FOURTH SECTION

CASE OF DZIECIAK v. POLAND

*(Application no. **77766/01**)*

JUDGMENT

STRASBOURG

9 December 2008

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 Dzieciak v. Poland,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 18 November 2008,

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

PROCEDURE

1. The case originated in an application (no. **77766**/**01**) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Zbigniew Dzieciak ("the applicant"), on 13 May 2000. On 25 October 2001 the applicant died. His wife, Mrs Zofia Dzieciak, informed the Court that she wished to pursue the application lodged by her late husband.

2. The applicant was represented by Mr A. **Rzepliński**, a lawyer from the Helsinki Foundation for Human Rights (Warsaw, Poland). The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that he suffered inhuman and degrading treatment while in detention and that the length of his pre-trial detention had exceeded a reasonable time. The applicant's wife complained that the authorities had contributed to the applicant's death and failed to take proper measures during his illness in order to protect his health and life.

4. On 28 February 2006 the Court decided to give notice of 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

5. The applicant was born in 1948 and lived in Warsaw.

A. The criminal proceedings against the applicant

6. On 17 September 1997 the applicant was arrested by the police. On 18 September 1997 the Warsaw District Court (*Sąd Rejonowy*) decided to place the applicant in pre-trial detention in view of the reasonable suspicion that he had been involved in drug trafficking as part of an organised criminal gang. In particular, the applicant was suspected of having participated in the recruitment of persons used for international drug trafficking.

7. The applicant's pre-trial detention was extended on several occasions.

8. On 15 May 1998 the applicant was indicted before the Warsaw Regional Court.

B. The applicant's state of health during his detention

9. The applicant, who had suffered two heart attacks in 1993 and 1995, submitted that his health deteriorated after his arrest. On 22 July 1998 he consulted a cardiologist. On 8 September 1998 the Medical Panel (*Komisja Lekarska)* decided that there were no reasons militating against the applicant's detention, provided that the detention centre in which he was detained possessed a

hospital wing.

10. In September 1998 the applicant and several co-accused were indicted before the Warsaw Regional Court (*Sąd Okręgowy*).

11. On 22 January 1999 the applicant consulted a non-prison doctor who prescribed a coronary angiography (*koronografia*). The applicant submitted that he had not been informed of this.

12. On 1 February 1999 the Medical Panel again found that the applicant could be held in a detention centre if it had a hospital wing.

13. On 4 August 1999 the applicant was again examined by a non-prison doctor who confirmed the need for a coronary angiography. The applicant submitted that the prison authorities refused to carry out this procedure. He complained about this to the Helsinki Foundation for Human Rights in Warsaw.

14. Between 18 and 31 August 1999 the applicant was treated in the hospital wing of the detention centre.

15. On 23 August 1999 the Warsaw Regional Court extended the applicant's detention, finding that the grounds for it remained valid. On the same date the court dismissed the applicant's request for release finding that the applicant's state of health was not incompatible with detention.

16. The applicant's detention was subsequently extended by the Supreme Court on 16 September 1999, on the ground of the reasonable suspicion against him.

17. In October 1999 the trial court decided to return the case to the prosecutor and to join the investigation to another case concerning organised crime. On 21 October 1999 the Warsaw District Court ordered the applicant's detention in connection with this set of criminal proceedings.

18. On 2 November 1999 the prison authorities replied to the Helsinki Foundation regarding the applicant's health care. The authorities stated that the applicant had been examined by doctors on several occasions and that the cardiologist had not ordered the coronary angiography but had only suggested it as one of several possible treatments. The applicant's state of health did not preclude detention and he could receive any necessary treatment in the hospital wing of the detention centre. They reiterated that the applicant was detained in a detention centre which had hospital facilities and that, if necessary, he would be hospitalised.

19. On 19 November 1999 the applicant was transferred to the Łódź detention centre, which had no hospital wing. The applicant argued that this was in reprisal for his complaint to the Helsinki Foundation. In March 2000 the applicant lost consciousness and was transferred to the Łódź Prison Hospital, where he remained for 10 months.

20. On 6 January and 24 March 2000 the Warsaw Regional Court, upon an application from the Wrocław Regional Prosecutor (*Prokurator Okręgowy*), further extended the applicant's pre-trial detention, relying on the reasonable suspicion that he had committed the offences in question and on the complexity of the case, which justified the continuation of the investigation.

21. On 7 April 2000 the Warsaw Court of Appeal (*Sąd Apelacyjny*), on an application from the prosecutor, decided to further extend the applicant's detention until 20 October 2000. In addition to the existence of a reasonable suspicion that the applicant had committed the offences, the court relied on the complexity of the case, the severity of the anticipated penalty and the need to secure the proper conduct of the investigation. Finally, the court found no evidence that the applicant, and four other co-accused, should be released from detention due to their various health conditions. The court added, however, that it was for the prosecutor to order a medical examination of the accused and to reach a decision regarding their further detention.

22. On 8 June 2000 the Supreme Court (*Sąd Najwyższy*) decided to amend the Court of Appeal's decision and extended the applicant's detention pending the outcome of the investigation until

10 October 2000.

23. On 3 October 2000 the Warsaw Court of Appeal, on another application from the appellate prosecutor, decided to extend the applicant's pre-trial detention, and that of fourteen co-accused, until 10 February 2001. The court repeated the reasons given in previous decisions.

24. On 4 October 2000 a coronary angiography and other tests were carried out in Łódź University Hospital. The applicant submitted that the results of the tests provided evidence of his very serious state of health and proof that his life was in danger.

25. On 14 November 2000 the Warsaw Court of Appeal dismissed the applicant's appeal against the decision of 3 October 2000 extending his detention. The appellate court, referring to the applicant's state of health, established that he could be detained and treated in the prison hospital until the date of the surgery.

26. On 7 December 2000 the applicant was examined by doctors from Łódź University Hospital, who ordered that he should undergo heart surgery in a non-prison hospital. A medical certificate of 24 January 2001, issued by Łódź Prison Hospital, confirmed the need to carry out a coronary artery bypass graft (CABG, a so-called heart bypass operation).

27. On 24 January 2001 the applicant was transferred to the Mokotów Detention Centre in Warsaw, as the surgery was to be carried out in the Anin Institute of Cardiology.

28. On numerous occasions the applicant applied to be released from detention. He justified these requests by referring to the state of his health and the fact that his imminent surgery could not be carried out in the hospital wing of the detention centre but necessitated his release from detention. Nevertheless, on 6 February 2001 the court further extended the pre-trial detention of the applicant and his co-accused. The decision did not contain any particular reference to the applicant's health.

