



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

THIRD SECTION

CASE OF ŠILIH v. SLOVENIA

(Application no. 71463/01)

JUDGMENT

STRASBOURG

28 June 2007

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
09/04/2009**

This judgment may be subject to editorial revision.

In the case of Šilih v. Slovenia,

The European Court of Human Rights (Third Section), sitting on 7 June 2007 as a Chamber composed of:

Mr C. BÎRSAN, *President*,

Mr B.M. ZUPANČIČ,

Mr J.-P. COSTA,

Mrs A. GYULUMYAN,

Mr DAVID THÓR BJÖRGVINSSON,

Mrs I. ZIEMELE,

Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 7 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 71463/01) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Slovenian nationals, Franja and Ivan Šilih (“the applicants”), on 19 May 2001.

2. The applicants were represented by Mr B. Grubar, a lawyer practising in Maribor. The Slovenian Government (“the Government”) were represented by their Agent, Mr L. Bembič.

3. The applicants alleged that their son had died as a result of medical negligence and, in particular, that their rights under Articles 2, 3, 6, 13 and 14 of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing liability for the death of their son.

4. On 11 October 2004 the Court decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, Franja and Ivan Šilih, were born in 1949 and 1940 respectively and live in Slovenj Gradec.

6. On 3 May 1993, at a disputed time between midday and 1.00 p.m., the applicants' son, Gregor Šilih, aged 20, sought medical aid in the Slovenj Gradec General Hospital because of, *inter alia*, nausea and itching skin. He was examined by a doctor on duty, M.E. On the basis of a diagnosis of urticaria (a type of allergic reaction), M.E. ordered the administration of intravenous injections of a drug containing glucocorticosteroid (Dexamethason) and an antihistaminic (Synopen). Further to the administration of injections, the applicants' son's condition significantly deteriorated. This was probably a result of him being allergic to one or both of the drugs that had been administered to him. His skin became very pale, he began to tremble and to feel cold; M.E. noticed signs of tachycardia. A diagnosis of anaphylactic shock was made. Subsequently, at 1.30 p.m., he was transferred to intensive care. M.E. ordered the administration of, *inter alia*, adrenaline. By the time the cardiologist arrived, the applicants' son had stopped breathing and had no pulse. Cardiopulmonary resuscitation was given. At an undetermined time around 2.15 p.m. the applicants' son was connected to a respirator and his blood pressure and pulse returned to normal, but he remained in a coma; his brain was severely damaged.

7. On 4 May 1993 he was transferred to the Ljubljana Clinical Centre (*Klinični center v Ljubljani*), where he died on 19 May 1993.

8. The exact timing of the events which led to the death of the applicants' son and the action taken by M.E. in response to the applicants' son's deteriorating condition were disputed in the domestic proceedings.

A. Criminal proceedings

9. On 13 May 1993 the applicants lodged a criminal complaint (*ovadba*) with the Slovenj Gradec Unit of the Maribor Basic Public Prosecutor's Office (*Temeljno javno tožilstvo Maribor, Enota v Slovenj Gradcu*) against M.E. for the criminal offence of "negligent medical treatment" (*nevestno zdravljenje*) which, following the applicants' son's death, was characterized as "a serious criminal offence that [had] caused damage to health" (*hudo kaznivo dejanje zoper človekovo zdravje*). The applicants argued that M.E. had given their son the wrong treatment and had failed to take appropriate measures after his condition deteriorated.

10. In the course of the preliminary proceedings (*predkazenski postopek*), medical documents concerning the treatment of the applicants' son were seized by the police and the Ljubljana Institute for Forensic Medicine (*Inštitut za sodno medicino v Ljubljani*) was appointed to prepare a forensic report.

11. On 8 April 1994 the Public Prosecutor dismissed the applicants' criminal complaint on the ground of insufficient evidence.

12. On 1 August 1994 the applicants, acting as subsidiary prosecutors (*subsidiarni tožilec*), lodged a request for the opening of a criminal investigation (*zahteva za preiskavo*) against M.E.

13. On 8 November 1994 the investigating judge of the Maribor Basic Court (*Temeljno sodišče v Mariboru*) granted their request. On 27 December 1994, upon an appeal by M.E. (*pritožba*), the interlocutory-proceedings panel (*zunaj obravnavni senat*) of the Maribor Basic Court overturned the investigating judge's decision finding that the evidence in the case-file, in particular the forensic report, did not afford reasonable grounds for suspecting that M.E. had manifestly acted in breach of professional standards.

14. The applicants' appeal (*pritožba*) and a request for the protection of legality (*zahteva za varstvo zakonitosti*) were dismissed. The latter was dismissed on 29 June 1995 by the Slovenj Gradec District Court (*Okrožno sodišče v Slovenj Gradcu*), which obtained jurisdiction in the case after the reorganization of the judiciary in 1995.

15. Subsequently, the applicants obtained a medical opinion from Doctor T.V. who stated, *inter alia*, that myocarditis (inflammation of the heart muscle), which had previously been considered to be a contributory factor in the death of the applicants' son, could have occurred when he was in anaphylactic shock or even later. As a result, on 30 November 1995 they lodged a request to reopen a criminal investigation (see paragraph 72). In addition, they lodged a motion to change the venue of the proceedings to the Maribor District Court (*Okrožno sodišče v Mariboru*). On 31 January 1996 the Maribor Higher Court granted their motion for a change of venue.

16. On 26 April 1996 the interlocutory-proceedings panel of the Maribor District Court granted the applicants' request for an investigation. An appeal by M.E. was rejected by the Maribor Higher Court on 4 July 1996 and the investigation was subsequently opened.

17. In the course of the investigation, the investigating judge examined witnesses and obtained an opinion from P.G., an expert at the Institute of Forensic Medicine in Graz (Austria). P.G. stated in his report that the administration of antihistaminic had led to the applicants' son's serious allergic reaction. He expressed doubts as to the pre-existence of myocarditis.

18. On 10 February 1997 the investigating judge closed the investigation.

19. Owing to the complexity of the case, the applicants asked the Maribor District Public Prosecutor's Office to take over the prosecution. Their request was rejected on 21 February 1997.

20. On 28 February 1997 the applicants lodged an indictment against M.E. for the criminal offence of "causing death by negligence" (*povzročitev smrti iz malomarnosti*).

21. On 7 May 1997, upon M.E.'s objection to the indictment, the interlocutory-proceedings panel of the Maribor District Court directed the applicants to request additional investigative measures.

