Selected Legislation and Jurisprudence

European Court of Human Rights*

ECHR 2017/14 *Case of Erdiñç Kurt and Others v. Turkey*, 6 June 2017, no. 50772/11 (Second Section)

This judgment is available only in French.

The Facts

The daughter of the other two applicants, born in 2003, underwent two high risk surgical operations that left her with serious neurological after-effects. In 2004, she began receiving treatment for heart problems in a children's hospital. The doctors decided to operate and her father signed a consent form that set out the potential risks. Following a decision by the hospital's medical board, a further operation was performed and the girl's father signed an identical form. On 11 July 2007, the medical board of another children's hospital diagnosed the child with severe and incurable delayed psychomotor development caused by hypoxic-ischaemic encephalopathy, and assessed her level of disability at 92%. Her parents lodged a complaint against the surgeons.

The report issued following an internal investigation stated that the child was suffering from a very serious congenital heart condition, and concluded that no errors had been committed by the medical team during the operations. In September 2008, the public prosecutor's office discontinued the proceedings.

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* These summaries are based on the provisional text of the judgements of the European Court of Human Rights. These judgments are still subject to editorial revision before their reproduction in *Reports of Judgments and Decisions*. For the full provisional text, see: <http://www.echr.coe.int>.

In May 2008, the applicants brought an action against the doctors in the Court of First Instance. The court appointed a panel of experts, which submitted its report on 31 July 2009. According to the report, the child had been suffering from a very serious and rare congenital disease known as Bland-White-Garland syndrome. The parents had signed a consent form prior to the two operations, and the report concluded that the doctors had not committed any medical or surgical error. The applicants contested the report, which they considered to be insufficient. The Court of First Instance dismissed their request for a second expert medical report. The applicants lodged an appeal, which was dismissed in April 2010. In October 2010, the Court of Cassation also dismissed their application for rectification.

The Law

Alleged Violation of Article 8 of the Convention

The applicants hold the authorities responsible for the neurological after-effects suffered by their daughter. They further maintain that they did not have an effective remedy to assert their rights, arguing that the civil procedure was not effective. The Court considers that the applicants' complaints should be examined from the standpoint of Article 8 of the Convention (right to privacy).

The Court notes that the daughter underwent two surgical procedures, the first one to treat a very serious congenital heart disease and the second one to remedy a complication following the first. This second operation resulted in severe neurological after-effects. The parents hold the doctors responsible for the disability of their daughter and consider that the judicial authorities have been ineffective in establishing liability.

There is no disagreement between the parties as to the existence of a legislative and regulatory framework requiring hospitals, whether private or public, to adopt measures to protect the lives of their patients. The dispute relates to the capacity of the judicial system to verify whether the medical team respected its professional obligations and to sanction possibly shortcomings.

The Court notes that the domestic legal system offered the applicants two remedies, one of a civil nature and the other of a criminal nature. It considers, however, that in the circumstances of the present case there is no need to go into the criminal procedure, as the procedural obligation under Article 2 of the Convention does not necessarily require the State to guarantee criminal prosecution in cases of medical negligence. Moreover, it observes that the parties' submissions essentially concern an action for damages.

The Court observes that the courts rejected the applicants' claims for compensation after obtaining an expert report concluding that the doctors made no mistake. The applicants contested the relevance and sufficiency of that report and unsuccessfully requested for a new expert report.

It is not for the Court to call into question the conclusions of expert opinions by making conjectures on the basis of the medical information at its disposal as to their correctness from a scientific point of view. The intensity of the evaluation to be carried out by the courts must be assessed on a case-by-case basis, taking into account the nature of the medical question concerned, its complexity and, in particular, whether the claimant alleging a misconduct on the part of health care professionals was able to make specific allegations of negligence which required a response from the reporting medical experts. It recalls, however, that it has already held that a procedure is ineffective in the light of procedural obligations if the outcome was based on expert reports evading or not satisfactorily addressing the central question which the experts had to answer and if at least the main arguments of the applicants did not receive a specific and explicit reply.

In this case, the Court notes that the report obtained by the Court of First Instance lists the rates of complications and deaths in or as a result of interventions such as those suffered by the child in the present case. The court concluded that, in view of the high risks, the doctors made no mistake and therefore could not be held liable.