29. On 27 April 2001 the applicant was indicted before the Warsaw Regional Court.

30. In April 2001 the applicant was examined by doctors in the Anin Institute of Cardiology, who agreed to carry out laser heart surgery on the applicant.

31. On 15 May 2001 the Warsaw Court of Appeal again extended the applicant's detention. The court found:

"In the instant case, [the applicant] was arrested on 17 September 1997 and detained on remand on 18 September 1997 by the decision of the Warsaw District Court.

On 9 May 2001 the pre-trial detention of 22 co-accused was extended until 11 October 2001. The procedural grounds therefore justify the extension of detention also with respect to [the applicant] until 11 October 2001. Moreover, there are no grounds for lifting his pre-trial detention under Article 259 of the Code of Criminal Procedure.

As [the applicant's] pre-trial detention has lasted for over 3 years and 6 months, it is necessary to schedule the date of the hearing and to plan the trial so that the provisions of the [Polish Code of Criminal Proceedings] and Article 6 of the [Convention] are respected - that is, the right to a trial within a reasonable time."

32. The applicant lodged an appeal against the decision but on 12 June 2001 the Warsaw Court of Appeal dismissed it.

33. The Anin Institute of Cardiology scheduled laser heart surgery on the applicant and ordered that he be admitted to the Institute on 27 July 2001. The applicant's representative submitted that the applicant was never informed of this. The Government submitted that the surgery could not take place on that date on account of prolonged renovation work to the Institute.

34. Between 8 August and 10 September 2001 the applicant was hospitalised in the Warsaw prison hospital for pneumonia.

C. The events of September and October 2001

35. On 5 September 2001 the Anin Institute of Cardiology sent a letter to the applicant, informing him that the second appointment for his laser heart surgery had been scheduled for 21 September 2001. The applicant submitted that the letter was delayed and that he had been informed about it after the date in question. From the copy of the envelope submitted by the applicant's wife, it appears that the letter was posted on 10 September 2001; a stamp indicates that it was delivered to the registry of the Mokotów Detention Centre on 11 September 2001 [*Sekretariat, Areszt Śledczy Warszawa; 11 Wrz. 2001*]. The envelope is marked "registered post - v. urgent" [*polecony – b. pilne*] and contains the following stamp "Censored 24.09.01" [*Ocenzurowano*]. The Government maintained that this letter never arrived at the Mokotów Detention Centre and that the authorities had not been aware that the Institute had scheduled the date of the applicant's surgery.

36. The Anin Institute of Cardiology again rescheduled the date of the applicant's heart surgery and gave him an appointment for 26 October 2001. It appears that this notification was delivered to the detention centre by the applicant's lawyer in person.

37. On 1 October 2001 the applicant was examined by the Medical Panel, which gave a decision on the same date. The decision contained a reference to his medical record and the information that he would be admitted to undergo surgery at the Anin Institute of Cardiology on 26 October 2001. The decision states:

"16. The Panel's decision -

It is necessary to change the preventive measure.

17. The grounds for the decision -

The patient requires surgical treatment at the Anin Institute of Cardiology. The date of admittance to the Institute is scheduled for 26 October 2001. Further ... detention is a threat to the patient's health."

This decision of the Medical Panel was not sent to the trial court until a later date (see paragraph 44 below).

38. On 5 October 2001 the Warsaw Court of Appeal extended the pre-trial detention of the applicant and the other co-accused for a further four months. The court did not examine the applicant's state of health or any circumstance that would concern him individually.

39. On 12 October 2001 Dr M.M., from the hospital wing of the Mokotów Detention Centre, issued a medical certificate, which was sent by fax to the trial court on 15 October 2001. The certificate stated:

"The prisoner's complaints:

Has been treated for many years for coronary thrombosis, hypertension. Had suffered heart attacks. Recent effort-related chest pain.

Established during examination:

Conscious, sound blood circulation and respiration ...

Diagnosis:

Ischaemic heart disease, has had heart attacks, currently has relatively sound blood circulation. Had pneumonia.

Conclusions:

At present he can participate in the court's hearings. The patient was examined by the Medical Panel on 1 October 2001."

40. On 16 October 2001 the trial against the applicant and forty-four co-ccused started before the

Warsaw Regional Court. The applicant was brought to the courtroom to attend the hearing of 16 October 2001. At the hearing the court informed the applicant's lawyer that a medical certificate of 12 October 2001 had been submitted on the previous day. In the light of the certificate, the court dismissed the applicant's request to sever the charges against him, holding that his health did not justify a separate examination of the case.

41. The applicant attended the second hearing on 18 October 2001.

42. At the next hearing, held on 19 October 2001, the applicant was heard and the statements given by him at the investigation stage were read out. The trial court adjourned the hearing until Monday 22 October 2001.

D. The events of 22 October 2001 and the death of the applicant

1. The account of the applicant's representative

43. On 22 October 2001 the applicant was brought to the court room, where he lost consciousness before the hearing began. An ambulance was called. At 9.30 a.m. he was transferred back to the hospital wing of the Mokotów Detention Centre. He was examined by a doctor, who considered that he did not require hospitalisation but was unfit to participate in the hearing on that day. After examination in the hospital wing the applicant was transferred to his cell in the detention centre.

44. The hearing started later than scheduled, due to the commotion caused by the applicant's fainting and the arrival of the ambulance. The presiding judge enquired about the applicant's health by calling the Mokotów Detention Centre and the Anin Institute of Cardiology. From the latter the judge learned that the applicant's admittance to the Institute was scheduled for 26 October 2001. The judge was also informed by the detention centre's authorities that the applicant had been examined by the Medical Panel on 1 October 2001 but that the report had not yet been confirmed by the relevant medical authorities, and thus could not be submitted to the court. Nevertheless, at the second break in the hearing, the Mokotów Detention Centre sent the presiding judge, by fax, the Medical Panel's decision, which concluded that the applicant's continued detention represented a risk to his health (see paragraph 37 above).

2. The Government's account

45. On 22 October 2001 at 9.30 a.m. the applicant was examined by a doctor from the hospital wing of the detention centre on account of a worsening of his health. The doctor issued a certificate stating that the applicant did not require hospitalisation but was unfit to participate in the hearing on that day.

3. Uncontested facts

46. At 3.45 p.m. on 22 October 2001 the applicant was taken from his cell to the hospital wing of the Mokotów Detention Centre; he was unconscious. The medical team managed to resuscitate the applicant, so that he began breathing on his own again and his heart beat was restored. They also attempted to locate a hospital that would admit him. The applicant was taken in a serious condition to hospital in Lindley Street, Warsaw, where he died on 25 October 2001 without regaining consciousness.

