



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

FIRST SECTION

CASE OF SOLSKA AND RYBICKA v. POLAND

(Applications nos. 30491/17 and 31083/17)

JUDGMENT

STRASBOURG

20 September 2018

FINAL

20/12/2018

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

In the case of Solska and Rybicka v. Poland,

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

Linos-Alexandre Sicilianos, *President*,

Aleš Pejchal,

Krzysztof Wojtyczek,

Ksenija Turković,

Pauliine Koskelo,

Tim Eicke,

Jovan Ilievski, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 28 August 2018,

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

PROCEDURE

1. The case originated in two applications (nos. 30491/17 and 31083/17) 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 Ewa Maria Solska (“the first applicant”) and Ms Małgorzata Ewa Rybicka (“the second applicant”), on 19 April 2017.

2. The applicants were represented by Mr P. Kładoczny, a lawyer working with the Helsinki Foundation of Human Rights, a non-governmental organisation based in Warsaw. The Polish Government (“the Government”) were represented by their Agent, Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the exhumation of their husbands’ remains had violated Article 8 of the Convention.

4. On 22 September 2017 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1937 and lives in Sopot. The second applicant was born in 1955 and lives in Gdańsk.

A. Crash

6. On 10 April 2010 an aircraft of the Polish Air Force was carrying a Polish State delegation from Warsaw to Smolensk, Russia, to attend a ceremony marking the 70th anniversary of the Katyń massacre. The delegation was led by the President of Poland and included many high-ranking officials. The aircraft crashed during the approach to Smolensk aerodrome, killing all ninety-six people on board (eighty-eight passengers and eight crew members).

7. The applicants are the widows of two victims of the crash, Mr Leszek Solski, an activist of the Katyń Families Association, and Mr Arkadiusz Rybicki, a member of parliament.

8. On 29 July 2011 the Polish Committee for the Investigation of State Aviation Accidents (*Komisja Badania Wypadków Lotniczych Lotnictwa Państwowego*) published its report on the causes of the crash. It concluded:

“the immediate cause of the accident was the descent below the minimum descent altitude at an excessive rate of descent in weather conditions which prevented visual contact with the ground, as well as a delayed execution of the go-around procedure. Those circumstances led to impact with an obstacle on the ground, resulting in the separation of part of the left wing with the aileron and consequently to the loss of aircraft control and eventual ground impact”.

The committee excluded the possibility that an explosion had taken place on board. An earlier report by the Russian Inter-State Aviation Committee contained similar findings. The Parliamentary Group on the Examination of the Smolensk Crash reached different conclusions, however, and suggested that an explosion on board may have been one of the causes of the accident. According to the applicants, the Parliamentary Group was not an official investigative authority.

B. Investigation into the crash

9. The Warsaw Regional Military Prosecutor’s Office opened an investigation into the crash on 10 April 2010.

10. Both applicants were granted victim status in the investigation.

11. On 4 April 2016 the investigation was assigned to an investigative team of the State Prosecutor’s Office (*Prokuratura Krajowa*).

12. On 21 June 2016 the State Prosecutor’s Office organised a meeting with the victims’ families. The purpose of the meeting was to explain the need to carry out exhumations and autopsies, as well as to hear opinions from all the families concerned.

13. The first applicant attended that meeting. She submitted that the prosecutor had focused on criticising the report of the Polish Committee for the Investigation of State Aviation Accidents. Only those families who supported the prosecutor’s decision on the exhumations had been allowed to

speak. The second applicant did not attend the meeting. She did not trust the State Prosecutor's Office because she felt that it favoured those families who supported the exhumations and the conspiracy theories around the crash.

14. On 7 October 2016, pursuant to Article 209 §§ 1 and 4 and Article 210 of the Code of Criminal Procedure ("the CCP"), a prosecutor of the State Prosecutor's Office decided to appoint a team of international and national forensic experts with a view to carrying out autopsies on the bodies of eighty-three victims of the crash (the bodies of nine victims had already been exhumed and four victims had been cremated). The prosecutor asked the experts to:

- "(1) carry out the medical imaging, examination and autopsy of the victims' remains;
- (2) determine the cause of death, and the manner and circumstances in which the victims sustained their injuries, including whether the injuries were sustained before or after their death, as well as to ascertain whether the injuries came about at the place and time the crash occurred;
- (3) ascertain whether the established injuries indicate that they came about as a result of the aircraft's impact with the ground and the disintegration of the aircraft parts, ...;
- (4) ascertain whether the victims' bodies have injuries typical of an explosion of explosive or flammable material, or of some other sudden release of energy;
- (5) ascertain whether the method used by the Russian experts to examine the corpses and carry out the autopsies was consistent with the current standards, and whether the conclusions of their forensic report with regard to the injuries, the circumstances in which they had occurred and the cause of death correspond to the conclusions of the report established by the [current] team of experts;
- (6) determine the identity of the victims by comparing the results of the genetic testing with their genetic profiles, established at an earlier stage of the proceedings...;
- (7) take samples from the victims' remains for further toxicological, histopathological, physicochemical and genetic examination."

The prosecutor further ordered (point IV of the decision) that for the purpose of carrying out the above-mentioned measures, the bodies of eighty-three victims be exhumed on dates to be determined in separate orders.

15. In his decision, the prosecutor noted that directly after the crash, the Russian authorities had carried out autopsies on the victims' bodies and identification. The victims' remains had subsequently been repatriated to Poland and buried. In the course of its investigation, the Warsaw Regional Military Prosecutor's Office had started to have doubts about the diligence of the Russian experts in identifying the victims and the injuries sustained by them. From August 2011 the Military Prosecutor's Office had carried out exhumations and autopsies on nine victims of the crash. The results of those examinations had confirmed that the Russian experts had not properly

recorded the injuries sustained by the victims and, in the case of six out of the nine bodies exhumed, had wrongly identified the victims. The prosecutor stated that, in the circumstances, doubts also remained in respect of the other victims of the crash. He further intended to resolve doubts concerning the alleged explosion on board.

16. On 12 October 2016 the second applicant wrote a letter to the Minister of Justice – Prosecutor General, objecting to the exhumation of her husband’s body. On 14 October 2016 the first applicant wrote a similar letter to the State Prosecutor’s Office, stating that she was convinced that her late husband had been properly identified. She had been present at the Moscow Forensic Institute where the identification of the victims had been carried out and had seen the body of her husband herself. The State Prosecutor’s Office replied in the negative to both letters. The second applicant was also informed that a meeting with the relatives of the victims and the prosecutors would be scheduled prior to each exhumation in order to explain the reasons behind the decision to carry out the exhumations.

17. The prosecutor’s decision of 7 October 2016 was served on the applicants’ lawyer on 20 October 2016.

18. On 27 October 2016 the applicants personally and through their lawyers lodged interlocutory appeals (*zażalenie*) against the prosecutor’s decision of 7 October 2016. They objected to the exhumation of their husbands’ remains and asked that that part of the decision be reversed.

19. The applicants argued that the prosecutor had applied Article 209 § 1 and Article 210 of the CCP without any consideration for the relevant provisions of the Constitution. Furthermore, the prosecutor’s decision had breached Article 2 § 1 (3) of the CCP, which provided that criminal proceedings had to respect the legal interests of a victim. The applicants further alleged that the reasons for the decision had been vague and sparse. The prosecutor had failed to properly establish that the exhumation of their husbands’ remains was necessary, since such a measure should be one of last resort.

20. In the applicants’ view, the decision on exhumation violated the respect due to the remains of their late husbands, as well as their personal right to respect for the memory of a late relative (*kult osoby zmarłej*). Furthermore, in issuing a general order to exhume all the victims, without taking into account their individual circumstances, the prosecutor had demonstrated a lack of respect for the victims and had violated the families’ right to dignity.

