Selected Legislation and Jurisprudence

European Court of Human Rights

ECHR 2018/1 *Case of Krunoslava Zovko v. Croatia*, 23 May 2017, no. 56935/13
(Second Section)

The Facts

The applicant, born in 1965, was injured in 2009 while driving home from work and was initially granted sick leave on the basis of a work-related injury. However, following a visit to her general practitioner in October 2011, she was granted sick leave on the basis of an illness. She complained to the administrative authorities, requesting that her sick leave be granted on the basis of her work-related injury, without success. The administrative authorities based their findings on expert reports they had commissioned from their in-house medical bodies, which, taking into account the arguments and medical documentation the applicant had submitted during the proceedings, found no causal link between her work-related injury and sick leave. The administrative court, after having held a hearing at which the applicant was represented by counsel, upheld the decision of the administrative authorities, ruling that she had failed to raise any doubts about the findings of those expert reports.

* 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>.

The Law

Alleged Violation of Article 6 § 1 of the Convention

The applicant complained that she had not had an effective opportunity to participate in the proceedings concerning her entitlement to sick leave, and that the principle of equality of arms had not been respected with regard to the commissioning and obtaining of the expert evidence on the matter. She relied on Article 6 § 1 of the Convention (right to a fair hearing).

The Court notes that the central tenet of the applicant's complaints concerns her alleged exclusion from the procedure of commissioning and obtaining the expert reports used to decide the merits of her claim to sick leave entitlement, and the alleged bias of the experts who produced the reports on the matter.

In order to determine the applicant's claim, the administrative authorities commissioned expert reports from their in-house expert medical bodies. On the basis of these reports, which found no causal link between the applicant's work-related injury and her sick leave, the administrative authorities, and subsequently the administrative court, dismissed the applicant's claim. In these circumstances the Court is ready to accept that the expert reports at issue had a decisive role in the assessment of the merits of the applicant's claim.

The Court observes that neither the contents of the case file nor the applicant's submissions disclose any evidence that the relevant medical experts lacked the requisite objectivity. This is supported by the fact that the expert reports were delivered by experts with a considerable professional and educational background and that the relevant domestic law sets out an overriding duty for experts to provide their opinions impartially and relevantly within their own areas of expertise.

After the assessment of the applicant's medical condition by her general practitioner, two expert medical reports were obtained in order to address the applicant's specific arguments as to the assessment of the reason for her sick leave, both of which took into account the arguments and documentation she had submitted during the proceedings.

The Court further notes that the applicant had an opportunity to challenge the expert reports and the relevant decisions of the administrative authorities before the administrative court. Indeed, upon the applicant's administrative action, the administrative court held a hearing at which it examined the applicant's arguments related to the findings of the expert reports. The administrative court thereby held that the applicant had failed to put to doubt the findings of the expert reports and that it had been undoubtedly established that the applicant's sick leave was not linked to her work-related injury.

With regard to the applicant's arguments that the administrative court refused to hear her oral evidence, the Court notes that the applicant was duly invited to attend the hearing before the administrative court but she failed to appear and instead sent her lawyer to represent her.

The Court would reiterate that it is primarily for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. It is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was admitted, were fair.

The Court is of the opinion that the applicant effectively participated in the procedure of commissioning and obtaining the expert reports used to decide the merits of her claim. In particular, she had cognisance of and was able to comment on all the documents taken into consideration by the experts, and was able to put forward all her arguments with the purpose of influencing the experts' findings.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 6 § 1 of the Convention.

ECHR 2018/2 *Case of Charles Gard and Others v. the United Kingdom*, 28 June 2017, no. 39793/17 (First Section)

The Facts

The first applicant ("CG") was born on 4 August 2016. His parents are the second and third applicants. CG is suffering from a very rare and severe mitochondrial disease called infantile onset encephalomyopathic mitochondrial DNA depletion syndrome ("MDDS"). The disease is caused by mutations in a gene called RRM2B. The mutations cause the deterioration and death of fuel-giving mitochondrial cells in every part of the patient's body, depriving him of the essential energy for living. In CG's case, his brain, muscles and ability to breathe are all seriously affected. He has progressive respiratory failure and is dependent on a ventilator. He can no longer move his arms or legs and is not consistently able to open his eyes. He is persistently encephalopathic, meaning that there are no usual signs of normal brain activities such as responsiveness, interaction or crying. In addition, he has congenital deafness and a severe epilepsy disorder. His heart, liver and kidneys are also affected but not severely.