The question to be decided by the experts was whether, irrespective of the risk of the intervention, the doctors had contributed to the damage. It was only when it had been established that the doctors had carried out the operation in accordance with good practice, taking due account of the risks which the operation presented, that the after-effects could be regarded as a complication.

However, the expert report of 31 July 2009 does not address this question in any way, since it does not examine whether and to what extent the doctors concerned have acted in accordance with current medical standards before, during and after the operation. For example, it does not specify which specific actions the doctors performed during the operation and during the postoperative follow-up. While the report finally concludes that the doctors were not at fault, it does not specify, apart from evidence of the existence of risks in literature, the grounds on which this conclusion is based. The report is therefore insufficiently substantiated.

The Court of First Instance did not consider it appropriate to grant the applicants' request for a second opinion, considering that the report was sufficient. The Court of Cassation also rejected the request for a new report, in support

of which the applicants had submitted a number of arguments. Therefore, the Court considers that the applicants did not receive an adequate legal response in view of the daughter's right to physical integrity.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 8 of the Convention.

ECHR 2017/15 *Case of Carvalho Pinto de Sousa Morais v. Portugal*, 25 July 2017, no. 17484/15 (Fourth Section)

The Facts

The applicant, born in 1945, suffers from bartholinitis, a gynaecological disease. She had surgery in May 1995. The operation left her in intense pain and led to a loss of sensation in the vagina, incontinence, difficulty walking and sitting, and having sexual relations. She found out that a pudendal nerve had been injured during the operation, and she therefore brought a civil action against the hospital for damages. At first-instance she was awarded EUR 80,000 for the physical and mental suffering caused by the medical error and EUR 16,000 for the services of a maid to help with household tasks.

However, on appeal, the Supreme Administrative Court, although confirming the findings of the first-instance court, found those awards excessive and reduced them to EUR 50,000 and EUR 6,000, respectively. It found in particular that her pain had been aggravated during the surgery, but that it was not new and had not resulted exclusively from the injury to the nerve; and that, in any case, she was already 50 years old at the time of the surgery and the mother of two children, an age when sexuality was not as important. It further found that she was unlikely to be in need of a full-time maid at the time as, considering the age of her children, she only needed to take care of her husband.

The Law

Alleged Violation of Article 14 of the Convention, read in Conjunction with Article 8

The applicant complained that the Supreme Administrative Court's judgment had discriminated against her on the grounds of her sex and age. She complained, in particular, about the reasons given by the court for reducing the

amount awarded to her in respect of non-pecuniary damage and about the fact that it had disregarded the importance of a sex life for her as a woman. She relied on Articles 8 (right to privacy) and 14 (prohibition of discrimination) of the Convention

Admissibility

The Court reiterates that Article 14 has no independent existence. However, its application does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. For Article 14 to become applicable, it is enough that the facts of the case fall “within the ambit” of another substantive provision of the Convention or its Protocols,

The Court has on many occasions held that the notion of “private life” within the meaning of Article 8 is a broad concept that does not lend itself to exhaustive definition. It covers the physical and psychological integrity of a person and, to a certain extent, the right to establish and develop relationships with other human beings. It can sometimes embrace aspects of an individual’s physical and social identity. The concept of private life also encompasses the right to “personal development” or the right to self-determination and elements such as gender identification, sexual orientation and sex life.

In the present case, the domestic proceedings aimed at establishing liability for medical malpractice and an adequate amount of compensation for the physical and psychological consequences of the operation. Therefore, the facts at issue fall within the scope of Article 8. It follows that Article 14, taken together with Article 8, is applicable.

Merits

The Court observes that the Supreme Administrative Court, while confirming the findings of the first-instance court, reduced the award to EUR 50,000. It relied on the same elements, but considered that the applicant’s physical and mental pain had been aggravated by the operation, rather than considering that it had resulted exclusively from the injury to the left pudendal nerve during surgery. Moreover, the Supreme Administrative Court relied on the fact that the applicant “was already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age”.

The Court notes that the Supreme Administrative Court also reduced the amount that had been awarded to the applicant in respect of the costs of a maid on the grounds that she was not likely to have needed a full-time maid at the material time as she “probably only needed to take care of her husband”, considering the age of her children.

