Selected Legislation and Jurisprudence

European Court of Human Rights

ECHR 2019/1 *Case of Vlase v. Romania*, 24 July 2018, no. 80784/13 (Fourth Section)

The judgment is only available in French.

The Facts¹

The applicants are the wife and daughter of N.V., who died in a military hospital on 13 January 2012. On 7 December 2011 N.V. was admitted to a military hospital where he underwent a check-up. He was diagnosed with a gastroduodenal ulcer caused by a bacterial infection. He was referred to a doctor who recommended surgery. Following post-operative complications, he underwent two further operations, carried out by the same medical team, and later a feeding tube was installed. On 6 January 2012 the presence of new bacteria was discovered. On 9 January 2012, N.V.'s state of health deteriorated owing to haemorrhaging. He died on 13 January 2012.

The applicants lodged a complaint of manslaughter with the court of first instance. An investigation was immediately launched, and several expert assessments were conducted. In August 2014 the applicants complained to the court about the delays in the proceedings. On 22 September 2014 the prosecutor's office at the county court brought criminal proceedings for manslaughter. On 3 June 2015 the prosecution decided to discontinue the case, as the

1 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>.

prosecutors had discovered no criminal negligence attributable to the doctors involved. The applicants, unsuccessfully, challenged that decision, and then lodged a legal challenge in court, which was referred to the prosecutor's office at the court of appeal. That court acceded to the challenge, and decided that the prosecutor's office at the military court held jurisdiction for the case. On 18 May 2017 the military court ordered the discontinuance of the complaint. The applicants' challenge was dismissed.

By order of 22 May 2017, the military court referred the case to the court of first instance. The proceedings are still pending.

The Law

Alleged Violation of Article 5 § 1 of the Convention

Relying, in particular, on Article 2 of the Convention (right to life), the applicants complained of the lack of an effective investigation following their criminal complaint concerning N.V.'s death.

The Court notes that, during a routine check-up at the military hospital, a stomach ulcer was diagnosed in N.V., and that he was hospitalised and subjected to several surgical procedures before dying. It considers that this situation led the applicants to legitimately suspect that medical negligence was the main cause of their relative's death. In these circumstances, it considers that the State should ensure that the procedural obligation under Article 2 of the Convention is respected.

The Court notes that the applicants lodged a criminal complaint about the shortcomings of the doctors involved in the treatment of N.V. and that, in the context of the criminal proceedings, the first applicant set up a civil action. The Court will therefore examine whether the applicants' remedy satisfies the requirements of promptness, effectiveness and due diligence arising from the procedural limb of Article 2 of the Convention.

In that regard, it points out, first of all, that the procedure following the lodging of a complaint by the applicants lasted more than two years. Although some steps were taken by the prosecutor's office to identify the possible causal link between the surgeries and the death of N.V., the chief prosecutor of the county court criticised the excessive length of the investigation and ordered its finalisation. The Court further notes that the proceedings against the doctors are still pending. The successive referrals of the case between the various public and military courts and tribunals, for reasons of jurisdiction, lengthened the procedure and resulted in unreasonable delays. These elements provide strong

indications that the procedure does not meet the requirements of promptness and diligence.

In addition, the Court reiterates that, with regard to the *prima facie* allegations of medical negligence which would have contributed to the death of N.V., the authorities should have analysed the matter in detail. In this respect, it observes that the criminal proceedings also concerned suspicions that N.V. had contracted a nosocomial infection before his death. However, the conclusions of the forensic inquiry requested by the prosecution were contradicted by the expert report made by a medical examiner appointed by the applicants. Although it is not for the Court to call the conclusions of expert reports into question by speculating on the basis of the medical information at its disposal, it notes that the expertise requested by the prosecution does not clarify the issue of the origin of the nosocomial infection, or the possible consequences of it for the death of N.V., and that more than six years after the death of the applicants' relative uncertainties still persist regarding the application of infection control standards.

The Court recalls that, in addition to the issue of respect for the rights arising from Article 2, more general considerations also call for a prompt examination of cases concerning medical negligence in hospital. Knowledge of the facts and possible errors in the administration of medical care is essential to enable the institutions concerned and the medical staff to remedy potential deficiencies and to prevent similar errors. Prompt review of such cases is important for the safety of users in all health services.

However, in the present case, more than six years after the start of the criminal proceedings, the domestic authorities did not deal with the applicants' complaint relating to the death of their relative with the level of care required by Article 2 and the respondent State failed to provide convincing and plausible explanations for this deficiency.