47. On 22 October 2001 the trial court decided to examine the charges against the applicant in a separate set of proceedings, as his health prevented him from participating in the hearings. The court further decided to release the applicant from detention on 26 October 2001 and to transfer him on that date to the Anin Institute of Cardiology for surgery.

48. On 8 November 2001 the Warsaw Regional Court decided to discontinue the criminal proceeding against the applicant on the ground that he had died on 25 October 2001. On 10 August 2002 the trial court convicted thirty-seven defendants and sentenced them to prison terms varying from 2 to 12 years.

E. The investigation into the applicant's death

49. On 30 October 2001 the applicant's wife requested the Warsaw District Prosecutor to start an investigation into the applicant's death. On 12 November 2001 the Helsinki Foundation for Human Rights made a similar request, informing the prosecutor that the applicant had not received adequate medical care in the Mokotów Detention Centre.

50. On 31 October 2001 a post-mortem examination of the applicant's body was carried out by the Warsaw Medical Academy (*Akademia Medyczna w Warszawie*). The examination concluded that the cause of the applicant's death was acute coronary insufficiency, given the advanced stage of his heart disease.

51. On 20 December 2001 the Warsaw District Prosecutor initiated an investigation into the allegations that the applicant's death had been caused by the failure of the doctors in the Mokotów Detention Centre to secure him adequate medical care.

52. On 13 February 2002 the prosecutor heard the applicant's wife. She described how her husband's health had constantly deteriorated, as observed by her during her regular bi-monthly visits. His serious health problems started when he was transferred to the Łódź Detention Centre, where there was no hospital facility. After he lost consciousness he spent several months in a hospital, and at that time he underwent a coronary angiography. On his return to the Warsaw Detention Centre, his health deteriorated further and he had been coughing badly, and suffered from chest pain. His complaints, however, were dismissed on each occasion by the prison doctor, a general practitioner. Only after collapsing 6 months later was he transferred to the Warsaw Prison Hospital, where he was diagnosed with pneumonia and treated accordingly. At that time it was recommended that he undergo heart bypass surgery. During the hearings which started a few days before his death the applicant was in very poor health. The applicant's wife also testified that he had received notification about the first scheduled operation in the Anin Institute of Cardiology, set for 21 September 2001, but only after that date. She went to the Anin Institute of Cardiology to obtain the second appointment for 26 October 2001, which she personally transmitted to the applicant's lawyer so that he could notify the detention centre. However, the applicant passed away before that date.

53. On 28 March 2002 the prosecutor heard the Head of the Warsaw Prison Hospital. She testified that the applicant had stayed in her ward until 10 September 2001 because he had pneumonia and was being prepared for a bypass operation, to be carried out in the Anin Institute of Cardiology. Since the operation could not be carried out at that time, the applicant was returned to his cell in the detention centre.

On the same date the prosecutor questioned a doctor working at the prison hospital, who was consulted by the applicant in 1997, on two occasions in 1998, on one occasion in 1999 and on 2 July 2001.

54. On 29 March 2002 the prosecutor heard another doctor, employed in the prison hospital, who had treated the applicant during his stay in the hospital, that is, until 10 September 2001. Like the previous witness, this doctor did not believe that the applicant had been simulating, had complained excessively or had not been following the doctor's recommendations.

55. On 29 March and 10 September 2002 the prosecutor heard Dr M.M. who worked in the hospital wing of the Mokotów Detention Centre. He stated that, according to a note made by him in the applicant's medical record, on 27 September 2001 he learned that the Anin Institute of Cardiology had decided to admit the applicant. He forwarded this request to the prison authorities, as it was necessary to obtain a decision from the Medical Panel. The prosecutor showed the witness a copy of the letter from the Anin Institute of Cardiology of 5 September 2001, stating that the date of the applicant's admittance to hospital was scheduled for 21 September 2001. The witness was unable to ascertain whether he had previously seen this letter or whether his annotation in the

applicant's medical record of 27 September 2001 had been made in connection with it.

56. On 4 April 2002 a doctor from the Anin Institute of Cardiology was heard by the prosecutor. She testified that in March 2001 the Mokotów Detention Centre requested the Institute to examine the applicant. He was diagnosed with coronary thrombosis and recommended for a laser operation. The witness stated:

“On 27 June 2001 a letter was sent to the detention centre with a request to stop administering aspirin to Mr Dzieciak; it also set the date of his admittance to the Institute for 6 July 2001. The patient did not show up. Again the patient was invited for 21 September 2001 – he did not turn up. The third summons was for 26 October 2001 – he did not show up. We received information that the patient had died on 25 October 2001 (we received this information from a judge). As far as I know the patient did not show up because he had not obtained leave from the detention centre, and we had not agreed to conduct the operation in the presence of guards as we had no conditions for that (moreover, we had repair work going on at that time).”

The witness also stated that the applicant's wife, who had apparently learned about the planned date of the operation, had informed the hospital administration about the difficulties experienced by the applicant in obtaining leave from the detention centre. The hospital's administration had contacted the Mokotów Detention Centre and learned that the decision on whether or not to grant the leave would be taken before 26 October 2001. The doctor also confirmed that a judge from the Regional Court had called the hospital on 22 October 2001, enquiring whether the applicant had an operation scheduled and saying that a fax with this information had been sent to the court.

57. Finally, on 4 April 2002 the prosecutor questioned another doctor from the prison hospital, who had treated the applicant on 20 and 22 October 2001. He testified that on 22 October 2001 the applicant was brought back from the court hearing at 9.30 a.m. suffering from chest pain. He conducted an ECG test and administered medication so that the applicant's condition was stable. The witness considered that the applicant had not required hospitalisation but issued a certificate stating that he should not attend the hearing on that day. At 3.33 p.m. on the same day the applicant was brought from his cell on a stretcher; he was unconscious, had no heart beat and was not breathing. After resuscitation his heart beat was restored and he began to breathe independently. The witness ordered an ambulance and contacted hospitals to find one which would admit the applicant. Finally, the fourth hospital, located on Lindley Street, agreed to admit the applicant.

58. The prosecutor also requested the Mokotów Detention Centre to clarify when the letter of 5 September 2001 from the Anin Institute of Cardiology, informing the authorities of the applicant's scheduled admittance on 21 September 2001 for surgery, had reached the detention centre. According to the Government, the Head of the Mokotów Detention Centre replied that there was no evidence that such a letter had ever arrived at the detention centre; however, the letter informing about the next date for surgery, scheduled for 26 October 2001, had reached the detention centre on 26 September 2001.