21. The applicants invoked Articles 2, 30, 45 and 47 of the Constitution, alleging, *inter alia*, that the prosecutor had applied the provisions of the CCP in breach of a person’s inherent right to dignity. They further relied on Articles 3 and 8 of the Convention. The applicants also claimed that the prosecutor had failed to inform them of their right to lodge an interlocutory appeal against his decision.

22. Lastly, the applicants relied on a letter dated 25 October 2016 from the Ombudsman to the Prosecutor General presenting arguments in favour of a judicial review of the prosecutor's decision on exhumation. The Ombudsman considered that exhumation of human remains carried out following a prosecutor's decision constituted an interference with the right to respect for the memory of a late relative, one of the personal rights protected by the Civil Code. Those personal rights constituted part of an individual's private life. Under Article 47 of the Constitution, everyone had the right to legal protection of his or her private life. In the light of that provision, everyone who considered that his or her private life had been violated by an act of the authorities had to have the opportunity to seek legal protection. Relatives, therefore, had to be provided with legal remedies with a view to determining whether the prosecutor's decision on exhumation was disproportionate.

23. On 23 and 24 November and 6 December 2016 respectively, the prosecutor refused to entertain the applicants' interlocutory appeals, finding them inadmissible in law. He stated that the applicants had wrongly interpreted his decision of 7 October 2016 in considering that it constituted a basis for the exhumation of their husbands' remains. The exhumation of their late husbands' remains would be decided in a separate order, specifying the time and place of exhumation. Nonetheless, he stated that a decision on exhumation under Article 210 of the CCP was not amenable to appeal. His decisions refusing to proceed with the interlocutory appeals did not contain any reference to the constitutional and Convention arguments raised by the applicants.

24. On 6, 7 and 21 December 2016 respectively, the applicants lodged interlocutory appeals against the prosecutor's decision with the Warsaw Regional Court. They alleged that the prosecutor's decisions refusing to entertain their interlocutory appeals had violated the provisions of the Constitution (Articles 45, 47 and 77 § 2), the Convention (Articles 3, 8 and 13) and the CCP. In their view, a correct interpretation of the relevant provisions of the CCP, in the light of the Constitution and the protection of fundamental rights, should have resulted in the availability of an interlocutory appeal against the prosecutor's decision of 7 October 2016.

25. The applicants invoked their right to dignity, the obligation to respect human remains and their right to respect for the memory of a late relative. They considered that the decision of 7 October 2016 concerned not only the appointment of a team of forensic experts but also the exhumation of their husbands' remains. In their view, that decision predetermined a decision to exhume the remains of their husbands; at a later date the prosecutor would only fix the exact date of the exhumation. The decision on exhumation constituted interference with the applicants' legal interests and therefore it was constitutionally required that they be provided with a legal remedy aimed at verifying the prosecutor's decision. The applicants also

stated that the prosecutor had failed to respond to their arguments based on the Constitution and the Convention.

26. The applicants also reiterated the arguments raised by the Ombudsman in his letter of 25 October, and in his subsequent letters of 2 and 18 November 2016 to the Deputy Prosecutor General.

27. On 3 April 2017 the Warsaw Regional Court (case no. VIII Kp 17/17) decided to refer a legal question to the Constitutional Court on the constitutionality of Article 210 of the CCP in so far as that provision did not provide for the opportunity to lodge an interlocutory appeal against a prosecutor's decision to exhume a body. The court alleged that the impugned provision was incompatible with Article 45 (the right to a court), Article 47 (the right to private and family life) and Article 78 (the right to appeal) of the Constitution and Articles 8 and 13 of the Convention. The court considered that the prosecutor's decision of 7 October 2016 had predetermined the issue of exhumation.

Having analysed the provisions of the CCP, the Regional Court found that prosecutors' decisions ordering autopsy (Article 209 of the CCP) or exhumation (Article 210 of the CCP) were not susceptible to judicial review. It noted, *inter alia*, that the right to grieve and the respect for that right owed to close relatives of a deceased person fell within the constitutional notion of "private and family life". In the event of the authorities interfering with that right, the individual concerned should be provided with a remedy. Article 210 of the CCP was constitutionally and conventionally deficient in that respect, since it did not provide for judicial review of a prosecutor's decision ordering exhumation.

28. As a result of the decision to refer a legal question, the proceedings before the Warsaw Regional Court have been suspended until the Constitutional Court issues a decision on the matter. The proceedings before the Constitutional Court are currently pending (case no. P 18/17).

29. On 24 May 2017 the applicants again urged the State Prosecutor's Office to revoke its decision on exhumation. The prosecutor replied in the negative on 7 June 2017.

30. The Government informed the Court that the exhumation of the applicants' husbands had initially been planned for 24 and 26 April 2018. The exhumations had been planned in line with the wishes of the families and the bodies of those victims whose families had not complained had been exhumed first. The bodies of those victims whose families had complained against the prosecutor's decision would be exhumed at a later stage.

31. On 13 April 2018 the prosecutor issued two orders setting the dates of the exhumation of the bodies of the applicants' husbands for 14 and 16 May 2018 respectively. The prosecutor stated that those orders were being issued in execution of the decision of 7 October 2016. The reasoning

was limited to a brief reference to the ongoing investigation and the decision of 7 October 2016.

32. The applicants lodged interlocutory appeals against the orders of 13 April 2018. On 27 April and 7 May 2018 the prosecutor refused to examine the applicants' interlocutory appeals on the grounds that they were inadmissible in law.

33. On 7, 8 and 9 May 2018 the applicants lodged interlocutory appeals with the Warsaw Regional Court against the prosecutor's decision refusing to examine their appeals. They argued that the prosecutor's decision violated various provisions of the CCP and the Constitution, as well as Articles 3, 8 and 13 of the Convention.

34. The Government submitted that in accordance with the code of conduct adopted by the investigative team of the State Prosecutor's Office, the prosecutors in charge of the investigation had taken steps to arrange a meeting with the applicants and their lawyers in order to explain the reasons for the intended investigative actions, to clarify the aim of the autopsies and to elucidate other important issues, such as the families' participation in the investigative actions and the issue of re-burial.

35. On 19 April 2018 the second applicant's lawyer informed the State Prosecutor's Office that his client would not take part in the proposed meeting with the prosecutors because she opposed the exhumation. The lawyer communicated with the prosecutors on all aspects of the planned exhumation.

36. On 24 April 2018 the first applicant and her lawyer participated in a meeting with the prosecutors responsible for the investigation. The participants discussed the organisational aspects of the exhumation.

37. The exhumation of the remains of Mr Arkadiusz Rybicki, the husband of the second applicant, was carried out on 14 May 2018. According to reports in the media, a few hundred people protested peacefully against the exhumation at the cemetery in Gdańsk. The exhumation exercise was secured by a large group of police officers.

38. The exhumation of the remains of Mr Leszek Solski, the husband of the first applicant, took place on 16 May 2018.

39. The investigation is pending.

C. Civil proceedings

40. On 3 November 2016 the applicants sought an injunction in the civil courts to prevent the prosecutor from carrying out the exhumation of their husbands' remains. They argued that it would interfere with their personal right to respect for the memory of their late relatives.

41. On 10 November 2016 the Warsaw Regional Court refused to grant an injunction. It held that the applicants had demonstrated that the planned exhumations would interfere with their personal rights, namely their right to

respect for the memory of their deceased closed relatives. The exhumation, the examination of the corpses and a second burial would interfere with that right. However, the Regional Court found that the applicants had failed to demonstrate that the intended interference with their personal rights would be unlawful and therefore dismissed their application. Pursuant to Article 209 § 1 and Article 210 of the CCP, a prosecutor was competent to order exhumation of bodies in the context of an investigation in which the deaths were being treated as suspicious. The legislature had decided that irrespective of the will and consent of the family, the prosecutor had a duty to order that an autopsy be carried out in every case of suspicious death and, if the corpse had been buried, also to order its exhumation. The legislature had given priority in this context to the investigation of serious crimes and punishment of the perpetrators over the protection of the right to respect for the memory of deceased family members.

