



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

FOURTH SECTION

CASE OF WASILEWSKA AND KAŁUCKA v. POLAND

(Applications nos. 28975/04 and 33406/04)

JUDGMENT

STRASBOURG

23 February 2010

FINAL

23/05/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the cases of Wasilewska and Kałucka 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,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 2 February 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 28975/04 and 33406/04) 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 two Polish nationals, Ms Sylwia Wasilewska and Ms Barbara Kałucka (“the applicants”), on 29 July 2004 and 23 August 2004 respectively.

2. The applicants were represented by Ms J. Agacka-Indecka, a lawyer practising in Łódź. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicants complained under Article 2 of the Convention that Mr Kałucki, the first applicant's boyfriend and the second applicant's son, was unjustifiably killed by the police and that the authorities failed to carry out an effective and thorough investigation into the circumstances of his death.

4. On 16 September 2008 the Court decided to give notice of the applications to the Government. It also decided to join the cases (Rule 42 § 1 of the Rules of Court) and to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1980 and 1949 respectively and they live in Łódź.

A. The events of 23 August 2002 as submitted by the applicants

6. On 23 August 2002 Mr Przemysław Kałucki, who at the material time was 26 years old, arrived at the Spała Sports Centre accompanied by two persons, G.B. and T.N. They parked their car, a Volkswagen Passat, next to a fence surrounding the Centre.

7. Suddenly, a column of four vehicles, three minibuses and one saloon car, arrived. Several armed men jumped out of the vehicles. It later turned out that they were police officers from the Łódź and Tomaszów Mazowiecki Police Forces and from a special anti-terrorist group.

8. Some of the officers wore plain clothes and others combat uniforms with bulletproof vests and helmets. Not all the police officers were wearing fluorescent vests and they bore no other visible signs that would indicate that they were from the police. In particular one police officer, later named witness no. 2, as was visible on the film recorded by the camera of the private television station TVN, was not wearing such a vest. The TVN television had been preparing a documentary on the work of the police and had placed cameras in the police cars. A short documentary "*Criminal Games*" was prepared following the operation.

9. Mr Kałucki and the other two occupants of the car thought they were about to be robbed and tried to escape in the direction of the swimming pool which led to a dead end. G.B. took the driver's seat and Mr Kałucki climbed into the back-seat behind him. The third man, T.N., did not manage to get inside the car and tried to run away.

10. Mr Kałucki and G.B. drove between the second and third police vehicles while the police opened fire, shooting repeatedly at the driver and the passenger. The orders of the commanding officer had not been complied with as he had ordered that the police officers from the last vehicle should arrest the suspects. Instead many other officers had left their vehicles and attempted to stop the car by firing automatic weapons.

11. The whole operation lasted fifteen seconds during which about 40 bullets were fired at the car as it was driving off, according to an expert, at no more than 20 k.p.h. In spite of the claims by the police officers that they had been aiming at the tyres, none of the tyres had been damaged.

12. The driver lost control of the vehicle and hit the fence. Mr Kałucki was severely wounded and was removed from the car by one of the police officers, who pulled him by the head. The first applicant submitted that Mr Kałucki was of a heavy build, weighing about 120 kg, and at the time of the events was observed to have five bullet wounds.

13. No arrangements had been made for an ambulance to be present. Although the police officers testified that they had attempted to resuscitate Mr Kałucki and stop the haemorrhage, the autopsy reports made no mention of this. Mr Kałucki died before the arrival of an ambulance twenty minutes after the shooting. The driver of the car, G.B., was seriously wounded.

B. The proceedings against the police

1. The prosecutor's decision

14. On an unspecified date both applicants requested the Łódź District Prosecutor to initiate a criminal investigation into the death of Mr Kałucki.

15. The prosecutor took testimony from all the police officers who had taken part in the operation, as anonymous witnesses (*świadek incognito*).