Finally, as regards the choice of the first applicant to bring civil proceedings in the context of the criminal proceedings for manslaughter, the Court observes that this remedy should have allowed for a joint examination of the criminal and civil liability. Moreover, this choice was preferred because the investigating authorities were required to gather evidence that could be used by the applicants to bring a civil action. However, the criminal proceedings are still pending before the domestic courts. In this context, the Court cannot blame the applicants for not instituting a separate civil or disciplinary action.

In conclusion, the Court considers that the national judicial system did not provide an adequate and prompt response to the arguable claim about N.V.'s death in hospital.

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

ECtHR 2019/2 *Case of Guelfucci v. France*, 26 July 2018, no. 31038/12 (Fifth Section)

The judgment is available only in French. This summary is restricted to the issues raised under the Articles 5 § 1, 6 § 1 and 13 of the Convention.

The Facts

The applicant is a French woman, born in 1960. Having been forcibly admitted to a psychiatric hospital in 1994 at her father's request, she disputed the lawfulness of her detention. In July 1994 the applicant's father alerted the police because of his concern about his daughter's mental state, as she had confided in third persons that she was intending to take her own life and the lives of her children. The applicant was detained in the psychiatric hospital that same evening, on the basis of two medical certificates. The next day, her father submitted a hospitalisation request pursuant to the Public Health Code.

The applicant remained in hospital until the beginning of August 1994. She brought several sets of proceedings before the judicial and administrative courts. In February 1996 she lodged a complaint with the criminal court alleging intrusion upon the home and wrongful detention, together with an application to join the proceedings as a civil party, against the director of the psychiatric hospital. He was acquitted in October 2006. In May 2004 she lodged four applications to set aside the decisions taken by the director of the psychiatric hospital with the administrative court, which dismissed them, as upheld by the administrative court of appeal. In November 2011 the *Conseil d'État* decided not to admit the appeal on points of law lodged by the applicant. In January 2006 the applicant lodged with the regional court an action against the State for compensation for the excessive length of proceedings following her criminal complaint. The court of appeal upheld the compensation award in June 2008.

The Law

Alleged Violation of Article 5 § 1 of the Convention

Relying on Article 5 § 1 (right to liberty and security), the applicant complained of the unlawfulness of her deprivation of liberty.

An individual cannot be deprived of his or her liberty unless he or she is reliably shown to be of unsound mind, the mental disorder is of a kind or degree warranting compulsory confinement, and the continued confinement does not extend beyond the persistence of the disorder. All these criteria have been met in the present case. Thus, the applicant's father has requested her hospitalisation on account of disturbing statements she had made, and his request has been supported by two detailed medical certificates. The head doctor in the hospital's psychiatric unit has confirmed that the hospitalisation was justified. Lastly, the expert appointed by the investigating judge has concluded that the applicant was suffering from psychosis and presented a suicide risk.

Both the criminal and administrative domestic courts have concluded that the applicant's hospitalisation has been compatible with domestic law. Thus, the criminal court held that the conditions laid down in the Public Health Code had been fulfilled when the applicant was forcibly hospitalised on 22 July 1994. In consequence, it had acquitted the director of the hospital. For their part, the administrative court and the administrative court of appeal have also held that the decision to admit the applicant and the subsequent decisions complied with the requirements laid down by the above-mentioned code. There is nothing in the case file which would justify reaching a different conclusion. Moreover, the applicant has not brought before the domestic courts an action which would have enabled the merits of her forced hospitalisation to be examined.

As the application does not disclose any appearance of a violation of Article 5 § 1, the complaint is manifestly ill-founded.

Alleged Violation of Article 6 § 1 and 13 of the Convention

Relying on Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), the applicant submitted that the length of the administrative proceedings had been excessive, that she did not have an effective remedy and that the *Conseil d'État* had provided no reasons for its decision not to admit her appeal on points of law.

The Court reiterates its well-established case-law that an action to establish State liability for shortcomings in the justice system is a remedy to be exhausted in order to lodge a well-founded application concerning the excessive length of administrative proceedings. As the applicant has brought no such action, the application lodged by her is inadmissible.

The applicant complains that the *Conseil d'État* has not given reasons for its decision to dismiss her appeal on points of law. However, an appellate court is not required to give more detailed reasoning when it simply applies a specific

legal provision to dismiss an appeal on points of law as having no prospects of success. The *Conseil d'État's* decision has been based on the absence of grounds such as to warrant admitting the appeal for the purposes of the Administrative Courts Code.

The complaint is thus manifestly ill-founded.