22. The investigating judge subsequently examined several witnesses and ordered that a forensic report be prepared by K.H., an Austrian forensic expert in the field of emergency medicine and anaesthesia. K.H. stated in his report that the ultimate reason for the death of the applicants' son was rather uncertain. He therefore considered the issue of the effectiveness of the measures taken by M.E in response to the applicants' son's condition as being of no importance.

23. On 24 November 1998 the investigating judge informed the applicants that the investigation had been closed.

24. On 10 December 1998 the applicants lodged an indictment supplemented by evidence that had been gathered in the extended investigation. On 12 January 1999 an interlocutory-proceedings panel rejected M.E.'s objection against the initial indictment (see paragraph 20 above) as unfounded.

25. On 22 January 1999 M.E. lodged a request for the protection of legality, claiming that the indictment as submitted on 10 December 1998 had not been served on her. On 25 February 1999 the Supreme Court annulled the Maribor District Court's decision of 12 January 1999 and remitted the case to the District Court with instructions to serve the initial indictment on M.E. M.E. subsequently lodged an objection and on 3 June 1999 the interlocutory-proceedings panel decided to refer the case back to the applicants, directing them to gather more evidence by requesting additional investigative measures.

26. The applicants complied with the directions and requested additional investigative measures. As a result, the investigating judge ordered a supplementary report from K.H., a reconstruction of the events of 3 May 1993 and the examination of witnesses.

The investigation was closed on 3 May 2000.

27. In the meantime, on 28 June 1999 the applicants again unsuccessfully requested the Public Prosecutor to take over the prosecution.

28. On 19 May 2000 the applicants filed a further indictment and the additional evidence they had been directed to obtain.

29. In August 2000 the applicants complained to the Judicial Council (*Sodni svet*) about the length of the criminal proceedings. They also challenged the three judges sitting in the interlocutory-proceedings panel which had previously decided on M.E.'s objection to the indictment. On 10 October 2000 the President of the Maribor District Court rejected the applicants' request for the judges to stand down.

30. Following a further objection to the indictment by M.E., the interlocutory-proceedings panel examined the case on 18 October 2000 and decided to discontinue the criminal proceedings. Relying in particular on the

opinions of the Ljubljana Institute of Forensic Medicine and K.H., it found that the applicants' son's reaction to the administration of Dexamthason and/or Synopen was a consequence of his sensitivity to those drugs and of myocarditis, which was undoubtedly a pre-existing condition. The court found that there was insufficient evidence to substantiate the applicants' accusation that M.E. had committed the alleged criminal offence. The applicants were also ordered to pay court fees and expenses incurred in the proceedings.

31. On 7 November 2000 the applicants lodged an appeal, which the Maribor Higher Court dismissed on 20 December 2000. The applicants then petitioned the Public Prosecutor General to lodge a request for the protection of legality with the Supreme Court. Their petition was rejected on 18 May 2001.

32. In the meantime, on 13 March 2001 the applicants lodged a constitutional appeal with the Constitutional Court (*Ustavno sodišče*), complaining about the unfairness and length of the proceedings and that they had been denied access to a court since the indictment had been rejected by the interlocutory-proceedings panel. On 9 October 2001 the Constitutional Court dismissed their appeal on the ground that a subsidiary prosecutor did not have *locus standi* before the Constitutional Court.

33. On 27 March 2001 the applicants also lodged a criminal complaint against seven judges of the Maribor District and Higher Court who had sat in their case. The criminal complaint, in which the applicants alleged that the judges had improperly dealt with their case, was dismissed as unfounded by the Maribor Public Prosecutor's Office on 13 June 2001.

34. Subsequently, the applicants made several attempts to re-open the case. Ultimately, on 16 July 2002, they lodged a new indictment against M.E. On 14 July 2003 the Slovenj Gradec District Court struck the indictment out because the prosecution of the alleged offence had become time-barred on 3 May 2003.

B. Civil proceedings

35. On 6 July 1995 the applicants instituted civil proceedings against the Slovenj Gradec General Hospital and M.E. in the Slovenj Gradec District Court for the non-pecuniary damage they had sustained as a result of their son's death in the amount of 24,300,000 Slovenian tolar (SIT).

36. On 10 August 1995 the applicants also instituted proceedings against the head of the internal medical care unit, F.V., and the director of the Slovenj Gradec General Hospital, D.P. Further to a request by the applicants, the court joined the two sets of proceedings.

37. All the defendants in the proceedings had lodged their written pleadings by October 1995.

38. On 30 August 1997, in a supervisory appeal (*nadzorstvena pritožba*) to the President of the Slovenj Gradec District Court, the applicants argued that the civil proceedings should proceed despite the fact that criminal proceedings were pending since the latter had already been considerably delayed.

39. On 21 October 1997 the court, referring to sub-paragraph 1 of section 213 of the Civil Procedure Act (see paragraph 77 below), stayed the civil proceedings pending the final decision in the criminal proceedings. It noted that the decision in the civil proceedings depended to a large extent on the determination of the preliminary question (*predhodno vprašanje*), namely the outcome of the criminal proceedings. The applicants did not appeal against that decision, which therefore became final on 17 November 1997.

40. On 22 October 1998 Judge S.P. replied to the applicants' supervisory appeal of 15 October 1998, stating, *inter alia*:

“[The applicants] are subsidiary prosecutors in the criminal proceedings and therefore know very well that the proceedings before the Maribor District Court, where the preliminary question is being determined, have not been completed. Their supervisory appeal concerning the stay of the [civil] proceedings is therefore pure hypocrisy.”

Upon a complaint by the applicants lodged with the Ministry of Justice, Judge S.P. was ordered to explain her reply to the applicants.

41. In February 1999 the applicants again filed a supervisory appeal; the stay, however, remained in force.

42. On 27 August 1999 Judge P.P., to whom the case appears to have been assigned in the meantime, sent the applicants a letter, in which he stated, *inter alia*:

“In the instant case the determination of criminal liability is a preliminary question which is relevant for the determination of the civil claim, since a civil court cannot establish facts which are different from those established by the criminal court”

43. On 8 September 1999 the applicants filed a motion for a change of venue, which the Supreme Court rejected on 13 October 1999.

44. On 6 December 1999 the Slovenj Gradec District Court informed the applicants that the reasons for staying the proceedings still obtained.

45. On 12 March 2001 the applicants filed a supervisory appeal requesting that the stay of the civil proceedings be lifted. On 19 May 2001 Judge P.P. scheduled a hearing for 13 June 2001. However, the scheduled hearing was subsequently cancelled at the applicants' request.