59. On 14 August 2002 the Anin Institute of Cardiology confirmed to the prosecutor that the letters indicating the dates of the applicant's admittance to the Institute (for 6 July and 21 September 2001) had been sent by ordinary mail to the Mokotów Detention Centre.

60. On 23 September 2002 the prosecutor ordered the Gdańsk Medical Academy to prepare an expert opinion. The prosecutor asked the experts to answer following questions:

“1. Was the death of Zbigniew Dzieciak a consequence of:

- unsuccessful medical treatment for which nobody can be held responsible *(niezawinione niepowodzenie lekarskie*),

- medical malpractice,

- failure to apply due diligence during his medical treatment at the Mokotów Detention Centre and

hospital in Lindley Street,

- other circumstances, different from the above?

2. Did the state of health of Zbigniew Dzieciak allow him to remain in the detention centre and to participate in the trial, including lengthy court hearings?”

61. In 1 July 2003 the experts submitted their opinion to the prosecutor. The experts relied on the applicant's medical file and on the post-mortem examination. They concluded as follows:

“...in answer to question no. 1, we consider that [the applicant's] death was the consequence of unsuccessful medical treatment for which nobody could be held responsible. Having analysed the file, we find that there was no medical malpractice during the period between the applicant's arrest and his death. On the basis of the submitted documents we cannot perceive any lack of diligence during his treatment in the detention centre and in hospital in Lindley Street. We have, however, reservations about the fact that the date of the applicant's cardio-surgical intervention was rescheduled twice (a conclusive elucidation of the grounds for this 'postponing' is not within the competence of the undersigned experts). Nevertheless, the type and extent of changes in the heart muscle, as established by the post-mortem examination, do not allow [us] to conclude if, and to what extent, the surgery would have led to improvement in the functioning of the applicant's left ventricle of the heart.

Ad 2.

In response to the second question, it should be noted that when the applicant's health was clearly deteriorating and in connection with the approaching surgery, the Medical Panel gave a decision on the necessity of changing the preventive measure, as a continued stay in detention constituted a threat to the patient's health. On the basis of the documents collected, it is not possible to establish the period when medical indications appeared indicating a need to change the preventive measure.

We believe that it is impossible to establish beyond doubt a causal link between the deterioration in the applicant's health and his participation in the trial.”

62. On 28 August 2003 the Warsaw District Prosecutor discontinued the investigation. The decision reads:

> “On 12 November 2001 the Helsinki Committee informed the District Prosecutor of the possibility that an offence had been committed under Article 231 or 160 of the Criminal Code. It appears from the request that on 22 October 2001 the applicant was called from his cell for transferral to the court hearing, and that his state of health subsequently deteriorated. Attempts were made until evening to resuscitate him in the hospital of the detention centre. In the evening he was taken to hospital in Lindley Street where, on 24 October 2001, he died.

Following the post-mortem examination the expert from the Warsaw Medical Academy established that the cause of [the applicant's] death had been acute coronary insufficiency, given the advanced stage of [his heart disease]. In the expert's opinion there was no evidence that would allow [him] to establish that the applicant's pneumonia had had a bearing on his death. [The Head of the Prison Hospital] testified that [the applicant] had been on her ward once – he was admitted on 8 August 2001 with symptoms of pneumonia and was released on 10 September 2001 in good condition. He was again admitted to the hospital on 22 October 2001 and he was transferred to hospital in Lindley Street after 5.20 p.m.

An expert opinion from the Gdańsk Medical Academy was ordered for the purpose of establishing the circumstances of [the applicant's] death.

From the submitted expert opinion it appears that the applicant's death was a consequence of unsuccessful medical treatment for which nobody could be held responsible. Having analysed the file the experts were unable to find evidence of medical malpractice during the period between the applicant's arrest and his death, could not perceive any [missing: lack of diligence] during his

treatment in the detention centre and subsequently in hospital in Lindley Street. In the experts' view it had not been possible to establish beyond doubt a causal link between the deterioration in the applicant's health and his participation in the trial.

In the light of the above it must be established that the evidence gathered does not allow the conclusion that [the applicant's] death was a consequence of the actions or omissions of third persons.

Accordingly it has been decided as above."

63. The applicant's wife, supported by the Helsinki Foundation, lodged an appeal against this decision. She complained that the prosecutor had failed to examine thoroughly the allegations raised in her request to initiate the proceedings. In particular, there had been no examination of why, having lost consciousness in the court room on 22 October 2001, the applicant was not immediately taken to hospital but was returned to the detention centre.

64. On 19 January 2004 the Warsaw District Court dismissed the appeal, reiterating the prosecutor's findings that the applicant's death was "unsuccessful medical treatment". The court had not made any new findings relating to the course of the events. It noted that the information about the surgery scheduled for 21 September 2001 had not reached the Mokotów Detention Centre. However, on 26 September 2001 the detention centre received information that the surgery could take place on 26 October 2001, provided that the applicant received authorisation. The court further established that on 1 October 2001 the Medical Panel had given a decision finding that a further stay in detention would pose a risk for the applicant's health; that ruling had been validated by the Head of the Panel on 22 October 2001. Previously, on 16 October 2001, the Head Doctor of the Prison Medical Service had ordered that the decision be supplemented by a copy of the results of the coronary angiography. On 23 October 2001 the Panel's decision was faxed to the trial court, at whose disposal the applicant remained. The court concluded:

"Taking into account the above circumstances, and the fact that it was not possible to establish a causal link between the applicant's participation in the trial [and the deterioration in his health] or to establish whether, and to what extent, the surgery would have led to an improvement in the functioning of the applicant's left ventricle of the heart, it must be concluded that the prosecutor was right in finding no evidence in the circumstances of the instant case pointing to the commission of an offence, and that the prosecutor's decision was based on Article 7 of the Code of Criminal Procedure. Accordingly, the impugned decision shall be upheld."

F. The civil proceedings for compensation

65. On 12 July 2002 the applicant's wife lodged a civil claim with the Warsaw Regional Court, seeking compensation in connection with her husband's death. She maintained that her late husband had not received proper medical treatment in the detention centre and had been obliged to participate in the hearings despite his poor state of health. The applicant's wife applied for legal aid, submitting that her monthly income, comprising her salary as a cleaning lady and disability benefit for her daughter, who suffered from cerebral palsy, was equivalent to EUR 370. The applicant's representative submitted that the court had exempted her from paying court fees but had dismissed her application for legal aid.

66. On 26 January 2004 the Warsaw Regional Court dismissed the claim. The court examined the treatment that the applicant had undergone since his arrest in 1997 and the prosecutor's case file concerning the investigation into the applicant's death. It found that the State Treasury could not be held liable for damage, as it had not been established that the applicant's death had been caused by unlawful actions or omissions of the detention centre officials. In addition the court found that the applicant had failed to prove that her financial situation had deteriorated as a result of her husband's death.