42. On 5 December 2016 the Warsaw Court of Appeal dismissed an interlocutory appeal lodged by the applicants and upheld the Regional Court's findings. The Court of Appeal noted that its decision could not have been altered by the applicants' argument about the unconstitutionality of Article 209 § 1 and Article 210 of the CCP because the prosecutor's decision ordering exhumation was not amenable to appeal. It found that even if those provisions were eventually found to be unconstitutional, that would not render the prosecutor's decision unlawful.

II. RELEVANT DOMESTIC LAW

A. Constitution of the Republic of Poland

43. The relevant provisions of the Constitution read as follows:

Article 45 § 1

“Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Article 47

“Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.”

Article 77 § 2

“Statutes shall not bar any person from having recourse to the courts in pursuit of claims alleging infringement of freedoms or rights.”

Article 79 § 1

“In accordance with principles specified by statute, anyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of

a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution.”

Article 193

“Any court may refer to the Constitutional Court a question of law as to whether a normative act is in conformity with the Constitution, ratified international agreements or statutes, if the answer to such question of law will determine an issue currently [pending] before such court.”

B. Code of Criminal Procedure

44. Article 236 of the CCP provides that persons whose rights have been violated by an order for search and seizure issued in the course of an investigation have the right to lodge an interlocutory appeal against such an order with a district court. Article 240 of the CCP provides that a prosecutor’s order for the interception and recording of telephone conversations is susceptible to an interlocutory appeal. Under Article 252 § 2 of the CCP, the same rule is applicable to a prosecutor’s order for the application of a preventive measure.

45. Article 209 of the CCP, in so far as relevant, reads:

“1. If it is suspected that death has been caused by criminal means, an examination of the corpse and an autopsy shall be ordered.

...

4. An autopsy shall be carried out by an expert in the presence of a prosecutor or a court. ...”

46. Article 210 of the CCP reads:

“In order to conduct an examination of the corpse or an autopsy, the prosecutor or the court may order exhumation of a corpse”.

C. The Cemeteries and Burials Act of 31 January 1959

47. Section 10(1) of the Cemeteries and Burials Act (*ustawa o cmentarzach i chowaniu zmarłych*) provides that the surviving close family of a deceased person has the right to bury the corpse.

48. Section 15(1) of the Act provides, in so far as relevant:

“The exhumation of a corpse and remains may be undertaken:

1) following a reasoned request by the persons entitled to bury the corpse with the agreement of a relevant sanitary inspector,

2) following an order by a prosecutor or a court;

3) ...”

D. The Supreme Court's case-law on the right to respect for the memory of a deceased relative

49. In its judgment of 23 September 2009, no. I CSK 346/08, the Supreme Court found that the emotional sphere connected with respect for the memory of a deceased close relative could be protected by Articles 23 and 24 of the Civil Code. The personal right connected to respect for the memory of a deceased person comprised not only the right to organise a funeral and to pay one's respects at a grave; it also encompassed the emotional sphere of the relatives and the right to show due respect for the memory of their deceased relative. It was an independent right which was based on the family relationships of the entitled surviving relatives with the deceased person.

50. In its judgment of 10 December 2015, no. V CSK 201/15, the Supreme Court held that in accordance with its well-established case-law, the right to bury the corpse of a deceased relative (section 10(1) of the Cemeteries and Burials Act), together with the right to exhumation (section 15(1)(1) of the same Act) and the right to respect for the memory of a deceased relative, constituted a personal right. This was known as the right to a grave and was protected by Articles 23 and 24 of the Civil Code.

51. In its resolution of 29 June 2016 no. III CZP 24/16, the Supreme Court noted that respect for the deceased was an important element of European culture, as well as one of the foundations of the doctrine of the Catholic Church proclaiming that the body of a dead person should be treated with "respect and love". For those reasons, the legal status of the corpse was unique. There were no provisions setting out explicitly a duty to respect corpses and human remains; however, it was universally accepted as an axiomatic moral duty, arising also from some legal norms. Those norms concerned, in particular, the provisions on protection of personal rights such as the right to respect for the memory of a deceased person (*kult osoby zmarłej*) and the right to a grave (*prawo do grobu*), provisions of medical law and other laws. Those provisions, as well as their judicial interpretation, were permeated with respect for the dead, and allowed interference with a corpse only in exceptional circumstances, clearly prescribed by statute.

52. The Supreme Court further noted that a court or a prosecutor could order the exhumation of a corpse or remains exclusively within the framework of pending proceedings – civil or criminal – on the basis of their investigatory or jurisdictional powers, where this was supported by significant public interest, stemming from Article 292 and seq. of the Code of Civil Procedure and Article 209 and seq. of the Code of Criminal Procedure.

THE LAW

I. JOINDER OF THE APPLICATIONS

53. Given their similar factual and legal background, the Court decides that the two applications should be joined, pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. The applicants complained that the exhumation of their husbands' remains without their consent and in the absence of a review of the prosecutor's decision had constituted an arbitrary interference with their rights under Article 8 of the Convention. Article 8 reads, in so far as relevant:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *The Government's submissions*

55. The Government raised a preliminary objection of non-exhaustion of domestic remedies. In their view, the lodging of the present applications had been premature, since the proceedings before the domestic court had been suspended pending a decision by the Constitutional Court on the legal question referred to it by the Warsaw Regional Court on 3 April 2017.

56. The Government submitted that the Warsaw Regional Court, adjudicating on the applicants' interlocutory appeals, had rightly decided to refer the legal question to the Constitutional Court, which was the only body competent to assess the constitutionality of the legal provisions applicable to a particular case. According to academic opinion and domestic case-law, the Constitution clearly gave the Constitutional Court exclusive competence to adjudicate on the constitutionality of statutes.

57. The domestic court – having identified some doubt as to the conformity of Article 210 of the CCP with the Constitution and the Convention – had had no alternative but to act in accordance with Article 193 of the Constitution and refer the legal question to the Constitutional Court. This appeared to be the only way in which to address the complaints raised by the applicants in their interlocutory appeals,

including claims of a violation of the Constitution. Such a course of events could therefore have been reasonably expected by the applicants, or should have at least been entertained by them, as they themselves had prompted the review of the constitutionality of the impugned provision of the CCP. Had the applicants allowed the domestic system to proceed and waited to obtain the Constitutional Court's decision, it could not be precluded that their allegations would have been accepted and they would have obtained appropriate redress. Instead, immediately after the Warsaw Regional Court had referred the legal question, the applicants had lodged the present applications.

58. With regard to the applicants' argument that the Regional Court should have directly applied the relevant provisions of the Constitution, the Government submitted that such a possibility could only be entertained when the Constitutional Court had declared unconstitutional the statutory legal basis for a decision.

59. With regard to the applicants' claims that the Constitutional Court was ineffective, the Government viewed them as widely exceeding the limits of the present case and unwarranted. There was no basis to assert that the Constitutional Court in its present state was unable to duly perform its duties. The legislative action undertaken by the Sejm (the lower House of Parliament) in 2015 and 2016 had been aimed specifically at improving the Constitutional Court's functioning. The Constitutional Court's judges enjoyed full independence in adjudicating all matters brought before that court. The majority of the applicants' arguments were of a political nature and were aimed at discrediting the Constitutional Court as a judicial institution. The Government urged the Court to disregard those arguments.

60. The Government referred to the Court's case-law, which stated that an application for a review of the constitutionality of a legal provision and its compatibility with a provision of superior legal force – where this was the scope of the Constitutional Court's jurisdiction – was required of the applicants if they were challenging a provision of a statute as being in itself contrary to the Convention (*Liepājnieks v. Latvia* (dec.), no. 37586/06, 2 November 2010, and *Grišankova et Grišankovs v. Latvia* (dec.), no. 36117/02, 13 February 2003). Should the Constitutional Court declare the impugned provision of the CCP unconstitutional, the domestic court would have the possibility of examining the applicants' interlocutory appeal.

