FOURTH SECTION

CASE OF BYRZYKOWSKI v. POLAND

(Application no. 11562/05)

JUDGMENT

STRASBOURG

27 June 2006

FINAL

27/09/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Byrzykowski v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 8 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 11562/05) 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 Mr Wojciech Byrzykowski.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz. The applicant was represented by Ms B. Słupska – Uczkiewicz, a lawyer practising in Wrocław.

3. On 3 July 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1974 and lives in Wroclaw.

5. On 11 July 1999 the applicant's 27-year-old wife was about to give birth to their child. She was admitted to a hospital of the Wrocław Medical Academy at 8 p.m. As there was no progress in the delivery and the child showed signs of heart distress, on 12 July 1999 at 10 a.m. a decision was taken to perform a caesarean section. Epidural anaesthesia was administered, as a result of which she went into a coma. All resuscitation efforts failed. The applicant's wife was subsequently transported to the intensive therapy unit, where she died on 31 July 1999.

6. A child H. was born by a caesarean section, suffering from serious health problems, mostly of a neurological character. He requires permanent medical attention.

A. Criminal investigations

7. On 31 July 1999 the applicant, represented by his father, requested that an investigation of the causes of his wife's death be instituted. His request was complied with on the same day. On 2 August 1999 a post mortem was carried out. A medical opinion prepared immediately thereafter noted, among others, the necessity of obtaining a medical expert opinion as to the circumstances which had led to her death.

8. On 11 August 1999 the Wrocław-Krzyki District Prosecutor requested that the medical records of the applicant's wife should be submitted to the prosecuting authorities.

9. On 19 August 1999 the applicant was interviewed by the Wrocław-Krzyki District Prosecutor.

10. On 6 October 1999 the Wrocław-Krzyki District Court, at the request of the District Prosecutor, released the physicians who had dealt with the delivery from their obligation to respect professional secrecy in order to obtain their testimony.

11. On 15, 17, 18, 19 November 1999 the District Prosecutor questioned medical staff dealing with the delivery and treatment of the applicant' s wife as to the circumstances of her death.

12. In a letter submitted on 15 December 1999 the applicant requested the District Prosecutor to hear additional witnesses. On 17 December 1999 the Wroclaw-Krzyki District Prosecutor questioned three other witnesses.

13. On 29 December 1999 the District Prosecutor, having regard to the results of the inquiry, instituted a criminal investigation into a suspected offence of manslaughter, punishable under Article 155 of the Criminal Code.

14. On 30 December 1999 the District Prosecutor decided to obtain a medical expert opinion from the Lublin Institute for Forensic Medicine as to the treatment administered to the applicant's wife.

15. On 4 and 10 February and 17 March 2000 the District Prosecutor heard further witnesses.

16. In a letter of 10 February 2000 the Lublin Institute of Forensic Medicine returned the case-file, explaining that it would not be able to prepare the opinion. On 30 March 2000 the District Prosecutor decided to obtain a medical expert opinion from the Kraków Institute of Forensic Medicine. Apparently the investigations were later stayed.

17. In October 2000 the District Prosecutor resumed the investigations, having obtained an expert opinion prepared by four medical experts of the Kraków Institute of Forensic Medicine.

18. By a decision of 31 October 2000 the District Prosecutor discontinued the investigations considering, in the light of the medical records, the testimony of the witnesses and the medical expert opinion, that the medical staff concerned had no case to answer. However, on the applicant's appeal, the investigations were subsequently resumed by a decision of 5 January 2001. The Wroclaw Regional Prosecutor considered that the investigations had been discontinued prematurely, without all necessary evidence having been taken and without the facts relevant for the decision having been sufficiently established. He decided that the anaesthesiologists dealing with the delivery should be questioned again in order to elucidate discrepancies between their testimony and that further experts should be appointed with a view to establishing whether the conditions of the delivery could have had a negative impact on the health condition of the applicant's son.

19. On 7 and 19 February 2001 the District Prosecutor questioned again the two anaesthesiologists involved in the treatment of the applicant's wife.

20. On 20 February 2001 the District Prosecutor decided to obtain another expert opinion from the Łódź Institute of Forensic Medicine.

21. Four experts of the Łódź Institute for Forensic Medicine prepared an opinion dated 28 June 2001 and submitted it to the District Prosecutor on 23 August 2001, noting, *inter alia*, that the applicant's son had died as a result of the damage he suffered during the delivery. The experts concluded, referring to the medical records of the case, that no criminal offence had been committed, the failure to reverse the result of anaesthesia not being a consequence of medical negligence.

