LAW AND ADMINISTRATION IN POST-SOVIET EUROPE

Vol. I(VII)/2020: 61–67

DOI: 10.2478/lape-2020-0006

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THE REQUIREMENTS DERIVING FROM THE PROCEDURAL ASPECT OF ART. 2 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN THE CONTEXT OF POLISH AND RUSSIAN INVESTIGATION REGARDING THE AIR CRASH OF POLISH AIR FORCE TU-154 IN SMOLENSK

Key words: European Court of Human Rights, art. 2 ECHR, right to life, procedural aspect, effective investigation, Smolensk Disaster

Abstract

The main aim of this analysis is the synthetic reconstruction of the standards of European Court of Human Rights concerning the procedural aspect of the right to life, and particularly the obligation of conducting an effective investigation in the context of the Polish Air Force Tu-154 air crash in Smolensk on 10th April 2010.

The right to life in the system of the European Convention of Human Rights has a particular character. It derives mostly from its paramount importance. Due to the character of the sphere guaranteed by the right to life, the European Court of Human Rights notices the need of protecting it, both in material and procedural aspect. This is also the reason why article 2 of the ECHR is backed up by the wide variety of positive obligations.

The standards of article 2 of the ECHR and state's positive obligations in this respect are fully applicable in relation to the air crash of the presidential Tu-154. State's obligations focus on both material and procedural aspect of incident causing death. The air crash of Tu-154 concerns particularly the obligation to conduct adequate and effective official investigation. This obligation concerns both Polish and Russian authorities.

The main aim of this research is to analyse which obligations are applicable in respect of this particular air crash.

The main aim of this analysis is the synthetic reconstruction of the standards of European Court of Human Rights concerning the procedural aspect of the right to

life, and particularly the obligation of conducting an effective investigation in the context of the Polish Air Force Tu-154 air crash in Smolensk on 10th April 2010.

The standards of the Court regarding this matter are clearly determined and impose particular obligations on the States Parties. Comparing them with the actual actions of authorities might raise some doubts concerning the fulfilment of this standard. Due to the limits of this study, it will mainly focus on the analysis of the standard of obligations of Russian and Polish authorities in the sphere of the procedural aspect of the right to life, and particularly – on the scope of obligation of conducting effective investigation.

The obligations deriving from procedural requirements of the right to life

The right to life in the system of the European Convention of Human Rights has the character of a fundamental right. It stems from the fact that it is a guarantee protecting human life, which is the highest value protected in the ECHR. Besides, ensuring the right to life is a necessary condition of the enjoyment of other rights and freedoms guaranteed in the Convention.

Due to the particular character of the sphere guaranteed by the right to life, the European Court of Human Rights sees the need of protecting it, both in its material and procedural aspects¹. In order to secure the right expressed in art. 2 of the Convention, the Court created also a wide range of positive obligations on the part of States-Parties to the Convention. The main positive obligation assumes that states are obliged not only to abstain from intentional and unlawful deprivation of life but should also take appropriate measures in order to protect the lives of individuals under its jurisdiction. In this respect, the obligation of a state exceeds the sole necessity of establishing effective norms of criminal law, supported by the mechanisms of execution aiming at prevention, suppression and sanctioning the violations of these regulations. According to the Court, in certain cases, the Convention may also imply a positive obligation to take up the operational actions of a preventive character in order to protect the life of an

individual, which is endangered by the criminal actions of another person².

Naturally, such obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. The preventive obligation of a state comes into play in the situation, in which authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk³.

Therefore, on the one hand, material obligations imply creating effective criminal law provisions, as well as all preventive actions aimed at the elimination of threats to the lives of individuals under the jurisdiction of the State-Party to the Convention. On the other hand, if an individual dies, the state has a procedural obligation of conducting adequate and effective official investigation, which should determine (to the highest possible extent of probability) the course of the event resulting in a death, as well as to bring all the responsible persons to justice.

I agree with T. Ophsal, which stresses, that no state is able to realise the obligation to protect life in its widest scope and to protect each human life against all form of death⁴. Yet, this is not the aim of guarantees protected under art. 2. The protection of the right to life implies the realisation of preventive obligations by states. These obligations may not be interpreted as imposing an impossible or disproportionate burden on the authorities⁵. If an individual dies, state's procedural obligations require determination of all the facts surrounding death and, if it's possible, holding the responsible individual (or individuals) guilty. This procedural obligation to conduct an effective investigation is binding irrespective of the cause of an person's death and it is applicable in every situation an individual dies.