The Court acknowledges that in deciding claims related to non-pecuniary damage within the framework of liability proceedings, domestic courts may be called upon to consider the age of claimants, as in the instant case. The question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the concrete case of the applicant. In other words, the Supreme Administrative Court made a general assumption without attempting to look at its validity in the concrete case of the applicant herself, who was fifty at the time of the operation at issue.

In the Court's view, the wording of the Supreme Administrative Court's judgment when reducing the amount of compensation in respect of non-pecuniary damage cannot be regarded as an unfortunate turn of phrase, as asserted by the Government. It is true that in lowering the amount the Supreme Administrative Court also took for granted that the pain suffered by the applicant was not new. Nevertheless, the applicant's age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds. This approach is also reflected in the decision of the Supreme Court of Justice to lower the amount allocated to the applicant in respect of the costs of a maid on the grounds that she "probably only needed to take care of her husband" given her children's age at the material time.

In the Court's view, those considerations show the prejudices prevailing in the judiciary in Portugal, as pointed out in a report of 29 June 2015 by the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers and in the CEDAW's concluding observations on the need for the respondent State to address the problem of gender-based discriminatory stereotypes. They also confirm the observations and concerns expressed by the Permanent Observatory on Portuguese Justice regarding the prevailing sexism within judicial institutions in its report of November 2006 about domestic violence.

Furthermore, the Court is forced to note the contrast between the applicant's case and the approach taken in two judgments of 2008 and 2014, which concerned allegations of medical malpractice by two male patients who were, respectively, fifty-five and fifty-nine years old. The Supreme Court of Justice found in those cases that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous

shock” and “strong mental shock”. In view of its findings, the Supreme Court of Justice awarded EUR 224,459 and EUR 100,000 respectively to the two male plaintiffs. It flows from those cases that the domestic courts took into consideration the fact that the men could not have sexual relations and how that had affected them, regardless of their age. Contrary to the applicant’s case, the Supreme Court of Justice did not take account of whether the plaintiffs already had children or not, or looked at any other factors. In particular, in the judgment of 4 March 2008, it argued that the fact that the impugned surgical procedure had left the plaintiff impotent and incontinent was enough to consider that non-pecuniary damage had been caused.

For these reasons, the Court holds, by five votes to two, that there has been a violation of Article 14 of the Convention read together with Article 8.

Concurring opinions of Judge Yudkivska and Judge Motoc. *Joint dissenting opinion* of Judges Ravarani and Bošnjak, defending the view that the judgement is inconsistent with the case-law of the Court.

ECHR 2017/16 *Case of Mardosai v. Lithuania*, 11 July 2017, no. 42434/15 (*Fourth Section*)

The Facts

The applicants, wife and husband, were born in 1971 and 1981 respectively. On 15 May 2009 the first applicant, who was nine months pregnant and already past her due date, was admitted to the obstetrics and gynaecology ward of a hospital. On the morning of 20 May 2009, she was given medication in order to induce labour, but the medication was subsequently discontinued and she was given sedatives. In the late afternoon, her waters broke. The doctors noticed that the heartbeat of the foetus was weak and decided to perform a Caesarean section. Following the surgery, the first applicant gave birth to a daughter. The newborn baby was in a serious condition, so she was taken to a hospital for intensive care. On 22 May 2009, the baby died.

Following the baby’s death, inquiries by the hospital and the healthcare authorities were carried out finding shortcomings in the doctors’ treatment of mother and baby during labour and in particular in resuscitating the baby after its birth. In June 2009, the couple requested the prosecuting authorities to open a pre-trial investigation into alleged medical negligence leading to

their daughter's death. The pre-trial investigation, during which a number of specialist opinions and forensic examinations were ordered and carried out, lasted just over four years and nine months before being discontinued by the prosecutor on the grounds that no causal link between the doctors' actions and the baby's death had been established. The couple appealed and the case was then transferred in April 2014 to a District Court for examination on the merits. It was however terminated as time-barred one month later. The applicants appealed without success.

The couple was successful in a parallel civil suit against the hospital which was concluded in November 2014. They were awarded EUR 24,115 in compensation.