The parents became aware of a form of therapy (“nucleoside treatment”) that has been used on patients with a less severe mitochondrial condition known as TK2 mutation. They contacted a professor of neurology at a medical centre in America, who confirmed that nucleoside treatment had not been used on either mice or humans with RRM2B mutation, but that there was a “theoretical possibility” that the treatment might be of benefit to CG.

At the start of January 2017, a plan was devised by CG’s treating clinicians for nucleoside treatment to be administered. As the treatment is experimental, an application to the Ethics Committee was prepared to authorise its use. However, before a treatment plan could be agreed, CG experienced an episode of brain seizures as a result of his epilepsy. On 13 January, CG’s treating clinicians informed the parents that CG was suffering severe epileptic encephalopathy. They concluded that nucleoside treatment would be futile and would only prolong CG’s suffering.

In February 2017, the treating hospital sought a declaration from the domestic courts as to whether it would be lawful to withdraw artificial ventilation and provide CG with palliative care. CG’s parents in turn asked the courts to consider whether it would be in the best interests of their son to undergo experimental treatment in the U.S.A. The domestic courts concluded that it would be lawful for the hospital to withdraw life sustaining treatment because it was likely that CG would suffer significant harm if his present suffering was prolonged without any realistic prospect of improvement, and the experimental therapy would be of no effective benefit.

This summary is restricted to the substantive issues raised under Articles 2 and 8 of the Convention

The Law

Alleged Violation of Article 2 of the Convention

In respect of Article 2 (right to life) the applicants have argued that the hospital has blocked life-sustaining treatment to CG.

Access to Experimental Treatment for Terminally Ill Patients

Concerning access to experimental treatment, or treatment that is not usually authorised, the Court has previously considered that the positive obligations under Article 2 may include the duty to put in place an appropriate legal framework, for instance regulations compelling hospitals to adopt appropriate measures for the protection of their patients’ lives.

The Court notes from the domestic proceedings, for example the need for permission from an Ethics Committee in order to access the nucleoside treatment that such a framework is in place in the United Kingdom. In addition it notes that the regulatory framework is derived from the relevant European Directives.

As a regulatory framework is in place, this condition is fulfilled. Article 2 of the Convention cannot be interpreted as requiring access to unauthorised medicinal products for the terminally ill to be regulated in any particular way. Accordingly, it considers that this aspect of the complaint is manifestly ill-founded.

Withdrawal of Life-sustaining Treatment

In addressing the question of the administering or withdrawal of medical treatment in previous cases, the Court has taken into account the following elements:

- the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2;
- whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel;
- the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests.

The Court considers the first element to be satisfied. In its previous decision *Glass* the Court found the Article 2 complaint inadmissible because the framework in place was appropriate. Moreover, it concluded that it did not consider that the regulatory framework in place in the United Kingdom is in any way inconsistent with the standards laid down in the Council of Europe's Convention on Human Rights and Biomedicine in the area of consent. The Court sees no reason to change its previous conclusion.

The second element is also satisfied. Whilst CG could not express his own wishes, the domestic courts ensured that his wishes were expressed through his guardian, an independent professional appointed expressly by the domestic courts for that purpose.

Moreover, the opinions of all medical personnel involved were examined in detail. These included the views of CG's treating specialist who enjoyed an international reputation in the field, and her supporting clinical team including paediatric doctors and nurses. Opinions were also sought from a clinical team at a specialised hospital in another European country. For the purposes of the

domestic proceedings the applicants were invited to privately instruct their own medical expert, which they did and the domestic courts engaged in detail with the views of that expert.

