investigation, finding that doctors had no case to answer.

COMPLAINTS

15. The applicants complained under the procedural aspects of Article 2 of the Convention about the authorities' failure to investigate the circumstances of the death of their daughter and to bring the perpetrators to justice.

THE LAW

16. The applicants complained under the procedural aspects of Article 2 of the Convention about the authorities' failure to investigate the circumstances of the death of their daughter.

17. After the failure of attempts to reach a friendly settlement, by a letter of 14 April 2016 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

18. The declaration provided as follows:

> "The Government hereby wish to express – by way of the unilateral declaration – their acknowledgement that Article 2 of the Convention in its procedural limb was violated in the applicants' case.
>
> Simultaneously the Government declare that they are ready to pay to the applicants the sum of EUR 12,500 jointly which they consider to be reasonable in the light of the Court's case-law and the particular circumstances of the [...] case.
>
> The sum referred to above, which is to cover any pecuniary and non-pecuniary damage, as well as costs and expenses, will be free from any taxes that may be applicable. It will be payable within three months from the date of notification of the decision taken by the Court pursuant to Article 37 § 1 of the European Convention of Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from the expiry of that period until settlement, at the rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.
>
> The Government would respectfully suggest that the above declaration might be accepted by the Court as 'any other reason' justifying the striking out of the case of the Court's list of cases, as referred to in Article 37 § 1 (c) of the Convention."

19. By letter of 16 May 2016 the applicants indicated that they were not satisfied with the terms of the unilateral declaration. They argued that the case was illustrative of systemic problems in securing medical expert opinions in the context of investigation of alleged medical malpractice in Poland. They were further of the view that the amount proposed by the Government was too low.

20. The Court reiterates that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

21. It also reiterates that in certain circumstances, it may strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicants wish the examination of the case to be continued.

22. To this end, the Court has examined the declaration carefully in the light of the principles emerging from its case-law, in particular the *Tahsin Acar v. Turkey* judgment (*Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; see also *WAZA Spółka z o.o. v. Poland* (dec.), no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.), no. 28953/03, 18 September 2007).

23. The Court is satisfied that the Government did not dispute the allegations made by the applicants and explicitly acknowledged the breach of the procedural limb of Article 2 of the Convention as claimed by them.

24. As to the intended redress to be provided to the applicants, the Government have undertaken to pay EUR 12,500 in respect of non-pecuniary damage. The Court notes that even if that amount does not exactly correspond to the awards made by the Court in similar cases, what is important is that the proposed sum is not unreasonable in comparison with them (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 105, ECHR 2006-V). The Government have committed themselves to paying that sum within three months from the Court's decision, with default interest to be due in case of late payment.

25. The Court notes that it has repeatedly found violations of Article 2 on account of inadequate investigations into deaths of applicants or their close relatives; including in cases involving alleged medical malpractice (see *Tarariyeva v. Russia*, no. 4353/03, ECHR 2006-XV (extracts), *Weber and Others v. Poland*, no. 23039/02, 27 April 2010; *Ciechońska v. Poland*, no. 19776/04, 14 June 2011 and *Byrzykowski v. Poland*, no. 11562/05, 27 June 2006). It follows that the complaints raised in the present application are based on the clear and extensive case-law of the Court.

26. The Court further notes that the Committee of Ministers remains competent to supervise, in accordance with Article 46 § 2 of the Convention, the implementation of judgments concerning similar issues (see *Žarković v. Croatia* (dec.), no. 75187/12, § 22, 9 June 2015). Therefore, the Court is satisfied that respect for human rights as defined in the Convention (Article 37 § 1 in fine) does not require it to continue its examination of the application. In any event, the Court's decision is without prejudice to any decision it might take to restore, pursuant to Article 37 § 2 of the Convention, the application to its list of cases should the Government fail to comply with the terms of their unilateral declaration (see *Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008, and *Aleksentseva and 28 Others v. Russia* (dec.), § 15, nos. 75025/01 et al., 23 March 2006).

27. The Court thus considers that it is no longer justified to continue its examination of the application.

28. In view of the above, it is appropriate to strike the application out of the list of cases. This decision is without prejudice to the Government's continuing obligation to conduct an investigation in compliance with the requirements of the Convention (see *Žarković,* cited above, § 23).

For these reasons, the Court, unanimously,

Takes note of the terms of the respondent Government's declaration under Article 2 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention.

Done in English and notified in writing on 15 December 2016.

Andrea Tamietti	Nona Tsotsoria
Deputy Registrar	President