The Law

Alleged Violation of Article 2 of the Convention

The applicants complained that the criminal investigation into the alleged medical negligence which had led to their newborn daughter's death had been lengthy and ineffective. They relied on the procedural limb of Article 2 of the Convention (right to life).

The Court will firstly address the applicants' submissions concerning the effectiveness of the criminal proceedings at the pre-trial and trial stage. The pre-trial investigation in the case lasted more than four years and nine months, a period which the Court considers excessive even taking into account the complexity of the case. As seen from the case file, there were several periods of inactivity, which together amounted to about one year and six months of inactivity imputable to the authorities. The Court also notes that for the rest of the time the investigation was conducted very slowly and the investigative measures were sparse.

The Government submitted that many of the delays in the investigation had been caused by the workload of specialists and experts, but the Court cannot accept that argument and reiterates that it is for the State to organise its judicial system in such a way as to enable its institutions to comply with the requirements of the Convention. The Government also argued that the applicants had themselves prolonged the investigation by requesting additional specialist opinions and forensic examinations. The Court acknowledges that the applicants' request for an additional specialist opinion appeared to have been based on their disagreement with the conclusions of the previous opinion rather than on any shortcomings therein. However, it notes that the

authorities were not obliged to satisfy the applicants' request for an additional opinion if they did not consider it necessary. The Court further observes that the applicants' request for an additional forensic examination resulted from the fact that their questions had not been forwarded to the experts conducting the previously ordered examination, without any reasons being provided, so in the Court's view, the applicants cannot be reproached for asking for another examination which would address their questions.

Of particular concern to the Court is the authorities' failure to forward an order for a forensic examination to the relevant experts for one year and two months, for which nobody was held responsible. Although the Government submitted that that failure had prolonged the investigation by "only five months", the Court considers such a delay to be significant, especially in view of the total length of the pre-trial investigation and the fact that the proceedings eventually became time-barred.

The Court further notes that, following the lengthy pre-trial investigation, the case was transferred to the District Court for examination on the merits when only slightly more than one month remained until the expiry of the statute of limitations. In such circumstances, the Court considers that there was little that the domestic court could do to avoid the case becoming time-barred, especially as the domestic law at that time did not allow suspending the statute of limitations.

Accordingly, the Court is of the view that in the present case the criminal proceedings could not be regarded as effective for the purpose of Article 2. However, the Court observes that there is no dispute that the death of the applicants' daughter was not intentional. It reiterates that, in cases concerning medical negligence, the procedural obligation under Article 2 does not necessarily require criminal liability, and civil liability may be sufficient. In the present case, the applicants lodged a civil claim against the hospital and were awarded compensation for pecuniary and non-pecuniary damage caused by the inadequate medical services which had contributed to their daughter's death.

The applicants lodged their civil claim in September 2011, but the first-instance judgment was only issued in November 2014, thereby raising the question as to whether the proceedings were sufficiently prompt. No information was provided to the Court as to the reasons for that delay. However, it may be assumed that the civil proceedings were stayed pending the outcome of the criminal proceedings, especially as the courts in the former proceedings relied on the evidence obtained in the course of the latter. After the criminal proceedings became time barred, the civil proceedings were concluded without undue delay.

The Court further observes that the amount awarded to the applicants in the civil proceedings (EUR 23,170 in respect of non-pecuniary damage and EUR 1,945 in respect of pecuniary damage) corresponded to the degree of the hospital's liability.

Lastly, the Court notes that the applicants complained only about the ineffectiveness of the criminal proceedings, but did not allege that the civil proceedings had been unfair or ineffective in any way, or that the amount awarded to them in the latter proceedings had been inadequate.

For these reasons, the Court holds, by five votes to two, that there has been no violation of Article 2 of the Convention under its procedural limb.

Joint partly dissenting opinion of Judges Yudkivska, Motoc and Ravarani, defending the view that the applicants had an effective remedy in civil proceedings and thus can no longer claim to be victims of the alleged violation of Article 2; accordingly, their complaint is incompatible *ratione personae* and should have been rejected in accordance with Article 35 § 4. *Dissenting opinion* of Judge Motoc, stating the view that the domestic courts had never properly addressed the procedural violation of Article 2, only the substantive violation. *Statement of dissent* by Judge Paczolay.