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

ECHR 2019/3 *Case of Annen v. Germany* (No. 3), 20 September 2018, no. 3687/10 (Fifth Section)

The Facts

The applicant, born in 1951, is a campaigner against abortion and operates an anti-abortion website. In November and December 2004, he distributed leaflets in the immediate vicinity of the medical practice of Dr S. The leaflets contained, *inter alia*, the following text on the front page: "*Did you know that Dr S. [full name and address] performs abortions that are unlawful according to the case-law of the Federal Constitutional Court?*" Underneath, the following was in smaller type: "*According to international criminal law: aggravated murder is the intentional 'bringing-to-death' of an innocent human being*". The back side of the folded leaflet contained the following text: "*The aggravated murder of human beings in Auschwitz was unlawful, but the morally degraded NS State allowed the aggravated murder of innocent people and did not make it subject to criminal liability*".

By a letter of 23 December 2004 Dr S. requested that the applicant sign a declaration to cease and desist. The applicant refused and published the following statement on his website: "*If Dr S. [full name], by carrying out abortions, publicly shows that he agrees with abortions, then he should stand by his opinion. Instead Dr S. considers the leaflet campaign to be slander, threatens an interim injunction and has already given his lawyer a mandate to lodge a criminal complaint for defamation/slander. We ask ourselves: Is Dr S. unprincipled and characterless?*"

Subsequently Dr S. applied to the regional court for a civil injunction ordering the applicant not to claim on the internet that the plaintiff performed

unlawful abortions and not to disseminate leaflets containing his name and the assertion that unlawful abortions were performed in his medical practice.

On 30 September 2005, the date of the oral hearing before the regional court, the applicant distributed a second leaflet directly in front of Dr S's practice. Among other places, the applicant deposited this second leaflet, in which Dr S. was not mentioned by name, into letterboxes in the immediate vicinity of the latter's practice. The following sentence was on the front side of the leaflet: "*Near you: unlawful ABORTIONS ... and YOU are silent about the AGGRAVATED MURDER of our CHILDREN?*" The back of the folded leaflet contained the following text: "*These pre-natal infanticides have meanwhile taken on proportions that bring to mind a new HOLOCAUST!*" Farther down the leaflet read: "*I'm simply unable to understand that medical personnel and doctors, who are supposed to help and save lives, stoop to take part in aggravated murder*".

In November 2005 the regional court granted the requested injunction and ordered the applicant to desist from asserting publicly, both in writing and orally, on the internet as well as on leaflets, that the plaintiff performed unlawful abortions in his medical practice. The decision was upheld by the court of appeal in February 2007.

The Law

Alleged Violation of Article 10 of the Convention

The applicant complained that the injunction, ordering him to desist from asserting that Dr S. performed unlawful abortions in his medical practice, had violated his freedom of expression as provided in Article 10 of the Convention.

At the outset the Court considers that the injunction interfered with the applicant's freedom of expression, had a legal basis and pursued the legitimate aim of protecting the rights and reputation of Dr S. It therefore remains to be determined whether the interference was "necessary in a democratic society" and whether the balancing exercise undertaken by the domestic courts was in conformity with the criteria laid down in the Court's case-law.

The Court observes that while the regional court considered the statements to be statements of fact, the court of appeal left this question open as in both cases the applicant's statements had not been justified. It considered that while strictly speaking calling abortions unlawful was correct, the statement

read in conjunction with the rest of the leaflets could be understood as alleging that Dr S.'s professional activities constituted aggravated murder.

The Court considers that the leaflets provide no further explanation regarding the fact that doctors providing abortions are exempt from criminal liability. It agrees with the domestic courts, that, when taking into account the leaflets as a whole, they could be understood as alleging that Dr S.'s professional activities constituted aggravated murder.

The Court would further reiterate that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, there must be a sufficient factual basis to support it, failing which it will be excessive. The Court notes that the applicant has not submitted any indication that Dr S. committed aggravated murder or that the abortions performed by him were subject to criminal liability. In sum, the Court finds that, even assuming that the applicant's statements were to be considered value judgments, there was not a sufficient factual basis for calling abortions as performed by Dr S. "murder". In that regard the Court also notes that these accusations were not only very serious, something reflected in the fact that a conviction for aggravated murder would carry a life sentence, but might also incite hatred and aggression.

The Court observes that the injunction was limited in scope and "only" prevented the applicant from stating that Dr S. was performing unlawful abortions and putting these within the same context as "aggravated murder", and/or expressly characterising them as "infanticide". In that regard the Court notes that the applicant was not per se prohibited from campaigning against abortions or criticising doctors that conducted abortions.

