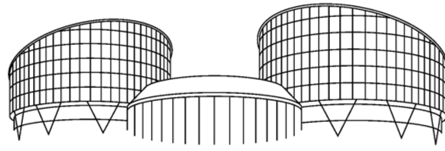

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 71506/13
Evija DUMPE
against Latvia

The European Court of Human Rights (Fifth Section), sitting on 16 October 2018 as a Chamber composed of:
Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*
Having regard to the above application lodged on 10 November 2013,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Evija Dumpe, is a Latvian national, who was born in 1970 and lives in Valmiera. She was represented before the Court by the Resource Centre for People with Mental Disability "Zelda", an association based in Riga.

2. The Latvian Government ("the Government") were represented by their Agent, Ms K. Līce.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. A.P.'s placement in a social care home and his death

4. The applicant's son, A.P., was born on 18 January 1991. Shortly after his birth he was diagnosed with Down's syndrome and epilepsy. No indications of congenital heart disease were found during an early consultation with a cardiologist, but remarks were made concerning secondary cardiomyopathy (*izsakās par sekundāru kardiomiopātiju*). A.P. had two epileptic seizures when he was five and nine years' old.

5. Due to delays in psychomotor and language development A.P. attended a specialised kindergarten and, subsequently, a specialised boarding school.

6. In 2007 the applicant placed A.P. in Ezerkrasti, a long-term State social care home, which was intended for children with mental disabilities. At the time of admission A.P.'s weight was recorded as 59.6 kg. During A.P.'s stay in this institution he had several outbursts of violence towards other residents and staff. On those occasions he was temporarily placed in a psychiatric hospital.

7. On 18 December 2009, because of institutional reorganisation, A.P. was transferred to the Rūja branch of the Vidzeme State Social Care Home (*Valsts sociālā aprūpes centra "Vidzeme" filiāle "Rūja"* – hereinafter "the Rūja home"). At the time of admission A.P.'s state of health was recorded as being satisfactory; the records in relation to his weight read: "68 kg". During his stay in the Rūja home (from 18 December 2009 to 14 April 2012) A.P. had at least six outpatient consultations with a psychiatrist, four consultations with a dermatologist, two consultations with a neurologist and two consultations with a general practitioner. During the last of those, on 11 April 2012, the general practitioner examined A.P. and his skin disorders and established that he was undernourished (*zema barojuma*).

8. According to the applicant, A.P. became apathetic, slow and passive in the Rūja home. Her complaints in that regard were not acted on. The applicant further contends that A.P. had been given drugs with the purpose of controlling his behaviour and that he had been made to walk barefoot so that he would not attempt to escape. When the applicant visited A.P. on 15 December 2011 she noticed that he had become weaker and slower. During her visit of 26 January 2012 A.P. was even weaker, more apathetic and drowsy; his appetite was good but owing to psoriasis on his palms and nails he had difficulties holding a spoon.

9. The Government argued that A.P. did not have any relations with his family. They relied in this connection on information contained in A.P.'s records at the Rūja home. It contained the following handwritten entries:

“The mother has visited once” and “The mother has visited twice upon invitation by the staff”. There is no information about the dates on which such entries were made or by whom. It was the Government’s submission that the applicant had not voiced any concerns about A.P.’s state of health during those visits.

10. On 13 April 2012 a nurse made an entry in A.P.’s records that he had “become unwell in the bath” (*vannā kļuva slikti*). She gave him medication, put an ointment on his skin and put him to bed. A.P. refused to eat. Another staff member checked on him during the night; he was asleep.

11. In the next morning – on 14 April 2012 – A.P. refused to eat, seemed feeble and curled in a foetal position. Nurses reported this and called an ambulance. A.P. was admitted to Vidzeme Hospital. A.P.’s general condition was described as serious (*smags*). The admission documents stated that he was undernourished; his skin was covered with psoriasis rashes. He was catatonic (*apziņas nav*) and his verbal reactions in response to being touched were inadequate. The diagnosis was: potential viral hepatitis, hepatorenal syndrome, hypoglycaemia, psoriasis decubitus of the gluteal muscles, Down’s syndrome. Following a further examination on the same day it was added that A.P. had massive and complete psoriasis, his skeleton was deformed and he was cachectic – his weight was approximately 36 kg. A.P. was placed in an infectious diseases ward.

