

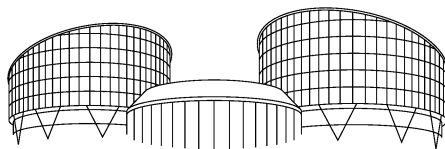
La CEDU sul diritto alla vita
(CEDU, sez. I, sent. 14 maggio 2020, ric. n. 24913/15)

La CEDU si pronuncia sul diritto alla vita. E' il caso del figlio del Sig. Jablonska morto a seguito di un controllo da parte della polizia nel quale è stato immobilizzato con forza ed esposto a gas lacrimogeni. Il ricorrente ritiene che c'è stata una violazione dell'art. 2 Conv.

La Corte ha ricordato che per l'art. 2 Conv. la privazione della vita può essere causata non solo nei casi di uccisione intenzionale ma anche nelle situazioni in cui è consentito "usare la forza".

A seguito della morte del giovane è sorto l'obbligo procedurale di indagare sulle circostanze della morte. Tuttavia l'indagine non ha fornito risposte chiare alle importanti questioni sollevate come ad esempio la modalità con cui gli ufficiali hanno usato la forza e se esistesse un nesso causale tra la forza usata dagli agenti e la morte del giovane.

La Corte, ritenendo l'indagine inadeguata in quanto non è riuscita a determinare le circostanze del caso, ha dichiarato la violazione, sotto il profilo procedurale, dell'art. 2 Conv.



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

FIRST SECTION

CASE OF JABŁOŃSKA v. POLAND

(Application no. 24913/15)

JUDGMENT

Art 2 (procedural) • Effective investigation • Death after police intervention to arrest fleeing suspect • Failure to provide clear answers to the circumstances surrounding the use of force, origin and consequences of injuries, and any causal link between the force used and the death, despite eyewitness testimonies and forensic evidence

Art 2 (substantive) • Necessity and proportionality of the use of force • Highly probable incidence of pre-existing medical condition of the deceased • Circumstances not sufficiently reliable and objective, preventing the Court from making a reliable assessment (of whether the actions of the police officers were Article 2 compliant) • No delay in the provision of medical care

STRASBOURG

14 May 2020

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 Jabłńska v. Poland,

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

Ksenija Turković, *President*,
Krzysztof Wojtyczek,
Aleš Pejchal,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges*,
and Abel Campos, *Section Registrar*,

Having regard to:

the application 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, Ms Teresa Jabłońska (“the applicant”), on 12 May 2015;

the decision to give notice of the application to the Polish Government (“the Government”);

the parties’ observations;

Having deliberated in private on 21 April 2020,

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

INTRODUCTION

The case concerns the death of the applicant’s son during an arrest attempt and the lack of an adequate investigation in that respect.

THE FACTS

1. The applicant was born in 1954 and lives in Warsaw. She had been granted legal aid and was represented by Mr Ł. Brydak, a lawyer practising in Warsaw.
2. The Government were represented by their Agent, Mrs J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.
3. The facts of the case, as submitted by the parties, may be summarised as follows.

EVENTS OF 18 JUNE 2013

4. On the evening of 18 June 2013 the applicant’s son, D.J., was driving his car in the company of a friend, M.S. They were stopped at a police checkpoint for a random search of the car. During the search the officers found two small packets containing white powder (later identified as amphetamine).

5. The officers decided to arrest D.J., but he refused to comply with their orders and began walking away from the car. Two officers (W.J. and M.K.) attempted to overpower and handcuff him; however they failed. Shortly afterwards, six more officers arrived at the scene. A struggle ensued and D.J. fell face down on the ground. The officers allegedly hit him with a truncheon and used tear gas. As submitted by the applicant, the officers also kicked D.J. in the head (at least once) and attempted to strangle him. The Government argued that those allegations had not been confirmed during the domestic investigation.

6. Eventually, the officers managed to subdue and handcuff D.J. He was lying face down on the ground and his head was bleeding. After a while, the officers turned him on his back and realised that he was not breathing. Two passing paramedics offered help and began resuscitation. Two of the officers, W.J. and A.O., also participated in the resuscitation attempt. Subsequently, an ambulance arrived and its crew continued the resuscitation attempts, which ended unsuccessfully forty minutes later when D.J. was pronounced dead.

PROCEEDINGS AGAINST THE POLICE

Evidence gathered by the prosecutor

7. An investigation into the events set out above was opened on 19 June 2013 by the Warsaw Wola District Prosecutor. Subsequently, it was transferred to the Warsaw Śródmieście District Prosecutor.