The High Court judge who made the first instance decision met with all the parties and medical professionals involved and visited CG in hospital. The Court of Appeal also heard from the doctor in America who was willing to treat the child who was also invited to discuss his professional views with CG's doctors in the United Kingdom, with a view to seeing whether they could narrow any of the issues between them. Finally, the parents were fully involved and represented through all the decisions made concerning CG and significant weight was given to their views

Also the third element is satisfied. There was not only the possibility to approach the courts in the event of doubt but in fact, a duty to do so.

Therefore, and in view of the margin of appreciation left to the authorities in the present case, the Court concludes that this complaint is manifestly ill-founded.

Alleged Violation of Article 8 of the Convention

The applicants' complaint about the manner in which the domestic courts made their decisions, concerns exclusively the alleged arbitrary interference in their private and family life. The complaint is therefore to be examined under Article 8 of the Convention, which protects the right to privacy.

As to the scope of Article 8 in this context, the Court has previously considered that a decision to impose treatment on a child contrary to the objections of the parent gave rise to an interference with the child's right to respect for his private life, and in particular his right to physical integrity.

The facts of the present case are exceptional and the Court does not have examples in its case law which address the approach to be taken in resolving such conflicts. Nonetheless, it has on many occasions considered the manner in which domestic authorities intervene when families are in conflict, often in situations relating to care and custody arrangements. In such cases the Court has frequently recalled that the decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration.

The applicants argued that the interference with their parental rights based on the "best interests" test of the child was unnecessary. According to

them, such an interference could only be justified where there was a risk of “significant harm” to the child.

The Court considers that even if the test suggested by the applicants is the appropriate one, the Court of Appeal and Supreme Court concluded that there was a risk of “significant harm” to CG. They arrived at this conclusion on reviewing the decision of the High Court which considered extensive, expert evidence and heard from all concerned with CG’s daily care, who concluded, unanimously that it was likely he was being exposed to continued pain, suffering and distress.

The domestic courts also found, based on that extensive, expert evidence that for CG to undergo experimental treatment, with no prospects of success would offer no benefit, and prolong his suffering.

The Court recalls that where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation of the domestic authorities will be wider. The Court has previously considered in the context of Article 8 that in respect of the lack of consensus on access to experimental medical treatment for the terminally ill, the margin of appreciation is wide. Moreover, it is clear that the case before it raises sensitive moral and ethical issues.

The Court is also mindful that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. The Court has already found that the legal framework in place was appropriate and that the authorities have a margin of appreciation in this sphere. The Court therefore considers that the legal framework as a whole has not been shown to be disproportionate.

Therefore, examining the decisions taken by the domestic courts in light of those considerations, the Court recalls that they were meticulous and thorough; ensured that all those concerned were represented throughout; heard extensive and high-quality expert evidence; accorded weight to all the arguments raised; and were reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for their conclusions at all three levels. Accordingly, the Court does not see any element suggesting that those decisions could amount to an arbitrary or disproportionate interference. This part of the complaint is manifestly ill-founded.

For these reasons, the Court, by a majority, declares the application inadmissible.

ECHR 2018/3 *Case of Nawrot v. Poland*, 19 October 2017, no. 77850/12 (First Section)

The Facts

The applicant, born in 1981, is currently serving a 10-year sentence of imprisonment following his conviction in 2001 for robbery. In August 2005, he was charged again with murdering an Italian citizen (P.A.) by repeatedly hitting him on the head. A psychological assessment, ordered to determine his criminal responsibility, found in July 2006 that he was suffering from a chronic psychotic disorder of a delusional type, related to lesions in his central nervous system, and a personality disorder. The report found that he would not have been aware of his actions in relation to the offence or be able to control them. The court discontinued the proceedings against him on grounds of insanity and recommended that he be placed in a psychiatric hospital, where he was sent in May 2008.

Reviews of his condition confirmed that he should remain in a psychiatric institution on the ground that he was a danger to society. However, a report drawn up on 17 June 2012 by a different team of psychiatrists found that he did not have any lesions in his central nervous system and was not suffering from a mental illness at the time of those offences. They diagnosed him with a dissocial personality disorder and stated that he had had full mental capacity at the time.