46. On 11 June 2001 the applicants filed a further motion for a change of venue. On 27 September 2001 the Supreme Court decided to move the venue to the Maribor District Court on the ground that there existed “tension which was impeding and delaying the trial.”

47. The case was subsequently assigned to Judge M.T.Z. On 3 April 2002 the court held a hearing.

48. After lodging criminal complaints against some of the judges (see paragraph 33 above), the applicants filed a motion on 8 April 2002 for all the judges at the Maribor District Court and Maribor Higher Court to stand down. Having been asked to comment on the applicants' request, Judge M.T.Z. stated, *inter alia*, that she had realised at the hearing on 3 April 2002 that one of the defendants, with whom she had shaken hands at the hearing, was a close acquaintance ("*dobra znanca*") of her father. She added that the applicants were constantly lodging objections which made it impossible to conduct the proceedings. It would appear that Judge M.T.Z. subsequently herself requested permission to withdraw from the case. On 12 August 2002 the request for the judges to stand down was granted as far as it concerned Judge M.T.Z. The case was assigned to Judge K.P.

49. On 24 November 2002 and 20 March 2003 the Supreme Court rejected the applicants' motions for a change of venue.

50. A hearing scheduled for 12 June 2003 was adjourned at the applicants' request, after they had alleged that their lawyer was unwilling to represent them since her daughter had been denied medical care in the Ljubljana Clinical Centre. Afterwards, they informed the court that their lawyer would continue to represent them.

51. On 28 October 2003 the Maribor District Court held a hearing.

52. On 8 December 2003 the applicants filed a motion for Judge K.P. to stand down. The request was rejected on 18 December 2003.

53. A hearing scheduled for 16 January 2004 was adjourned because the applicants had lodged a motion for a change of venue. On 5 March 2004 the applicants lodged another motion. Both motions were rejected by the Supreme Court (on 22 January 2004 and 13 May 2004 respectively).

54. It appears that the hearings scheduled for 23 and 24 March 2005 were adjourned due to the applicants' newly appointed lawyer's commitments in another unrelated case.

55. On 4 May 2005 the applicants filed written submissions and amended their claim for damages. They also requested that the proceedings be expedited.

56. Hearings were held on 23, 25 and 27 January 2006 before Judge D.M., to whom the case had apparently meanwhile been assigned. The applicants withdrew their claims in respect of F.V. and D.P. After the hearing, they requested Judge D.M. to stand down. Their request was rejected by the President of the Maribor District Court on 30 January 2006. However, on 31 January 2006, Judge D.M. herself asked to withdraw from the proceedings, on the ground that her full name had been mentioned in a newspaper article on 28 January 2006 which also stated that she had been asked to stand down owing to the alleged unequal treatment of the parties in the proceedings. The President of the court upheld her request as being "certainly well-founded".

57. The case was subsequently assigned to Judge A.Z.

58. Hearings were held on 16 June and 25 August 2006.

59. On the latter date the Maribor District Court delivered a judgment in which it rejected the applicants' claim, which ultimately amounted to SIT 10,508,000 in respect of non-pecuniary damage and SIT 5,467,000 in respect of pecuniary damage. The applicants were ordered to pay legal costs to the defendants. Relying on the expert opinions, the court concluded that M.E. could not have foreseen the applicants' son's reaction to drugs administered to him and that she and the hospital staff had acted in accordance with the required standard of care. In addition, the court rejected as unsubstantiated the applicants' claim that the hospital was not sufficiently equipped.

60. On 25 October 2006 the applicants lodged an appeal with the Maribor Higher Court. The proceedings are still pending.

C. The criminal complaint filed against the first applicant

61. On 29 April 2002 the Maribor District Public Prosecutor lodged a bill of indictment (*obtožni predlog*) against the first applicant. She was accused of insulting behaviour by allegedly saying to an official at the Maribor District Court "I have had enough of this f** court, the damn State does not do anything, is it not aware that our son was killed". The prosecution was based on a criminal complaint filed by the Maribor District Court.

62. On 5 October 2004 the Maribor District Court withdrew the criminal complaint as a result of the Ombudsman's intervention (see paragraph 67 below). The Maribor Local Court subsequently dismissed the bill of indictment.

D. Findings of the Ombudsman

63. The applicants lodged several petitions with the Ombudsman's office concerning the conduct of the civil proceedings. Their case was reported in the Ombudsman's Annual Reports of 2002, 2003 and 2004.

64. In a letter sent to the President of the Slovenj Gradec District Court on 24 April 2001, the Deputy Ombudsman stressed that the issue of criminal liability could not be regarded as a preliminary question (*predhodno vprašanje*) in the civil proceedings instituted against the doctor and the hospital. He further stated that there was no justification for staying the proceedings.

65. In a letter to the applicants of 29 August 2002 and his Annual Report of 2002 (pp. 42 and 43), the Ombudsman criticised the conduct of Judge M.T.Z. The Ombudsman stressed that the judge had expressed concerns about her impartiality (see paragraph 48 above) only after the applicants had filed the request for her to stand down and after the Ombudsman's

intervention in the case, although she had been aware of the reasons for the concerns beforehand.

66. The section of the Ombudsman's Report of 2003 (pp. 226-228) dealing with the applicants' case and in particular criticising aspects of the judge's conduct of the civil proceedings states, *inter alia*:

"In the record of the hearing [of 28 October 2003] reference is made to twelve questions which the plaintiffs were not permitted to ask. ... For the majority of these twelve questions, the record does not contain any reasons to explain why the judge did not allow the plaintiffs to put the question. In each instance, there was a prior objection by the defendants' representatives to the question.

...

Although [the applicants'] reactions, statements and proposals were perhaps sometimes extreme, the authorities, including the courts, ought to have taken into account their emotional distress... This may require the trial to be conducted in a particularly respectful and flexible way, without breaching procedural rules to the detriment of the defendants. However, the record of the hearing gives the impression of a tense rather than comfortable atmosphere at the hearing, this being supported also by the records of the exchanges between the judge and the plaintiffs' representative."

67. In his Annual Report of 2004 (pp. 212-214), the Ombudsman criticised the Maribor District Court for filing the criminal complaint against the first applicant (see paragraphs 61-62 above). The report drew attention to the Maribor District Court's explanation that the court was required by law to file and pursue the criminal complaint as to refrain would constitute a criminal offence. The Ombudsman stressed that there was no legal basis for such a conclusion. On the contrary, a criminal charge for an offence of insulting behaviour could only be pursued on the basis of the aggrieved party's criminal complaint, which in the instant case was the Maribor District Court's complaint. Following the Ombudsman's intervention and in view of the arguments expressed in its letters, the Maribor District Court decided to withdraw the criminal complaint against the first applicant.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

68. The Criminal Code (*Kazenski zakonik*, Official Gazette no. 63/94), as amended, defines, under the heading "Criminal Offences causing Damage to Health" criminal offences concerning injury caused by the negligence of health-care providers. In addition, Article 129 of the Criminal Code provides that anyone who causes the death of another by negligence

shall be sentenced to imprisonment for not less than six months and not more than five years. These offences are subject to mandatory prosecution by the Public Prosecutor, but a subsidiary prosecution by an aggrieved party will also lie (see, paragraph 70 below).