8. On 19 June 2013, a post-mortem examination and a forensic inspection of D.J.'s body (*ogłędziny zwłok*) were carried out. The forensic expert established that his death had been caused by acute cardiorespiratory failure related to chronic circulatory insufficiency. The expert noted that D.J.'s neck injuries might also have had an impact on his death.

9. On the same day, a search of D.J.'s house and shop was carried out, during which 53.94 g of cocaine was found.

10. During the investigation into the circumstances of D.J.'s death, the applicant, together with her two daughters, submitted numerous evidentiary requests to the prosecutor. In particular, they asked to have the recordings from the security cameras secured, to have D.J.'s car examined for any traces of blood, to have evidence taken from certain witnesses and also to have the details of other potential witnesses established (persons whose car registration plates had been recorded on CCTV).

11. On 7 February 2014 experts from the Department of Forensic Medicine at Warsaw Medical University ("the Forensic Institute") submitted a toxicology report to the district prosecutor. According to the report, there were traces of cocaine and cannabis in D.J.'s body, which indicated that he had been a cocaine user.

12. On 28 May 2014 the district prosecutor asked the Forensic Institute to prepare an expert report and reply to the following seven questions:

"1. How did D.J.'s injuries originate?

2. ... how [can] D.J.'s neck injuries ... be classified with reference to the provisions of the criminal code and also [could] these injuries ... have occurred in the circumstances as described by the police officers[?]

3. What impact on the victim's death did his neck injuries have?

4. In view of the post-mortem results and the reconstruction of the incident, can it be concluded that tear-gas spray was used on D.J., and if yes, did it have an impact on his death?

5. State, if possible, within what timeframe (how soon) did D.J.'s death occur?

6. Did the actions of any of the police officers expose the victim to a direct risk of death or grievous bodily harm?

7. What was the direct cause of D.J.'s death?"

13. On 6 August 2014 the forensic expert, Dr A.B., submitted a report answering the questions put by the prosecutor. With reference to D.J.'s neck injuries (questions nos. 1, 2 and 3) the expert stated that they had been inflicted by a hard blunt object impacting with considerable force. According to her, those injuries could have occurred when the officer M.K. had attempted to restrain D.J. by applying a type of neck hold from behind. Since M.K. was much smaller than D.J., he had been in fact hanging on D.J.'s neck. This strong pressure on D.J.'s neck had exposed him to a direct risk of death or grievous bodily harm. However, in view of the "dynamics of the incident", the expert could not confidently indicate which person had been directly responsible (question no. 6). It could also not be excluded that those injuries had occurred when D.J. had fallen on the ground.

14. The expert further stated (question no. 7) that D.J.'s death had been caused by acute cardiorespiratory failure related to chronic circulatory insufficiency. The results of the post-mortem examination did not indicate that his death had been caused by physical injuries. Most of his injuries had been superficial. It had not been established that the neck injuries had caused him to choke. This theory was confirmed by the results of the reconstruction, as the neck injuries had occurred at the beginning of the incident.

15. Lastly, the expert was of the opinion that the death of the applicant's son could have occurred as a result of so-called "excited delirium syndrome" ("EDS"). She stated that such a condition could not be identified anatomically during a post-mortem examination, but only afterwards on the basis of the victim's characteristics and when other causes of death were excluded. Deaths

often occurred during police intervention and individuals who suffered EDS were often heavy-set men. During arrest they demonstrated extraordinary physical strength and resistance to pain. Death happened within the first hour of the incident. Such cases were most frequently associated with cocaine abuse. D.J. was found to have been a cocaine user and to have been suffering from a chronic circulatory insufficiency.

Prosecutor's decision

16. On 25 September 2014 the Warsaw Śródmieście District Prosecutor discontinued the investigation into the death of the applicant's son, which related to offences defined in Article 155 of the Criminal Code (manslaughter) in conjunction with its Article 231 § 1 (abuse of powers). The prosecutor based his decision in particular on the following documents: a record of D.J.'s belongings (*protokół oględzin rzeczy*); a record of the reconstruction of the incident (*protokół eksperymentu procesowego*); footage from a security camera; medical documents, including toxicology results; and photographs from the scene of the incident. The prosecutor also took statements from the police officers involved and from other witnesses. A post-mortem examination was conducted and the prosecutor obtained an additional forensic report.