Starting from July 2012, the applicant challenged his confinement in psychiatric hospitals and applied to be released. He attempted to commit suicide twice in 2013 and in May of that year he told the court that he had been simulating mental illness. The courts examined his submissions and divergences in opinions from two sets of experts, but held that his detention was justified by his condition.

Amid differing expert opinions on his mental state, he continued to be held in psychiatric hospitals until 30 May 2014, when the security measure was lifted and he was transferred to a prison to serve the remainder of the sentence imposed in 2001. In July 2015, the applicant was found guilty of several counts of robbery committed in 2005 and given a three-year prison sentence, suspended for seven years. The court found he had had full mental capacity at the time of the events. In those same proceedings another person was charged and convicted of murdering the Italian citizen.

This summary is restricted to the issues raised under Article 5 § 1(e) of the Convention.

The Law

Alleged Violation of Article 5 § 1(e) of the Convention

The applicant complained that his detention in a psychiatric hospital had been unlawful. The Court considers that the complaint falls to be examined under Article 5 § 1(e) of the Convention, which protects the right to liberty and security of persons of unsound mind.

The Court reiterates that, for the purposes of Article 5 § 1(e), an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

The Court will focus its examination on the period starting on 17 June 2012, when the experts confirmed that he had not been suffering from a mental illness at the time when the offences had been committed, and ending on 30 May 2014, the date of his release. In the Court’s view, regarding the manner in which the applicant’s personality disorder manifested itself, it is doubtful whether the regional court in 2012 could be said to have established that he was “of unsound mind” within the meaning of Article 5 § 1(e) of the Convention. However, even assuming that the applicant was reliably shown to be of unsound mind, it remains to be examined whether that disorder was of “a kind or degree warranting confinement”.

The Court notes firstly that initially the applicant’s mental disorder was indeed considered so serious that he was found to have acted in a state of insanity for the purposes of the Criminal Code. However, subsequently the experts changed their opinion and agreed that the applicant had been able to recognise the significance of his actions and control his behaviour.

The Court has repeatedly stressed that the permissible grounds for deprivation of liberty listed in Article 5 § 1 are to be interpreted narrowly. Moreover, in order to amount to a true mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1, the mental disorder in question must be so serious as to necessitate treatment in an institution appropriate for mental health patients. The Court has further expressed doubts as to whether a person’s dissocial personality or dissocial personality disorder alone could be considered a sufficiently serious mental disorder so as to be classified as a “true” mental disorder for the purposes of Article 5 § 1(e).

The Court is doubtful whether, in the present case, the applicant's condition was indeed so serious that it warranted compulsory confinement during the whole period in question. In this regard, it points out that on 17 June 2012 the experts considered that his condition had significantly improved over the years. In the context of a further periodic review, on 20 July 2012 the experts stressed that during the applicant's stay in the psychiatric hospital no acute psychotic symptoms had been observed. Equally, in their opinion of 27 August 2013 the experts noted that, while the applicant claimed to have suffered from a brief psychotic disorder in the past, at that time he only had a severe dissocial personality disorder. At the same time, they also observed that the question as to whether the applicant's detention should be lifted was a legal issue, not a medical one.

With regard to the potential risk posed by the applicant's release, the Court observes that the domestic courts relied on a risk that the applicant might commit a similar criminal offence of significant harm to the community. Initially, the security measure applied in respect of the applicant was indeed mainly based on his involvement in the murder of P.A. However, later on, another person was charged with P.A.'s murder and the applicant was only charged with several counts of robbery and theft. It would thus appear that, with the passage of time and the developments regarding the factual basis for the assessment, the possible risk of his reoffending became less significant.

In the Court's opinion, in extending the applicant's detention in psychiatric hospital beyond 17 June 2012, no sufficient consideration was given to whether the applicant represented an imminent danger to others or to himself. The Court further considers that the reasons given by the domestic courts do not appear sufficient for this purpose.

In those circumstances, the Court is not persuaded that the domestic authorities established that the validity of the applicant's confinement could be derived from the persistence of a disorder of a kind or degree warranting compulsory confinement. Therefore, his detention between 17 June 2012 and 30 May 2014 fell short of the conditions assumed by Article 5 § 1(e) of the Convention.