In these circumstances the Court concludes that the injunction was not disproportionate to the legitimate aim pursued, namely the protection of the rights and reputation of Dr S., and that the reasons given by the domestic courts were relevant and sufficient. The interference with the applicant's exercise of his right to freedom of expression could therefore reasonably be regarded by the domestic courts as necessary in a democratic society.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 10 of the Convention.

ECHR 2019/4 *Case of Pojatina v. Croatia*, 4 October 2018, no. 18568/12 (First Section)

The Facts

The applicant, born in 1976, gave birth to her first three children in hospital. In 2011 she became pregnant with her fourth child and had a due date in February 2012. During her pregnancy she wrote to the Chamber of Midwives to enquire whether she could have professional help with a home birth. The Chamber told her that under Croatian law, health professionals, including midwives, were unable to assist with home births. In particular, the setting up of private practices by midwives was not clearly regulated and thus no midwife was officially assisted with home births. The Chamber also cited a statement by the Ministry of Health showing that there was no system for assisting home births in Croatia. On 15 February 2012 the applicant gave birth to her fourth child at home, assisted by a midwife from abroad.

The Law

Alleged Violation of Article 8 of the Convention

The applicant complained that Croatian law had dissuaded healthcare professionals from assisting her when giving birth at home, in violation of her right to a private life, as provided for in Article 8 of the Convention.

Interference with Article 8?

Although Article 8 of the Convention cannot be interpreted as conferring a right to give birth at home as such, the fact that it is impossible in practice for women to be assisted when giving birth in their private home interferes with Article 8. The principles regarding justification under Article 8 § 2 are applicable.

Was the Interference “in Accordance with the Law”?

The Court reiterates that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable a citizen to regulate his or her conduct. In the present case, the domestic legal provisions providing the legal basis for the impugned interference were accessible to the applicant. In addition, although at

first there might have been some doubt as to whether a system for assisted home births was set up in Croatia, the applicant was clearly made aware, through the letters from the Chamber of Midwives and the Ministry of Health which she received while she was still pregnant with her fourth child, that the relevant domestic law did not allow health professionals, including midwives, to assist with planned home births. The Court therefore holds that the impugned interference was also foreseeable for the applicant and thus in accordance with the law. However, the Court invites the Croatian authorities to consolidate the relevant legislation so that the matter is expressly and clearly regulated.

Did the Interference Pursue a Legitimate Aim?

The impugned interference serves the legitimate aim of the protection of the health and rights of others within the meaning of Article 8 § 2 of the Convention.

Was the Interference Necessary in a Democratic Society?

The Court has to establish whether the fact that it was impossible in practice for the applicant to be assisted by a health professional from the Croatian health-care system during her home birth struck a fair balance, on the one hand, between the applicant's right to respect for her private life under Article 8, and, on the other hand, the State's interest in protecting the health and safety of mothers and children during and after delivery. In addition to this, the Court has to verify whether the respondent State, by allegedly denying postnatal care to the applicant and her child born at home, and by making it difficult for her to register her child in the State register, overstepped the margin of appreciation afforded to it. In that regard, the Court takes note of the Government's argument that in the light of all the scientific findings known to them, and even though home delivery might be more pleasant for mothers-to-be, it still represented an option that was not as safe as a full hospital delivery.

The Court notes that the applicant could have opted to give birth in any maternity ward in Croatia. However, according to the applicant's submissions based on her own experience, the wishes of mothers-to-be do not seem to be fully respected in maternity wards. Those remarks would seem to be confirmed in substance by the Committee on the Elimination of Discrimination against Women.

In the Court's opinion, those concerns cannot be disregarded when assessing whether the authorities struck a fair balance between the competing interests at stake. At the same time, the Court acknowledges that in recent times, various initiatives to improve the situation have been taken. The Court invites the Croatian authorities to make further progress in such matters.

The Court notes that there are no provisions under domestic law criminalising home births. Moreover, no woman or health professional has ever been punished for such actions. The Court is of the view that by not passing legislation that would in practice allow women to be assisted by health professionals from the Croatian healthcare system when giving birth at home, the State did not overstep the wide margin of appreciation afforded to it on the matter. There still remains a great disparity between the legal systems of the Contracting States on the matter.

As to the applicant's complaint that she and her child were denied postnatal care, the Court notes that the applicant never reported the event of being denied postnatal care to any relevant authority. In any event, it was undisputed that the applicant and her child eventually did receive post-delivery medical care.

As to the applicant's complaint that women giving birth at home experienced difficulties in registering their children in State registers as the relevant law obliged them to submit medical documents to prove their motherhood, the Court finds such a requirement understandable as it is clearly directed at avoiding possible abuses in situations where there is no official information on the birth of a child or its biological parents.