The Court had the opportunity to confirm it on several occasions, especially in the cases, in which the

¹ More on the issue of positive obligations: A.R. Mowbray, *The Development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford – Portland Oregon, 2004; J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014; E. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności*, Warszawa 2016.

² ECtHR judgment *L.C.B. v. the United Kingdom*, 9.06.1998, appl. no 23413/94, § 36.

³ ECtHR judgment *Osman v. the United Kingdom*, 28.10.1998, appl. no 23452/94, § 116.

⁴ T. Opsahl, *The right to life*, [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht – Boston – London, 1993, p. 209.

⁵ *Osman v. the United Kingdom*, § 116.

death was caused by accidents, natural disasters or by a human being. For instance, the Court examined the case of a mudslide in the vicinity of mountain Elbrus⁶, the flood in Vladivostok⁷, the methane explosion at the rubbish tip⁸, an accident at the construction site⁹, train accident¹⁰, car crash¹¹ or other events, such as the death caused accidentally by a falling tree¹². In the above cases the Court examined both the preventive obligations of a state, as well as procedural obligations, particularly the necessity of conducting an effective investigation, which should enable the determination of all the facts surrounding death and potentially, bringing the responsible to justice and – if it will be possible – enabling their conviction.

The state's obligation to conduct an adequate and effective investigation

In the context of analysis of state's positive obligations, it is paramount to mention, that the Court already had the opportunity to examine the circumstances of an aircraft accident. It took place in the case *Papapetrou and Others v. Greece*. In this judgment, the ECtHR also stressed the necessity of conducting an official and effective investigation, which also should be complete, impartial and thorough¹³.

The case regarded the death of the applicant's parents, who died in a helicopter crash. It happened on 11th September 2004, when the Orthodox Patriarch of Alexandria and Africa, Petros VII and 16 other people (including his brother, two metropolitan bishops, four prelates, four secular and five military members of the crew) died in the crash on the Aegean Sea, close to Arhos

mountain, the sacred place for the Orthodox, in the north eastern part of Greece¹⁴. In the aforementioned case, the Court investigated whether there was a violation of art. 2 in its procedural aspect, in the context of shortcomings concerning the investigative actions.

The Court reminded that art. 2 requires authorities to conduct an official and effective investigation in every situation, in which an individual's death is caused by the use of force. Such investigation should be, in particular, complete, impartial and thorough¹⁵. According to the Court, the lack of direct responsibility of a state for the death of an individual does not exclude applying art. 2¹⁶. The state's obligation requires conducting an effective, official investigation, whenever there is reason to believe that an individual has suffered life-threatening injuries in suspicious circumstances. The investigation should result in establishing causes of fatal injuries, identification and punishment of responsible individuals. It gains significance in the case victim's death, because the essential aim, which it pursues, is to ensure the effective implementation of the domestic regulations protecting the right to life¹⁷. Furthermore, in *Slimani v. France* the Court stated that the obligation of an effective investigation in cases involving State agents or bodies, should ensure their accountability for deaths occurring under their responsibility. It is particularly important when the death is a result of a negligence caused by authorities¹⁸.

Apart from that, authorities are required to realize several other obligations. They must act on their own motion once the issue has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. In this respect, it can be legitimately expected that the necessary investigation would be conducted without a specific, formal complaint from the victim or his family¹⁹.

⁶ ECtHR judgment *Budayeva v. Russia*, 20.03.2008, appl. no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02.

⁷ ECtHR judgment *Kolyadenko and Others v. Russia*, 28.02.2012, appl. no 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05.

⁸ ECtHR judgment *Öneryıldız v. Turkey*, 30.11.2004, appl. no 48939/99.

⁹ ECtHR decision *Pereira Henriques and Others v. Luxembourg*, 26.08.2003, appl. no 60255/00.

¹⁰ ECtHR decision *Bone v. France*, 1.03.2005, appl. no 69869/01.

¹¹ ECtHR decision *Rajkowska v. Poland*, 27.11.2007, appl. no 37393/02.

¹² ECtHR judgment *Ciechońska v. Poland*, 14.06.2011, appl. no 19776/04.

¹³ ECtHR judgment *Papapetrou and Others v. Greece*, 12.07.2011, appl. no 17380/09, § 48.

¹⁴ *Ibidem*, § 5–28.