67. The applicant's wife appealed against the judgment.

68. On 14 November 2004 the Warsaw Court of Appeal dismissed the appeal. The court agreed with the first-instance court's assessment that the applicant's wife had not sustained damage as a consequence of her husband's death, and that her claim had thus been ill-founded. The court also dismissed as unsubstantiated the applicant's complaints that the prison authorities had contributed to her husband's death by failing to provide him adequate medical care.

69. The applicant failed to lodge a cassation appeal with the Supreme Court against that judgment. She did not apply to a court to have a legal-aid lawyer appointed for the purpose of lodging such appeal on her behalf.

II. RELEVANT DOMESTIC LAW

Preventive measures, including detention on remand

70. The relevant domestic law and practice concerning the imposition of pre-trial detention (*aresztowanie tymczasowe*), the grounds for its extension, release from detention and the rules governing other, so-called “preventive measures” (*środki zapobiegawcze*) are set out in the Court's judgments in the cases of *Gołek v. Poland*, no. 31330/02, §§ 27-33, 25 April 2006 and *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 August 2006.

The Code sets out the margin of discretion as to the continuation of a specific preventive measure. In so far as relevant, Article 257 provides:

“1. Pre-trial detention shall not be imposed if another preventive measure is sufficient.”

The relevant part of Article 259 provides:

“1. If there are no special reasons to the contrary, pre-trial detention shall be lifted, in particular if depriving an accused of his liberty would:

(1) seriously jeopardise his life or health; or

(2) entail excessively harsh consequences for the accused or his family.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

71. The applicant complained that, while held in pre-trial detention, he had not received adequate medical care. The applicant submitted that the authorities had postponed his surgery and ignored his medical needs because he refused to cooperate with the prosecutor and special services.

After his death, the applicant's wife complained that her husband had died in custody as a result of inadequate and belated medical assistance and that the authorities had contributed to his death. The Court will examine the complaints from the standpoint of Article 2 of the Convention, the first sentence of which provides:

“1. Everyone's right to life shall be protected by law.”

72. The Government contested that argument.

A. Admissibility

73. The Court notes that the Government raised an objection that the applicant's wife had not exhausted the remedies available under Polish law. They maintained that she had not lodged a cassation appeal with the Supreme Court in the civil proceedings for damages.

74. The applicant's representative contested the Government's arguments and submitted that the applicant's wife had made use of the remedies available to her. In particular she had appealed to the District Court against the prosecutor's decision to discontinue the criminal proceedings and had pursued a civil case for compensation. She had failed to lodge a cassation appeal with the Supreme Court because she had not been represented by a lawyer and had been absent from the hearing before the Court of Appeal.

75. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI, and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports* 1996-IV,).

76. The Court emphasises that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the *Akdivar and Others* judgment, cited above, § 69, and the *Aksoy* judgment, cited above, §§ 53 and 54).

77. The Court observes that the Polish legal system provides, in principle, two avenues of recourse for victims alleging illegal acts attributable to the State or its agents, namely a civil procedure and a request to the prosecutor to open a criminal investigation.

78. With regard to the criminal investigation into the applicant's death, the Court notes that his wife initiated criminal proceedings directly after his death. The prosecutor discontinued the investigation and this decision was upheld by the Warsaw District Court on 19 January 2004. No appeal lay against that second ruling. The applicant and the Government disagree as to the effectiveness of this investigation. The Court will revert to that issue at the merits stage.

79. As regards a civil action to obtain redress for damage sustained through alleged illegal acts or unlawful conduct on the part of State agents, the Court notes that the applicant's wife brought such a civil claim before the domestic courts. However, both the District Court and the Regional Court dismissed her claim on the grounds that the applicant's death had not been caused by the illegal action of a State agent, as had been confirmed in the criminal investigation, and that she had failed to substantiate her claim that she had sustained damage. The Government nevertheless suggested that the applicant's wife should have further lodged a cassation appeal with the Supreme Court. However, the Government did not refer to any examples of cases in which the Supreme Court had allowed a cassation appeal and considered the merits of a claim where the lower courts had found that the claimant had sustained no damage and where they had relied on the outcome of criminal proceedings in which no unlawful action by a State agent had been disclosed.

80. The Court further reiterates that, even assuming that the applicant had pursued her claim until the Supreme Court and had been successful in recovering civil damages from a State body on account of negligent acts or omissions leading to her late husband's death, this would still not resolve the issue of the procedural obligations arising under Article 2 of the Convention. It recalls in this connection that a Contracting State's obligation under Article 2 of the Convention to conduct an investigation capable of leading to the identification and punishment of that responsible might be rendered illusory if, in respect of complaints under that Article, an applicant were required to exhaust an action leading only to an award of damages (see *Yaşa v. Turkey*, 2 September 1998, § 74, *Reports* 1998-VI).

81. In the light of the above, the Court finds that in the particular circumstances of the case the applicant should be considered as having exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention (see *Baysayeva v. Russia*, no. 74237/01, § 109, 5 April 2007). For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. The alleged failure to protect the applicant's life

(a) The parties' submissions

83. The applicant's representative submitted that the quality and effectiveness of the health care provided to the applicant had been inadequate and superficial. He invoked the Court's case-law regarding the State's obligation to secure to those deprived of liberty the appropriate health care and requiring the State to ensure such detention conditions that would be compatible with the Convention (he referred, *inter alia*, to *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 46, ECHR 2003-V). Moreover, the applicant's representative pointed out that the State was to assure systematic monitoring of the health and living conditions of incarcerated persons and that a long period of detention of a person in ill-health may amount to inhuman and degrading treatment (he cited *Mouisel v. France*, no. 67263/01, § 138, ECHR 2002-IX, and *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI).

84. The applicant's representative underlined that the detention centre's authorities had been negligent in failing to secure the applicant's transfer to the Anin Institute of Cardiology on three occasions. He considered that there had been serious shortcomings in the provision of information to the trial court about the applicant's state of health. In particular, it was inexplicable that the detention centre's doctor had certified on 12 October 2001 that the applicant was fit to participate in the hearings, although the Medical Panel had concluded 12 days earlier that it was necessary to release the applicant. Moreover, he pointed to the 22-day delay in submitting the Panel's decision to the trial court, despite its conclusion that detention constituted an obvious threat to the applicant's health.

85. The applicant's representative submitted that during the last month of his life the applicant had not had access to a cardiologist and could consult a doctor in the hospital wing of the detention centre only exceptionally. After the trial started he was prevented from consulting a doctor at all, as every day he was transferred to the trial court before the doctors' arrival in the Mokotów Detention Centre and returned to his cell after they had finished their duties. The applicant felt very poorly, could not walk and was very weak, as had been seen by other inmates and guards.