For these reasons, the Court holds, by five votes to two, that there has been a violation of Article 5 § 1(e) of the Convention.

Joint dissenting opinion of Judges Pardalos and Wojtyczek, stating that the majority did not give sufficient consideration to certain important factual circumstances of the case.

ECHR 2018/4 *Case of Frančiška Štefančič v. Slovenia*, 24 October 2017, no. 58349/09 (Fourth Section)

The Facts

The applicant's son, born in 1961, was suffering from mental illnesses and was admitted to a psychiatric hospital on several occasions. In June 2008 he regularly telephoned and went in person to the State Prosecutor's Office, making various delusional accusations. On 19 June 2008 he threatened that he would come back to the State Prosecutor's Office on the next day, armed. The head of the State Prosecutor's Office then contacted the psychiatric hospital where the applicant's son had been treated and was advised to suggest to the community health centre that a referral be made for his involuntary confinement. In the early evening of the same day, several police officers, a doctor of the health centre (Dr. B.A.) and two medical technicians went to the applicant's son's home.

According to the police report, the applicant's son refused to be taken to the psychiatric hospital. He became agitated and verbally aggressive. When he pushed off the medical technicians who were attempting to take him by his arms and then forcefully resisted being handcuffed by the police officers, they used force to push him to the ground. Eventually a medical technician injected him with an antipsychotic drug and, after he had been turned on his stomach, with another medication used to reduce the tremors caused by antipsychotic drugs. A few moments later, the officers and medical technicians noticed that he had vomited, which the doctor attributed to exertion. One medical technician then detected an irregular heartbeat. The medical team began to resuscitate the applicant's son, but this was to no avail. At 8.45 p.m. the doctor pronounced him dead.

A preliminary inquiry was carried out into the circumstances of the applicant's son's death, in which the authorities examined the scene of the incident, ordered a forensic report and took statements from the applicant and the members of the intervention team. The forensic report established that the applicant's son had died as a result of asphyxiation caused by aspiration of gastric contents. It considered that the intervention team could not have applied measures to prevent him from inhaling gastric contents, having regard to his aggressiveness. In September 2008 the head of the State Prosecutor's Office decided that the conditions had not been met to open criminal proceedings.

In January 2009 the applicant lodged a criminal complaint against the police officers, alleging that her son had died as a result of an unnecessary and unprofessional police intervention. The complaint was rejected in June 2009.

The Law

Alleged Violation of Article 2 of the Convention

The applicant complained that the State had been responsible for her son's death in the course of an intervention intended to take him to a psychiatric hospital. She also complained that the investigation into the circumstances of his death had been carried out by the authorities merely as an attempt to conceal the truth and to avoid liability. The Court considers that her complaints fall to be examined under Article 2 of the Convention, which protects the right to life.

Necessity and Proportionality of the Force Used

As regards the cause of death, the Court notes that the forensic report established that the applicant's son had died as a result of asphyxiation caused by aspiration of gastric contents. Although the applicant alleged that her son had been strangled by the police officers, the Court has no reason to doubt the accuracy of the expert report as regards the applicant's son's immediate cause of death, a detailed explanation having been provided in that regard. As to the cause of his vomiting, the forensic pathologist concluded that it had most likely been induced by a blow or pressure to the stomach during the struggle to restrain him.

The forensic pathologist proceeded from the assumption that the applicant's son had started to vomit during that struggle, concluding that his active resistance had prevented the intervention team from turning him onto his side or lifting him up into a vertical position in order to clear his respiratory tract. Only once he had lost consciousness was it possible to provide him with medical help, but by then, the medical staff could not have done anything to prevent his death.

Assuming that the hypothesis advanced by the forensic pathologist was correct, it inevitably gives rise, firstly, to the question of causality, and, in so far as an affirmative finding would be made in that regard, the question of whether the force applied to the applicant's son was justified in the circumstances of the case. However, the Court notes with concern that neither the question of whether there was a causal link between the force used against the applicant's

son and his death nor the question of necessity and proportionality of that force have been addressed by the domestic authorities.