2. *The applicants' submissions*

61. The applicants disagreed with the Government's objection. They argued that the suspended proceedings before the Warsaw Regional Court pending a decision by the Constitutional Court on the legal question should not negatively affect the admissibility of their case. That was because the

Constitutional Court could no longer be regarded as an effective and impartial judicial body able to fulfil its constitutional duties.

62. Considering that the Constitutional Court was no longer an independent and effective body and being aware of the current situation of the Constitutional Court, the applicants had never asked the Warsaw Regional Court to refer a legal question to the Constitutional Court. Instead, their lawyer had asked the Regional Court at the hearing held on 9 March 2017 to quash the prosecutor's decision directly on the basis of the Constitution.

63. However, even leaving aside the question of the independence, impartiality and effectiveness of the Constitutional Court, the applicants stressed that neither the judgment of the Constitutional Court nor that of the Warsaw Regional Court had been able to suspend the execution of the prosecutor's decision. In fact, the exhumations had been carried out on 14 and 16 May 2018 respectively, without waiting for the conclusion of the proceedings before the Constitutional Court. In the applicants' view, without any prospect of suspending the prosecutor's decision, the only redress they could theoretically have obtained after many years of proceedings before the Constitutional Court and the Regional Court, would be moral satisfaction from confirmation that the exhumation had been unlawful. To obtain just satisfaction for the non-pecuniary damage suffered by them, they would have to initiate civil proceedings, which could last several more years. Therefore, the applicants believed that the only remedy which could be considered effective in their case would be a suspensive interlocutory appeal against a prosecutor's decision to exhume a body.

64. Lastly, the applicants had unsuccessfully applied to the civil courts for an injunction preventing the prosecutor from carrying out the exhumations. In this regard, they referred to the Court's case-law according to which "when a remedy has been pursued, use of another remedy which has essentially the same objective is not required" (*Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts)). Therefore, given that they had made use of the possibility of seeking an injunction, they could not justifiably be required to pursue other remedies.

65. The applicants maintained that the domestic law did not provide them with any effective remedy which they could have used before applying to the Court.

3. *The Court's assessment*

66. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption

that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among many other authorities, *Vučković and Others v. Serbia* [GC], no. 17153/11, §§ 69-77, 25 March 2014, and *Parrillo v. Italy* [GC], no. 46470/11, § 87, ECHR 2015, with further references).

67. In the instant case, relying on the proceedings pending before the Constitutional Court following the referral of a legal question, the Government pleaded that the applications were premature. The Warsaw Regional Court, while examining the applicants' interlocutory appeals against the prosecutor's decision of 7 October 2016, had decided to refer to the Constitutional Court a legal question on the conformity of Article 210 of the CCP with the Constitution and the Convention.

68. The Court notes that the referral of the said question had no practical effect on the execution of the prosecutor's decision ordering the exhumation of the remains of the applicants' deceased husbands. In particular, it did not lead to a suspension of the prosecutor's decision with regard to the applicants. The referral of the legal question suspended only the examination of the applicants' interlocutory appeal by the Warsaw Regional Court. The exhumations were carried out regardless of the proceedings pending before the Constitutional Court.

69. Therefore, the Court finds that the applicants have established that the remedy advanced by the Government was in fact inadequate and ineffective, having regard to the particular circumstances of the case, and that they were accordingly absolved from the requirement to await the outcome of the constitutional referral proceedings (see *Vučković and Others*, cited above, § 77).

70. Having regard to this conclusion, the Court does not consider it necessary to examine in the instant case the applicants' arguments relating to the alleged lack of effectiveness and independence of the Constitutional Court.

71. It follows that the objection raised by the Government must be dismissed.

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

B. Merits

1. *The applicants' submissions*

73. The applicants noted that there was no dispute between the parties that the right to respect for the memory of a deceased family member fell within the scope of Article 8 § 1 of the Convention. That conclusion was supported by the well-established case-law of the Court in cases such as, for example, *Pannullo and Forte v. France* (no. 37794/97, ECHR 2001-X), *Estate of Kresten Filtenborg Mortensen v. Denmark* ((dec.), no. 1338/03, ECHR 2006-V), *Hadri-Vionnet v. Switzerland* (no. 55525/00, 14 February 2008), *Girard v. France* (no. 22590/04, 30 June 2011) and *Elberte v. Latvia* (no. 61243/08, ECHR 2015). However, contrary to the Government's position, the applicants believed that the right at issue should be considered part of family life rather than private life, as it was closely connected to the relationship between family members and their strong emotional bonds. They referred to previous cases in which the Court had ruled that various measures undertaken by the authorities with regard to the remains of persons close to the applicants had interfered with the latter's right to private and family life. To date, the Court had never ruled on a case involving the question of exhumation against the will of the deceased's family. However, the applicants saw no reason to distinguish their case from the above-mentioned judgments regarding the relationship between individuals and the remains of their close relatives.

74. There was no doubt that the exhumation carried out pursuant to the prosecutor's decision of 7 October 2016 constituted an interference with their right to respect for the memory of a deceased family member, and thus with their rights under Article 8 of the Convention. Referring to the Government's argument that the prosecutor would issue a separate order specifying the exact date of each exhumation, the applicants maintained that this had been merely a formality, since the issue of exhumation had been predetermined by the prosecutor's decision of 7 October 2016. The prosecutor's orders of 13 April 2018 setting the date of the exhumations for 14 and 16 May 2018 respectively stated that they were being issued in execution of the previous decision of 7 October 2016. This confirmed the conclusive nature of the decision of 7 October 2016.

75. The applicants argued that the interference at issue had not been carried out "in accordance with the law". The prosecutor's decision of 7 October 2016 had a legal basis in domestic law, namely the CCP. However, the mere existence of a legal basis for interference was not sufficient to satisfy the requirement of lawfulness, and the law had to meet certain qualitative requirements.

76. The provisions of the CCP applicable in the present case did not provide any safeguards against arbitrariness. In particular, they did not allow the family of the deceased to appeal against an exhumation order to

an independent court. Moreover, domestic law did not require the prosecutor to take into account the feelings and preferences of the family of a deceased person. As a consequence, the prosecutor was empowered to undertake a measure that constituted a serious interference with the individuals' private and family life in a completely arbitrary manner. The applicants pointed out that the CCP allowed appeals to the court against certain decisions issued by a prosecutor in the course of an investigation. These concerned, *inter alia*, decisions regarding searches and seizures, control and recording of telephone conversations and preventive measures (see § 44 above). It would be difficult to justify why those types of decisions by a prosecutor could be amenable to judicial review (even though, as a rule, an interlocutory appeal did not automatically suspend the execution of a decision, but the court could order suspension in particular cases – Article 462 § 1 of the CCP), whereas the power to order exhumation “had to be completely arbitrary”.

77. The applicants agreed that the interference at issue, serving to elucidate the causes of the crash, had pursued the legitimate aim of protecting the rights and freedoms of others, national security and public safety.

78. The applicants conceded that the investigation into the circumstances of the crash was of utmost importance for the whole country. Nonetheless, they doubted that the exhumation of their husbands' bodies had been necessary within the meaning of Article 8 § 2.