86. The Government submitted that the applicant had obtained adequate medical treatment while in detention and that his death had been a result of a constant deterioration in his health, in spite of the efforts of the medical services. They maintained that the applicant had been seen by various doctors when he was admitted to the Mokotów Detention Centre in September 1997, and he had been considered fit for detention. Afterwards, he was examined by cardiologists on a couple of occasions between June 1998 and February 1999, and was treated in the hospital wing of the detention centre in August 1999. The Government pointed out that the applicant had stayed at the Łódź Prison Hospital between March 2000 and January 2001 and that, during that time, he had undergone specialised treatment. He was subsequently transferred to the Mokotów Detention Centre while awaiting the date of admittance to the Anin Institute of Cardiology, but he had been under the care of the doctors in the hospital wing. During the period preceding the applicant's death on 25 October 2001, he had received medical treatment when necessary; in particular, he had been examined by a

doctor on 2, 7, 12, 15, 20 and 21 October 2001.

87. With reference to the dates of surgery scheduled by the Anin Institute of Cardiology, the Government submitted that the first appointment, for 27 July 2001, had been cancelled due to the renovation of the Institute. The Government admitted that there had been some confusion regarding the notification of the second appointment, scheduled for 21 September 2001. However, they noted that the Head of the Mokotów Detention Centre had denied receiving such notification and submitted that the only evidence regarding its late delivery to the applicant had been the envelope provided to the Court by the applicant's wife; this had not been submitted to the prosecuting authorities.

88. Finally, the Government referred to the conclusion of the medical experts, who had found it impossible to assess whether surgery would have improved the applicant's health, taking into account the advanced stage of his illnesses. Moreover, immediately after being informed about the date of the applicant's admittance to the Institute on 26 October 2001, the Medical Panel issued an opinion that he should be released from detention. Unfortunately, the applicant died before the date of the planned surgery. The Government concluded that the applicant's right to life as secured by Article 2 of the Convention had not been violated.

(b) The Court's assessment

i. General principles

89. The Court reiterates that the first sentence of Article 2 § 1 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 *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36, *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII and (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

90. In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies *(Keenan v. the United Kingdom*, no. 27229/95, § 91, ECHR 2001-III).

91. The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment (see *Kudła*, cited above, § 94; *McGlinchey,* cited above, § 46).

Although the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see, under Article 3 of the Convention, *Hurtado v. Switzerland*, 28 January 1994, § 79, Series A no. 280-A).

92. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see *Ireland v. the United Kingdom,* 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in

custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

ii. Application of the general principles in the present case

93. The Court notes that from his arrest in September 1997 until his death in October 2001 the applicant was held in pre-trial detention and, accordingly, was under the control of the Polish authorities. It is not disputed that the applicant suffered from serious heart disease, had had heart attacks prior to his detention, and that his state of health deteriorated during the years he spent in custody. The Government did not deny that the authorities had been aware of his disease, which required periodic hospitalisation and medical interventions and, eventually, qualified him for heart surgery in a civilian hospital. The Court will thus examine whether the medical treatment received by the applicant in detention and particularly during the final months of his life was adequate (see *Tarariyeva v. Russia*, no. 4353/03, §§ 76-89, ECHR 2006-... (extracts)).

94. The Court first notes that in September 1998 and February 1999 the Medical Panel examined the applicant and concluded that his state of health was not incompatible with detention, provided that there was a hospital wing in the detention centre. Nevertheless, in November 1999 the applicant was transferred to the Łódź Detention Centre, which had no hospital wing. The applicant asserted that his transfer was a punishment for his complaint to the Helsinki Foundation. The Government did not comment on that matter and did not explain the reasons for the transfer. It appears from the case file and the parties' submissions that the applicant did not receive any medical treatment during the four months he remained in the Łódź Detention Centre. There is no evidence that he saw a doctor during that time. Although the Court finds it unsubstantiated that the transfer was imposed on the applicant as punishment, it considers that, in consequence, the applicant's health deteriorated to the extent that on 21 March 2000 he lost consciousness and was transferred to the Łódź Prison Hospital, where he had remained for ten months. That period must be regarded as lengthy and indicative of the serious state of the applicant's health.

95. Subsequently, on 24 January 2001, the applicant was transferred to the Mokotów Detention Centre, where he had access to doctors from the hospital wing. The Court notes that the applicant's wife complained in the domestic investigation that this care had been unsatisfactory and that the general practitioners treating the applicant had dismissed all his complaints until he lost consciousness and was treated in the prison hospital for pneumonia (see paragraph 52 above). While these allegations have not been confirmed, it is clear that on 8 August 2001 the applicant was diagnosed with pneumonia and hospitalised in the prison hospital until 10 September 2001. During this time the applicant was examined by doctors from the Anin Institute of Cardiology, who decided that he would undergo laser heart surgery.

96. The Court observes that it has not been disputed that, following the recommendation in the medical opinion of 24 January 2001, the Anin Institute of Cardiology scheduled three dates for the applicant's admittance for surgery: 27 July, 21 September and 26 October 2001. With regard to the first two dates, the Court considers that neither the domestic authorities nor the Government have offered a satisfactory explanation as to why the applicant was not transferred to the Institute. The circumstances of the notification for 21 September 2001, sent by the Institute on 5 September 2001, are particularly troubling, as it is clear from the evidence provided by the applicant's wife that the letter was delayed by a prosecutor for the purpose of censorship until 24 September 2001 (see paragraph 35 above). The Court notes that the domestic authorities unconditionally accepted the Mokotów Detention Centre's assertion that it had never received this notification.

Finally, the third notification for surgery, scheduled for 26 October 2001, was transmitted to the detention centre directly by the applicant's lawyer. However, the applicant died before the date in question.

97. In connection with the scheduled surgery, the Medical Panel examined the applicant and

concluded on 1 October 2001 that detention posed a threat to his health. Given such a recommendation and the imminent date of surgery, the Court considers it particularly striking that notification of this decision to the trial court was delayed by the medical authorities for 22 days. The decision was forwarded to the Regional Court only after the events of 22 October 2001 and was a basis for its decision on that date to release the applicant from detention as of 26 October 2001 (see paragraphs 37, 44 and 47 above). This failure on the part of the authorities was not convincingly explained by the Government; nor did the domestic authorities offer any critical evaluation of the delay.