22. In a letter dated 29 August 2001 the Łódź Institute of Forensic Medicine informed the District Prosecutor about an editorial error in its opinion in so far as it contained a reference to the death of the applicant's son.

23. On 10 September 2001 the District Prosecutor questioned another witness. In a letter submitted on the same day the applicant and his father contested the medical expert opinion of 28 June 2001 containing among other things the wrong information about the death of the applicant's son as a result of damage he had suffered during the delivery. They submitted that this error indicated that the opinion had not been prepared with the requisite care and attention to detail.

24. On 17 September 2001 the District Prosecutor decided to obtain an additional expert opinion from the Poznań Institute of Forensic Medicine. On 30 November 2001 this opinion was submitted. It further contained answers to the 32 questions posed by the applicant.

25. On 6 December 2001 the Wrocław District Prosecutor discontinued the investigations. In his decision he relied on the medical expert opinion which stated that the treatment of the applicant's wife and the

handling of the delivery, i.e. the caesarean section, epidural anaesthesia and reanimation had been carried out properly and had been adequate given her state of health and the circumstances. They could not have contributed to the deterioration of her condition or led to her subsequent death.

26. On 21 January 2002 the applicant appealed against the decision of 6 December 2001.

27. On 23 May 2002 the Wrocław-Krzyki District Court upheld the contested decision. It considered that the evidence obtained during the investigation had not provided any grounds on which to bring charges against the medical staff. It also referred to four medical expert opinions (from Wrocław, Poznań, Kraków and Łódź) according to which the medical treatment of the applicant's wife during and after the delivery of birth was not improper. Consequently, no action or omission of a criminal character could have caused her death.

28. On 25 July 2002 the Wrocław-Krzyki District Court rejected the applicant's appeal of 17 July 2002 against the decision of 23 May 2002.

29. On 10 December 2002 the District Prosecutor, at the applicant's request, questioned a new medical expert in connection with the circumstances of the death of the applicant's wife.

30. On 1 March 2003 the District Prosecutor resumed the investigations, which had been terminated by the decision of 6 December 2001.

31. On 26, 28 March, 24, 28 April, 29 May and 3 June 2003 the District Prosecutor questioned the medical staff involved in the dealing with the delivery.

32. On 4 April 2003 the Dolny Sląsk Chamber of Physicians submitted to the prosecuting authorities two expert opinions prepared for the purposes of disciplinary proceedings which were pending at that time (see §§ 39 and 40 below).

33. On 9 June 2003 the District Prosecutor ordered another expert opinion from the Białystok Institute of Forensic Medicine. Subsequently, it urged the Institute several times to accelerate the preparation of the opinion. On 14 October 2004 the opinion, prepared by four experts, was submitted to the District Prosecutor. The opinion also contained answers to the 32 questions posed by the applicant.

34. On 3 December 2004 the District Prosecutor interviewed one witness.

35. On 1 December 2004 the applicant submitted an unsolicited expert opinion prepared by two physicians.

36. On 8 December 2004 the District Prosecutor discontinued the investigations. He had regard, *inter alia*, to the medical expert opinion prepared by experts from the Białystok Institute for Forensic Medicine, which had stated that the caesarean section, epidural anaesthesia and reanimation had been adequate, given to the condition of the applicant's wife and the circumstances.

37 On 23 December 2004 the applicant appealed against this decision.

38. On 24 March 2005 the Wrocław Regional Prosecutor decided to quash the contested decision. The Prosecutor observed that the evidence gathered so far in the case was incomplete in that it did not allow for the establishment of the relevant facts. Certain facts relevant for the assessment of the case had to be established, in particular the kind and exact amounts of medication administered to the applicant's wife before the caesarean section. Further, certain discrepancies between various depositions of the anaesthesiologist F. M. had to be elucidated. It also seemed that there might have been some errors in the medical records which should be further investigated.

39. On 14, 29 April and 13 May 2005 the District Prosecutor heard witnesses. On 13 May 2005 experts from Warsaw who had prepared the opinion for the purposes of the disciplinary proceedings pending before the Regional Chamber of Physicians were also questioned. On 24 May and 28 July 2005 other witnesses were heard.

40. On an unspecified date in autumn of 2005 the prosecuting authorities requested that an additional expert opinion be prepared by the Institute of Forensic Medicine of the Białystok Medical Academy. This opinion is currently being prepared and the file of the investigations has been sent to the Institute.