¹⁵ ECtHR judgment *McCann and Others v. the United Kingdom*, 27.09.1995, appl. no 18984/91, § 161–163; ECtHR judgment *Kaya v. Turkey*, 16.02.1998, appl. no 22729/93, § 105; ECtHR judgment *Çakıcı v. Turkey*, 8.07.1999, appl. no 23657/94, § 86.

¹⁶ *Papapetrou and Others v. Greece*, § 49.

¹⁷ *Pereira Henriques and Others v. Luxembourg*, § 56.

¹⁸ ECtHR judgment *Slimani v. France*, 27.07.2004, appl. no 57671/00, § 29–30; see also *Papapetrou and Others v. Greece*, § 50.

¹⁹ ECtHR judgment *Ilhan v. Turkey*, 27.06.2000, appl. no 22277/93, § 63; ECtHR judgment *McKerr v. the United Kingdom*, 4.05.2001, appl. no 28883/95, § 111.

To satisfy the requirements of effectiveness, it is necessary that the persons responsible for investigation are independent from those involved in the event causing death²⁰. This means not only a lack of hierarchical or institutional connection but also a practical independence²¹.

The effectiveness of an investigation should guarantee the identification and punishment of those responsible for the death of an individual. It is not an obligation of a result, but of means. The authorities must take whatever reasonable steps at their disposal to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death²².

Any investigation deficiencies that might impair its ability to establish the causes of a victim's death or the identification of person or persons responsible, might lead to the conclusion that the investigation was ineffective²³.

It is crucial that the society also has direct access to an investigation and its conclusions. As the Court stresses, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests²⁴.

The scope of state's procedural obligations, particularly concerning adequate and effective investigation is constantly evolving. It is noticeable, for instance in the case *Tagayeva v. Russia*. In the judgment, the Court reminded its contemporary requirements regarding investigation. According to ECtHR, persons responsible for carrying out the investigation must be independent

from those implicated in the events; the investigation must be "adequate"; its conclusions must be based on thorough, objective and impartial analysis of all relevant elements; it must be sufficiently accessible to the victim's family and open to public scrutiny; and it must be carried out promptly and with reasonable expedition. To fulfil the requirement of "adequacy", the investigation must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible²⁵.

The requirements deriving from procedural obligations in the ECHR system in the light of Polish and Russian authorities' actions regarding Smolensk air crash

It is noticeable, that according to the ECtHR standards investigation should be: official, adequate, effective, prompt, its conclusions must be based on a thorough analysis and it should involve the participation of a victim's family. It is perfectly reasonable to raise a question which obligations deriving from Court's case-law come into play and involve the activities of Polish and Russian authorities in the context of Smolensk air crash.

Chronologically, the authorities' actions should contain:

- 1) the realisation of preventive measures (before the accident);
- 2) the securing of bodies;
- 3) the securing of the wreckage of the aircraft;
- 4) a thorough forensic analysis *in situ*, questioning of witnesses;
- 5) the DNA examination of bodies;
- 6) specialist examination of the aircraft wreckage;
- 7) the access of relatives to the investigation;
- 8) the public access to the information regarding the investigation and its outcome;
- 9) transparent character of the investigation activities;
- 10) the publication of the results of investigation.

²⁰ ECtHR judgment *Oğur v. Turkey*, 20.05.1999, appl. no 21594/93, § 91–92.

²¹ ECtHR judgment *Ergi v. Turkey*, 27.08.1998, appl. no 23818/94, § 83–84, ECtHR judgment *Armani Da Silva v. the United Kingdom*, 30.03.2016, appl. no 5878/08, § 232.

²² *McKerr v. the United Kingdom*, § 113; ECtHR judgment *Salman v. Turkey*, 27.06.2000, appl. no 21986/93, § 106; see also ECtHR judgment *Gül v. Turkey*, 14.12.2000, appl. no 22676/93, § 89.

²³ ECtHR judgment *Hugh Jordan v. the United Kingdom*, 4.05.2001, appl. no 24746/94, 127; *Papapetrou and Others v. Greece*, § 53.

²⁴ *Oğur v. Turkey*, § 92, *Gül v. Turkey*, § 93; *McKerr v. the United Kingdom*, § 115.

²⁵ ECtHR judgment *Tagayeva and Others v. Russia*, 13.04.2017, appl. no 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, § 496; *Armani Da Silva v. the United Kingdom*, § 229–240, 243; More on states' positive obligations in this sphere: J. Czepek, *op.cit.*, p. 70–77.