98. The Court also notes that, since the trial court was unaware of the Medical Panel's decision of 1 October 2001, in examining on 16 October 2001 whether to extend the applicant's detention it relied on the opinion issued by a doctor from the detention centre on 12 October 2001. The latter's conclusion was in total contradiction to the Panel's decision, issued twelve days previously. Moreover, the Court cannot but note that the opinion of 12 October 2001 referred to the fact that the applicant had been examined by the Panel without, however, making it clear that the Panel had altered its previous conclusions and found that detention posed a threat to the applicant's health (see paragraph 39 above).

99. In examining the quality of the medical care received by the applicant, the Court cannot overlook the events of 16 to 22 October 2001. However, the Court's task is made particularly difficult by the fact that the domestic authorities failed to establish the course of the events that took place on 22 October 2001 (see paragraphs 108-109 below). The Government failed also to give a detailed account of the circumstances directly preceding the applicant's death, although they did not contest the version of events submitted by the applicant's representative. In consequence, and since the course of events as submitted by the applicant's representative, and reflected in paragraphs 43-44 above, was to a great extent confirmed in the statements made by the witnesses in the domestic investigation, the Court is prepared to accept it (see paragraphs 56 and 57 above). Neither the domestic authorities nor the Government provided the Court with any explanation as to the applicant's alleged loss of consciousness in the court building on 22 October 2001; his transfer by ambulance back to the detention centre and placement in his cell until about 3.45 p.m., when he was returned, unconscious, to the hospital wing. The Court thus considers that there is insufficient material before it to reach any findings on the appropriateness of the medical care provided to the applicant on 22 October 2001.

As regards the days preceding 22 October 2001, the Court observes that it does not seem to be contested by the Government that on 16, 18 and 19 October 2001 the applicant attended the hearings in his case and therefore had no access to a doctor, as he had remained outside the detention centre during the duty hours of the doctors from the hospital wing (see paragraph 85 above).

100. Finally, the Court reiterates that the applicant was detained at the disposal of the Regional Court, which had been obliged to display diligence in the examination of the prosecutor's motions to extend the applicant's detention. In total, the applicant remained in detention from 17 September 1997 until his death on 25 October 2001; that is, for over four years. The Court notes that the domestic authorities conducting criminal proceedings against the applicant continued to extend his detention, relying, repetitively, on the reasonable suspicion against him and on the complexity of the investigation, which justified his continued detention. On almost every occasion the courts relied on grounds that did not pertain to the applicant individually (see paragraphs 20, 28, 31 and 38 above). The Court considers that the domestic courts failed to give serious consideration to the applicant's state of health, except for general statements on some occasions to the effect that it had not been established that the health of the applicant and of the other co-accused was incompatible with detention (see paragraph 28 above). For example, the decision of 6 February 2001 extended the applicant's detention, with no reference to his health or to the medical certificate of 24 January 2001 which confirmed the need for the applicant to undergo heart surgery in a civilian hospital (see

paragraphs 26 and 28 above). Moreover, in the decision of 15 May 2001, given after three years and eight months of detention, the domestic court again failed to give any consideration to the applicant's health and did not invoke any new grounds that could justify its extension (see paragraph 31 above).

The Court concludes that the grounds given by the domestic authorities were particularly unsatisfactory given the serious state of the applicant's health, and could not justify the overall period of the applicant's detention, which exceeded four years. Moreover, in the light of the circumstances of the case the Court considers that the applicant's health was found to be providing more and more cause for concern and to be increasingly incompatible with detention.

101. The foregoing considerations are sufficient to enable the Court to conclude that the quality and promptness of the medical care provided to the applicant during his four-year pre-trial detention put his health and life in danger. In particular, the lack of cooperation and coordination between the various state authorities, the failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment and constituted a violation of the State's obligation to protect the lives of persons in custody.

There has accordingly been a violation of Article 2 of the Convention on account of the Polish authorities' failure to protect the applicant's life.

2. The alleged inadequacy of the investigation

(a) The parties' submissions

102. The applicant's representative submitted that the investigation into the applicant's death had not been properly carried out. In particular, the prosecutor had failed to question the applicant's cellmates and the prison guards who had witnessed the deterioration in the applicant's health on the days of the hearings. In addition, the prosecutor had waited ten months for an expert opinion and had failed to examine the experts who had prepared it or to order another. The expert opinion on which the prosecution had based its decision to discontinue the investigation had not been exhaustive or independent, on account of the doctors' professional solidarity.

103. The Government submitted that the domestic authorities had conducted a thorough and effective investigation into the circumstances of the applicant's death. The district prosecutor heard six doctors who had been involved in the applicant's treatment. The prosecution's case file included the post-mortem examination and the applicant's medical file and had been analysed by the experts. The Government considered that the prosecutor's decisions had been considerably influenced by the expert opinion, which had found no negligence in the applicant's treatment. That expert opinion was exhaustive and answered all questions put by the prosecutor. The Government maintained that it had rightly served as a basis for discontinuation of the investigation concerning the applicant's death.

(b) The Court's assessment

104. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 86, ECHR 1999-IV). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV). Since often, in practice, the true circumstances of the death in

such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial (see *Makaratzis v. Greece* [GC], no. 50385/99, § 73, ECHR 2004-XI).

105. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Paul and Audrey Edwards v. the United Kingdom*, cited above, § 71). A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, § 139).

106. In the present case, following the applicant's death and complaints made by the Helsinki Foundation and the applicant's wife, the prosecution service opened an investigation in December 2001. A number of doctors involved in treating the applicant were heard, a post-mortem examination was conducted and an expert opinion was prepared. On 28 August 2003 the investigation was discontinued by the prosecutor, who found that no offence had been committed. That decision was upheld by the District Court on 19 January 2004 (see paragraphs 62 and 64 above).

107. At the outset the Court reiterates its above findings that the domestic authorities failed to establish the exact course of the events of 22 October 2001 (see paragraph 99 above). From the prosecutor's decision it appears that he accepted the following course of events, apparently repeated after the Helsinki Foundation's first motion to institute proceedings:

"...on 22 October 2001 the applicant was called from his cell for transferral to the court hearing, and his state of health subsequently deteriorated. Attempts were made until evening to resuscitate him in the hospital of the detention centre. In the evening he was taken to hospital in Lindley Street where, on 24 October 2001, he died."

However, such a course of the events is in contradiction with the evidence given by the witnesses during the investigation (see paragraph 57 above). The prosecutor failed to establish whether the applicant was taken to the court room that morning, what exactly happened in the court building, why the ambulance brought him back to the detention centre and finally what happened before the applicant was brought unconscious from his cell at 3.45 p.m. The prosecutor failed to refer to the witness statements and to assess their accuracy, or to hear other witnesses such as prison guards, the applicant's cell mates or the ambulance team. The Court reiterates that the failure to establish the events of the last hours before the applicant lost consciousness on 22 October 2001 was crucial for an adequate assessment of whether the applicant received proper medical care on that day and whether the authorities had contributed to his death on 25 October 2001.