ECHR 2017/17 *Case of Mirzashvili v. Georgia*, 7 September 2017, no. 26657/07 (*Fifth Section*)

The Facts

In 1998, the applicant, born in 1971, had an operation to remove a malignant tumour from his right testicle. He subsequently had chemotherapy on a sporadic basis. As the illness then returned, he had another operation in 2003. According to a medical certificate dated 4 March 2005, the applicant also suffered from chronic hepatitis C (HCV).

In August 2005, the applicant was placed in pre-trial detention on charges of theft and armed robbery. He was convicted of those charges in October 2006 and sentenced to ten years' imprisonment, the conviction and sentence being later upheld on appeal.

Shortly after being placed in detention he was transferred to the prison hospital, where his diagnoses were confirmed and the doctors recommended a consultation with an oncologist and a special medical examination at the

National Centre for Oncology (NCO). The applicant stayed at the prison hospital for several months until early February 2006, without a specialist examination, receiving pain medication to treat his symptoms. After several prison transfers and given that his health was still unsatisfactory, he was again admitted to the prison hospital in late February 2006. In March 2006, he was examined by an oncologist, who concluded that the cancer had returned and that the chronic HCV had worsened. In November 2006, the applicant was sent to the NCO for a course of chemotherapy, but he was not sent there again for a check-up and chemotherapy a few weeks later, contrary to the oncologist's recommendations. During the subsequent months the applicant underwent chemotherapy on two occasions but during several periods in 2007 he only received treatment for his symptoms.

In March 2008, following the European Court of Human Rights' indication, under Rule 39 of its Rules of Court (interim measures), that he should be placed in the prison hospital and provided with adequate treatment for his cancer and chronic HCV, the applicant was transferred to the prison hospital. Subsequently he underwent comprehensive specialist examinations both at the prison hospital and at a civilian medical institution.

The Law

This summary is restricted to the issues raised with regard to the medical treatment in prison.

Alleged Violation of Article 3 of the Convention

Relying on Article 3 (prohibition of torture or inhuman or degrading treatment), the applicant alleged that he had not been provided with adequate medical care in either of the detention facilities, including the prison hospital.

The Court considers that the applicant's complaint concerning the alleged lack of adequate medical treatment in prison should for the purposes of examination be divided into two periods — before and after the application by the Court of Rule 39 of the Rules of Court.

Medical Care until 28 March 2008

The Court notes that the applicant entered the prison system in August 2005 with a serious medical condition — he had recently been treated for testicular cancer and had chronic HCV. Given the nature of his ailments and in view of the relevant medical conclusions, the minimum medical assistance needed for

the applicant included access to an oncologist and specialist medical check-ups for the timely diagnosis and treatment for his cancer and possible complications (see in this respect the relevant WHO guidelines). The Court will now examine whether that kind of medical care was offered to the applicant.

It is true that the relevant authorities took note of the seriousness of the applicant's condition promptly. As early as 20 August 2005, just a few days after his arrest, he was transferred to the prison hospital, where he stayed until 4 February 2006. The Court cannot, however, disregard the content of the relevant medical records that show that during that period of time the applicant was only provided with treatment for his symptoms, that is with pain medication. The first time the applicant was allowed to see an oncologist was only on 7 March 2006, that is after a delay of almost seven months. Such an omission was clearly at variance with the repeated recommendations of the doctor who was treating him at the prison hospital for an urgent consultation with an oncologist and an appropriate medical examination.

The Court further observes that on 7 March 2006, following an examination by an oncologist, the applicant was diagnosed with a recurrent tumour and a worsening of his HCV. That diagnosis was confirmed in August 2006 by a group of medical experts. They recommended that the applicant have the rest of his tumour removed and receive intensive chemotherapy under conditions of stability. However, that recommendation was not acted on. It was not until 17 November 2006, after repeated requests, that the applicant was transferred to the NCO for chemotherapy.