41. The proceedings are pending.

B. Disciplinary proceedings

42. On 30 August 1999 the applicant submitted a request to the Regional Chamber of Physicians to initiate disciplinary proceedings against the anaesthetist, F.M. On 26 October 1999 the Dolny Śląsk Chamber of Physicians started an inquiry concerning the causes of death of the applicant's wife.

43. On 10 November 1999 the inquiry was stayed, the Chamber having regard to the parallel criminal investigations which were being conducted at that time by the District Prosecutor.

44. On 16 October 2002, after the decision of the District Prosecutor of 6 December 2001 concerning the discontinuance of the criminal proceedings had become final, the proceedings were resumed.

45. On 11 December 2002 the Dolnośląska Chamber of Physicians requested additional expert opinions from two experts from Warsaw. The opinions were submitted on 7 February 2003.

46. On 25 February 2003 the Supreme Chamber of Physicians decided to transmit the disciplinary case concerning the death of the applicant's wife to the Poznań Regional Chamber of Physicians.

47. On 3 June 2004 the Wielkopolska Chamber of Physicians transmitted the case-file to the Dolny Śląsk Regional Medical Court.

48. On 25 April 2005 the Regional Medical Court in Wroclaw stayed the proceedings against F.M. pending the outcome of the further criminal investigations concerning the death of the applicant's wife. It had regard to the fact that on 24 March 2005 the Wroclaw-Krzyki District Prosecutor had allowed the applicant's appeal against a decision of 8 December 2005 to discontinue the proceedings (see § 38 above). The court further observed that a motion to impose disciplinary sanctions had been submitted to that court by the Agent for Disciplinary Matters only on 17 February 2005. The court noted that the disciplinary liability of the physician concerned had become prescribed under the relevant provisions of the Chamber of Physicians Act. However, as the criminal investigations were still pending, the period of prescription "could be prolonged", pursuant to the provisions of Article 51 (2) of that Act.

49. The proceedings are pending.

C. Civil proceedings

50. On 11 July 2002 the applicant, acting also on behalf of his son H., lodged a compensation claim against the hospital and against the hospital's insurance company with the Wroclaw Regional Court. He claimed a monthly pension for the child, just satisfaction for non-pecuniary damage they had suffered as a result of death of their mother and wife, and compensation for the funeral costs. He argued that his wife's death and his son's health problems had resulted from negligence in the handling of the anaesthesia administered to his wife during the birth. In passing, he observed that the experts who had prepared the opinion for the criminal investigation had stated that his son had also died; this was an example, in his view, of how badly the opinion had been prepared.

51. On 9 September 2002 the applicant was partly exempted from a court fee.

52. At a hearing held on 20 December 2002 the Wroclaw Regional Court ordered that the full medical records of the applicant's wife's case be submitted in evidence and that the file of the criminal investigations which were pending at that time be also submitted.

53. On 24 January 2003 the Wrocław Regional Court held a hearing. The applicant informed the court that the disciplinary proceedings were pending before the Regional Chamber of Physicians. The court decided to request information about the state of the proceedings and any possible expert opinions from the Chamber.

54. In February 2003 the applicant requested the court to admit in evidence an expert opinion he had privately commissioned before the lodging of the civil case (see § 35 above). This request was apparently refused.

55. By a decision of 7 April 2003 the Wrocław Regional Court stayed the proceedings until the end of the disciplinary proceedings. The court referred to two opinions which had been prepared in these proceedings and which indicated that it was likely that certain irregularities had indeed taken place when handling the delivery. The court considered that in these circumstances it was reasonable to stay the proceedings until the disciplinary proceedings had come to an end as their outcome was relevant for the further conduct and, possibly, the outcome of the civil case.

56. The applicant appealed, arguing, *inter alia*, that the disciplinary court of the Chamber of Physicians

which could eventually be called upon to give a ruling in this case, was composed of four physicians and just one judge, which rendered these proceedings inherently unfair in that it was unlikely that it would be fully impartial.

57. By a decision of 25 April 2003 the Wroclaw Regional Court rejected the appeal as having been lodged outside the applicable time-limit.

58. By a letter of 9 September 2003 the applicant applied for the resumption of the stayed proceedings, arguing that in any event the civil court was not bound by the conclusions of the organs of the professional association of physicians.