17. The prosecutor established that at about 8.30 p.m. on 18 June 2013, two police officers, W.J. and M.K., had stopped the car driven by the applicant's son in order to search it. There had also been a passenger in the car, M.S. Officer W.J. had recognised one of them as the man he had arrested a few years earlier in connection with various car break-ins. D.J. had been asked to open the car boot. In his wallet the officers had found two small packets containing white powder – as later established, 0.82 g and 0.62 g of amphetamine. In view of that discovery, the officers had decided to arrest him. D.J. had attempted to convince them not to arrest him by offering money. The arrest attempt had failed as D.J. had refused to comply with the officers' orders and had begun to walk away from the car. They had managed to bring him back but he had still resisted their attempts to handcuff him. He had been agitated and had demonstrated extraordinary physical strength. W.J. and M.K. had tried various holds on him, such as an arm lock with a truncheon (*dźwignia na rękę z użyciem pałki*), and also tear gas. During the struggle which ensued, D.J. had hit his head on the triangular window pane of the police car and had kicked the right rear bumper, damaging it. Consequently, he had lost his balance and fallen on his back. At that time W.J. and M.K. had called for back-up. D.J. had again attempted to flee but the officers had managed to catch him.

18. During a further struggle, D.J. had fallen on top of one of the officers (M.K.), who had at that point managed to handcuff one of his hands. D.J. had been left lying face down, and he had also been bleeding heavily from a cut on his forehead (which had occurred when he had hit the car). Six more officers had arrived at the scene and had continued the attempts to handcuff D.J. The applicant's son had been very aggressive and agitated. He had shouted vulgar words at the officers and tried to kick them. He had also inflicted injuries on himself by repeatedly hitting his head on the pavement. Despite the fact that the officers had outnumbered him, they had not been able to handcuff him.

19. Eventually, as D.J. had been trying to get up, he had hit one of the officers, A.T., in the stomach. A.T. had thought that D.J. posed a serious threat and had hit him twice with a truncheon on his left side. However, D.J. had been resistant to the pain and remained very forceful. At last, after some time, four police officers had managed to restrain and handcuff him. They had also called an ambulance.

20. At that time, two people had approached the group: U.M. and R.S. They had informed the officers of their status as paramedics and that they could provide medical aid. Shortly before beginning the resuscitation procedure, D.J. had been in verbal contact and had attempted to free himself. When the paramedics had turned him on his back, they had realised that he was not breathing. Cardiopulmonary resuscitation ("CPR") had been performed in turns by the paramedic,

R.S., and officers W.J. and A.O. At the same time, D.J.'s handcuffs had been taken off. At 8.53 p.m. an ambulance had arrived and its crew had continued performing CPR. The resuscitation attempts had ended unsuccessfully at 9.33 p.m. when the applicant's son had died.

21. The prosecutor considered that the police action had been justified in the circumstances of the case. There had been a reasonable suspicion that D.J. had committed an offence (he had been in possession of two packets containing what had looked like intoxicants) and he had attempted to flee. The prosecutor further noted that apart from the use of truncheons, the officers had not hit D.J. but had only used restraint techniques (*techniki obezwładniające*). The prosecutor did not find credible the evidence given by M.S. (D.J.'s passenger), who had testified that one of the officers had kicked D.J. three times in the head. Nor did he find credible evidence given by three other witnesses, who had claimed that D.J. had been hit by the officers. Those witnesses had arrived at the scene after CPR had already commenced.

22. The prosecutor further held that D.J.'s death had been caused by acute respiratory and circulatory failure related to chronic circulatory insufficiency. Referring to the forensic opinion, he stated that D.J.'s physical injuries and, in particular, his neck injuries, had no connection with his death, which had resulted from "excited delirium syndrome". This condition, often related to stress caused by police actions, was associated with excessive hormonal stimulation resulting in acute respiratory failure. The prosecutor considered that D.J.'s situation was a typical example of that condition. During the attempted arrest D.J. had displayed extraordinary strength and resistance to pain. It had also been demonstrated that he had been using cocaine and other drugs.

23. The prosecutor concluded that even if, as stated by the forensic expert, some of the neck injuries suffered by D.J. had exposed him to a direct risk of death or grievous bodily harm, it was not possible to blame any of the intervening officers, taking into account the dynamics of the events and D.J.'s resistance.