B. The Criminal Procedure Act

69. Criminal proceedings in Slovenia are regulated by the Criminal Procedure Act (*Zakon o kazenskem postopku*, Official Gazette no. 63/94; hereinafter referred to as the “CPA”) and based on the principles of legality and officialness; Prosecution is mandatory when reasonable suspicion (*utemeljeni sum*) exists that a criminal offence subject to mandatory prosecution has been committed.

70. Public prosecutions are conducted by the public prosecutor’s office. However, if the public prosecutor dismisses the criminal complaint or drops the prosecution at any time during the course of the proceedings, the aggrieved party has the right to take over the proceedings in the capacity of subsidiary prosecutor (*subsidiarni tožilec*), that is, as an aggrieved party acting as a prosecutor (CPA, section 19(3)). A subsidiary prosecutor has, in principle, the same procedural rights as the public prosecutor, except those vested in the public prosecutor as an official authority (CPA, section 63(1)). If the subsidiary prosecutor takes over the proceedings, the public prosecutor is entitled at any time pending the conclusion of the main hearing to resume the conduct of the prosecution (CPA, section 63(2)).

71. Criminal investigations are conducted by the investigating judge at the request of a public or subsidiary prosecutor. If the investigating judge does not agree with the request to open an investigation, he must refer it to an interlocutory-proceedings panel of three judges (*zunaj-obravnavni senat*), which then decides whether to open a criminal investigation. If the investigating judge grants the request, the accused may lodge an appeal with the interlocutory-proceedings panel. Parties to the proceedings may appeal against the interlocutory-proceedings panel’s decision to the Higher Court (*višje sodišče*). Appeals do not stay the execution of the decision to open an investigation (section 169 of the CPA).

72. If a request for investigation has been dismissed owing to a lack of reasonable suspicion that the suspect has committed a criminal offence, criminal proceedings may be reopened at the request of the public or subsidiary prosecutor provided that new evidence is produced on the basis of which the interlocutory-proceedings panel can satisfy itself that the conditions for instituting criminal proceedings are met (CPA, section 409).

73. The investigating judge terminates the investigation once the circumstances of the case have been sufficiently elucidated (CPA, section 184). Thereafter, proceedings before a court may be conducted only on the basis of an indictment (CPA, section 268).

74. According to section 274 of the CPA, the accused may lodge an objection to the indictment within eight days after its receipt. The objection is examined by the interlocutory-proceedings panel. Section 276 of the CPA provides, *inter alia*:

“(2) If in considering the objection the interlocutory-proceedings panel discovers errors or deficiencies in the indictment (section 269) or in the procedure itself, or finds that further investigations are required before the decision on the indictment is taken, it shall return the indictment to the prosecutor to correct the established deficiencies or to supplement ... the investigation. The prosecutor shall within three days of being informed of the decision of the panel submit an amended indictment or request the ... supplementing of investigation. ...”

In addition, the relevant part of section 277 of the CPA provides:

“(1) In deciding an objection to the indictment the interlocutory-proceedings panel shall not allow the indictment and shall discontinue the criminal proceedings if it finds that:

...

3) a criminal prosecution is statute-barred ...

4) there is not enough evidence to justify reasonable suspicion that the accused has committed the act with which he is charged.”

C. The Code of Obligations

75. Under the provisions of the Obligations Act (*Zakon o obligacijskih razmerjih*, Socialist Federative Republic of Yugoslavia’s (“SFRJ”) Official Gazette no. 29/1978,) and its successor from 1 January 2002, the Code of Obligations (*Obligacijski zakonik*, Official Gazette no. 83/2001), health institutions and their employees are liable for pecuniary and non-pecuniary damage resulting from the death of a patient caused by medical malpractice. The employer may incur civil liability for its own acts or omissions or vicarious liability for damage caused by its employees provided that the death or injury resulted from the employee’s failure to conform to the relevant standard of care. Employees are directly liable for death or injury under the civil law only if it is caused intentionally. However, the employer has a right to bring a claim for a contribution from the employee if the death or injury was caused by the latter’s gross negligence.

D. The Civil Procedure Act

76. Section 12 of the Civil Procedure Act (*Zakon o pravdnem postopku*, SFRJ Official Gazette no. 4-37/77), as amended, provides:

“When the decision of the court depends on the preliminary determination of the question whether a certain right or legal relationship exists, but [the question] has not

yet been decided by a court or other competent authority (preliminary question), the court may determine the question by itself, save as otherwise provided in the special legislation.

The court's decision on the preliminary question shall be effective only in the proceedings in which the question was determined.

In civil proceedings, the court shall be bound with respect to the existence of the criminal offence and criminal liability by the final criminal court's judgment by which the accused was found guilty."

77. The relevant part of section 213 of the Civil Procedure Act provides as follows:

"In addition to the examples specifically given in this Act, the court may order a stay of proceedings:

1. if it decides not to determine the preliminary question itself (section 12)"

78. The relevant part of section 215 of the Civil Procedure Act provides:

"If the court has stayed the proceedings in accordance with the first line of the first paragraph of ... section 213, the proceedings shall resume once the [other] proceedings are finally concluded (*pravnomočno končan postopek*) ... or when the court finds that there is no longer any reason to await the end [of the other proceedings].

In all cases, the discontinued proceedings shall continue at the relevant party's request, immediately after the reasons justifying the stay cease to exist."

79. Equivalent provisions can be found in sections 13, 14, 206 and 208 of the new Civil Procedure Act (*Zakon o pravdnem postopku*, Official Gazette no. 83/2001) that came into force on 14 July 1999.