59. By a decision of 9 October 2003 the Regional Court refused to resume the stayed proceedings on the ground that a team of specialists had been charged with the preparation of the opinion for the purpose of the disciplinary proceedings in order to assess the medical procedures followed in the case and such opinions had already been partly prepared. Their conclusions indicated possible negligence on the part of the medical staff involved; in addition, the medical records of the applicant's late wife had been included in the files of the disciplinary proceedings, which were already well advanced. Hence, a decision of the disciplinary court could influence the judgment to be given in the civil proceedings.

60. On 2 March 2004 the applicant requested the civil court to take measures in order to have the disciplinary proceedings accelerated.

In a letter of 1 April 2004 the Chamber of Physicians in Wroclaw informed the Wroclaw Regional Court that the proceedings were still pending, that on 15 April 2004 charges would be brought against F.M. and that the files of the case would be sent, together with a motion for the imposition of a disciplinary penalty, to the Disciplinary Court of the Regional Chamber.

61. On 16 April 2004 the Regional Court informed the applicant that the civil proceedings would be resumed after the disciplinary proceedings had come to an end.

62. On 3 June 2004 a motion to have a disciplinary penalty imposed on F.M. was submitted to the Regional Disciplinary Court.

63. By a letter of 23 November 2004, in reply to a query submitted by the civil court on 8 November 2004, the Regional Agent for Disciplinary Matters of the local Chamber of Physicians reiterated that on 3 June 2004 the case had been submitted to the disciplinary court.

64. By a letter of 21 February 2005 the applicant requested the civil court to resume the proceedings. The applicant emphasised that there had been no progress whatsoever in the disciplinary proceedings since June 2004, when the disciplinary case had been brought to the court. This delay could only be attributed to the unwillingness of the Chamber of Physicians to conduct an effective investigation into the medical negligence which was arguably involved in his case. He invoked the possibility that any disciplinary liability would be prescribed as a result of the lapse of time.

65. On 7 June 2005 the Wroclaw Regional Court dismissed the applicant's request for the proceedings to be resumed, considering that they should remain stayed until the criminal proceedings pending before the Wrocław-Krzyki District Prosecutor were completed.

66. The proceedings are pending.

II. RELEVANT DOMESTIC LAW

A. The Chambers of Physicians' Act

67. The Chambers of Physicians' Act of 17 May 1989 established Chambers of Physicians as a professional organisation of physicians. Membership of a local Chamber is mandatory. The disciplinary responsibility of physicians for professional misconduct may be determined in proceedings before the organs of the Chambers, i.e. 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.

68. 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 striking off the register of physicians.

69. The procedure to be followed in disciplinary proceedings is governed by the Order on Procedure in Disciplinary Proceedings issued by the Minister of Health on 26 September 1989.

70. Under this Order, 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.

71. If information existing at the time when investigations are instituted, or gathered in the course of an investigation, is sufficient to charge a physician with professional misconduct, an agent shall draw up a motion to the court for a disciplinary penalty to be imposed, containing a detailed description of the alleged offence and written grounds.

72. Pursuant to Article 26 of the Order, 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.

73. A complainant may lodge an appeal against this decision with the Chief Agent for Disciplinary Matters. A further refusal of the Chief Agent may be appealed against to the Principal Court.

74. Under Article 29 of the Order, if the court, having received a motion for a penalty to be imposed, decides that the case is ready for examination at a hearing, it orders that a hearing be held. A physician is summoned to a hearing, whereas his defence counsel and the agent are informed of its date.

75. Under Article 18 of the Order, in disciplinary proceedings the complainant is entitled to: submit a request for evidence to be taken, lodge with the disciplinary court an appeal against the agent's decision to discontinue the proceedings, and lodge an appeal against a decision of a first-instance court on the merits, but only on the question of responsibility. The complainant is entitled to have access to the case-file, but the agent can limit this access to documents which are not covered by medical secrecy.

76. Pursuant to Article 5 of the Order, the proceedings before the court are public for members of the Chambers of Physicians.

B. The Civil Code

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

C. The Criminal Code

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

D. The 2004 Law

79. On 17 September 2004 the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Law") entered into force. Under Article 2 read in conjunction with Article 5(1) of the 2004 Law, a party to pending proceedings may ask for the proceedings to be speeded up and/or request just satisfaction for their unreasonable length .

80. The Law lays down various legal means designed to counteract and/or provide redress for undue delays in judicial proceedings.

The relevant part of Article 2 of the 2004 Law reads:

"1. Parties to proceedings may lodge a complaint that their right to a trial within a reasonable time has been breached [in the proceedings] if the proceedings in the case last longer than is necessary to examine the factual and legal circumstances of the case ... or longer than is necessary to conclude enforcement proceedings or other proceedings concerning the execution of a court decision (unreasonable length of proceedings)."