16. On 18 August 2003 the Łódź Regional Prosecutor decided to discontinue the investigation. The prosecutor established that the operation had been initiated upon information that two armed criminal gangs would engage in a confrontation in the Spół Sports Centre. According to the information obtained by the police the gangs would be armed with semi-automatic Kalashnikov-type weapons. Twenty-two police officers had arrived in four unmarked cars, wearing balaclavas and bulletproof vests. The officers from the Łódź Police Force were in plain clothes but were wearing fluorescent vests with the word “Police” marked on them. The other group, from a special anti-terrorist force, were wearing uniforms and dark-coloured vests marked “Police”.

17. The police operation had started when the commanding officer received information that a suspicious group of people had gathered on the grounds of the Sports Centre. After he had given the order to move, the column of cars had approached the Volkswagen Passat that was parked at right angles to the street. The commanding officer had ordered the arrest of three men who were standing next to the Passat and who turned out to be Mr Kałucki, G.B. and T.N. The arrest was to be carried out by police officers from the last two cars in the column. The police vehicles had moved one after the other, blocking the street and the suspects' car. The suspects had tried to escape and two of them had jumped into the car and driven off fast, taking advantage of a gap that had been left between the second and third police vehicles. By this time almost all the police cars had stopped and the police officers had got out. They were armed with guns and semi-automatic rifles. A police officer, who in the proceedings was named anonymous witness no. 4, got out of the second vehicle and found himself in the way of the Passat so he jumped aside to avoid being hit by the rapidly moving car. He shouted “police” and started shooting, aiming at the tyres of the suspects' car. He fired eleven shots from his sub-machine gun (*pistolet maszynowy Glauberyt*). Another police officer, witness no. 2, got out of the first vehicle and found himself facing the escaping Passat. He was wearing a fluorescent vest marked with the word “Police”, and shouted “stop, police” but the driver failed to obey. At the last moment, the witness had had to jump aside but had nevertheless been hit by the car and sustained an injury to his leg. He had not lost balance, and fired five shots from his gun (*pistolet marki Glock*) at the tyres of the Passat. A policeman from the anti-terrorist forces, witness no. 3, had stepped out of the second car and had also

attempted to stop the car by firing eleven shots from his sub-machine gun (*pistolet maszynowy MP-5*). He aimed at the engine, front tyres and, as the car was passing him, its side and the rear tyres. The next police officer, witness no. 6, had followed police officer no. 2 out of the first police vehicle. As the suspects' car was passing him he noticed that the driver was aiming at him with an object resembling a gun. The police officer then fired a short burst from his machine gun (*karabin* Kalashnikov) aiming at the lower side of the car and tyres. Finally, another officer from the anti-terrorist forces, witness no. 18, had got out of the third vehicle. Noticing that the suspects' car had passed one of the police vehicles and hit officer no. 2, he had run after the escaping vehicle, shouted to the driver to stop and opened fire with his machine gun (a Kalashnikov), aiming at the car's left rear tyres. The other police officers had run after T.N., the remaining suspect who had not managed to get into the car, and overpowered him.

18. The suspects' car stopped on reaching the metal fence. Witness no. 18 had gone to the car and ordered the driver to surrender. He had helped him out of the car and attended to him as he was bleeding. Anonymous witness no. 7 had opened the rear door of the car and removed Mr Kałucki, pulling him by the head as he had not reacted to his orders. He did not resist but was still alive. The police officer had tried to staunch the bleeding from his back and called the commanding officer, who brought over a medical ventilator and started to resuscitate him until the arrival of the ambulance.

19. The prosecutor also established that Mr Kałucki's death had been caused by a bullet wound to the torso. The bullet breached the abdominal aorta causing a massive haemorrhage. It did not leave his body and the experts were able to establish that it had been fired by witness no. 18. In addition to the fatal wound, Mr Kałucki had sustained a further five surface bullet wounds to his head, right arm, lower torso, left torso and left thigh.