The Court further notes that the relevant prison authorities refused to comply with another recommendation given by the applicant's doctor. Thus, on 5 December 2006 his oncologist recommended that the applicant return to the NCO for a check-up and chemotherapy after three weeks; he also recommended that he be placed under continuous medical supervision in the prison hospital. Contrary to that recommendation, the applicant was placed in a normal prison cell and was not taken for chemotherapy as scheduled. He was not provided with chemotherapy again until July 2007, a delay of over half a year. The Court finds that break in the applicant's treatment, particularly in view of the deterioration of his condition, to be deplorable.

Gaps in the applicant's treatment also marred the subsequent period. Although the applicant finished his chemotherapy in September 2007, he was advised to have quarterly medical examinations. That recommendation was not complied with in prison. On 31 January 2008, he was transferred for a check up to the prison hospital. Despite reiterated complaints about the lack of treatment for *inter alia* HCV, he was discharged from the prison hospital. In that connection, however, the Court notes that, albeit with a delay, the applicant

had a test for liver function, which established that he did not require anti-viral treatment. He returned to prison, where he was left without medical supervision for another month until the Court applied Rule 39 of the Rules of Court.

Last but not least, in 2006-2007 the applicant was twice transferred to the NCO. The costs of those visits, including the chemotherapy, were borne by his family. The Government alleged that the authorities had offered to fund treatment at the prison hospital, however, they failed to submit any evidence to substantiate that statement. It thus appears that despite the seriousness of the applicant's medical condition and the doctor's recommendation that he have regular chemotherapy, the applicant would have been left without the urgently required chemotherapy, unless his readiness to have the treatment at his own expense at the NCO.

To sum up, the Court considers that the Government have failed to give any valid explanation for the irregular and disjointed medical supervision and treatment provided in disregard of the professional medical advice for the applicant's cancer at the material time. Given the seriousness of his condition, in particular the diagnosis of recurrent tumour eight months after his arrest, and the risks and suffering attached to it, the Court concludes that the applicant did not receive adequate medical assistance at the relevant period of time.

Medical Assistance after 28 March 2008

On 28 March 2008 the Court, acting under Rule 39, indicated to the Government that the applicant should be placed in the prison hospital, where he could be provided with adequate medical treatment for his cancer and chronic HCV. The Government acted accordingly, transferring the applicant to the prison hospital the next day and providing him with all the required medical examinations. In mid-April 2008, he was offered chemotherapy at the prison hospital for the first time. The applicant, however, declined that offer, arguing that as the prison hospital had no oncologist and it was not adequately equipped to provide him with that treatment. Another offer followed in May 2008, which the applicant again refused.

The Court notes at the outset that after comprehensive medical tests in the prison hospital in April-May 2008 all the medical specialists, including the liver specialist, concluded that antiviral treatment should be postponed. Subsequently, in October 2008 and January 2009, medical tests revealed that the HCV had not replicated. No liver pathology was revealed in April 2009. The specialists concluded that the applicant did not require antiviral treatment.

As for the cancer, the Government complied with both of the Court's indications under Rule 39. The applicant was transferred first to the prison hospital

and then to the NCO. The Court notes that the applicant refused to have chemotherapy at the prison hospital. The Court accepts that complex treatment often requires constant supervision by specialist doctors and that having chemotherapy without such supervision can cause harm. However, it cannot overlook the fact that in 2008 a new prison hospital was opened, which according to the CPT was better equipped to provide prisoners with treatment for serious medical problems. Furthermore, the applicant was under regular supervision of an oncologist and a chemotherapist while he was in the prison hospital. The relevant authorities explicitly committed to providing the chemotherapy under the supervision of the relevant specialists. In view of all of the above-mentioned factors, the three-and-a-half month gap in the applicant's chemotherapy due to his two refusals to have such treatment in the prison hospital cannot as such be attributed to the Government. The relevant authorities undertook very specific measures in order to provide the applicant with the required treatment in the prison hospital. Although the Court understands why the applicant was hesitant, it does not consider that the Government were negligent with respect to him or his serious medical condition during that phase of his treatment.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 3 of the Convention on account of the inadequate medical treatment provided to the applicant for his cancer in prison until 28 March 2008; and that there has been no violation of Article 3 on account of the medical treatment provided to the applicant in prison after 28 March 2008.