79. Firstly, it had been unnecessary to order the exhumation of the remains of all victims in one decision in order to verify the hypothesis that the crash had been caused by an explosion. The prosecutor could have ordered first the exhumation of the bodies of those victims whose families did not oppose it. If those actions had turned out to be inconclusive, the exhumation of other bodies would have been justified. Secondly, the exhumation of the remains of all the victims had been impossible, since four of the bodies had already been cremated. Thirdly, with regard to the need to properly identify the victims, neither the prosecutor nor the Government had provided any evidence suggesting that the applicants' husbands could have been wrongly identified. Fourthly, the prosecutor's decision had been issued more than six years after the crash. The Polish authorities had already had an opportunity to examine the bodies of the victims immediately after they had been repatriated to Poland and before the burials, but they had not done so. Forcing the applicants to relive the trauma of 10 April 2010 after so many years just in order to fix the consequences of the authorities' inaction required particularly convincing arguments. The applicants disagreed with the Government that the judgment in *Tagayeva and Others v. Russia* (nos. 26562/07 and 6 others, ECHR 2017 (extracts)) was relevant for their case, since in that case, the families of the victims had demanded that the

authorities carry out the exhumations, whereas in the present case the applicants had consistently opposed the exhumations.

80. On the issue of identification of the bodies, the first applicant emphasised that she had taken part in the identification of her husband's body in Moscow. She had been present when her husband's body had been put into a coffin and placed in the car which had transported it to the airport. Being a physician by training, she had no doubts with regard to the identification of her husband. The second applicant had not taken part in the identification of her husband's body. His body had been identified in Moscow by the then Minister of Health, who had been a friend of Mr Rybicki for many years.

81. The applicants stressed that they had not been involved in the decision-making process regarding the exhumation of their husbands' bodies. A meeting with the families should have been organised before the decision of 7 October 2016 had been issued. Such a meeting would have permitted the families to be consulted on the prosecutor's plans and to choose options which adequately respected their feelings. A meeting subsequent to the said decision could not be considered as a consultation, because it had not allowed the applicants to influence the decision-making process. The authorities had not even consulted the applicants on the planned date of the exhumation. In fact, the applicants had been unaware of the timetable of the exhumations until they had been served with the Government's observations in the present case.

82. In the applicants' view, in such sensitive matters as the exhumation of the body of a close relative, only a judicial review could have ensured the proper weighing of the various conflicting interests at stake. In accordance with the Court's case-law, judicial review was one of the most important safeguards against arbitrary interferences with rights protected by Article 8. The applicants referred to the cases of *Varga v. Romania* (no. 73957/01, §§ 70-74, 1 April 2008), *Kennedy v. the United Kingdom* (no. 26839/05, § 124, 18 May 2010), and *X v. Finland* (no. 34806/04, § 220, ECHR 2012 (extracts)).

83. The lack of any real consultations or judicial review was even more striking given the lapse of time between the crash and the prosecutor's decision. It was not an urgent situation, where even a slight delay could cause irreversible damage to the investigation. Consequently, the flawed decision-making process was not justified.

84. In the Polish context, the necessity of a judicial review was even more important, taking into account that the prosecution service was not an independent authority, but a body subordinated to the Prosecutor General, who was at the same time the Minister of Justice.

85. The applicants emphasised that the prosecutor's decision had caused them significant psychological harm by forcing them to relive the mourning and the trauma. Both applicants had already endured prolonged mental

suffering following the loss of their husbands. The Government had not presented any convincing arguments which could justify exposing them again to such psychological trauma.

86. In conclusion, the authorities had shown a blatant disregard for the applicants' feelings, and the interference at issue had not been necessary in terms of Article 8 § 2.

2. *The Government's submissions*

87. On the issue of interference, the Government noted that matters concerning the burial of family members fell within the scope of Article 8. Referring to the *Estate of Kresten Filtenborg Mortensen v. Denmark* ((dec.), no. 1338/03, ECHR 2006-V), the Government did not contest that the applicants' right to respect for the memory of a deceased family member fell within the scope of Article 8 § 1. They asserted that this right should be considered to fall within the notion of the right to private life.

88. The purpose of the prosecutor's decision of 7 October 2016, however, had been to appoint a team of international forensic experts with a view to carrying out autopsies on the bodies of eighty-three victims of the crash. That decision, *per se*, did not constitute an interference in terms of Article 8 § 1 of the Convention. However, in order to enable the forensic experts to examine the victims' bodies, it had been necessary to have access to them. It could then be said that in some way, as noted by the Warsaw Regional Court, the prosecutor's decision of 7 October 2016 had predetermined the issue of exhumation. To be precise, the prosecutor had stated that separate orders were to be issued regarding the exhumation of each of the victims.

89. With regard to the requirement of lawfulness, the Government stressed that the decision of 7 October 2016 had been not only based on clear and accessible law, namely the CCP, but had also been expressly required by it. The law obliged the prosecutor to open an investigation where there was good reason to suspect that an offence had been committed. Moreover, under Article 209 § 1 of the CCP, it was obligatory to order an autopsy if it was suspected that death had been caused by criminal means. Where the victims were numerous, it could be seen as discriminatory to decide to exhume only certain bodies and omit others, especially if the cause of death could be different, as in the case of an aircraft crash. If a prosecutor decided to order exhumations only in respect of some victims of a crash, that would be contrary to the standards of effective investigation.

90. As regards the existence of safeguards against arbitrary interferences with Article 8 of the Convention, the Government argued that the case-law referred to by the applicants was irrelevant to the present case because there were obvious factual differences. In addition, in the present case the interference was not of an arbitrary nature and had served important interests of justice.

91. The Government maintained that the interference at issue had served a legitimate purpose. It was clear that the interests of national security, public safety, prevention of crime and disorder, and the economic well-being of the country were at stake as far as the proper investigation of the crash was concerned.

92. The interference with the applicants' rights had been necessary in a democratic society. The Government referred to the procedural obligation under Article 2 of the Convention, which required the State to carry out an effective investigation into the death of a person. The authorities conducting an inquiry must take all reasonable steps and measures in order to properly investigate the suspected crime. Referring to the case of *Tagayeva and Others v. Russia* (cited above), the Government stressed that failure to carry out autopsies on all the victims could lead to a finding of a violation of Article 2.

93. The Government reiterated that the investigation in the present case concerned an event of unprecedented gravity, in which many of the highest State officials had died, including the President of the Republic of Poland. As a consequence of that incident, the entire functioning of the State had been affected. That fact warranted undertaking all reasonable steps in order to investigate the incident, including exhumation of the bodies of the victims. The information obtained through the autopsies was of vital importance in explaining the causes of the crash, its course and also the causes of the victims' death. The crash continued to be a subject of public interest.

94. The State authorities had had to balance the interest of the investigation into the circumstances of the crash, as required by the procedural limb of Article 2, against the interest of the family and private life of the victims' relatives, protected by Article 8 § 1. The latter interest could be justifiably interfered with where exhumations were deemed necessary as part of an ongoing investigation. The authorities had carried out a balancing exercise and appropriately weighed the conflicting interests at hand.

95. With regard to the rationale behind the provisions of the CCP in so far as they did not offer a possibility of lodging an interlocutory appeal against the prosecutor's decision ordering exhumation, the Government submitted that prosecutors, being the authority responsible for conducting investigations into suspected crimes, took independent decisions based on already established facts and their professional experience. Prosecutors were afforded a range of discretionary powers for the purpose of achieving the aim of an investigation.

96. The legislature, being aware that certain private interests would clash with the public interest pursued by a prosecutor, had excluded the possibility of lodging an interlocutory appeal against such decisions by prosecutors. Otherwise, a prosecutor's action would often be paralysed by

numerous appeals lodged by unsatisfied parties to the case, who would feel that their rights were being interfered with. Only if prosecutors were allowed to undertake procedural decisions unhindered in the course of an ongoing investigation could the public interest of prevention of crime and punishment of perpetrators be met. Nonetheless, the balancing of the two conflicting interests was carried out by prosecutors within the remit of their competences.