108. The Court also notes that the prosecutor failed to display diligence even in establishing the real date of the applicant's death. According to the medical documents in the file, and the Government's submissions, the applicant's death was pronounced on 25 October 2001, and not on 24 October 2001 – the date given by the prosecutor in his decision.

109. Such shortcomings in establishing the crucial issue of the course of the events directly leading to the applicant's death must be considered important and as adversely influencing any conclusions the domestic authorities subsequently reached.

110. Admittedly, it was understandable that the prosecutor's conclusions were based on the findings

by the experts who, in their opinion, stated that the applicant's death had been the result of unsuccessful medical treatment for which nobody could be held responsible. However, the prosecutor gave no consideration to the doubts raised by the experts as to the circumstances in which the applicant's surgery was postponed on three occasions, the elucidation of which they judged to be outside their competence. That issue was mentioned in the District Court's decision; however, the latter unconditionally accepted the detention centre's explanation, without giving it any critical assessment. Finally, the Court cannot but note that the investigation lasted over two years, until the prosecutor decided to discontinue it, and that during that time the case lay dormant for over nine months as the prosecutor was waiting for an expert opinion to be prepared. In the context of the case, which required promptness, this period should be considered substantial, in particular since there is no appearance that the prosecutor took any action to discipline the experts.

111. Having regard to the above considerations, the Court concludes that the authorities failed to carry out a thorough and effective investigation into the allegations that the applicant's death was caused by ineffective medical care during his four years in pre-trial detention. The incomplete and inadequate character of the investigation is highlighted by the fact that it was not capable of establishing the facts of the events directly preceding the applicant's death.

There has accordingly been a violation of Article 2 of the Convention in that respect.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Articles 3 and 5 § 3 of the Convention

112. The applicant also complained that he had not received appropriate medical care during his pre-trial detention, in breach of Article 3 of the Convention. He also maintained, relying on Article 5 § 3 of the Convention, that the length of his detention had been excessive.

113. The parties reiterated, *mutatis mutandis*, their arguments concerning the complaint under Article 2 of the Convention. The Government acknowledged that the applicant's pre-trial detention had lasted for over four years, but refrained from expressing an opinion on whether it had satisfied the requirements of Article 5 § 3 of the Convention.

114. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

115. The Court observes that the complaint under Article 3 of the Convention has the same factual background as the above complaint under Article 2 of the Convention. Moreover, in finding a violation of the latter provision the Court also had regard to the reasonableness of the length of the detention and the grounds given by the domestic authorities in extending it (see paragraph 99 above). In the light of this finding the Court considers that it is not necessary to examine the facts of the case separately under Articles 3 and 5 § 3 of the Convention.

B. Article 6 of the Convention

116. Lastly, in his submissions made on 3 October 2006, the applicant's wife's representative complained that in the criminal proceedings against him the applicant had not had a fair trial, in violation of Article 6 of the Convention. In particular, he complained that the applicant had been required to appear at the hearing although he was very ill, which had violated his defence rights.

117. However, pursuant to Article 35 § 1 of the Convention:

“1. The Court may only deal with the matter ... within a period of six months from the date on which the final decision was taken...”

118. Irrespective of possible issues relating to the applicant's wife victim status, the Court notes that the criminal proceedings against the applicant were finally discontinued on 8 November 2001, thus more than six months before the date on which this complaint was submitted to the Court.

It follows that this part of the application has been introduced out of time and must be rejected in

accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. 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

120. The applicant's wife claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

121. The Government contested the claim and considered it exorbitant.

122. The Court considers it reasonable to award the applicant's wife EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

123. The applicant did not claim reimbursement of any costs and expenses incurred before the Court.

C. Default interest

124. 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

1. *Declares* unanimously the complaints concerning Articles 2, 3 and 5 § 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the authorities' failure to protect the applicant's life;

3. *Holds* by five votes to two that there has been a violation of Article 2 of the Convention as regards the absence of an effective investigation into the applicant's death;

4. *Holds* unanimously that there is no need to examine the complaints under Articles 3 and 5 § 3 of the Convention;

5. *Holds* unanimously

(a) that the respondent State is to pay the applicant's wife, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 9 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Nicolas Bratza
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the

dissenting opinion of Judges Garlicki and David Thór Björgvinsson is annexed to this judgment.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGES GARLICKI AND DAVID THÓR BJÖRGVINSSON

We fully concur with the finding of a violation of the substantive aspect of Article 2. It is obvious that when the State decides to keep a sick person in prison, it must provide him or her with proper medical care.

We have more problems with the procedural aspect of Article 2. In particular, it is difficult for us to accept that there was no effective investigation into the applicant's death.

The investigation took place promptly, was carried out by an authority independent from the Prison Department and involved some participation of family members.

We do not share the opinion that "the domestic authorities failed to establish the exact course of the events" (paragraphs 99 and 107). In our view, the investigation allowed most of the facts to be established, particularly those relevant to the events of 22 October 2001. The description of those facts contained in paragraphs 9 to 48 of the judgment – that had to be based upon the investigation file – is fairly comprehensive. The investigating authorities acted with sufficient diligence: all those who could contribute to the establishment of facts had been heard by the prosecutor and expert opinions had been ordered and examined. It is true that other witnesses could also have been summoned (see paragraph 107 *in fine*), but we are not convinced that their testimony could have adduced relevant information. Prison guards and cell mates could confirm that the applicant had been very sick, but this was also established by other witnesses as well as by experts.

Article 2 requires that an effective investigation should be carried out in all situations where there has been a substantive violation of Article 2. But it cannot be interpreted in such a way that an investigation is only effective when it results in a criminal charge against individual State agents. Criminal responsibility on the part of individual State agents may of course rightly be ruled out on the basis of principles differing from those applying to the international-law responsibility of the Convention States. This is particularly true in the circumstances of this case where State responsibility is not engaged on the basis of the actions of identifiable individual State agents but rather by reference to the lack of quality and promptness of the medical care provided, the lack of cooperation and coordination between the various State authorities and other factors engaging different authorities and many individuals contributing to the breach (see paragraph 101 for further details). Although such reasons are sufficient to engage State responsibility under the Convention they may not be sufficient to charge and convict any individual person. We have the impression that in this case the majority have forgotten about this difference.

DZIECIAK v. POLAND JUDGMENT

DZIECIAK v. POLAND JUDGMENT