The applicant's appeal

24. On 4 September 2014 the applicant and her two daughters appealed against that decision. The applicant submitted that the police officers had not been able to apply the restraint techniques correctly and their inept actions had caused D.J.'s death. In the final moments of the struggle, eight police officers had been unable to handcuff D.J. who, although tall and heavily built, had not been particularly athletic. In the applicant's view the intervention on that day had been wholly unprofessional and had resembled a common tussle rather than a police operation.

25. The applicant further stressed that D.J. had had two large haematomata on the front of his torso, in particular just below his right ribcage. It had not been explained why officer A.T. had hit D.J. when the latter had already been lying on the ground, bleeding heavily (as confirmed by witnesses). Likewise, the officers had used tear gas on D.J. when he had already been lying face down on the ground and had been bleeding heavily from his head wound. In the applicant's view, such use of force had clearly been disproportionate.

26. Furthermore, only the police officers had testified that D.J. had inflicted injuries on himself by repeatedly hitting his head on the pavement. That allegation had not been confirmed by other witnesses. Even if her son had indeed hit his head on the pavement, it was the duty of the police to take all necessary measures to prevent persons under their control from harming themselves.

27. The applicant submitted that the police officers had been completely unprepared for administering emergency medical assistance to the victim. When R.S. (a paramedic and witness) had asked if anyone could help perform CPR, only one of eight officers had stated that he knew how to do it. Furthermore, R.S. had testified that when he had begun performing CPR, D.J. had still been handcuffed. It had only been at his explicit and firm request that the officers had removed the handcuffs. It had also been R.S.'s personal first-aid kit that had been used during the

incident. Consequently, it could not be said that the officers had provided the requisite emergency medical assistance to D.J.

28. The applicant also stressed that the prosecutor had failed to deal with numerous inconsistencies between the statements made by the police officers and those made by other witnesses. The cause and consequences of D.J.'s neck injuries had not been properly explained, particularly the consequences of the neck hold applied by officer M.K. None of the officers had stated that the victim had shouted "air" and cried for help, while four other witnesses had confirmed that fact.

29. In the applicant's view, such uncritical acceptance of the version of events as presented by the police officers was surprising. In particular, the prosecutor had found credible the testimony given by the paramedics (R.S. and U.M.), even though those witnesses had contradicted the officers.

30. Furthermore, the prosecutor had failed to hear another direct witness of the incident, despite the fact that the applicant had provided her contact details. Lastly, the applicant stressed that a witness confrontation should have been organised in order to explain the discrepancies between witness statements and to establish the course of events.

District Court's decision

31. The Warsaw District Court held hearings on 28 October and 13 November 2014.

32. On 13 November 2014 the Warsaw District Court, in a briefly reasoned decision, dismissed the applicant's appeal and upheld the prosecutor's decision. The court shared the prosecutor's conclusions. It further stressed that in view of the dynamics of the incident, it had not been necessary to organise a witness confrontation. In particular, the court stressed that only M.S. had testified that D.J. had been kicked by one of the officers. However, that testimony had conflicted with the other testimony. The court stated:

"In view of the collected evidence, it cannot be established that the actions of a certain person/certain people caused D.J.'s death. In other words, there is no cause-and-effect connection. D.J.'s death was caused by acute respiratory and circulatory failure related to a chronic circulatory insufficiency. The injuries which he sustained were of no relevance to his death and the circulatory failure was most probably caused by 'excited delirium syndrome'. At the time of his arrest D.J. fulfilled all the attributes of a person suffering from 'excited delirium syndrome' and since other causes of death had been eliminated, this one remained highly probable."

33. The decision was final as no appeal lay against it.

Developments after communication of the case

34. On a later unknown date the Warsaw District Prosecutor analysed the case and decided to complement the evidence with a view to reopening the investigation. In that connection, four witnesses were questioned (on 12 April, 16 May, 20 August and 20 November 2018). Three of them stated that they had no recollection of the events of 18 June 2013. One of the witnesses stated that he had noticed an officer swinging his hand in an apparent attempt to hit D.J. However, the witness's view had been obstructed by passing cars and he had not seen whether D.J. had indeed been hit. In any event, he stressed that he would not have been able to identify that officer.

35. On 20 May 2019 the prosecutor ordered a supplementary medical opinion from Dr A.B. of the Forensic Institute, in order to eliminate any inconsistencies in her opinion of 4 August 2014 (see paragraphs 13-15 above). The expert was asked to specify whether D.J.'s neck injuries had occurred as a result of a hard blunt tool impacting with considerable force or because of the neck hold applied by officer M.K., or alternatively as a result of D.J.'s fall. In addition, she was asked which of the persons who had been in direct contact with D.J. could have caused his neck injuries.