12. The entry from the third day, 16 April 2012, noted that the patient was conscious but did not react to the examination; his general condition was very serious (*galēji smags*). The skin diseases were estimated to have lasted for approximately half a year. The patient was described as hypotrophic, neglected, and as having extreme asthenia. The infectologist’s conclusion was: coma of unclear aetiology (*neskaidras etioloģijas koma*), cardiac insufficiency, cachexia, hepatorenal syndrome, progressive psoriasis, Down’s syndrome, epilepsy and bedsores. The examining neurologist added to this list hypoglycaemia and hyperglycosuria.

13. On 17 April 2012 A.P. passed away. His final clinical diagnosis read: cardiac insufficiency, acute hepatitis B, hepatocellular dysfunction, Down’s syndrome, epilepsy, progressive psoriasis, cachexia and bedsores.

2. *Criminal proceedings*

14. On 18 April 2012 criminal proceedings were instituted concerning A.P.’s death. On 20 April 2012 the applicant gave evidence as a witness and on the same day she was given victim status.

15. A forensic medical examination was carried out on 19 April 2012. The report of 22 May 2012 stated that prior to his death A.P. had been in a weakened state. His death had been caused by cardiovascular deficiency triggered by cardiomyopathy. No injuries were found on A.P.’s body. The patient had suffered from Down’s syndrome, epilepsy, acute hepatitis B and

psoriasis. Additionally, during the stay in Vidzeme Hospital an impaired glucose tolerance (hypoglycaemia, hyperglycosuria) had been identified.

16. Evidence was taken from the staff at the Rūja home and the attending general practitioner. A senior nurse, who at the material time had been the head of the healthcare section, testified that A.P. had been undernourished since his admission. His weight could not have been 68 kg. There had been no scales in the Rūja home to measure weight. The general practitioner explained that he had first measured A.P.'s weight during an examination of 20 May 2010 (his weight had been 68 kg). Although on 11 April 2012 he had noted that A.P. had been undernourished (he had not weighed A.P. during this examination), but his weight loss had not been significant.

17. On 28 September 2012 a police inspector ordered an additional forensic examination. She considered that the Health Inspectorate's report (see paragraphs 26-30 below) did not allow a conclusion to be made with a sufficient degree of certainty that there had been a causal connection between the violations found in that report in relation to A.P.'s medical care and his death or infection with the hepatitis B virus. Nine specific questions were put to a panel of five experts.

18. On 8 November 2012 the panel gave the following assessment.

> "It can be seen from the case material that the client of the Rūja home, A.P., had a genetic disorder – Down's syndrome with the associated characteristic mental and somatic health problems ... Functional and morphological somatic disorders can affect various organs and systems, including immune and metabolic systems and so forth. Such disorders can often be latent because the body can compensate for them up to a certain point in time, and the individual appears healthy. As a result of various disadvantageous circumstances and factors, reserves used to compensate can decrease and decompensation can occur, which can lead to a lethal outcome.
>
> The aforementioned provides a medical explanation as to what happened to A.P. Until October 2011 he can be considered to have been a patient with relatively compensated Down's syndrome, but when his main diseases progressed, previously compensated metabolic disorders manifested themselves ... which resulted in ... weight loss, [and] tissue and organ dystrophy, which (as shown by the autopsy) most seriously affected the patient's heart and was the direct cause of his death.
>
> The [above-mentioned assessment] allows comprehension of the dynamics of the development of his health disorders and to dispel suspicion that the failure to carry out professional duties ... was one of main factors leading to the death of A.P."