E. Regulation concerning the organisation and functioning of the Tribunal of the Chamber of Physicians.

80. The Regulation on the organisation and functioning of Tribunal of the Chamber of Physicians ("the Medical Tribunal") (*Pravilnik o organizaciji in delu razsodišča Zdravniške Zbornice Slovenije*), issued on 20 March 2002, lays down, *inter alia*, the procedure for establishing the responsibility of doctors for breaches of the professional rules and the disciplinary measures which can be taken as a result. The Chamber's prosecutor (*tožilec Zbornice*), who is elected from among the members of the Chamber of Physicians, is autonomous and has authority to lodge an indictment with the first-instance Medical Tribunal. The aggrieved party may request the Chamber's prosecutor to start the proceedings, but the prosecution may reject such a request. If so, the aggrieved party may invite the Medical Tribunal to conduct a preliminary examination. However, the power to file the indictment is vested solely in the Chamber's prosecutor.

81. Article 7 of the Regulation provides that the Medical Tribunal must base its decision solely on the indictment and evidence submitted by the Chamber's prosecutor and the accused doctor. If the accused doctor or the Chamber's prosecutor is dissatisfied with the verdict, he or she may appeal to the second-instance Medical Tribunal.

F. The 2006 Act

82. On 1 January 2007 the Act on the Protection of the Right to a Trial without Undue Delay (*Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja* – Official Gazette no. 49/2006 - “the 2006 Act”) became operational. It allows a party to proceedings to ask for the proceedings to be expedited by means of a supervisory appeal (*nadzorstvena pritožba*) and a motion for deadline (*rokovni predlog*) and to lodge a claim for just satisfaction (*zahteva za pravično zadoščenje*). The remedies provided by this law are subject to certain restrictions in the case of finally resolved proceedings.

83. Section 2 of the 2006 Act states that it applies, *inter alia*, to parties to court proceedings and injured parties in criminal proceedings.

THE LAW

I. VIOLATION OF ARTICLE 2 OF THE CONVENTION

84. The applicants complained that their son had died as a result of the negligence of medical practitioners and, in particular, that the criminal and civil proceedings they had instituted did not allow for the prompt and effective establishment of responsibility for their son's death.

The relevant part of Article 2 of the Convention provides:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life...”

A. Admissibility

1. Jurisdiction ratione temporis

85. In the Court's view, although the respondent Government have not raised any objection as to the Court's competence *ratione temporis*, this issue calls for consideration by the Court (see *Blečić v. Croatia* (dec.), no. 59532/00, 30 January 2003)

86. In accordance with the generally recognised rules of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with regard to that Party (see e.g. *Kazimova v. Azerbaijan* (dec.), no. 40368/02, 6 March 2003). However, from the ratification date onwards, all the State's alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation (see, for example, *Yağci and Sargin v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, p. 16, § 40).

87. The Court notes that the Convention entered into force in respect of Slovenia on 28 June 1994.

88. It further observes that the applicants submitted a complaint concerning the substantive aspect of Article 2, that is responsibility for the applicants' son's death, and a complaint concerning the procedural aspect of Article 2, namely the alleged ineffectiveness of the subsequent judicial proceedings. The Court will now consider whether it has temporal jurisdiction to deal with each of the applicants' complaints (see, *mutatis mutandis*, *Slimani v. France*, no. 57671/00, ECHR 2004-IX (extracts); *Kanlıbaş v Turkey*, (dec.), no. 32444/96, 28 July 2005).

(a) Complaint concerning the substantive aspect

89. The Court observes that it was not disputed either before it or in the domestic proceedings that the applicants' son died in the hospital on 19 May 1993. The applicants argued that their son's death was a consequence of negligence on the part of the medical practitioners.

90. The Court finds that this applicants' complaint, which concerns a substantive aspect of Article 2, is obviously based on facts which occurred and ended before 28 June 1994 and is therefore incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

(b) Complaint concerning the procedural aspect

91. The Court notes that it has previously had an opportunity to examine the *ratione temporis* issue in cases where facts concerning the substantive aspect of Articles 2 or 3, namely responsibility for death or ill-treatment, fell outside the period under the Court's competence while facts concerning the related procedural aspect, namely the subsequent proceedings, fell at least partly within that period. The Court, for instance, found in *Moldovan and Others and Rostas and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01 (joined), 13 March 2001) that it lacked jurisdiction *ratione temporis* to deal with the alleged procedural violation of Article 2 although the impugned proceedings continued after the ratification of the Convention. It reached a similar conclusion in respect of the alleged procedural violation

of Article 3 in *Voroshilov v. Russia* ((dec.), no. 21501/02, 8 December 2005). In *Balasoiu v. Romania*, on the other hand, the Court declared the substantive aspect of the complaint under Article 3 incompatible *ratione temporis*, but considered that it had jurisdiction to examine the procedural aspect concerning the proceedings against the police which continued well beyond the date of ratification ((dec.), no. 37424/97, 2 September 2003).

92. Acknowledging the difficulties in determining the temporal jurisdiction where the facts relied on fall partly within and partly outside the period of the Court's competence, the Court stated in its recent *Blečić v. Croatia* judgment that: "[i]n order to establish the Court's temporal jurisdiction it is ... essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated" ([GC], no. 59532/00, §§ 72 and 82, ECHR 2006-...).

93. Whether it is appropriate to examine the procedural aspect of the complaint in the absence of competence to deal with the substantive aspect therefore depends on the facts of the particular case and the scope of the right involved (paragraphs 91 and 92 above).

94. As regards the scope of the right and the corresponding obligation under the procedural aspect of Article 2 that is alleged to have been breached by the State in the present case, the Court reiterates that that provision imposes a particular obligation on the State to set up an effective judicial system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter (see *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999). In the Court's view, this obligation has an autonomous scope and is not confined to cases where it is apparent that the State could have been responsible, either directly or through its positive obligations, for the death of an individual (see, among other authorities, *Vo v. France* [GC], no. 53924/00, §§ 85-87, ECHR 2004-VIII).

95. In this connection, the Court notes that the fact that the applicants' son's condition had started significantly to deteriorate in the hospital and that his death was potentially related to the medical treatment he had received has not been disputed in the present case. Moreover, the Court is satisfied that the two sets of proceedings instituted were theoretically capable of leading to the establishment of the exact circumstances which led to the applicants' son's death and the potential responsibility for it at any level. The Court's task under the procedural aspect of Article 2 therefore consists in reviewing whether the proceedings referred to were effective in practice.

96. The Court must now determine whether the facts constitutive of the alleged procedural violation of Article 2 in the present case fell within the

period under the Court's temporal jurisdiction (see paragraphs 92 and 93 above). The Court observes in this respect that the criminal proceedings were re-opened on 4 July 1996, further to the applicants' request of 30 November 1995 which followed the initial request of 1 August 1994 (paragraphs 12-15 above). The civil proceedings were instituted in 1995 and are still pending.