97. The aim of the prosecutor's actions in the present case had been at least twofold. His decision of 7 October 2016 purported to help explain both the cause of the crash and the cause of death, as well as to verify the identity of the victims. The prosecutor had explained that the autopsies carried out by the Russian authorities had proven to be erroneous or incomplete. Taking into account the high stakes of the investigation, the prosecutor had had no alternative but to appoint new experts and demand that a new and comprehensive forensic expert opinion be issued.

98. Only a proper identification of all the remains of the victims would enable their relatives to fully enjoy their right to respect for the memory of the deceased, and honour and respect for the burial. It was in the applicants' interest to ensure that they could respect the memory of their late husbands whilst visiting the graves where their remains had been laid. The only way to ensure the respect for that interest was to make sure that the remains buried in each grave belonged to the person believed to have been buried there. This necessitated carrying out DNA tests on the victims' remains.

99. The Government disagreed that there had been no justification for carrying out the exhumations against the will of the families owing both to the lapse of time since the crash and the lack of autopsies carried out by the Polish authorities prior to the burial of the victims.

100. Contrary to the applicants' statements, the prosecutor had shown willingness to consult with the victims' relatives prior to issuing an exhumation order in respect of each particular victim. This demonstrated that the prosecutor had not only been aware of the applicants' interests, but had also taken active steps to ensure that the applicants' doubts were cleared and the reasons for his decision properly explained.

3. The Court's assessment

(a) Applicability of Article 8

101. The Government did not contest that the applicants' right to respect for the memory of their deceased family members attracted the protection of Article 8 § 1.

102. The applicants agreed that Article 8 § 1 was applicable, but argued, contrary to the Government, that the right to respect for the memory of a late relative should be considered part of family life.

103. The present case raises an issue of applicability of Article 8 § 1 to the exhumation of a deceased person against the will of the family members in the context of criminal proceedings. The Court has not yet specifically addressed this question in its case-law.

104. The Court observes in this context that the exercise of Article 8 rights concerning family and private life pertain, predominantly, to relationships between living human beings. However, it is not excluded that respect for family and private life extends to certain situations after death (see *Jones v. United Kingdom* (dec.), no. 42639/04, 13 September 2005).

105. In the cases of *Pannullo and Forte* (cited above, §§ 35-36) and *Girard* (cited above, § 107) the Court recognised that an excessive delay in returning a deceased child's body to the parents for a funeral or in returning bodily samples on completion of the relevant criminal proceedings may constitute an interference with both the "private life" and the "family life" of the surviving family members. In the case of *Płoski v. Poland* (no. 26761/95, § 32, 12 November 2002), a refusal to allow the applicant, a prisoner, to attend the funeral of his close relatives was found to constitute an interference with the right to respect for his private and family life. In the case of *Elli Poluhas Dödsbo v. Sweden* (no. 61564/00, § 24, ECHR 2006-I) the Court found that the refusal to transfer an urn containing the ashes of the applicant's husband could also be seen as falling within the ambit of Article 8, without however stating whether the interference found related to the concept of private life or family life. In the case of *Hadri-Vionnet v. Switzerland* (no. 55525/00, § 52, 14 February 2008) the Court decided that the possibility for the applicant to be present at the funeral of her stillborn child, along with the related transfer and ceremonial arrangements, was also capable of falling within the ambit of Article 8. In the case of *Sabanchiyeva and Others v. Russia* (no. 38450/05, § 122-23, ECHR 2013 (extracts)), the Court accepted that the refusal to return the bodies of the applicants' relatives, alleged terrorists, and their burial in an unspecified location had amounted to interference with the relatives' "private life" and "family life". In the cases of *Petrova v. Latvia* (no. 4605/05, § 77, 24 June 2014) and *Elberte v. Latvia* (no. 61243/08, § 89, ECHR 2015), the Court recognised that the removal of a deceased relative's organs or tissues without consent came within the scope of the "private life" of the surviving family members. In the case of *Lozovyie v. Russia*, (no. 4587/09, § 34, 24 April 2018), the Court held that the applicants' right to respect for their private and family life had been affected by the failure of the State to inform them of their son's death before he had been buried.

106. The above-mentioned case-law demonstrates that certain issues related to the way in which the body of a deceased relative was treated, as well as issues regarding the ability to attend the burial and pay respects at the grave of a relative have been recognised as coming within the scope of the right to respect for family or private life under Article 8.

107. The applicants relied in the instant case on their right to respect for the memory of a late relative (*kult osoby zmarłej*), which, in their view, was closely connected to relations between family members. The Court notes that this right is recognised under domestic law as one of the personal rights protected by the Civil Code. It is vested in the surviving family members of a deceased person and extends, *inter alia*, to organising a funeral and paying respect to a deceased relative at his or her grave (see paragraphs 49-51 above).

108. Regard being had to its case-law concerning surviving family members and the above-mentioned circumstances, the Court finds that the facts of the present case fall within the scope of the right to respect for private and family life.

(b) Whether there was an interference

109. The applicants maintained that the exhumation carried out on the basis of the prosecutor's decision of 7 October 2016 constituted interference with their Article 8 rights. The Government expressed some doubt as to whether that decision in itself amounted to interference. However, they agreed that the decision of 7 October 2016 had predetermined the issue of exhumation. The remains of the applicants' husbands were exhumed on 14 and 16 May 2018 respectively.

110. The Court considers that the exhumation of the remains of the applicants' deceased husbands, carried out despite the applicants' objections, could be regarded as impinging on their relational sphere in such a manner and to such a degree as to disclose an interference with their right to respect for their private and family life.

(c) Was the interference justified?

111. In order to be justified under Article 8 § 2 of the Convention, any interference must be in accordance with the law, pursue one of the listed legitimate aims and be necessary in a democratic society (see *Pretty v. the United Kingdom*, no. 2346/02, § 68, ECHR 2002-III, and *Glass v. the United Kingdom*, no. 61827/00, § 73, ECHR 2004-II).

(i) In accordance with the law

112. The Court notes from its well-established case-law that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law (see *Halford v. the United Kingdom*, 25 June 1997, § 49, *Reports of Judgments and Decisions* 1997-III), which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet

these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner in which it is exercised (see *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82; *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II; *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008).

113. The interference with the right to respect for the private and family life must therefore be based on a “law” that guarantees proper safeguards against arbitrariness. There must be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse of powers (see, *mutatis mutandis*, *Polyakova and Others v. Russia*, nos. 35090/09 and 3 others, § 91, 7 March 2017). The requirements of Article 8 with regard to safeguards will depend, to some degree at least, on the nature and extent of the interference in question (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 121, 20 June 2002; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 46, ECHR 2001 IX; and *C.G. and Others v. Bulgaria*, no. 1365/07, § 45, 24 April 2008). In a number of cases involving complaints under Article 8, the Court has found that proper legal safeguards against arbitrariness would necessitate the provision of judicial or other independent scrutiny of relevant measures affecting individuals (see *Rotaru v. Romania*, § 59; *C.G. and Others v. Bulgaria*, § 40, both cited above; *Varga v. Romania*, no. 73957/01, § 73, 1 April 2008; *Heino v. Finland*, no. 56720/09, § 45, 15 February 2011; *X v. Finland*, cited above, §§ 220-21; and *Polyakova and Others v. Russia*, cited above, §§ 116-17).

114. The Court must thus examine the “quality” of the legal rules applicable to the applicants in the instant case.

115. The Court notes that in his decision of 7 October 2016 the prosecutor ordered autopsies to be carried out on the bodies of eighty-three victims of the crash (including the applicants’ husbands), pursuant to Article 209 § 1 of the CCP. He further ordered that for the purpose of carrying out the autopsies, the bodies of the victims be exhumed in accordance with Article 210 of the CCP.

116. The Court observes that the applicants questioned the quality of Article 210 of the CCP, which constituted the legal basis for the prosecutor’s decision ordering exhumation. In particular, they contested the fact that they had been unable to challenge the prosecutor’s decision on such a sensitive issue before a court. In their view, only a judicial review could have ensured that the conflicting interests at stake were properly weighed. The Government asserted that the legal basis for the exhumation was fully compatible with the relevant case-law requirements.