ECHR 2017/18 Case of Rõigas v. Estonia, 12 September 2017, no. 49045/13 (Second Section)

The Facts

The applicant's son, born in 1983, was diagnosed with malignant melanoma in 2006. In that year, he underwent surgery and regular check-ups. In April 2009 he had more surgery, in which a metastasis was removed from his brain, and he received radiation therapy. Following a deterioration of his health, he was admitted to hospital again in September 2009. After computerised tomography (CT) and magnetic resonance imaging scans of his brain had been performed, a hospital medical council decided to proceed with palliative care. It found that, because his tumour had spread, oncological treatment would not

be effective. For one week, in October 2009, the applicant's son was physically restrained to a bed, apparently in order to prevent him from hurting himself, because he was in a disturbed state of mind. When he was additionally suffering from progressive respiratory failure, he was transferred to an intensive care unit, where, on 12 October 2009, he stopped breathing and mechanical ventilation was applied. On the next day, the characteristics corresponding to brain death were ascertained. The applicant's son died on 15 October 2009. An autopsy was performed on the following day. The medical death certificate indicated cerebral oedema as the immediate cause of death and melanoma with multiple metastases as the medical condition that had brought it about.

According to the applicant, her son did not sign the medical council's decisions not to provide him with oncological treatment and to proceed with palliative care. She also maintains, in particular, that he fell into a coma following an overdose of medicine, that the protocol for verifying brain death was not properly carried out by the hospital and that the administration of food and medicines was not resumed, despite her requests.

Following her son's death, the applicant complained to the police about his treatment in the hospital and requested an expert examination. After she had additionally complained to the Health Board, the case was transmitted to the Expert Committee on the Quality of Health Care Services, which, after examining the medical records, obtaining explanations from the hospital staff and obtaining expert opinions, found no medical malpractice. The applicant's action to have the Expert Committee's report declared unlawful was dismissed by a final judgment of the Supreme Court in December 2015. In parallel, following an offence report that she lodged, criminal proceedings were initiated. They were eventually terminated in October 2012 as on the basis of the gathered evidence the commission of an offence had not been proven.

The Law

Alleged Violation of Article 2 of the Convention

The applicant complained of lack of effective investigation into her son's maltreatment and subsequent death in a hospital as a result of alleged medical negligence. The Court considers that the applicant's complaints should be examined from the standpoint of Article 2 of the Convention (right to life) in as much as they are related to the death of the applicant's son in the hospital.

In determining whether the State has fulfilled its positive obligation under Article 2 to set up an effective independent judicial system, the Court will

examine whether the available legal remedies, taken together, as provided for in law and applied in practice, secured the effective legal means capable of establishing the relevant facts, holding accountable those at fault and providing appropriate redress to the victim.

The Court firstly notes that with regard to potential medical negligence cases, the respondent State has made available both criminal-law and civil-law remedies that in principle enable claims of medical errors resulting in the death of a patient to be addressed and those responsible to be held accountable.

As regards criminal-law remedies, negligent manslaughter, the causing of serious damage to health by negligence, as well as placing or leaving another person in a dangerous situation constitute criminal offences under the Estonian Penal Code. Furthermore, under the Code of Criminal Procedure, an investigative body or the public prosecutor's office must institute criminal proceedings if they obtain information indicating that a criminal offence may have taken place. Such information may be obtained, for example, through a report made by a victim or the victim's next-of-kin. Also, health-care professionals are under a duty to report suspicious deaths. The Establishment of the Cause of Death Act provides for further rules relating to death while in hospital.

The Court has also taken note of the domestic courts' case-law, which indicates that criminal proceedings have been conducted against medical practitioners in medical negligence cases and that those responsible have also been convicted. The Court also notes the central role of forensic medical examinations and the importance accorded to medical expert opinions in cases dealing with possible medical errors.

As for civil remedies, the Court has had regard to domestic law and practice according to which medical errors can be established in civil courts, which also can and do award compensation for non-pecuniary damage. The Court also notes that under domestic law, a civil claim against the accused can be brought within the framework of criminal proceedings. The Court observes that in certain circumstances the deceased persons' next-of-kin, as heirs, can claim compensation for non-pecuniary damage caused by the death and, in "exceptional circumstances", can also claim compensation on their own behalf.