97. Taking into consideration that the alleged defects in the proceedings originated at the earliest on the date the proceedings were instituted, which was after 28 June 1994, the date Slovenia ratified the Convention, the Court finds that it has temporal jurisdiction to examine the applicants' complaint concerning the procedural aspect of Article 2. The Court may also have regard to the facts prior to ratification inasmuch as they may be relevant for the understanding of facts occurring after that date (*Broniowski v. Poland* (dec.) [GC], no. 31443/96, §74, ECHR 2002-X).

2. *Exhaustion of domestic remedies*

98. The Government pleaded a failure to exhaust domestic remedies. They argued that the present application was premature since the civil proceedings were still pending. After the termination of the criminal and civil proceedings, the applicants would also be able to lodge a civil claim for compensation against the State on the basis of the alleged violation of their rights in the proceedings in accordance with section 26 of the Slovenian Constitution (see *Lukenda v. Slovenia*, no. 23032/02, § 9, 6 October 2005)

99. In addition, they said that the applicants had failed to avail themselves of other remedies which were generally available in respect of complaints of undue delays in proceedings, namely a supervisory appeal, an action in the administrative courts or a constitutional appeal.

100. The applicants disputed the Government's arguments. Relying on the Court's case-law concerning the length of proceedings, the applicants averred that none of the remedies invoked by the Government would be effective in practice, in particular in respect of their complaint under Article 2 of the Convention. In addition, they had lodged a constitutional appeal in the criminal proceedings. However, it had been rejected as in the Constitutional Court's opinion they lacked *locus standi*.

101. The Court emphasises that in reviewing whether the rule of exhaustion of domestic remedies has been observed, it is essential to have regard to the existence of formal remedies in the legal system of the State concerned, as well as to the particular circumstances of the case and to the question whether the applicants did everything that could reasonably have been expected to do in order to exhaust available domestic remedies (see, among other authorities, *Merit v. Ukraine*, no. 66561/01, § 58, 30 March 2004).

102. With regard to the second limb of the Government's objection (paragraph 99 above), the Court notes that in the present case they referred to the same remedies as in the cases of *Belinger* and *Lukenda* (see *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001 and *Lukenda*, cited above). In those cases the Court dismissed the Government's objection of non-exhaustion of domestic remedies in respect of the complaints concerning the length of the proceedings. The Court finds that the Government have not submitted any convincing arguments which would require the Court to distinguish the instant case from its established case-law.

103. The Court on the other hand notes that the Act on the Protection of the Right to a Trial without Undue Delay (the 2006 Act) came into force on 1 January 2007. It introduced remedies concerning specifically the right to have one's case examined within a reasonable time, within the meaning of Article 6 § 1 of the Convention. However, in the present case it is not merely the excessive length of civil proceedings which is in issue, but the question whether in the circumstances of the case seen as a whole, the State can be said to have complied with its procedural requirements under Article 2 of the Convention (*Byrzykowski v. Poland*, no. 11562/05, § 90, 27 June 2006).

104. In this connection, the Court notes that the applicants requested that criminal proceedings be instituted against the doctor, M.E. On 4 July 1996 the criminal investigation was opened after the applicants brought a subsidiary prosecution. The case was closed on 18 October 2000, after two remittals (paragraphs 21-25 above), by the interlocutory-proceedings panel's decision to dismiss the indictment. That decision was upheld by the Maribor Higher Court on 20 December 2000. The applicants' constitutional appeal against that decision was dismissed by the Constitutional Court on the grounds that they did not have *locus standi* (paragraph 32 above). On 6 July 1995 the applicants brought an action for compensation against the hospital and the doctor in the civil courts. That action is still pending (paragraphs 35 and 60 above).

105. The Court observes that the applicants resorted to all the remedies which they could have used in the context of the criminal proceedings. As regards the civil proceedings, the Court considers that the first limb of the Government's objection (paragraph 98 above) is closely linked to the substance of the applicants' complaint under the procedural limb of Article 2 and that its examination should therefore be joined to the merits of the case. The Court further notes that this complaint is not inadmissible on any other grounds.

B. Merits

1. *The parties' submissions*

(a) The Government

106. The Government submitted that the doctor could not be liable for the unsuccessful treatment as long as it had been conducted *lege artis*; that is in compliance with the traditions and regulations of the medical profession and in accordance with scientific progress. They argued that the Slovenian legislation and the system in practice provided effective proceedings for determination of the criminal, civil and disciplinary responsibility of medical personnel.

107. With regard to civil responsibility, the Government averred that the Obligations Act and the Code of Obligations afforded an effective protection of the right to life (see paragraph 75 above). The civil responsibility did not depend on the establishment of criminal responsibility and, in particular, the civil courts were not bound by the acquittal of the defendant (paragraphs 76-79 above).

108. In support of their arguments, the Government submitted copies of judgments that had been delivered between 1998 and 2003 in five cases of alleged medical error. In four of them the health-care institutions had been ordered to pay damages to the plaintiffs. They also submitted a list of 124 claims against health-care institutions that had been lodged with the Ljubljana and Maribor District Courts between 1995 and 2004. At least 57 of them had been finally resolved (*pravnomočno končanih*). The remainder, including six from 1995, appear to be pending before courts of first or second instance. The outcome of the proceedings is not stated on the list.

109. The Government further argued that in the instant case the length of the proceedings was explained by the complexity of the issues dealt with by the courts. In addition, the applicants' conduct, in particular their repeated challenges of the judges and motions for a change of venue had obstructed the proper conduct of the proceedings.

110. The Government supported the domestic courts' decision to stay the civil proceedings, saying that it was reasonable in view of the extensive process of gathering evidence that was concurrently taking place in the criminal court. Moreover, the applicants had not appealed against that decision.

111. The Government also commented on the withdrawal of Judge M.T.Z. (see paragraph 48 above). They pointed out that the judge had learned from the Ombudsman's intervention that her handshake with one of the defendants had had an adverse effect on the applicants. However, the

main reason behind her request for withdrawal was the continuous complaining by the applicants.

112. As regards the effectiveness of the criminal proceedings in practice, the Government referred to the data submitted by the Slovenian courts which showed that subsidiary prosecution in cases of death resulting from alleged medical negligence was rare. Such cases were normally dealt with by the Public Prosecutor. In support of this argument, the Government submitted figures which showed that in twelve recent medical malpractice cases, the criminal proceedings for the offence of causing death by negligence had been instituted on the initiative of the Public Prosecutor. In two such cases the aggrieved party had later taken over the prosecution.