117. The Court notes that both parties agreed that the CCP provided a legal basis for the exhumation. The Court is therefore satisfied that the interference complained of had a legal basis in Polish law, namely Article 210 of the CCP.

118. With regard to the quality of the law, the Court observes that the instant case pertains to obligations of the State under the Convention which may come into conflict. On the one hand, Article 2 of the Convention contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (see, among many other authorities, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 169-82, 14 April 2015, and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 229-39, ECHR 2016). The alleged lack of an effective investigation into an alleged breach of the substantive limb of Article 2 may engage the responsibility of the High Contracting Party.

119. On the other hand, in carrying out an effective investigation, the authorities have an obligation to protect the right to respect for everyone's private and family life set forth in Article 8 of the Convention. In the Government's submission, the requirements of an effective investigation made it necessary to provide for certain interference in the exercise of a claimant's right to respect for his or her private and family life.

120. In order to be "effective", as the word is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate. This implies, *inter alia*, that the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including 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 death (see *Armani Da Silva*, cited above, § 233, with further references). An effective investigation may, in some circumstances, require the exhumation of the bodies of the deceased (see, *mutatis mutandis*, *Tagayeva and Others v. Russia*, cited above, § 509).

An effective investigation must also be accessible to the victim's family to the extent necessary to safeguard their legitimate interests (see *Armani Da Silva*, cited above, § 235). The manner in which those legitimate interests are safeguarded may differ depending on a number of factors. In any event, measures available to the victims in the course of an investigation should not undermine its effectiveness.

121. In these circumstances, the Court considers that the State authorities are required to find a due balance between the requirements of an effective investigation under Article 2 of the Convention and the protection of the right to respect for private and family life of the parties to the investigation and other persons affected. In the applicants' case, the requirements of the investigation's effectiveness have to be reconciled to the highest possible degree with the right to respect for their private and family

life. There may be circumstances in which exhumation is justified, despite the opposition by the family.

122. The Court agrees with the Government that the investigation in the present case concerns an incident of unprecedented gravity, which affected the entire functioning of the State. At the same time, the Court is mindful of the importance of the applicants' interest in ensuring that the remains of their deceased husbands were respected.

123. The Government submitted that the legislature had excluded the possibility of lodging an interlocutory appeal against a prosecutor's decision ordering exhumation, since otherwise the prosecution's ability to conduct an investigation would be obstructed by numerous appeals lodged by unsatisfied parties. However, the Court notes that the Code of Criminal Procedure does not exclude all judicial scrutiny in the exercise of prosecutorial powers in an investigation. Certain decisions taken by a prosecutor in the course of an investigation are amenable to judicial review. This concerns decisions on search and seizure (Article 236 of the CCP), on control and recording of telephone communications (Article 240 of the CCP) and on the application of preventive measures (Article 252 § 2 of the CCP).

124. In the instant case, the prosecutor ordered the exhumation of the remains of the applicants' husbands. When issuing his order, the prosecutor was not required by the CCP to assess whether the aims of the investigation could have been attained through less restrictive means and to evaluate the possible implications of the impugned measures on the private and family life of the applicants. Furthermore, the prosecutor's decision was not amenable to appeal before a criminal court or any other form of adequate scrutiny before an independent authority.

125. The Court also notes that the applicants attempted to obtain an injunction from a civil court preventing the prosecutor from carrying out the exhumations. However, the civil courts dismissed their application, having found that the prosecutor had exercised his functions in compliance with the relevant provisions of the CCP. The civil courts neither reviewed the necessity of the impugned measure nor weighed the interference resulting from the prosecutor's decision against the applicants' interests safeguarded by Article 8 of the Convention (see paragraphs 41-42 above).

126. Having regard to the foregoing considerations, the Court concludes that Polish law did not provide sufficient safeguards against arbitrariness with regard to a prosecutorial decision ordering exhumation. The domestic law did not provide a mechanism to review the proportionality of the restrictions on the relevant Article 8 rights of the persons concerned resulting from the prosecutor's decision (see *Polyakova and Others*, cited above, §§ 99 and 101). The applicants were thus deprived of the minimum degree of protection to which they were entitled.

127. The Court finds accordingly that it cannot be said that the interference in question was “in accordance with the law” as required by Article 8 § 2 of the Convention.

128. There has therefore been a violation of Article 8 of the Convention.

(ii) Legitimate aim and necessity of the interference

129. Having regard to the above conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see, for example, *Kopp v. Switzerland*, 25 March 1998, § 76, *Reports of Judgments and Decisions* 1998-II).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

130. The applicants further alleged a violation of Article 13 read in conjunction with Article 8 of the Convention, complaining that the domestic law did not provide them with an effective remedy as they were unable to have the prosecutor’s decision on exhumation reviewed in either criminal or civil proceedings. Article 13 of the Convention reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

131. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible. However, having regard to its finding relating to Article 8 of the Convention (see paragraphs 126-128 above), the Court considers that it is not necessary to examine separately whether, in this case, there has been a violation of Article 13 (see, among other authorities, *Heino*, § 55, and *Elberte*, § 147, both cited above).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

132. 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

133. The applicants claimed 50,000 euros (EUR) each in respect of non-pecuniary damage.

134. The applicants submitted that they had been deeply traumatised after the loss of their husbands in the crash. They had experienced problems

with going about their daily life and had been treated for depression. Just as they had been beginning to recover, the prosecutor had decided to order the exhumation of their husbands' remains. That decision had plunged them back into the trauma and the related psychological problems. The psychological harm they had suffered had been exacerbated by the fact that the authorities had completely ignored their feelings and objections, showing blatant disregard for them and their late husbands. The applicants had been further tormented by the detailed information of the results of each autopsy sent to them by the prosecutor.

135. The first applicant also referred to the uncertainty as to the date for the exhumation of her husband's remains. She felt that the authorities had ignored her tragedy and treated her as an object in order to achieve their political aims. The second applicant emphasised the arbitrariness of the prosecutor's decision. The prosecutor had ignored her argument that she had been present during the identification of her late husband.

136. The Government invited the Court to reject the applicants' claims for non-pecuniary damage, since there had been no violation of the Convention in the instant case. In the alternative, they submitted that the sums claimed were grossly exorbitant in the light of the circumstances of the case and the Court's awards made in similar cases.

137. The Court has found a violation of Article 8 in that the domestic law did not provide sufficient safeguards against arbitrariness with regard to the prosecutor's decision ordering exhumation. It considers that the applicants have endured mental suffering as a result of that decision, as well as feelings of frustration in trying to defend their Article 8 rights. Ruling on an equitable basis, it awards each applicant EUR 16,000.

B. Costs and expenses

138. The applicants also claimed EUR 960 for the costs of legal representation in the proceedings before the Court. This sum was to be allocated to the Helsinki Foundation for Human Rights as reimbursement for the work of its employee, Mr P. Kładoczny, who had represented the applicants on a *pro bono* basis.

139. The Government submitted that this claim should be rejected. They noted that the applicants had not incurred any costs for their legal representation because it had been offered to them on a *pro bono* basis.

140. It has not been shown that the costs claimed were actually incurred. Accordingly, the Court rejects the claim for costs and expenses.

C. Default interest

141. 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,

1. *Joins* the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; to be converted into the currency of the respondent State 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 20 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Eicke is annexed to this judgment.

L.-A. S.

A. C.

CONCURRING OPINION OF JUDGE EICKE

Introduction

1. The plane crash at Smolensk Severny Airdrome on 10 April 2010, in which all 96 persons on board, including the President of Poland and other senior representatives of the Polish State, who were on their way to attend the ceremony marking the 70th anniversary of the Katyń Massacre, were killed, was, as the judgment records, clearly “an incident of unprecedented gravity, which affected the entire functioning of the State” (§ 122). It provides the background to the complaints in this case.