19. The panel gave the following conclusions in reply to the questions asked by the police. The medical treatment A.P. had received in the Rūja home could not be considered as fully adequate to the client's state of health. Nevertheless, A.P. had had Down's syndrome with the associated characteristic mental and somatic health problems, psoriasis and hepatitis B. A.P. had been treated to the extent possible in the Rūja home. The panel found that it was conceivable that if A.P. had been placed in a hospital and comprehensively examined in October to November 2011, when his health

condition had worsened, the chronic hepatitis B condition could have been diagnosed. Nonetheless, the panel did not consider that this could be viewed as the cause of A.P.'s worsening state of health. The panel continued:

> "There is a higher probability [than the irregularities in A.P.'s medical care] that the negative dynamic of the client's state of health was connected with the metabolic disorders characteristic of Down's syndrome that usually cause dystrophic changes in many vital organs (for example, the heart, muscles, intestinal tract, kidneys, lungs, pancreas, and so forth). A body can compensate for such disorders up to a certain point; however, when the compensatory reserves are exhausted, decompensation occurs which may lead to death, as happened [in this case]."

The panel further noted:

> "In order to clarify the [reasons for] A.P.'s worsening state of health in October to November 2011, a more active reaction on the part of the responsible healthcare professionals would have been desirable; [this could have been done by] carrying out additional examinations, inviting consultants [to examine the patient] or through ordering an inpatient examination in a hospital. It is possible that these steps would have positively affected the lifespan of the client for a certain period of time, though it is difficult to estimate to what extent as, according to the data available in the literature, the life expectancy of Down's syndrome patients is considerably shorter than average."

In Vidzeme Hospital A.P. had received adequate treatment in respect of his serious condition. The panel added that the time and routes of transmission of the hepatitis B could not be determined on the basis of the information available in the file; presumably, it had occurred a long time ago. The panel noted:

> "Thus in this context it is not possible to pronounce on the causal connection between the (possibly improper) carrying out of professional obligations or negligence on the part of the healthcare professionals and the death of A.P."

The panel concluded:

> "As shown by the pathological and histological examinations of A.P.'s body, the direct cause of his death was cardiomyopathy (dystrophy of the heart muscle) with accompanying cardiovascular deficiency. Its development ought to be causally connected to Down's syndrome, which A.P. was genetically proven to have and which is [usually] accompanied by severe metabolic disorders (for example malnutrition), the cause of which is multifactorial. Psoriasis and chronic viral hepatitis B can be noted as the accompanying diseases, which did not have a significant influence on the patient's lifespan."

20. On 17 January 2013 the police inspector terminated the criminal proceedings for lack of *corpus delicti*. She relied on the forensic medical expert report, quoted above, and concluded that the evidence gathered did not establish that the staff (*personāls*) of the Rūja home had been liable for A.P.'s death. Even though the Health Inspectorate and the panel of five experts had established some violations in A.P.'s medical care, particularly with regard to the fact that the staff of the Rūja home had not reacted in a timely and adequate manner to the changes in his state of health in October

to November 2011, these actions could not be regarded as an improper or negligent carrying out of professional obligations of the healthcare professionals that would have caused A.P.'s infection with hepatitis B or his death – the offence proscribed under section 138 (2) of the Criminal Law.

21. In her complaint about this decision the applicant emphasised that several crucial aspects concerning A.P.'s basic and medical care had been disregarded.

22. On 4 March 2013 a supervising prosecutor upheld the police inspector's decision. She reiterated that the evidence had not established a causal connection between the performance of professional duties on the part of the healthcare professionals of the Rūja home and A.P.'s death. She quoted the medical assessment contained in the forensic examination report and referred to the conclusions made therein (see paragraphs 18-19 above). The applicant's allegations were thus unsubstantiated.

23. In her further complaint to a superior prosecutor the applicant pointed to the findings in the respective investigations of various institutions; each of those institutions had pointed out numerous deficiencies in the social and medical care provided at the Rūja home (see paragraphs 26-36 below).

24. On 11 April 2013 the superior prosecutor admitted that there had been serious violations in relation to A.P.'s medical care but reiterated that no causal connection between the performance of their professional duties on the part of the staff of the Rūja home and A.P.'s infection with hepatitis B or death had been established by the panel of experts (see paragraph 19 above).