In the instant case the applicant chose to use the criminal-law remedy. It must thus be assessed whether the criminal proceedings were in accordance with the State's procedural obligation under Article 2 of the Convention. During the criminal proceedings, the applicant, her son's friends who had visited him at the hospital and members of the medical staff were heard as witnesses; copies of the medical file and the autopsy report were used as evidence and experts from the Estonian Forensic Science Institute were asked to submit an expert assessment. The forensic medical assessment concluded

that the applicant's son's death had been caused by malignant melanoma with multiple metastases. The forensic experts asserted that applicant's son's treatment had conformed to his state of health and did not identify any instances of medical negligence or errors of treatment. Based on the material gathered during the proceedings, the criminal investigation was terminated as there was no evidence to suggest that his death could be attributed to the medical staff.

As regards the length of the proceedings, the Court considers that although there seem to have been periods of lesser activity during the proceedings, the total duration of the proceedings — two years and ten months until the final judgment on the termination of the criminal proceedings — cannot be considered excessively long.

The Court stresses that medical negligence cases often entail complex medical diagnoses and decisions that might have been taken under pressure or possibly in situations where no course of action would be free from some adverse side effects or would guarantee full recovery. In such instances, the investigative bodies and ultimately the courts, tasked with the responsibility of giving ex post legal qualification to previous medical decisions and courses of treatment, cannot assume the position of first-hand medical experts. This is why the medical expert opinions are very likely to carry a crucial weight in the courts' assessment of highly complex issues of medical negligence. Consequently, given the importance of the medical expert opinions, the procedural aspects of obtaining such opinions are essential. Those aspects concern, *inter alia*, the competence and independence of the experts, ensuring that the questions posed to the experts cover all the medically relevant aspects of the case, and that the expert opinions themselves are sufficiently reasoned.

The Court does not find sufficient grounds to conclude that the criminal proceedings in the respondent State would have been inadequate or not sufficiently thorough. The prosecutor's decision to terminate the criminal proceedings was not taken hastily or arbitrarily, but rather relied on the evidence gathered, including the forensic medical assessment. The Court considers that although the forensic medical opinion might not have addressed all the questions that the applicant herself considered important, the national prosecution authorities should be allowed a certain discretion in deciding which questions are relevant in establishing criminal liability.

In conclusion, taking into account that the respondent State has demonstrated that both the civil-law and criminal-law remedies exist and function in practice, and considering that the criminal-law remedy used by the applicant in the present case cannot be said to have been applied ineffectively, the Court finds no violation of Article 2 of the Convention.

Alleged Violation of Article 8 of the Convention

The applicant complained that various medicines were administered without the consent of her son or the consent of the applicant herself. She additionally complained about the medical procedures of intubation and tracheotomy performed on her son and the use of physical restraints to attach his hands to the bed against his will as well as that of the applicant. The Court considers that the applicant's complaints should be examined from the standpoint of Article 8 (right to privacy).

The Court notes that the applicant complained that no consent had been obtained from either her son or herself before certain medicines had been administered and medical procedures carried out. In other words, the applicant has firstly submitted a complaint as an indirect victim on behalf of her son and secondly as a direct victim of not having been asked for consent.

In so far as the complaint relates to the lack of consent from the applicant's deceased son, the Court considers that the complaint is incompatible *ratione personae* with the provisions of the Convention. The question of consent to medical treatment concerns the core of a person's right to respect for his private life and belongs to the category of non-transferable rights. Thus, the applicant cannot rely on that right on behalf of her son in the context of proceedings under Article 8 of the Convention.

With regard to the part of the complaint concerning failure to obtain consent from the applicant herself, the Court observes that the applicant was not her son's legal representative. Against that background, it must be considered that the applicant did not have the authority to act on her son's behalf, including in the area of medical treatment. In those circumstances, although her son's time in the hospital must undoubtedly have been emotionally difficult for her, the Court is not satisfied that the applicant's own rights under Article 8 were directly affected by the fact that she was not asked for consent to her son's treatment.

It follows that complaint under Article 8 in its entirety is incompatible *ratione personae* and must be declared inadmissible.

For these reasons, the Court, unanimously declares the complaint under Article 8 of the Convention inadmissible; and holds that there has been no violation of Article 2 of the Convention.

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