113. As to the present case, the Government stressed that the applicants' right to take over the prosecution by no means implied the right to have somebody prosecuted or convicted. The Public Prosecutor's decision not to institute proceedings against the accused had been sufficiently explained and was based on an independent assessment of the evidence. In the subsequent proceedings brought by the applicants, the courts had thoroughly investigated the cause of death and had appointed several forensic experts for that purpose. In the light of the complexity of the case the courts had done all they reasonably could to ensure the prompt determination of the charge. The applicants' conduct, however, had substantially contributed to the overall length of the criminal proceedings, since they had made numerous appeals and unsuccessful attempts to reinstitute the proceedings.

114. Finally, the Government also referred to the proceedings at the Medical Tribunal to demonstrate the effectiveness of the system of protection of the right to life. The tribunal was competent to establish possible misconduct by a doctor. As a result, disciplinary measures, including the suspension or revocation of a licence, could be imposed. The applicants had not availed themselves of that remedy.

(b) The applicants

115. According to the applicants, the public prosecutor had not shown any intention of bringing those responsible to justice. The criminal proceedings had failed to produce any significant result. Consequently, the applicants had been left with no option but to take over the prosecution, which had placed them at a disadvantage. Moreover, it had taken more than seven years for the authorities to investigate the case and rule on the indictment.

116. The applicants criticised the way the civil proceedings had been conducted. They felt that the authorities had been reluctant to investigate their case and had treated them discriminatorily. They also disagreed with the Government about the need to stay the civil proceedings. The establishment of criminal responsibility did not represent a preliminary

question for the purposes of the Civil Procedure Act (see paragraph 76 above). In the applicants' submission, civil responsibility could be established even if no criminal offence had been committed. It could also be shared between different parties, and relate to different damage.

2. *The Court's assessment*

117. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. In particular, the obligations under Article 2 of the Convention include the requirement for an effective independent system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I).

118. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged" (see *Calvelli and Ciglio*, cited above, § 51).

119. Whatever the case may be, the procedural obligation of the State under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice which includes the requirement of a prompt examination of the case without unnecessary delays (see *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Byrzykowski*, cited above, § 117).

120. In the instant case, it was open to the applicants to request a criminal investigation into the events surrounding the death. It was further open to them to bring a civil action against the hospital and/or the medical practitioners concerned. Hence, the Court finds no indication that there has been any failure on the part of the State to provide a procedure whereby the criminal and civil responsibility of persons who may be held answerable could be established. In addition, it appears that the proceedings before the Medical Tribunal, if pursued by the Tribunal's prosecutor, could also play a role in establishing the circumstances of death and potential disciplinary responsibility for it (see paragraphs 80-81 above).

121. However, for the assessment of this case it is relevant to examine how this procedure worked in the concrete circumstances.

122. While no disciplinary proceedings were instituted with regard to the applicants' son's death, the applicants requested the institution of criminal proceedings against the doctor, M.E., on 1 August 1994. The initial decision to open the investigation was overturned in December 1994. The next request was upheld by the Maribor District Court, which obtained jurisdiction in the case after a change of venue. After the indictment was lodged the case was twice remitted for further investigation. The proceedings were finally discontinued by the interlocutory-proceedings panel's decision of 18 October 2000. The panel found that there was insufficient evidence that the accused had committed the alleged criminal offence of causing death by negligence. That decision was upheld by the appellate court on 20 December 2000. The applicants were subsequently left without any other remedy to pursue their complaints concerning the conduct of the criminal proceedings since the usual possibility of lodging a constitutional appeal was not available to them at the material time (see paragraph 32 above).

The criminal proceedings were, as is usual, limited only to the determination of the charge brought against the doctor concerned.

123. It is understandable that the applicants were critical of the outcome of the criminal proceedings; not least because it was they who carried the burden of pursuing the investigation. The Court also observes that almost five years elapsed between the applicants' second request for an investigation and the dismissal of the charge by the interlocutory-proceedings panel. The Court, however, does not find it necessary to determine separately the effectiveness of the criminal proceedings against M.E. since the applicants also instituted civil proceedings against the doctor and the hospital (see for example *Calvelli and Ciglio*, cited above, § 55, and *Vo*, cited above, § 94). It was not disputed between the parties that the scope of civil responsibility was significantly broader than criminal responsibility and not necessarily dependent on it (see, *mutatis mutandis*, *Erikson v. Italy* (dec.), cited above). The Court refers in this connection to the

aforementioned principles relating to the nature of procedural obligations in the sphere of medical negligence (see paragraph 118 above).

124. The applicants instituted civil proceedings on 6 July 1995. Two years later the court stayed the proceedings pending the outcome of the criminal proceedings. It resumed the civil proceedings in May 2001, that is five months after the delivery of the appellate court's decision allowing the discontinuation of the criminal proceedings. The Maribor District Court delivered a judgment rejecting the applicants' civil claim on 25 August 2006, more than eleven years after the proceedings were instituted. The case is currently pending on appeal.

125. The Court reiterates that in the context of Article 2 a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, among other authorities, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 72, ECHR 2002-II). It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that Article (see, *mutatis mutandis*, *R.M.D. v. Switzerland*, judgment of 26 September 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2015, § 54).

126. The Court accepts that the medical questions involved in the case were of some complexity. It also appreciates that the evidence adduced in the criminal proceedings could be relevant to the decisions in the civil proceedings. It therefore does not find that the decision to stay the civil proceedings was in itself unreasonable since it could have been dictated by considerations related to the fair and efficient administration of justice (see for example *Byrzkowski*, § 116, cited above).

127. Furthermore, in the civil proceedings the applicants repeatedly challenged the judges sitting in their case and lodged several motions for a change of venue of the proceedings. Many of these steps had no prospect of improving their situation. However, some of the applicants' requests turned out to be well-founded. For instance, the second motion for a change of venue was upheld and the proceedings were, as a result, moved to the Maribor District Court (see paragraph 46). The applicants were also successful on two occasions with their call for individual judges to stand down, although it appears that the judges concerned ultimately withdrew on their own initiative (see paragraphs 48 and 56 above).

128. It is apparent from the case file that the applicants' conduct had no effect on the length of the civil proceedings before they resumed in May 2001. Although the decision to stay the proceedings was issued only in October 1997, no steps were taken in the proceedings for almost six years. The Court finds that the delays which occurred in the criminal proceedings, through no fault of the applicants, may have contributed to the length of that part of the civil proceedings.

129. After the civil proceedings resumed it took an additional five years for the first-instance court to reach a verdict. Even if the applicants' behaviour contributed to the delays in this part of the civil proceedings (see paragraph 127, and also 45, 50 and 54 above), this, in the Court's view, does not justify their overall length.