81. The relevant parts of Article 4 provide:

"1. The complaint shall be examined by the court immediately above the court conducting the impugned proceedings."

82. Article 5, in its relevant part, reads:

"1. A complaint about the unreasonable length of proceedings shall be lodged while the proceedings are pending. ..."

83. Article 12 provides for measures that may be applied by the court dealing with the complaint. The relevant part provides:

"1. The court shall dismiss a complaint which is unjustified.

2. If the court considers that the complaint is justified, it shall find that there was an unreasonable delay in the impugned proceedings.

3. At the request of the complainant, the court may instruct the court examining the merits of the case to take certain measures within a specified time. Such instructions shall not concern the factual and legal assessment of the case.

4. If the complaint is justified the court may, at the request of the complainant, grant ... just satisfaction in an amount not exceeding PLN 10,000 to be paid by the State Treasury. If such just satisfaction is granted it shall be paid out of the budget of the court which conducted the delayed proceedings."

84. Article 15 provides for an additional compensatory remedy:

"1. A party whose complaint has been allowed may seek compensation from the State Treasury ... for the damage it suffered as a result of the unreasonable length of the proceedings."

85. Article 16 further specifies:

"A party which has not lodged a complaint about the unreasonable length of the proceedings under Article 5(1) may claim – under Article 417 of the Civil Code ... – compensation for the damage which resulted from the unreasonable length of the proceedings after the proceedings concerning the merits of the case have ended."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

86. The applicant complained that no effective investigation has been conducted so as to allow for the establishment of responsibility for his wife's death and his son's serious health damage. He invoked Article 2 of the Convention 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 ..."

A. Admissibility

87. The Government submitted that the applicant had failed to comply with the exhaustion of domestic remedies rule in Article 35 § 1 of the Convention. They submitted that under domestic law there existed remedies sufficient to allow redress in cases of alleged medical malpractice in that criminal investigations, civil compensation proceedings and professional disciplinary proceedings could be instituted in such cases. The applicant had availed himself of these remedies. Criminal investigations were pending and it could not therefore be said that the competent authorities had remained totally passive in the examination of the circumstances of the applicant's wife's death or that the investigations which had been undertaken were so ineffective as to make recourse to the domestic remedies meaningless. Likewise, disciplinary and civil proceedings were pending. Hence, the applicant's complaints were premature.

88. In respect of the civil proceedings, the Government were of the view that it had been open to the applicant to lodge with a competent court a complaint about a breach of his right to have his case heard within a reasonable time, as provided for by the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time. As he had failed to avail himself of this remedy, the application was inadmissible for non-exhaustion of domestic remedies.

89. The applicant disputed the Government's submissions. He submitted that the three sets of proceedings in which he sought to establish the circumstances of his wife's death had already been pending for over six years. The prosecuting authorities had been passive in the investigations and if the investigations had made any progress at all, this had been essentially because of the applicant's tenacity and his repeated appeals against decisions to discontinue them. Likewise, the applicant's efforts to resume the civil proceedings, which had been stayed pending the outcome of the disciplinary and criminal investigations, had failed.

90. In so far as the Government invoke the provisions of the 2004 Law in the context of the complaint made under Article 2 of the Convention, the Court observes in this connection that the 2004 Law introduced remedies, of both a remedial and compensatory character, concerning specifically the right to have one's case examined within a reasonable time within the meaning of Article 6 § 1 of the Convention. It has held that these remedies are effective in respect of the excessive length of pending judicial proceedings (see *Michalak v. Poland* (dec.), no. 24549/03, 1 March 2005, and *Charzyński v. Poland* (dec.), no. 15212/03, 1 March 2005). However, in the present case it is not merely the excessive length of civil proceedings which is in issue, but the question whether in the circumstances of the case seen as a whole, the State can be said to have complied with its procedural requirements under Article 2 of the Convention.

91. In this connection the Court notes that the applicant requested, on 31 July 1999, that criminal proceedings be instituted in respect of his wife's death. Also in the same year, he requested that disciplinary proceedings be instituted in connection with the case. In July 2002 he lodged an action for compensation with the civil court. All these sets of proceedings are currently pending. On 7 April 2003 the civil court stayed the civil proceedings, pending the outcome of the disciplinary proceedings (§ 55 above). The applicant's subsequent efforts to have these proceedings resumed failed. On 25 April 2005 the Regional Medical Disciplinary Court of Dolny Śląsk stayed the disciplinary proceedings pending the termination of the criminal investigations (§ 48 above). As a result, three sets of proceedings concerning the applicant's complaint under Article 2 of the Convention have been and are currently pending for periods ranging from almost seven to four years.