36. On 26 June 2019 the forensic expert submitted her report in reply to the prosecutor's questions. She reiterated the findings made in her opinion of 4 August 2014, stressing that her previous opinion had been delivered on the basis of the case file. She stated that it was true that she had

found that the neck injury had been caused by a hard blunt object impacting with considerable force. At the same time, she agreed that none of the witnesses had confirmed that D.J. had been hit by such an object. In these circumstances, the second possibility, discovered during the reconstruction – that officer M.K. had applied a neck-hold from behind D.J. and, given the differences in height, had in fact been hanging from D.J.'s neck – could, in her view, have caused the injuries in question. She stressed that it had not been her intention to conclude that D.J.'s injuries had occurred as a result of a fall, but that those injuries could have occurred when he had already been lying on the ground. Nevertheless, none of the persons who had taken part in the incident had admitted to having touched D.J.'s neck at that point in time.

37. The expert concluded that it could not be unequivocally established which person who had been in direct contact with D.J. had caused his neck injuries. In the expert's view, the victim's neck injuries had most probably occurred when officer M.K. had attempted to overpower him.

38. On 30 October 2019 the Warsaw District Prosecutor questioned M.K. The officer stated that he only had a very vague recollection of the incident and could not remember any details. He submitted that at the relevant time there had been no police procedures relating to interventions when a person was suspected of being under the influence of drugs. Moreover, as regards the case in question, at the relevant time neither he nor his colleagues had had any reason to believe that D.J. could have been under the influence of drugs.

39. On 14 November 2019 the Government informed the Court that the Warsaw District Prosecutor had decided that the supplementary evidence obtained did not constitute circumstances justifying resuming the investigation.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

CRIMINAL CODE

40. The relevant provisions of the Criminal Code provide as follows:

Article 155 (manslaughter)

"Anyone who unintentionally causes the death of another person shall be sentenced to a term of imprisonment for between three months and five years."

Article 231 (abuse of power)

"1. A public official who, by overstepping his powers or not fulfilling his duties, acts to the detriment of public or private interests shall be liable to serve a prison term of up to three years.

...

3. If the perpetrator of the act specified in [paragraph] 1 acts unintentionally and causes serious damage, he shall be liable to a fine, or the penalty of restriction of liberty, or deprivation of liberty for up to two years."

CODE OF CRIMINAL PROCEDURE

41. Pursuant to Article 327 § 1 of the Code of Criminal Procedure, any discontinued investigation may be reopened pursuant to an order given by a prosecutor, provided that it will not be conducted against a person who was a suspect in the previous proceedings.

USE OF FORCE BY THE POLICE

42. The Act of 24 May 2013 on the use of direct coercion and firearms (*Ustawa o środkach przymusu bezpośredniego i broni palnej*) specifies types of coercive measures and the circumstances in which they can be applied.

43. In particular, section 7 of the Act provides that a police officer should use coercive measures in a manner which causes as little harm as possible, and should discontinue their use if the person complies with orders.

44. Section 19 (4) of the Act provides as follows:

“A truncheon shall not be used to hit or push against a [person’s] head, neck, stomach and non-muscle and particularly delicate parts of the body, unless it is necessary in order to counter an attack against the health or life of another person.”

THE LAW

ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

45. The applicant complained that her son D.J. had died as a result of an incompetently conducted police operation and an excessive and disproportionate use of force by police officers. She further alleged, under Articles 2 and 6 of the Convention that the authorities had failed to conduct an effective investigation into his death. The Court, being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), considers that the applicant’s complaints should be examined under Article 2 of the Convention alone, which provides in so far as relevant:

“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:

...

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

Admissibility

46. In a document of 27 April 2018 containing their additional observations and comments on the applicant’s just-satisfaction claims, the Government raised a preliminary objection of non-exhaustion of domestic remedies. They submitted that the application was premature, since the Warsaw District Prosecutor had been complementing the evidence with a view to reopening the investigation.

47. The applicant did not comment on the Government’s objection.

48. The Court reiterates that under Rule 55 of the Rules of Court, any plea of inadmissibility must have been raised by the respondent Contracting Party – in so far as the nature of the objection and the circumstances so allowed – in its written or oral observations on the admissibility of the application (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52, 15 December 2016).