20. Following a search of the Passat two guns had been found, one on the floor behind the driver's seat and the second in the pocket at the back of the driver's seat.

21. The other suspect, G.B., had sustained two bullet wounds to the torso and head, the latter caused by a shot fired by witness no. 2. As a result, he had become severely disabled, suffering from paralysis on one side of his face and deafness.

22. The prosecutor established that the driver of the Passat had failed to obey the order to stop, accelerated towards witness no. 2, and had therefore acted with the intention of killing him. The prosecutor concluded that in those circumstances the police officers had had the right to use their firearms in pursuing persons against whom there was a reasonable suspicion that they had attempted to commit homicide and were armed. According to the prosecutor, the investigation materials showed that when using their weapons the police officers had followed all the relevant rules and their sole

intention had been to stop escaping suspects. The prosecutor thus decided to discontinue the investigation as no crime had been committed.

2. The appellate proceedings

23. Both applicants appealed against that decision. They submitted that G.B. and Mr Kałucki had not been armed as the guns found in the car had not been used and did not have their fingerprints on them. The gun linked by the expert to Mr Kałucki by scent identification had been hidden in the pocket of the car seat and thus could not have been used by him. The applicants alleged that the prosecutor had failed to deal with many inconsistencies in the testimonies of the police officers. Moreover, it had not been explained why no blood stains had been found in the car even though Mr Kałucki had died of a haemorrhage and suffered many bullet wounds. The applicants also blamed the police for not preparing the operation properly. They pointed to the fact that in total twenty-three armed police officers had participated in the operation during which forty shots had been fired at the car (including one which had passed through a point above the driver's door handle, five through the boot, eight through the rear bumper, and four through the driver's seat and back seat). The car's tyres remained undamaged despite the testimonies of the police officers that they had all aimed at the tyres. The applicants therefore submitted that the force used by the police officers against two unarmed men had been disproportionate.

24. On 25 February 2004 the Tomaszów Mazowiecki District Court (*Sąd Rejonowy*) dismissed the applicants' appeals and upheld the prosecutor's decision. It found that no offence had been committed and the law, in particular section 17(1)(6) of the Police Act, had been complied with. The court stated:

“When seeing the police, [G.B. and Mr Kałucki] tried to escape. This attempt was met with a firm but proper response from the police officers participating in the operation, in particular anonymous witness no. 2, who stood in the path of the oncoming car and attempted to stop it by shouting: 'Stop, police'. One should recall at this point the very important circumstance that this witness was wearing a fluorescent vest with the word 'Police' marked on it, leaving no room for doubt about his function. The car was heading straight for the intervening police officer who only managed to avoid being hit by G.B. [who was driving the car] through his training and expertise...

The court has established, after analysing the evidence, that when firing the shots the police officers followed all the procedures necessary in the situation and their intention was only to stop the speeding car and to arrest the fugitives. They used their guns in the direct pursuit of the suspects, who had made an attempt on the life and health of the police officers...

The court does not agree with the submission made in the appeal lodged by the [first applicant's] lawyer that Przemysław Kałucki and [G.B.] had not used any firearms and that no shot had been fired by them. The actions of the police officers were not in response to shots being fired by the suspects. They attempted to arrest persons in respect of whom there was a reasonable suspicion that they were armed, without a

relevant licence, and who had made a direct and illegal attempt on the life and health of the police officers....”