In conclusion, the Court is of the view that the interference with the applicant's right to respect for her private life was not disproportionate.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 8 of the Convention.

Concurring opinion of Judge Koskelo, stating that the complaint should have been examined from the point of view of the State's positive obligations. *Partly dissenting opinion* of Judge Wojtyczek, questioning the admissibility of the application.

ECtHR 2019/5 *Case of M.T. v. Estonia*, 23 October 2018, no. 75378/13 (Second Section)

The Facts

The applicant, born in 1962, has lodged the application on behalf of her son, O.T., who spent more than five years in a psychiatric institution. The courts ordered O.T.'s placement in the psychiatric hospital in May 2011. They based the order on a psychiatric report of November 2010 that found that he was

suffering from paranoid schizophrenia and, following a sexual offence involving a 10-year old girl, posed a danger to society. The applicant, who had been appointed his legal guardian, brought proceedings before the courts to discontinue his treatment. All her requests were however dismissed. The courts essentially relied on an opinion drawn up in December 2012 by O.T.'s doctor and the head of the department at the hospital where he was being treated finding that his mental condition had not changed. They also heard the head of the department, the applicant and her son at a hearing in 2013, and found that it was not necessary to order a fresh external expert opinion, as requested by the applicant. In those proceedings, the applicant also unsuccessfully complained that her son could not himself challenge in court the necessity of his further treatment.

The Law

Alleged Violation of Article 5 § 4 of the Convention

The applicant complained of the lack of objectivity, independence and thoroughness of the medical committee, whose opinions the domestic courts relied on when refusing to alter or terminate O.T.'s treatment. She further complained of the impossibility for her son to challenge the lawfulness of his detention. The Court considers that both of the complaints should be examined from the standpoint of Article 5 § 4 of the Convention (right to have lawfulness of detention decided speedily by a court).

In the context of Article 5 § 4 the Court has stressed that the required medical assessment must be sufficiently recent as to enable the authorities to assess the mental health of the person concerned at the time when the request for discharge is examined.

The Court notes that the initial order placing O.T. in coercive psychiatric treatment relied on an independent external forensic psychiatric expert report of 8 November 2010. The applicant did not challenge its findings. The impugned proceedings concerned the applicant's request for judicial review of O.T.'s continued coercive psychiatric treatment. In view of the central role of a medical opinion in such proceedings, the domestic courts relied on the expert opinion of 11 December 2012 of the medical committee comprised of O.T.'s attending doctor and the head of the department of the hospital where O.T. was being treated.

Given the time that elapsed since the last external forensic psychiatric expert report, the Court does not consider that recourse to an independent psychiatric opinion, which is an important safeguard against possible arbitrariness in

decision-making, was necessary. The fact alone that an opinion was provided by doctors of the same hospital in which the applicant was being treated is not sufficient to draw the conclusion that they would not be able to carry out their duties with the required impartiality, professionalism and objectivity if there is nothing to indicate a breakdown in trust between the applicant and the staff of the institution or any deadlock in the evolution of the situation. Therefore, it does not, in itself, necessarily lead to the finding of a violation under Article 5 of the Convention.

The Court finds noteworthy that the relevant expert opinion on which the Estonian courts relied was sufficiently recent. Lastly, insofar as the applicant complains about other procedural aspects such as, *inter alia*, that the expert opinions themselves are sufficiently reasoned, the Court notes that the domestic courts did not rely solely on the said medical opinion.

The domestic courts also heard oral evidence from the head of the coercive treatment department, Dr S.K., who asserted that O.T. had not recovered, denied his condition and having committed a criminal offence, and did not adhere to the administered treatment, and that the possibility of outpatient treatment in such circumstances was therefore excluded. O.T. (represented by his counsel) and the applicant were also heard. In the light of the information before them, the domestic courts did not consider it necessary, although they were entitled to under the domestic law, to order an external expert opinion.

The Court observes that other than pointing out that the doctors of the medical committee worked at the same hospital where her son was being treated, the applicant did not substantiate her concerns about the impartiality of the said doctors any further. She neither raised concerns about their compliance with the rules of professional conduct nor claimed that the bond of trust with the medical personnel of the hospital had been broken.

Against that background, and considering that it is in the first place for the national authorities to evaluate the evidence before them, the Court is satisfied that the domestic authorities could have legitimately been considered to have had sufficient evidence to decide on the case before them. In those circumstances, the discretionary choice not to order an additional external psychiatric expert assessment cannot be considered arbitrary.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 5 § 4 of the Convention.

Joseph Dute

Professor of Health Law, Faculty of Law, Radboud University, Nijmegen,
The Netherlands