49. The Court notes that it was only in her observations submitted on 5 April 2018 that the applicant brought to its attention the fact that the Warsaw District Prosecutor had begun collecting supplementary evidence with a view to reopening the investigation. At the time of making their initial observations, the Government were not aware of that fact and therefore, they were not in a position to comply with the time-limit established in Rule 55.

50. However, the Court observes that on an unknown date before 14 November 2019 the Warsaw District Prosecutor had decided not to reopen the investigation (see paragraph 39 above) and the initial decisions of 2014 remain in force (see paragraphs 16 and 32 above).

51. Consequently, given that the final decision in the criminal proceedings was delivered before the Court had decided on the admissibility of the application, the Government’s objection regarding non-exhaustion of domestic remedies should be dismissed (see *Sidiropoulos and Papakostas v. Greece*, no. 33349/10, § 66, 25 January 2018).

52. Furthermore, the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

Merits

The parties’ submissions

(a) The applicant

53. The applicant alleged that her son's death had resulted from an unprofessional intervention by the police. In her view, the police officers had used coercion and force which had been disproportionate in the circumstances of the case. She stressed that her son, a significantly overweight person, had been immobilised in an inappropriate position, on his abdomen, and exposed to tear gas, which had additionally affected his breathing functions.

54. Moreover, the police officers had not been properly trained and had not had medical equipment in order to be able to administer first aid even before the arrival of the paramedics.

55. Lastly, the applicant alleged that the authorities had failed to conduct an objective, thorough and independent investigation into D.J.'s death. In particular, the prosecution had failed to question persons who had witnessed the incident and whose telephone numbers had been known to the investigating authorities. They had also failed to organise a witness confrontation. Most importantly, the investigation had been tendentious and one-sided, directed at exonerating the police officers.

(b) The Government

56. The Government submitted at the outset that the attempt to arrest the applicant's son had been undertaken because he was suspected of committing an offence of possession of drugs. The officers who had attempted to arrest him had acted within the framework of their competences. They had refrained from hitting him and had only used restraint techniques. In the Government's view, the use of force during the attempt to arrest D.J. had been proportionate and justified, and had not gone beyond what had been necessary in the circumstances of the case.

57. As regards the alleged failure to provide D.J. with adequate and timely medical assistance, the Government submitted that this issue had been examined during the investigation conducted by the Warsaw District Prosecutor. As established by the investigating authorities, D.J. had been immediately provided with emergency medical assistance. First aid had been administered by two paramedics and two officers, W.J. and A.O. The Government contended that the events in the case had unfolded dynamically – the victim's car had been stopped at 8.30 p.m. and an ambulance had arrived at 8.53 p.m.

58. The Government concluded that the State's responsibility could not be engaged. The death of the applicant's son had resulted not from the police's actions but from "excited delirium syndrome", and the use of coercive measures had been absolutely necessary.

59. The Government further argued that the authorities had complied with the procedural obligation stemming from Article 2 of the Convention. The prosecuting authorities had initiated an investigation of their own motion, immediately after the death of the applicant's son. They pointed out that the investigation had been expedited and completed within seventeen months. During the proceedings an autopsy had been carried out and the authorities had obtained a medical report on the causes of D.J.'s death. In addition, the prosecutor had obtained witness testimony and a reconstruction of the incident had been carried out. The criminal proceedings had guaranteed the necessary element of public scrutiny in that the applicant had been involved as a party at both the investigative and the judicial stages. In sum, the Government submitted that the investigation and the criminal proceedings had been effective and thorough.

The Court's assessment

(a) General principles

60. The Court reiterates that 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. Any use of force must be no more than "absolutely necessary" for – and strictly proportionate to – the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c) (see, among other authorities, *McCann and Others v. the United*

Kingdom, 27 September 1995, §§ 148-149 and 200, Series A no. 324, and *Wasilewska and Katucka v. Poland*, nos. 28975/04 and 33406/04, § 42, 23 February 2010).

61. The Court further reiterates that Article 2 of the Convention contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (for a summary of the relevant general principles, see the Grand Chamber judgment in the case of *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 229 et seq., ECHR 2016).

62. The Court notes in particular that the obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue, including eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 113, ECHR 2005-VII).

(b) Application of the above principles in the present case

(i) Procedural limb

63. The Court considers it necessary first to address the procedural aspect of the complaint under Article 2.

64. It finds, at the outset, that the applicant's son died during a police intervention and that in the light of the general principles set out above, a procedural obligation arose under Article 2 of the Convention to investigate the circumstances of his death (see *Dimitrov and Others v. Bulgaria*, no. 77938/11, § 131, 1 July 2014).