25. That decision was final as no appeal lay against it.

C. The criminal proceedings against some of the suspects

26. After the events, G.B. and some other persons arrested in the Spala Sports Centre were indicted on various charges.

27. It appears that in the course of these proceedings the police officers who had participated in the operation again gave evidence in court. The applicants submitted excerpts from the transcript of one of the hearings held on an unspecified date when the court heard witness no. 2. The witness repeated the version of events he had given in the investigation against the police. Afterwards he was shown the episodes from the film recorded by a TVN camera. He then testified as follows:

“I saw on the film that a person, probably me, jumped out of a car and did not have a yellow vest on, but from what I can remember I must have put on this vest when drawing alongside the second vehicle. It was caused by the fact, mentioned by me before, that according to the first plan of the operation, the team in the vehicle I was in was supposed to make arrests at the swimming pool [located deeper inside the grounds of the Centre, where some other suspects were arrested]. That's why I was taken by surprise when the order of the commanding officer came and so did not have my vest on when I got out of the car. I was not wearing a helmet either, as I did not put it on and it remained in the car. At this moment I do not remember if I got out of the car with the vest in my hand but I believe so.”

28. It appears that in December 2003 the Piotrków Trybunalski Regional Court convicted G.B. of assaulting a police officer and sentenced him to six years' imprisonment.

29. It appears that subsequently in this set of proceedings, on 29 January 2005, an expert opinion was submitted to the court by a road accident expert. The expert was unable to establish beyond reasonable doubt the exact location of witness no. 2 and the Volkswagen Passat during the events. He was also unable to give a conclusive opinion on whether the driver of the Passat had had time to change direction in order to avoid hitting witness no. 2, who had emerged suddenly from his police car.

II. RELEVANT DOMESTIC LAW

30. Article 16 of the Police Act of 6 April 1990 (*Ustawa o Policji*) reads, in so far as relevant:

“1. If a lawful order given by a police authority or police officer has not been complied with, a police officer may apply the following coercive measures:

1) physical, technical and chemical means to restrain or escort persons or to stop vehicles;

- 2) truncheons;
- 3) water cannons;
- 4) police dogs;
- 5) rubber bullets fired from firearms.

2. Police officers may apply only such coercive measures as correspond to the exigencies of a given situation and are necessary to ensure that their orders are obeyed.”

31. Section 17 of the Police Act provides:

“1. If the coercive measures mentioned in section 16 (1) prove insufficient, or their use in the circumstances is not possible, a police officer may use firearms exclusively:

1) in order to fend off a direct and illegal attempt on the life, health or liberty of a police officer or other person, or to prevent activities directly related to such an attempt,

2) against a person who fails to obey an order to drop immediately a weapon or another dangerous instrument whose use poses a threat to the life, health or liberty of a police officer or other person,

...

6) in the direct pursuit of a person in relation to whom the use of firearms was lawful under paragraphs 1-3 or 5, or who is reasonably suspected of committing a crime, an attempted act of terrorism, abduction in order to obtain a ransom or other demand, mugging, robbery, violent assault, intentional serious bodily injury, rape, arson or other intentional threat to public security, life and/or health,

...

2. In operations by organised units or sub-units of the Police, firearms shall be used only on the direct orders of the commanding officer.

3. Firearms shall be used so as to cause minimum damage to the person targeted, and without any intention of depriving that person of his or her life and without endangering the life or health of others.

4. The Council of Ministers shall issue a resolution defining the conditions and operational procedural requirements for the use of firearms by the organised Police detachments mentioned in paragraph 2.”

THE LAW

32. The Court notes that the account of the facts surrounding the death of Mr Kałucki has been furnished by the applicants. They submitted to the

Court the documents pertaining to the investigation opened into their allegations and some documents relating to the second set of proceedings.

33. The Government, however, did not submit observations on the admissibility and merits of the applicants' complaints. The Government also failed to provide documents concerning the subsequent criminal proceedings against some suspects and which were regarded by the Court as important to the establishment of facts and assessment of the thoroughness of the investigation. Moreover, they did not offer any explanation for their failure to submit the information requested by the Court.

34. In these circumstances, the Court will examine the admissibility and merits of the applicants' complaints solely on the basis of their submissions and the documents relating to the domestic proceedings provided by them (see *Fedotov v. Russia*, no. 5140/02, § 61, 25 October 2005 and *Kostadinov v. Bulgaria*, no. 55712/00, § 50, 7 February 2008).