They did not examine the seriousness of the applicant's son's injuries sustained during his struggle with the police, including those which could have supported the hypothesis that the vomiting had been induced by blows or pressure to the stomach. Nor were the police officers questioned by independent authorities about the force they had used to subdue him and secure the handcuffs on him.

In this connection, it is worth noting that one of the medical technicians stated that the force used on the applicant's son might have been excessive, given that he had not been particularly aggressive and had not physically attacked anyone. Although agitated and resistant to the idea of hospitalisation, the applicant's son did not respond with aggression until force was used on him.

In sum, the Court is of the opinion that the omissions in the investigation of the applicant's son's death do not allow for a conclusion whether the use of force was absolutely necessary and proportionate, which includes the question of whether it was adapted to the vulnerable state of the applicant's son, and whether the intervention was conducted so as to minimise the risk to the applicant's son's life.

Provision of Medical Assistance

Secondly, the Court is not satisfied that the course of events as explained by the forensic pathologist was satisfactorily corroborated by the statements of the intervention team. Not one police officer or medical professional involved in the incident mentioned that the applicant's son had already started to vomit or exhibited any signs of respiratory distress related to the inhalation of gastric contents during his confrontation with the police.

More importantly, all members of the intervention team who were in the applicant's house during the incident, with the exception of Dr. B.A., stated that Dr. B.A. had initially attributed the applicant's son's vomiting to exertion and done nothing to clear his respiratory tract. According to one of the medical technicians, who stated that after the applicant's son had calmed down he had noticed that his breathing was disrupted and had warned Dr. B.A. about it, the doctor had concluded that the applicant's son was breathing, and had gone outside the house to arrange for his transport to the psychiatric hospital.

In the Court's opinion, the accounts of the police officers and the medical technicians involved in the incident are difficult to reconcile with the conclusions of the forensic pathologist that (i) the applicant's son had started

to vomit during the physical confrontation with the police, and (ii) he could not be helped due to his strong resistance. Considering that the forensic report proposed what the pathologist described as a “likely” course of events, his conclusions in this regard need to be regarded with some reservation. Further, in the light of the above statements of the intervention team it was necessary to establish whether the applicant’s son’s breathing problems could and should have been recognised sooner and appropriate measures taken in order to prevent his death.

It is true that the Court has repeatedly held that errors of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are not sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations, under Article 2 of the Convention, to protect life. It is also true that, according to the statements of the police officers and medical staff, the whole incident from the police struggle with the applicant’s son to his vomiting and the loss of consciousness and interruption of breathing lasted only a few minutes.

However, the question of reaction time of the medical staff was not examined by the domestic investigating authorities, nor was it assessed whether the delay in the provision of medical care, although perhaps not significant, might have contributed to the applicant’s son’s death in a manner constituting a breach of duty of care on the part of Dr. B.A. or the entire medical team involved in the incident.

Conclusion

In the Court’s opinion the documents provided by the Government do not give a clear picture of the incident; nevertheless, the domestic prosecution authorities readily accepted the hypothesis suggested by the forensic pathologist, neglecting to notice the omissions and contradictions in the case material or take any steps in order to settle them. The domestic preliminary inquiry was thus not capable of determining to a sufficient extent whether any of the persons involved in the incident might be held responsible for the applicant’s son’s death. Yet no judicial investigation was conducted in the course of which additional explanations might be requested from the intervention team and the forensic pathologist in order to clarify the questions identified above. The Court therefore finds that the conclusions made by the investigating authorities were inadequate, leaving open a number of questions that should have been examined in order to ensure that the investigation was effective.

For these reasons, the Court, unanimously, holds that there has been a violation of Article 2 of the Convention.

ECtHR 2018/5 *Case of V.P. v. Estonia*, 9 November 2017, no. 14185/14 (Second Section)

The Facts

The case concerns the suicide of the applicant's son, born in 1955. He had a history of mental illness (paranoid schizophrenia) and had been placed in a psychiatric hospital fourteen times from 1980. On 30 April 2012, he attempted to commit suicide by taking a large number of pills. The applicant called an ambulance. The applicant's son was diagnosed with intoxication and taken to a hospital. Owing to a lack of space he was initially placed in the intensive care unit of the renal department. On 1 May 2012, he was transferred from the renal department to the intensive care unit of the department of internal medicine, located on the twelfth floor of the hospital. He committed suicide on the same day by jumping out of the window.