First of all, those obligations concern activities preceding the event causing death. In this case, these are the ones preceding the air crash. Those obligations have a preventive character. The Court noted on many occasions, that state's obligations are applicable in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents²⁶.

In such situations, the state needs to realize several obligations that could have prevented the event causing the death. They may include, for example: installation of vertical and horizontal drainage system allowing the controlled release into the atmosphere of the accumulated in order to avoid the explosion at the rubbish tip²⁷, repairing the dam and cleaning the mud collector to prevent the mudslide²⁸, or fixing the functioning of the anti-flood system and reservoir²⁹.

The positive obligations of Russian and Polish authorities in the context of the Smolensk air crash are very similar. On the part of Polish authorities, they include the responsibility for the technical condition of the aircraft, the preparation and organisation of the flight. Obligations of Russian authorities concern responsibility for the appropriate technical preparation and maintenance of the Smolensk airport (the control tower, the runway) as well as the appropriate training of the ground personnel and proper communication.

The remaining part activities of the authorities is connected with particular obligations of both states after the event causing death, *i.e.* after the crash of the president's aircraft. Firstly, the Russian authorities were obliged to secure both bodies and the wreckage. The effectiveness of the investigation requires state to conduct thorough forensic analysis of the site³⁰, post-mortem examination of the bodies and questioning the potential witnesses. The Court, very frequently refers to these obligations jointly, in order to emphasise the necessity of taking up forensic actions in its widest meaning. The Court emphasises that authorities are obliged to initiate all the available, reasonable steps to secure all the

evidence concerning the event. It includes *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death³¹.

Even though, the Court refers to the above obligations jointly, the violation of any of them might result in individual violation of art. 2 of the Convention by in its procedural aspect. Therefore, even the lack of only of post-mortem examination may lead to the conclusion that there had been a violation of the right to life in its procedural aspect³².

The serious doubts raised in respect of the post-mortem examination concern both activities of Polish and Russian authorities. The Russian authorities had never conducted such examination. Moreover, it was proved by the exhumation, that the Russians mixed the remains of various victims while placing them in coffins. It is worth mentioning that, the post-mortem analysis was not completed by the Polish authorities immediately after the crash, when the bodies of victims had been transported to Poland. It wasn't until 6 years later that the decision about the exhumation of the victims was taken³³. This issue was partially examined by the Court in *Solska and Rybicka v. Poland*³⁴, however the case regarded the violation of art. 8 of the Convention in the context of the lack of consent for exhumation of some family members³⁵.

The requirements concerning the efficiency of investigation also imply the necessity of securing the wreckage, which is standard procedure in the cases of aircraft accidents. This aims at guaranteeing possibly the most accurate analysis of the wreckage in order to establish, with the highest probability, the chain of events lead-

³¹ *e.g. Armani Da Silva v. the United Kingdom*, § 233; see also T. Jasudowicz, *Położenie prawne Rodzin Smoleńskich w kontekście wyjaśniania Katastrofy Smoleńskiej i dochodzenia roszczeń z niej wynikających*, [in:] T. Jasudowicz, G. Górski, *Prawne problemy tragedii smoleńskiej. Teksty i materiały*, Toruń 2018, p. 178; more on the issue of forensic obligations regarding investigation in accordance with the standards deriving from the Court's case-law: T. Jasudowicz, *Kryminalistyczne aspekty prawa do życia w świetle orzecznictwa strasburskiego*, [in:] A. Bulsiewicz, A. Marek, V. Kwiatkowska-Danel (eds.), *Doctrina multiplex veritas una. Księga jubileuszowa ofiarowana profesorowi Mariuszowi Kulickiemu*, Toruń 2004, p. 211–228.

³² *e.g. Salman v. Turkey*, § 106.

³³ ECtHR judgment *Solska and Rybicka v. Poland*, 20.09.2018, appl. no 30491/17, 31083/17, § 79.

³⁴ *Ibidem*, § 118 *et seq.*

³⁵ *Ibidem*.

²⁶ *Öneryıldız v. Turkey*, § 93.

²⁷ *Ibidem*, § 102.

²⁸ *Budayeva v. Russia*, § 147–160.

²⁹ *Kolyadenko and Others v. Russia*, § 166–180.

³⁰ For example: ECtHR judgment *Mustafa Tunç and Fecire Tunç v. Turkey*, 25.06.2013, appl. no 24014/05, § 111 *et seq.*

ing to the event causing death, as well as to determine the responsibility of an individual or individuals. The last aspect is particularly necessary to fulfil the requirements of adequacy and effectiveness of an investigation.