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

35. The applicants complained that Mr Kałucki had been killed in breach of Article 2 of the Convention. They alleged that the police officers had used machine and other guns from very close range on unarmed men who were panicking because they thought they were being robbed. Thus the police had used lethal force in circumstances where this was not absolutely necessary and in an excessive manner. They also complained that the police operation, which had been initiated on the basis of an unconfirmed anonymous call, was not properly prepared and was badly directed.

The applicants further complained that the authorities had failed to conduct an effective investigation into Mr Kałucki's death. For example it had not been clarified why no traces of his blood had been found in the car, in spite of the fact that he had died of massive bleeding. The sequence of events had not been clarified by the prosecutor and some of the evidence had not been properly secured. In particular the CCTV and TVN recordings had been destroyed in unknown circumstances.

36. Article 2 of the Convention provides:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

37. The Government did not submit any comments regarding the admissibility and merits of the case.

A. Admissibility

38. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicants' lawyer in general submitted that there had been a violation of the Convention.

40. As mentioned above, the Government did not submit any comments on the merits of the case.

2. The Court's assessment

(a) As regards Mr Kalucki's death

41. Article 2, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe. The Court must subject allegations of a breach of this provision to the most careful scrutiny. In cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 150, Series A no. 324, and *Makaratzis v. Greece* [GC], no. 50385/99, §§ 56-59, ECHR 2004-XI).

42. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c) of the second paragraph of Article 2. This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a

democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the permitted aims (see *McCann and Others*, cited above, §§ 148-149).

In that connection the Court reiterates that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others (see *Makaratzis*, cited above, § 66 and *McCann and Others*, cited above, § 200).

43. Furthermore, the Court has consistently held that, in principle, there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the loss of an opportunity (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 95, ECHR 2005-VII).

44. Accordingly, and with reference to Article 2 § 2 (b) of the Convention, the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity (*ibid.*).

45. In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards (see *Makaratzis*, cited above, §§ 57-59, and the relevant provisions of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, set out in the *Makaratzis* judgment). In line with the above-mentioned principle of strict proportionality inherent in Article 2 (see *McCann and Others*, cited above, § 149), the national legal framework regulating arrest operations must make recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed. As the text of Article 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force (see *Makaratzis*, cited above, § 58 and *Andreou v. Turkey*, no. 45653/99, § 50, 27 October 2009).

46. In determining whether the force used is compatible with Article 2, it may therefore be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (see *Bubbins v. the United Kingdom*, no. 50196/99, § 136, ECHR 2005-II (extracts) § 79).

47. Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident (see *Makaratzis*, cited above, § 58). In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.

48. Against this background the Court must examine in the present case not only whether the use of lethal force against Mr Kałucki was legitimate but also whether the operation was regulated and planned and organised in such a way as to minimise to the greatest extent possible any risk to his life (see *Makaratzis*, cited above, § 60).

49. Turning to the facts of the present case the Court accepts that the police officers intervened in order to arrest persons who were suspected of belonging to a gang and being armed – among them Mr Kałucki. Indeed firearms were found in Mr Kałucki's car although there is no evidence that Mr Kałucki or any other suspects had intended to use them (see paragraph 20 above). Moreover, the suspects attempted to escape in a car and it was alleged that this created a danger for the police officers of being hit by it.

The police officers opened fire allegedly with the purpose of stopping the escaping suspects, who, according to the authorities, had made an attempt on the life or health of a police officer.

50. Consequently, the Court observes that the police considered that there was a need to resort to the use of their weapons in order to neutralise the threat posed by its driver to the police officers and stop the car, so that they could arrest the suspects (see *Makaratzis*, cited above, § 66).

51. The Court must therefore examine whether the considerations which led the police to open fire were compatible with Article 2 of the Convention and whether the level of force used was absolutely necessary.