2. Applying the principle of subsidiarity and out of respect for the highly sensitive and emotionally charged context, the Court in its judgment rightly, in my view, limited itself to addressing the complaints made by the applicants only to the extent absolutely necessary. As a consequence, it (a) found that the order for the exhumation of some of the victims of that plane crash, under Articles 209 and 210 of the Code of Criminal Procedure, was not “in accordance with the law”, as required by Article 8 § 2 of the Convention (§ 127) and (b) considered that it was not necessary to consider and/or reach a concluded view on whether that exhumation was “necessary in a democratic society” and/or proportionate (§ 129).

3. I fully agree both with that approach as well as with the conclusion that the interference with the applicants’ rights for respect of their private and family life under Article 8 § 1 of the Convention was not “in accordance with the law” because “Polish law did not provide sufficient safeguards against arbitrariness with regard to the prosecutorial decision ordering exhumation” (§ 126).

4. For the reasons set out in a little more detail below, the only disagreement I have with the judgment relates to the necessity and appropriateness of the Court’s response to the Government’s arguments based on Article 2 of the Convention in §§ 121 to 122 of the judgment.

Article 2 and balancing

5. In response to the applicants’ complaint of a breach of Article 8 of the Convention arising out of the exhumations ordered by the Polish prosecutor, the Government, perfectly understandably, raised the argument that the rights of the applicants had to be balanced against any obligations the State may have under Article 2 of the Convention to conduct an investigation into the causes of the loss of life resulting from the Smolensk plane crash.

6. While both parties in their pleadings addressed in detail the position under Article 8 and set out their respective positions, no Article 2 complaint was before the Court and no detailed submissions on the existence, nature

and/or extent of the duty imposed by Article 2 on the Polish State were either sought by the Court or otherwise made by the parties.

7. In light of the principle of subsidiarity and out of respect for the highly sensitive and emotionally charged context of these particular applications, it seems to me that the passages in §§ 121 to 122 were both unnecessary and, in so far as they may be misunderstood as an endorsement or acknowledgement of the compliance of the Polish investigations with Article 2, inappropriate.

8. Why unnecessary? Even though the Polish government first relies on the obligations under Article 2 of the Convention under the heading “The requirement of lawfulness”, its argument was squarely put on the basis that “[t]he state authorities must have balanced the national interests behind a full investigation into the circumstances of the catastrophe – as required by Article 2” with the “interest of the protection of family and private life of the victims as protected by Article 8 § 1 of the Convention” and the submissions that “the state authorities correctly carried out this balancing out [sic] and appropriately weighed the conflicting interests at hand” (§ 75 of the Government’s Observations of 22 November 2017). The Court, in § 121, consequently also refers to the obligations under Article 2 of the Convention as support for an argument that “the State authorities are required to find due balance” between the requirements of an investigation under Article 2 and the protection of the right to respect for private and family life of the affected individuals under Article 8. While both do so under the heading related to the lawfulness of the interference, it seems to me clear that, in fact, the need for a balance only arises at the later stage (if one gets there) when the Court is considering whether a particular interference with the rights under Article 8 § 1 are “necessary in a democratic society” and/or proportionate. Neither the need for a balance generally nor any obligations on the Polish State arising under Article 2 are either required or, in this case, relevant to answering the question whether the relevant Polish law complied with the requirements of the rule of law and whether it provided sufficient safeguards against arbitrariness so as to be “in accordance with the law”.

9. Why inappropriate? As I indicated above, as an *obiter dictum* not strictly relevant or necessary for the conclusion the Court reached and expressed without having had detailed submissions on the Article 2 aspect, the passages in §§121 to 122, in my view, create an unnecessary risk of being misunderstood or misinterpreted and are, on their face, too narrowly drawn by their almost exclusive reference to the need for any investigation under Article 2 to be “effective”.

10. Of course I agree that, in so far as it is necessary for a court to consider the necessity and/or proportionality of an order for the exhumation of the victim of an incident under Article 8 § 2, any obligation on the state ordering the exhumation arising under Article 2 is plainly a highly relevant

and important consideration. In fact, frequently, the exhumation of a body will be a necessary part of an effective investigation within the meaning of the State's procedural obligation under Article 2 of the Convention and, as a matter of principle, Article 8 does not provide family members with an unconditional right to prevent the authorities from carrying out such an exhumation in the appropriate circumstances.

11. That, however, was not the question the Court decided this case on nor was it a question the Court ultimately felt it necessary to consider and determine. This may be even more important in light of the fact that, as I understand it, this may well be a question the domestic courts may have to answer at some stage (whether in these or other cases) depending on the outcome of the reference by the Warsaw Regional Court to the Constitutional Court, made on 3 April 2017 (§ 27) on the constitutionality of Article 210 of the Code of Criminal Procedure. The Court should not be taken to have pre-determined this question (either specifically or generally) if it were to arise before the domestic courts.

12. Furthermore, it is important to stress that “effectiveness” of an investigation is not the only relevant aspect of the positive obligation under Article 2. As this Court has repeatedly made clear, in addition to being effective and independent, any investigation under Article 2 also has to (a) be prompt (see e.g. *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 237, 30 March 2016) and (b) proceed with reasonable expedition (see e.g. *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 305, ECHR 2011 (extracts)). In the latter case, the Court confirmed that the requirements of promptness and expedition are “essential in maintaining public confidence in their adherence to the rule of law” (*ibid.*).

13. In considering expedition, I am, of course, aware that there are aspects of the Polish criminal investigation which, despite the passage of more than eight years since the plane crash, have not been able to be concluded *inter alia* due to a refusal by the Russian authorities to hand over the wreckage of the plane as required Appendix 13 of the Chicago Convention (see *inter alia* the draft resolution unanimously adopted by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 25 June 2018 and the Draft Explanatory Report thereto).

14. However, in relation to the exhumations (in particular in light of the impact they are said to have had on the victims widows in this case), questions concerning the expeditious nature of the investigations may nevertheless arise out of the fact that, as I understand it

(a) the Polish authorities started their criminal investigation(s) on 10 April 2010 and, so the applicants say, could therefore have examined the victims' bodies then, i.e. as soon as they were returned to Poland (and before they were buried and some of them were cremated);

(b) the Polish authorities carried out a few exhumations after August 2011 as a result of which some of the mis-identifications (now given as one of the reasons for the 2017/18 exhumations) were discovered; and

(c) no explanation has been provided by the Respondent Government (who carries the primary burden to establish justification) for what appears to be (even taking the August 2011 date as the starting point) a more than 5-year delay in seeking to exhume these victims' bodies now.

15. Absent detailed submissions, it is, of course not for the Court (nor for me in this separate opinion) to pre-judge this question but, consequently, it seems to me that the incomplete and *obiter* reference to the Article 2 obligations was inappropriate in the circumstance of this case and should not have been made.

16. Finally, I should make clear that reference to the Article 2 obligations of the Polish State made in the judgment and above assume that Article 2 does, in fact, impose a positive obligation on the Polish State to conduct an effective and expeditious investigation into a plane crash that occurred within the jurisdiction of another Council of Europe State, namely Russia. This is, however, merely an assumption and does not reflect any (detailed) consideration and even less a decision that such an obligation, in fact, arises in relation to Poland under Article 2 of the Convention. The relevant international law and its inter-play with the European Convention on Human Rights are clearly complex and would require careful consideration if the issue ever came up for decision before the Court.

17. That said, there can be no doubt about the legitimacy of the desire by the Polish State to conduct its own criminal investigations into what caused the plane crash and whether any person was criminally liable in relation thereto, even more so in context of this most tragic event and its continuing significance for the Polish government and for many Polish citizens. The only question is whether, as a matter of Convention law, such an investigation is required by Article 2 of the Convention.