92. In this context, the Court emphasises that in reviewing whether the rule of exhaustion of domestic remedies has been observed, it is essential to have regard to the existence of formal remedies in the legal system of the State concerned**,** as well as to the particular circumstances of the case and to the question whether the applicant did everything that could reasonably be expected in order to exhaust available domestic remedies (see, among other authorities, *Merit v. Ukraine*, no. 66561/01, § 58, 30 March 2004).

93. The Court notes that the applicant resorted to all the remedies which he could use in the context of the alleged medical malpractice. The applicant repeatedly appealed against decisions by which the criminal investigations were discontinued, and they were resumed three times, the appellate prosecuting authorities essentially considering that the lower prosecutors had failed to gather evidence sufficient for the elucidation of the circumstances of the case. The civil and disciplinary proceedings were stayed pending the outcome of the other sets of proceedings. Having regard to the interrelation between the various proceedings in which the applicant has sought to establish the circumstances of his wife's death, the Court considers that the Government's objection is closely linked to the substance of the applicant's complaints under this provision and that its examination should therefore be joined to the merits of the case.

B. Merits

1. The parties' submissions

94. The Government submitted that it could not be contested that in the Polish legal system there existed legal provisions for protecting patients' lives. In particular, the Court had found no indication in its previous

decisions concerning Poland that there had been any failure to provide a mechanism whereby the criminal, disciplinary or civil responsibility of persons who might be held answerable could be established (see, among other authorities, *Skraskowski v. Poland* (dec), no. 36420/94, 6 April 2000; *Siemińska v. Poland* (dec.), no. 37602/97, 29 March 2001).

95. According to the well-established case-law of the Court, investigations into deprivations of life must be, *inter alia*, independent, effective, reasonably prompt, subject to sufficient public scrutiny and must involve the next of kin to an appropriate extent (*Jordan v. the United Kingdom*, no. 24746/94, §§ 102-109).

96. The Government argued that the criminal investigations had been conducted by an independent public prosecutor. He had obtained evidence from the medical staff involved in the treatment of the applicant's wife. Further, in order to avoid any doubts as to the objectivity of the medical expert opinions, they had been obtained from institutes of forensic medicine situated in towns other than that of the hospital in which the applicant's wife had been treated and died. Therefore, there could be no doubts as to the independence and objectivity of the public prosecutor.

97. The Government also considered that the criminal investigation had been reasonably prompt. The only delays in the investigations had resulted from the necessity to obtain additional expert opinions and the time needed for their preparation. The significant number of these opinions – four had been prepared in the case so far – had resulted, on the one hand, from new facts disclosed during the investigations and, on the other, from the fact that the applicant had made use of his procedural rights and contested the findings of opinions submitted by the experts. Moreover, the very complex character of the case had made it impossible for different forensic institutes to prepare their opinions immediately. In the light of the Court's case-law, it had to be accepted that there might be obstacles or difficulties which prevented progress in an investigation in a particular situation (*Jordan*, cited above, §§ 102-109).

98. The Government stressed that the applicant, as the next-of-kin of the victim, had been actively involved in the procedure. In particular, he had testified as to the circumstances of the medical treatment and death of his wife. Further, he had submitted various motions for evidence to be taken. His questions had also been dealt with by the experts preparing the expert medical opinions.

99. The Government submitted that after the applicant had lodged a complaint with the local Chamber, an inquiry into the cause of death of his had wife started. These proceedings had subsequently been stayed, regard being had to other sets of proceedings concerning the same act pending at that time. The reasons for the staying of the disciplinary proceedings were justified since the results of the criminal investigations might have had an impact on the final decision of the Chamber of Physicians.

100. As to the conduct of the civil proceedings, the Government averred that the decision of the court to stay the civil proceedings had been based on Article 177 § 1 of the Code of Civil Procedure, which provided that the court could do so *ex officio* if facts emerged the establishment of which in a criminal or disciplinary proceedings could affect the decision in the civil case.

101. The Government considered that the same principle applied to the civil court's decision to stay the civil proceedings until the criminal proceedings were completed.