52. The Court accepts that the use of weapons could be regarded as absolutely necessary and justified under paragraph 2 of Article 2 of the Convention as long as those participating in the police operation could be considered as having honestly believed that a police officer had been exposed to a clear and immediate danger. In the circumstances of the instant case it could be argued that such danger existed, and the use of firearms could be regarded as absolutely necessary, before the suspects' car had passed the police officer.

53. However, in the present case the majority of the shots were fired at the escaping vehicle, once it had passed the police officer who had been allegedly hit by it. At that moment there had been no direct danger to the

police officer and the only intention of the police officers had been to prevent the escape of the suspects.

The following elements illustrate the manner in which lethal force was used in the instant case:

(i) Within a very short period, five police officers fired between five and eleven shots each, or a series of shots from automatic guns, aiming at the car in which the two men were trying to escape. At that time it cannot be said that the suspects still posed a threat to the police officer, witness no. 2. The car was moving, according to an expert, no faster than 20 k.p.h towards a swimming pool from which there was no way out.

(ii) The police officers were shooting mostly at the side of the car or from the rear towards the front of the vehicle. In particular the anonymous witness no.18 who had fired the lethal shot at Mr Kałucki had run after the escaping vehicle and opened fire at the rear of it with his Kalashnikov gun (see paragraph 17 above).

(iii) The police officers were allegedly aiming at the tyres; however, in the domestic investigation it was discovered that the tyres remained untouched. Mr Kałucki, on the other hand, in addition to the fatal wound, sustained about five other superficial wounds to his torso or head. The rear bumper, the boot also located at the rear of the car, the door at the height of the handle and the driver's and back seats had been severely damaged by bullets (see paragraph 23 above).

54. Serious issues also arise as to the conduct and organisation of the operation. Firstly it should be noted that Mr Kałucki was not killed in the course of an unplanned operation which gave rise to developments to which the police were called upon to react (compare and contrast *Makaratzis*, cited above, § 69). It was a planned operation in which significant police forces were deployed, although they acted upon anonymous and rather vague information that two criminal gangs would be confronting each other. In particular, it appears that the police did not know how many suspects would be involved or whether they would actually be armed.

55. The Court further notes that the subsequent proceedings against the suspects cast doubts on whether the intervening officers were clearly identifiable as being from the police (in particular whether witness no. 2 whom the suspects allegedly tried to kill with their car had been wearing a fluorescent jacket, see paragraph 27 above). It also appears that the order of the commanding officer to carry out the arrest of Mr Kałucki by the officers from the last car was changed and police officers leapt out of all the cars and tried to stop the car by shooting at it. Moreover, in planning an operation involving a large number of officers and an unknown number of suspects, the police failed to arrange for an ambulance to be present. In consequence the victims waited about 20 minutes for its arrival.

56. Finally, the Court observes that the Government have failed to submit any comments regarding the proportionality of the level of force used by the police, the organisation of the police action and whether an

adequate legislative and administrative framework had been put in place to safeguard citizens against arbitrariness and abuse of force.

In particular, the Government have not sought to argue that the use of force was no more than absolutely necessary for one or more of the legitimate purposes set out in paragraph 2 of Article 2 of the Convention. The Court reiterates that this should have been a point for the Government to advance, and failure to do so could result in the Court's finding a violation of Article 2 under its substantive limb without examining whether the killing of Mr Kałucki was justified under Article 2 § 2 of the Convention (see *Akkum and Others v. Turkey*, no. 21894/93, § 239, ECHR 2005-II (extracts)).

57. Having regard to the circumstances as analysed above the Court considers that the manner in which the police responded and the degree of force used cannot be considered to have been strictly proportionate to the aim of preventing Mr Kałucki's escape and arresting him or averting the perceived threat posed by him. Moreover, the operation was not planned so as to reduce to a minimum recourse to lethal force.

58. In such circumstances the Court finds that there has been a violation of Article 2 of the Convention, under its substantive head, in respect of Mr Kałucki's death.