130. In this connection, the Court considers it unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings. Although it is for the domestic courts to assess whether an individual judge is able to sit in a particular case, the Court is nevertheless struck by the way this issue was dealt with in the instant case (see paragraphs 48, 56 and 65).

131. The Court finds that these factors, coupled with the matters criticised by the Ombudsman (see paragraphs 63-67), which the Government failed to refute, could, quite obviously, have contributed to the applicants' mistrust in the conduct of the proceedings.

132. Having regard to the above background and noting that after almost twelve years the proceedings instituted in order to elucidate the allegations of medical malpractice are still pending, the Court cannot accept that they resulted in an effective examination into the cause of and responsibility for the death of the applicants' son.

133. Lastly, the Court observes that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent the repetition of similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services (see *Byrzykowski*, cited above, § 117).

134. In these circumstances, the Court concludes that there has accordingly been a procedural violation of Article 2 of the Convention. It follows that the Government's preliminary objection (see paragraph 105 above) must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

135. The applicants complained that the failure of the domestic judicial authorities to deal properly with their case amounted to humiliating and degrading treatment, which led to their early retirement on the grounds of disability.

They invoked Article 3, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

136 Although the proceedings in the present case may have adversely affected the applicants and caused them distress, the Court considers that the documents in the case file do not demonstrate that the situation complained of reached the threshold of severity required to bring it within the scope of Article 3 of the Convention. Moreover, the lack of effectiveness of the respective proceedings on which the present complaint is based has already been examined in the context of the procedural limb of Article 2 of the Convention (see paragraphs 117-134).

This part of the application must be rejected as manifestly ill-founded in accordance with Article 35 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND 13 OF THE CONVENTION

137. The applicants complained under Article 6 § 1 of the Convention about the length and unfairness of the proceedings. They submitted that the judges were biased, that evidence they had submitted was disregarded and that the court had erred in serving one of the indictments on the accused. The relevant part of Article 6 reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... within a reasonable time by an independent and impartial tribunal established by law.”

138. The applicants also complained that the Constitutional Court and other competent authorities had failed to respond to their complaints concerning the conduct of the proceedings relating to their son’s death. They relied on Article 13 of the Convention, which provides:

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

139. The Government, relying on the same arguments as under Article 2, pleaded non-exhaustion of domestic remedies. They also submitted that the complaints were unsubstantiated.

140. Since the civil proceedings are still pending and their outcome is uncertain, the Court concludes that the complaint of unfairness of the civil proceedings is premature and must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

141. As regards the complaints concerning the length of the civil and criminal proceedings, the alleged unfairness of the latter and the alleged violation of Article 13 of the Convention, the Court notes that they are linked to the complaint of a procedural breach of Article 2 and must therefore likewise be declared admissible (see, *mutatis mutandis*, *Byrzykowski*, cited above, § 120). In view of the applicants’ submission and having regard to the finding relating to the procedural aspect of Article 2

(see paragraphs 117-134 above), the Court considers that no separate examination of these complaints is necessary.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

142. Finally, the applicants alleged that their criminal complaint against the doctor who had treated their son had led to hostility on the part of the Slovenj Gradec Hospital, which had compelled them to seek medical care elsewhere. They invoked Article 14 of the Convention, which reads:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

143. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by those provisions. There can be no room for the application of Article 14 unless the facts of the case fall within the ambit of one or more of such provisions (see *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 17, § 36).

144. Having regard to the above, the Court notes that the applicants failed to invoke any other provision of the Convention or its Protocols in respect of the complaint under Article 14. Article 14 cannot therefore be applicable in the present case. However, even assuming that it was applicable, the applicants have failed to submit any evidence in respect of the facts complained of. This part of the application must therefore be rejected as manifestly ill-founded in accordance with Article 35 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

146. The applicants claimed SIT 1,300,000 (approximately 5,440 euros (EUR)) in respect of pecuniary damage resulting from the expenses they had incurred as a result of the inactivity of the courts in the domestic

proceedings and the Public Prosecutor's refusal to institute criminal proceedings.

147. They also claimed SIT 1,800,000 (approximately EUR 7,540) in respect of non-pecuniary damage. They alleged that they had suffered mental trauma as a result of the inactivity of the authorities which dealt with their case.

148. The Government argued that the applicants had failed to prove the pecuniary damage allegedly incurred. In any event, they were entitled to lodge a civil claim in this respect against the State in the domestic courts. As regards the Public Prosecutor's refusal to institute criminal proceedings, the Government averred that the State could not be liable for damages deriving from that decision, which later proved to have been correct.

149. The Government considered the applicants' claim for non-pecuniary damage unsubstantiated and exorbitant.

150. The Court finds that the applicants have failed to submit documentary evidence of the expenses they allegedly incurred as a result of the inactivity of the courts in the domestic proceedings. As regards the remainder of the claim for pecuniary damage, the Court does not discern any causal link between the violation found and the pecuniary damage alleged (see paragraph 123). It therefore rejects this claim.

151. As to non-pecuniary damage, the Court, deciding on an equitable basis and having regard to the sums awarded in similar cases and the violation which it has found in the present case, awards the applicants the full sum claimed, namely EUR 7,540.

B. Costs and expenses

152. The applicants also claimed SIT 1,100,000 (approximately EUR 4,600) for costs and expenses incurred before the domestic courts and the Court.

153. The Government submitted that the expenses incurred before the domestic courts were included in the applicants' claim for pecuniary damage. As for the claim for expenses incurred before the Court, it was unsubstantiated.

154. Under the Court's case-law, an applicant is entitled to the reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, having regard to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

155. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's preliminary objection as to the exhaustion of domestic remedies in respect of Article 2 of the Convention;
2. *Declares* the complaint concerning the procedural aspect of Article 2 of the Convention, the complaints concerning the length of the civil and criminal proceedings and the alleged unfairness of the criminal proceedings under Article 6 of the Convention and the alleged violation of Article 13 of the Convention admissible;
3. *Declares* the remainder of the application inadmissible;
4. *Holds* that there has been a procedural violation of Article 2 of the Convention and accordingly *dismisses* the Government's preliminary objection based on non-exhaustion of domestic remedies;
5. *Holds* that there is no need to examine separately the complaints concerning the length of the civil and criminal proceedings and the alleged unfairness of the criminal proceedings under Article 6 of the Convention and the alleged violation of Article 13 of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,540 (seven thousand five hundred forty euros) in respect of non-pecuniary damage and EUR 2,000 (two thousand euros) in respect of costs and expenses; plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Corneliu BÎRSAN
President