Above all, the wreckage is a crucial evidence found at the site of the event causing death and must be secured as such³⁶ in order to be submitted to a further, thorough forensic analysis. The wreckage still hasn't been examined by the Russian authorities. The examination undertaken by Polish authorities was impossible due to the fact that the wreck has never been returned to them. Moreover, the remains of the aircraft have been neither collected nor secured after the crash. There are also documents and footage proving the incidents of destroying the remains of the aircraft. In this respect, there are serious doubts whether the requirements of effective investigation have been fulfilled in this aspect.

The access of relatives of victims to the information concerning investigation and its status is an essential element of investigation. A similar guarantees regard the public access to such information. As it was underlined by T. Jasudowicz, the Court associates this requirement with, "the right of the society to information". The Court, on many occasions, emphasised the criterion of sufficient transparency of investigation and expressed the necessity of "public control", connecting it with the requirements of the rule of law³⁷. In the judgment *McKerr v. the United Kingdom* the Court pointed out that, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. However, in all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests³⁸.

The access of the public to investigation and its results involves also the requirement of its transparent character. It enables the public control over investigation and its results. Also – the open access to such information – contributes to establishment of the society's trust towards state and its organs. Naturally, the public

must also have access to published, official results of the investigation and – if it's possible – to information concerning individuals responsible for the violation.

Apart from the above elements, applicable in the context of the Smolensk air crash, the requirement regarding the independence of investigation is worth mentioning. Serious doubts may appear both in the context of the independence of the Russian MAK (Interstate Aviation Committee)³⁹, as well as the Polish investigation conducted by the Naczelna Prokuratura Wojskowa (Supreme Military Prosecutor Office)⁴⁰. Clearly, establishing an independent group of international experts, having the access to the whole wreckage (secured properly after the crash) and all of the secured evidence, would have fulfilled this requirement much better.

Adequate and effective official investigation must lead to establishment of the course of events causing death and hold the responsible individuals liable either for their actions or negligence that led to the death. The investigation should include not only the preparatory proceedings, but also imply the effectiveness of a trial. Furthermore, the discussed procedural obligation entails the requirements of thoroughness, promptness, practical character, independence as well as access of the family and the public to the investigation and its results. Such an investigation should be a serious attempt of establishing the course of incident causing death and may not be based on hasty or early assumptions or conclusions.

The actions of both Polish and Russian authorities undertaken in the context of the Smolensk crash may raise serious doubts regarding the fulfilment of this standard. These doubts arise more or less in respect to most of the elements of the aforementioned standard. So far, the Court has issued only one judgment regarding the Smolensk air crash. However, the case was focused only on the violation of art. 8 of the Convention⁴¹. Therefore, it should be assumed that the Court still did not have the opportunity to examine Polish

³⁶ ECtHR judgment *Mustafa Tunç and Fecire Tunç v. Turkey*, 14.04.2015, appl. no 24014/05, § 17; ECtHR judgment *Nachova and Others v. Bulgaria*, 6.07.2005, appl. no 43577/98, 43579/98, § 160.

³⁷ T. Jasudowicz, *Śledztwo smoleńskie z perspektywy prawa do życia w Europejskiej Konwencji Praw Człowieka*, [in:] T. Jasudowicz, G. Górski, *op.cit.*, p. 207.

³⁸ *Oğur v. Turkey*, § 92, *Gül v. Turkey*, § 93; *McKerr v. the United Kingdom*, § 115.

³⁹ MAK (International Aviation Committee) – an organisation established on 30th December 1991 in order to investigate the causes of civil aviation accidents at the territory of states which formerly were the republics of the Soviet Union, later on gathered around the Commonwealth of Independent States. MAK is registered at ICAO – see <https://mak-iac.org/en/> (access: 29.12.2018).

⁴⁰ See T. Jasudowicz, *Śledztwo smoleńskie z perspektywy...*, p. 213.

⁴¹ *Solska and Rybicka v. Poland*.

and Russian investigation of the Smolensk air crash in respect to their accordance with the standard of effective investigation. Maybe the Court will still have such possibility.

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- ECtHR judgment *Solska and Rybicka v. Poland*, 20.09.2018, appl. no 30491/17, 31083/17;
- ECtHR judgment *Tagayeva and Others v. Russia*, 13.04.2017, appl. no 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11.