102. The applicant submitted that the criminal investigations in the case had not been conducted efficiently, as required by the Court's case-law under Article 2 of the Convention. The authorities had failed to take appropriate measures in order to establish the circumstances of his wife's death. The investigations had been discontinued several times and it was only the applicant's determination and his repeated efforts to have them resumed which had resulted in their being conducted anew.

103. As to the disciplinary proceedings, the applicant stressed that no decision on the merits of the case had been given so far. The initial measures taken as a result of his request to have disciplinary proceedings instituted which he submitted in 1999, were followed by a two-year period, from 3 February 2000 to 16 October 2002, during which no progress was made. During this time, the medical records of the applicant's wife had apparently been obtained. Later on, a medical expert opinion had been prepared which served as a basis for the motion to the Medical Court to have a disciplinary penalty imposed on F.M. However, this had been done only after disciplinary liability had apparently become prescribed, as it transpired from the decision of 25 April 2005.

2. The Court's assessment

104. 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. 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 co-ordination 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).

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).

105. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. 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.

However, the obligations of the State 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 within a time-span such that the courts can complete their examination of the merits of each individual case (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 51-53; ECHR 2002-I; *Vo* v. France [GC], no. 53924/00, §§ 89-90, ECHR 2004-VIII).

106. In that connection, the Court observes that it was open to the applicant to initiate a criminal investigation into the events of the case. It was further open to him to bring a civil action in tort against the State Treasury, seeking compensation for his wife's death. He could also institute proceedings in order to establish the disciplinary liability of the medical practitioners concerned by initiating a procedure provided for by the laws governing the professional liability of physicians. Hence, the Court finds no indication that there has been any failure on the part of the State to provide a procedure whereby the criminal, disciplinary or civil responsibility of persons who may be held answerable could be established.

107. However, for the assessment of the case it is relevant to examine how this procedure worked in the concrete circumstances.

108. In this connection, the Court first observes that after the applicant's wife died on 31 July 1999, a police inquiry was instituted immediately on the same date, following the relevant request submitted by the applicant. Subsequently, a post-mortem was carried out on 2 August 1999. On 11 August 1999 the police requested that the relevant medical records be submitted to it. Further, a number of witnesses were interviewed shortly after the material events. On 29 December 1999 the prosecutor, having regard to the material gathered during the police inquiry, instituted a criminal investigation into the suspected offence of manslaughter. Therefore the initial measures aiming at establishing the facts of the case were taken promptly.

109. However, later on, the criminal investigations considerably slowed down. On 10 February 2000 the Lublin Institute of Forensic Medicine informed the prosecuting authorities that they could not comply with its request to prepare a medical expert report on the case. It was only on 30 March 2000 that the prosecution requested another forensic medicine institution to prepare a forensic opinion. Subsequently, the proceedings

were stayed pending the submission of the report. They were resumed in October 2000.

110. By a decision of 31 October 2000 the District Prosecutor discontinued the investigations, considering, in the light of the medical records, the testimony of witnesses and the medical expert opinion, that the medical staff involved had no case to answer. However, on the applicant's appeal, they were subsequently resumed by a decision of 5 January 2001. The higher prosecutor examining the applicant's appeal considered that the investigation had been discontinued prematurely, without all necessary evidence having been taken and without the facts relevant for the decision having been established (see § 18 above).

111. The Court further observes that the investigations were subsequently discontinued twice, on 6 December 2001 and 8 December 2004. They were twice resumed, on 1 March 2003 and 24 March 2005 (see §§ 30 and 38 above).

In its decision of 25 March 2005 the Wroclaw Regional Prosecutor observed that the evidence gathered so far in the case was incomplete in that it did not allow for the establishment of the relevant facts. The prosecutor ordered that further evidence should be taken.

The Court therefore notes that the investigations were discontinued three times and subsequently resumed in the light of the shortcomings in the taking of the evidence. The authorities examining the applicant's appeals against the decisions to discontinue them repeatedly had regard to the failure of the lower authorities to elucidate all circumstances relevant for the decision to be given. The Court considers that, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower authorities, the repetition of such orders within one set of proceedings discloses a serious deficiency in the operation of the judicial system (*mutatis mutandis*, *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003).

112. As regards the disciplinary proceedings, the Court notes that they were instituted in 1999, but were subsequently stayed in November 1999, pending the outcome of the criminal investigations. After they were resumed, they were later stayed again by a decision of 25 April 2005, the court having regard to the criminal investigations which were still pending at that time. These proceedings are still currently pending.