In October 2012, the applicant turned to the Expert Committee on the Quality of Health-Care Services (hereinafter the "Expert Committee"). The Expert Committee found that the psychiatric treatment the applicant's son had received had been in compliance with standard medical practice. Placing him in the renal and internal medicine departments had been justified as he had been in need of medical supervision. His suicidal tendencies had been properly assessed upon his admission to hospital on 30 April 2012. However, the supervision he had been under had been insufficient and the technical characteristics of the building – the fact that the windows could not be closed to prevent people jumping out – had also served as factors contributing to his suicide. The Expert Committee recommended that the hospital implement a procedure for the supervision of suicidal patients and train its staff accordingly. It recommended the use of technical solutions to minimise the risk of suicide, such as monitoring equipment in the rooms and windows with shatterproof glass that could not be opened.

In May 2013, the applicant lodged an offence report with the local prosecutor's office. The prosecutor refused to institute criminal proceedings on the grounds that the elements of a criminal offence were lacking. The applicant's subsequent appeal to the Office of the Prosecutor General was dismissed, as

was the appeal to the Court of Appeal as it had not been submitted through a lawyer. The Supreme Court subsequently dismissed the applicant's request to be granted legal aid.

The Law

Alleged Violation of Article 2 of the Convention

Relying on Article 2 (right to life), the applicant complained that the authorities had not carried out a sufficiently thorough and independent criminal investigation into her son's death and that they should have prevented him from committing suicide.

The Court will address the preliminary issue of the alleged non-exhaustion of domestic remedies with regard to both of the applicant's complaints together.

The Court takes note of the fact that the respondent State has enacted an overall regulatory framework for the organisation of healthcare services and their supervision. There is no indication of a failure of the respondent State to ensure the implementation of such a framework nor any sign of a systematic or structural dysfunction in the provision of healthcare services that the authorities knew or ought to have known about. Against that background, the Court is compelled to reiterate that even if there were shortcomings of the hospital in providing adequate supervision for applicant's son, as well as in accessing the hospital windows and their functioning – as pointed out by the Expert Committee – those elements cannot themselves lead to the conclusion that the criminal remedy was the sole appropriate course of action to address the applicant's complaints.

The aforementioned does not mean that the seriousness of those shortcomings could be disregarded at the domestic level. It is precisely in that respect that an efficiently functioning judicial system, capable of establishing the responsibility of healthcare service providers and offering adequate redress, becomes important.

In the present case the relevant authorities provided a sufficient explanation for why they considered that no elements of a criminal offence existed. In the light of the provided reasoning, the decision not to institute criminal proceedings cannot be considered arbitrary.

The Court notes further that although the applicant was aware of the existence of civil-law remedies, she did not attempt to make use of them. Since criminal proceedings were never instituted, she did not lodge a civil claim within those proceedings. The applicant did not lodge a separate civil claim

against the healthcare service provider either. As regards the involvement and opinion of the Expert Committee, the Court has previously found in the Estonian context that recourse to the Expert Committee cannot, especially taken alone, be considered sufficient to meet the requirement of exhaustion of domestic remedies.

The Court is mindful of the applicant's point of view that her purpose was never to gain monetary compensation by lodging a civil claim against the healthcare service provider. However, the Court considers that regardless of whether or not the awarding of damages is seen as the primary goal of a civil claim, civil court proceedings also inevitably presuppose determining the facts of a case, finding out the cause of death and – if justified – establishing the liability of those responsible. Moreover, the procedural obligation deriving from Article 2 of the Convention in cases involving medical negligence does not necessarily require States to offer criminal-law remedies.

The Court has had regard to the domestic law and practice which allows medical negligence to be addressed in the civil courts, which can and do award compensation for non-pecuniary damage. Assessing whether such a civil-law remedy would have provided an adequate response and redress in the specific circumstances of the applicant's case was only possible if the applicant had used that remedy.

The Court considers that the applicant's complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies

For these reasons, the Court, unanimously, declares the application inadmissible.

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