(b) As regards the investigation into Mr Kałucki's death

59. 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 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also 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 *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001 and *Bubbins*, cited above, § 137).

60. The Court must assess whether that investigation met the requirements of Article 2 of the Convention. In this respect the Court notes that its knowledge of the proceedings at issue is limited to the materials from the investigation file submitted by the applicants. The Government failed to submit materials concerning the subsequent criminal proceedings

which had been considered by the Court to be crucial to the establishment of the facts and to an assessment of the thoroughness of the investigation (see paragraphs 32-37 above). The Court will assess the merits of the complaint on the basis of the available documents (see paragraph 34 above).

61. In the instant case, following the incident in the Spala Sports Centre, the prosecutor opened an investigation. However, the investigation was discontinued by the prosecutor whose findings were upheld by the District Court on 24 February 2004. The prosecutor had established that the sole intention of the police officers had been to stop the escaping suspects, who had attempted to kill a police officer by hitting him with their car. The domestic court established that the police officers had been persuaded that Mr Kałucki and his associates belonged to a gang and were armed. Thus, when they attempted to escape in a car, hitting one police officer, the police officers had rightly opened fire with the aim of stopping them. These arguments were sufficient for the authorities to discontinue the investigation.

62. However, the Court does not consider such an approach to be satisfactory and finds that the authorities failed to apply the standards embodied in Article 2 of the Convention (see paragraph 59 above). The Court reiterates that when, as in the case under consideration, the police decide to resort to potentially lethal force, the level of such force cannot be more than absolutely necessary for achieving its purpose. The national authorities, however, failed to address this question. There was no examination of whether a lesser degree of force would have been sufficient to stop the escaping vehicle, taking into account the fact that most of the shots were fired when there was no longer a threat to the life or limb of the police officer, as alleged. In a situation where five police officers used sub-machine and machine guns and opened fire “in pursuit” of the escaping suspects the prosecutor and the court were under an obligation to assess whether recourse to firearms had been justified and the level of force used by the police proportionate to the achievement of the permitted aims.

Furthermore, the manner in which the operation was carried out was not examined and the authorities unconditionally embraced the statements of the police officers who maintained that they had been aiming at the tyres with the sole aim of stopping the vehicle notwithstanding the fact that the tyres remained untouched and all the shots had hit the people in the car and the upper part of the car.

63. In view of the lack of a thorough and effective investigation into the death of Mr Kałucki in that the necessity of using such a high level of lethal force was not called into question, the Court finds that there has been a violation of the procedural limb of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

64. The first applicant complained of a violation of Article 3 of the Convention in that Mr Kałucki had been subjected to inhuman treatment prior to his death. The applicant referred to the fact that the police had removed Mr Kałucki from the car by pulling him by the head, which must have caused him unbearable suffering. Moreover, no first aid had been offered to Mr Kałucki until the arrival of the ambulance twenty minutes later.

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

66. 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 shortcomings in the organisation of the police operation, in particular the unavailability of an ambulance at the scene (see paragraph 57 above). In the light of these findings the Court considers that it is not necessary to examine the facts of the case separately under Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicants submitted that they had sustained non-pecuniary damage but they did not claim any specific sum in this respect. The second applicant also claimed reimbursement of her medical treatment and the first applicant school expenses for her and Mr Kałucki's daughter.

69. The Government contested these claims.

70. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, taking into account the particular circumstances of the case, it awards each of the applicants 20,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicants, who were represented by a lawyer, did not claim reimbursement of any costs and expenses.

C. Default interest

72. 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 applications admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention on account of Mr Kałucki's death;
3. *Holds* that there has been a violation of Article 2 of the Convention as regards the absence of an effective investigation into Mr Kałucki's death;
4. *Holds* that there is no need to examine the complaint under Article 3 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay each of the applicants, 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), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (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* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President