113. The Court further notes that in its decision of 25 April 2005 the Regional Medical Court observed that the disciplinary liability of the physician concerned had become prescribed as the three-year time-limit in which it could have been sought had elapsed. However, as the criminal investigations were still pending, the court further stated the period of prescription "could be prolonged", pursuant to the provisions of Article 51 (2) of that Act.

The Court first notes that it is unclear from the formulation of this decision whether the Medical Court indeed prolonged the period of prescription concerned, as it merely stated that it "could" be prolonged. Consequently, this decision by itself leaves the applicant in a state of further uncertainty as to whether the disciplinary liability of the physician concerned became prescribed, or can be further pursued.

114. To sum up, the Court observes that the applicant's wife's death occurred on 21 July 1999. Despite the fact that proceedings were instituted in which the applicant sought to ascertain the relevant facts and to establish the liability of persons responsible for the handling of her delivery and for her death, after almost seven years no final decision in any of these proceedings has been given. The prosecuting authorities repeatedly criticised the prosecutors investigating the case on the grounds that the evidence gathered was incomplete and that the decisions to discontinue the investigations were premature because of shortcomings in the taking of the evidence. The applicant remains in a protracted state of uncertainty as to their outcome.

115. Although the Court accepts that the medical questions involved in the case may have been of some complexity, it does not find that this could justify the overall length of the investigation.

116. Further, the Court notes that the authorities repeatedly referred to the other sets of pending proceedings as a justification for staying them or for the refusals to resume them. The Court appreciates that the evidence taken in one set of proceedings could be relevant for the decisions to be taken in other proceedings, and that the outcome of such proceedings could have an impact on the further conduct of the proceedings which were stayed. It considers that such decisions could have been dictated by reasonable considerations related to the fair and efficient administration of justice.

However, having regard to the overall length of the period which has elapsed since the death of the applicant's wife and also to the fact that the procedures instituted with a view to establishing the circumstances of her death seem rather to have hindered the overall progress in the proceedings, the Court is

of the view that it cannot be said that the procedures applied in order to elucidate the allegations of medical malpractice resulted in an effective examination into the cause of death in the present case.

117. Lastly, the Court observes that, apart from the 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. This is because the knowledge of facts and possible errors committed in the course of medical care should be established promptly in order to be disseminated to the medical staff of the institution concerned so as to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services.

118. In these circumstances, the Court concludes that there has accordingly been a procedural violation of Article 2 of the Convention. It follows that the Government's preliminary objection (see paragraphs 87-90 above) must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

119. The applicant complained of a violation of his right to have his complaints examined within a reasonable time. He relied on Article 6 of the Convention.

120. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

121. Having regard to the finding relating to Article 2 (see paragraph 118 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

123. The applicant claimed PLN 540,000 in pecuniary damages arising out of his wife's death and his son's poor health. He argued that this amount covered lost earnings which his late wife could have realised until her retirement age, regard being had to her qualifications and her earnings prior to her pregnancy and death. He further argued that this amount related also to the costs of care of his son H. from October 1999 until August 2003, which care normally would have been carried out by his mother. He also submitted that his son had been undergoing continuous medical care and rehabilitation specific to his condition resulting from the circumstances of his birth, the total amount paid for this care amounting to PLN 37,000.

124. The applicant further claimed moral damages to compensate him for the death of his wife and his son's poor health and the failure of the domestic authorities to carry out a prompt and efficient investigation.

125. The Government found the applicant's claims exorbitant and unjustified.

126. As regards the claim for pecuniary damage, the Court considers that there is no causal link between the alleged damage and the above violation of the State's procedural obligations under Article 2 of the Convention it has found (see § 118 above).

127. As to non-pecuniary damage, the Court, deciding on an equitable basis, and having regard to the sums awarded in similar cases and the violation which it has found in the present case, awards the applicant EUR 20,000.

B. Costs and expenses

128. The applicant also claimed PLN 51,935 for the costs and expenses incurred before the domestic courts and before the Court.

129. The Government considered that the amount claimed by the applicant was excessive.

130. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads, less EUR 850 paid to the applicant in legal aid, plus any tax that may be chargeable on that amount.

C. Default interest

131. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a procedural violation of Article 2 of the Convention and accordingly dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies;

3. *Holds* that there is no need to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
      (i) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, less EUR 850 (eight hundred and fifty euros) paid to the applicant in legal aid;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY Nicolas BRATZA
Registrar President

BYRZYKOWSKI v. POLAND JUDGMENT