65. The Court notes that the criminal proceedings in the present case were instituted immediately after the incident, that is, on 19 June 2013. Subsequently, numerous witness statements were taken and evidence was collected. In addition, an autopsy was conducted and a forensic report was obtained (see paragraph 16 above). The investigation was discontinued by the Warsaw District Prosecutor, whose findings were upheld by the Warsaw District Court on 13 November 2014. Having regard to the complexity of the case, the Court considers that the investigation was conducted both promptly and with reasonable expedition. The fact that after the communication of the present case, the prosecution authorities decided to complement the evidence with a view to reopening the investigation does not change this conclusion in any way.

66. Turning to whether the investigation conducted was adequate, the Court needs to examine whether it was capable of leading to the establishment of the facts and a determination of whether the force used was or was not justified in the circumstances, and of identifying – and, if appropriate, punishing – those responsible.

67. The Court observes that during the investigation the prosecutor established that the police action had been justified in the circumstances of the case. It was noted that there had been a reasonable suspicion that D.J. had committed an offence of possession of drugs and the officers had only been attempting to prevent him from fleeing. The prosecutor found that D.J.'s death had resulted from "excited delirium syndrome". This condition, related to stress caused by police actions, was associated with excessive hormonal stimulation and had resulted in acute respiratory failure (see paragraph 22 above). Those findings were subsequently upheld by the District Court.

68. However, the Court notes that the investigation did not provide clear answers to a number of major questions arising in the case, specifically: exactly how the officers had used force against the applicant; what was the origin and consequences of D.J.'s neck injuries; and whether there was any causal link between the force used by the police officers and D.J.'s death.

69. With regard to D.J.'s neck injuries, the investigation did not clearly establish how they could have been caused and what were their consequences (see paragraphs 22 and 23 above). At the same time, although the forensic expert who had conducted the post-mortem examination concluded that D.J.'s neck injuries might have had an impact on his death, and Dr A.B. also stated

that the strong pressure on D.J.'s neck had exposed him to a direct risk of death or grievous bodily harm (see paragraphs 8 and 13 above), the prosecutor nevertheless concluded that those injuries had no connection with D.J.'s death (see paragraph 22 above).

70. The Court further observes that five years after the events in question, the prosecution services attempted to review the case and obtained a supplementary forensic opinion in order to eliminate any possible inconsistencies in the opinion of 4 August 2014. Yet, even then, no clear answers were provided. The expert reiterated the findings made in her original opinion and concluded that the victim's neck injuries had most probably occurred when officer M.K. had attempted to overpower him (see paragraphs 36 and 37 above). For the Court, the analysis of the origin and consequences of the victim's neck injuries carried out by the prosecution service remains inadequate.

71. Furthermore, the prosecutor failed to deal with the allegations that D.J. had been beaten during his arrest. In particular, no measures were taken to resolve the inconsistency between the version of events given by the police officers, and the version of events as described by M.S. and other witnesses, who had expressly stated that D.J. had been kicked in the head by one of the officers (see paragraph 21 above), for example, by way of a confrontation between those concerned. The Court notes that the applicant expressly requested that the prosecution services organise a witness confrontation; she also submitted information regarding other potential witnesses (persons whose car registration plates had been recorded on CCTV) (see paragraph 10 above). The Court observes that the prosecution services did not contact those other potential witnesses until five years after the events in question, by which time they had no recollection of the incident (see paragraph 34 above).

72. The Court does not consider such an approach on the part of the authorities to be satisfactory and finds that they failed to apply the standards embodied in Article 2 of the Convention (see paragraphs 61 and 62 above).

73. In view of all the above considerations, the Court finds that the investigation failed to determine the important factual circumstances of the case and that there has been a violation of the procedural limb of Article 2 of the Convention.

(ii) *Substantive limb*

74. The Court notes that two further questions arise in the present case. The first issue concerns the negative obligations imposed on the State by Article 2 of the Convention, in the context of the use of force by the police officers against the applicant's son while attempting to arrest him. The second concerns the State's positive obligation to take all necessary measures for the protection of his life, in particular by providing him with the requisite medical care (see, for example, *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, § 55, 7 February 2006).

(1) Necessity and proportionality of the force used on D.J.

75. The Court notes that the applicant contested the circumstances of D.J.'s death as established by the domestic investigation. She alleged that the officers had used force and restraint techniques which had been disproportionate in the circumstances, in particular given her son's heavy build (see paragraph 53 above).

76. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by

the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 182, 14 April 2015).

77. In the present case, it must be noted that the domestic court which examined the appeal against the decision not to prosecute the police officers did not carry out an independent establishment of facts but instead relied on the circumstances of the incident as established by the investigation. The Court is mindful, however, of its finding above that the investigation undertaken by the authorities, including the way in which the facts in question were established, was not adequate and effective. The circumstances of the incident as established by the investigation cannot therefore be considered as sufficiently reliable and objective.

78. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (*Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII). Consequently, according to its case law where it was unable to establish the exact circumstances of a case for reasons objectively attributable to the State authorities, that it was for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to exhibit solid evidence that could refute the applicant's allegations (see *Mansuroğlu v. Turkey*, no. 43443/98, § 80, 26 February 2008, with further references and *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 586, 13 April 2017). However, the present case should be distinguished from those cases. In the light of the factual findings made by the domestic authorities in the present case, it is highly probable that the applicant's son's death was caused by acute respiratory and circulatory failure related to a chronic circulatory insufficiency (see paragraphs 16 and 32 above).

79. Given the absence of elements which could indicate with sufficient certainty whether there was a causal link between the force used against D.J. by the police officers and his death, and whether that use of force was strictly proportionate to a legitimate aim pursued, the Court is not in a position to make a reliable assessment of the question whether the actions of the police officers were in compliance with the guarantees of Article 2 (see *Ayvazyan v. Armenia*, no. 56717/08, § 91, 1 June 2017; and *mutatis mutandis* in the context of Article 3, *Tadić v. Croatia*, no. 10633/15, §§ 61-2, 23 November 2017 and cases cited therein).

80. Consequently, the Court cannot establish the substantive violation of Article 2 of the Convention on this account.

(2) Provision of medical assistance

81. The Court reiterates that the authorities have an obligation to protect the health of persons who are in detention or police custody or who, as in the case of D.J., have just been arrested and whose relationship with the State authorities is therefore one of dependence. That entails providing prompt medical care where the person's state of health so requires in order to prevent a fatal outcome (see *Saoud v. France*, no. 9375/02, § 98, 9 October 2007, and *Boukrourou and Others v. France*, no. 30059/15, § 63, 16 November 2017).

82. The Court also reiterates that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. In other words, for a positive obligation to arise, it must be established that the authorities failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid a real and immediate risk to life (see *Scavuzzo-Hager and Others*, cited above, § 66, and *Saoud*, cited above, § 99).

83. The Court observes that the events in the present case unfolded dynamically: the whole incident – from the stopping of D.J.'s car to the struggle with the police officers and D.J.'s loss of consciousness – lasted about twenty minutes (see paragraphs 17 and 20 above). The chronology of events was determined by the prosecution as follows: D.J.'s car was stopped at 8.30 p.m. and

shortly afterwards the police officers requested the assistance of the emergency medical services; before their arrival, medical assistance was provided to D.J. by two passing paramedics and also two of the police officers, W.J. and A.O., who performed CPR in turn with one of the paramedics; and the ambulance arrived at 8.53 p.m. In the light of those factors, established by the domestic authorities and undisputed by the applicant, and given the dynamic way in which the events developed, the Court concludes that the authorities cannot be found to have failed in their obligation to protect D.J.'s life.

84. It follows that there has been no violation of Article 2 of the Convention on account of the alleged delay in the provision of medical care to the applicant's son.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. 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."

Damage

86. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

87. The Government argued that the claim was exorbitant and asked the Court to assess the issue of compensation on the basis of its recent case-law in respect of similar cases.

88. Taking into account all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 26,000 in respect of non-pecuniary damage.

Costs and expenses

89. The applicant, who was represented by a lawyer, also claimed EUR 2,500 for the costs and expenses incurred before the Court.

90. The Government argued that the applicant had failed to substantiate the costs claimed and had not provided any proof (invoice or a contract) that she had in fact covered the costs of legal representation.

91. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the absence of documents in support of the applicant's claims and the above criteria, the Court rejects the claim for costs and expenses for the proceedings before the Court.

Default interest

92. The Court considers it appropriate that the default interest rate 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,

Declares the application admissible;

Holds that there has been a violation of Article 2 of the Convention under its procedural limb;

Holds that there has been no violation of Article 2 of the Convention under its substantive limb;

Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros) to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(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;

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

Done in English, and notified in writing on 14 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Ksenija Turković

RegistrarPresident