25. The applicant lodged a further complaint restating her previous arguments. In a final decision of 10 May 2013 the acting chief prosecutor of the relevant region upheld the decision terminating the criminal proceedings. She concluded by stating that the applicant's opinion that the investigating authorities should assess whether the staff of the Rūja home had been aware of the threat to A.P.'s health and whether, in the light of that, they had treated him with the requisite care, indicated that the applicant had insufficient understanding of the elements of the offence under section 138 of the Criminal Law; such information had not been necessary to determine whether elements of offence under section 138(2) were present.

3. *Other investigations*

(a) Investigation by the Health Inspectorate

26. On the basis of the applicant's complaint, the Health Inspectorate (*Veselības inspekcija*) – the institution responsible for monitoring the quality of professional medical care in healthcare establishments – carried out an investigation into the medical care provided to A.P. During the course of their investigation, they carried out an inspection at the Rūja home

and questioned its staff and doctors who had provided medical care to A.P. (a psychiatrist, two dermatologists, a neurologist and a general practitioner).

27. In their report of 19 June 2012 the Health Inspectorate, *inter alia*, observed that on the day of the inspection medical care had been provided by uncertified nurses who, moreover, had had a very heavy workload. With regard to the treatment provided to A.P., the Health Inspectorate found that the medical records contained little information on the patient's mental health. It noted that even though his therapy had been notably altered since June 2010, no indications had been given for the change in the records. Some records concerning the receipt of treatment were contradictory. Some consultations had never taken place. Some drugs had never been provided. For the period from 28 January to 10 April 2012 the medical records contained no entries at all. Thus, the Health Inspectorate concluded that it was impossible to examine the dynamics of the changes in and the overall state of, A.P.'s health over that period of time.

28. Further, on 11 April 2012 A.P. had been examined by a general practitioner who had not objectively and comprehensively assessed the general state of A.P.'s health (cachexia had been disregarded). Thus, the Health Inspectorate concluded that section 37(1)(1) of the Medical Treatment Law had been violated. On 13 April 2012 a nurse had noted that A.P. had "become unwell in the bath"; however, an ambulance had not been called. The Health Inspectorate considered that this oversight amounted to a violation of section 45(1)(1) of the Medical Treatment Law. An ambulance had only been called the following day, after which A.P. had been taken to Vidzeme Hospital.

29. The Health Inspectorate made the following conclusions.

1) The applicant had not been immediately informed of the worsening of the state of A.P.'s health.

2) The cause of A.P.'s sudden death had been cardiomyopathy but the fatal outcome had also been determined by the undiagnosed and untreated hepatitis B.

3) The staff of the Rūja home and the general practitioner had not in a timely manner assessed the changes in the state of A.P.'s health, despite the fact that he himself had been incapable of understanding and communicating concerns about his wellbeing.

4) The analysis of the documents did not exclude the possibility that the medical records had been tampered with.

5) The effectiveness of the therapy could not have been assessed owing to the shortcomings in the medical records and the fact that A.P.'s skin condition had been examined by different doctors.

6) The worsening of A.P.'s health in October 2011 could be considered the beginning of the acute hepatitis B manifesting itself clinically.

7) The routes of transmission of hepatitis B to A.P. could not be determined.

30. Owing to the seriousness of the violations found in relation to A.P.'s medical care, the Health Inspectorate sent the full report and the case materials to the prosecutor's office. Following the termination of the criminal proceedings on 17 January 2013 the issue was referred back to the Health Inspectorate for assessment of any potential disciplinary liability.

31. On 11 and 12 February 2013 the Health Inspectorate, in accordance with Article 45^1 of the Code of Administrative Offences, imposed monetary fines on the general practitioner and the nurse for the breach of the relevant healthcare regulations. The general practitioner was fined 35 Latvian lati (LVL – approximately 50 euros (EUR)) for the failure to provide an objective assessment of A.P.'s state of health, including psoriasis and cachexia, and to refer him for further treatment. The nurse was fined LVL 20 (approximately EUR 28) for the failure to consider it necessary to call an ambulance on 13 April 2012.

(b) Inspection by the Ministry of Welfare

32. On 18 April 2012 the Department of Social Services and Social Assistance of the Ministry of Welfare (*Labklājības ministrijas Sociālo pakalpojumu un sociālās palīdzības departaments* – hereinafter "the Department") carried out an inspection of the Rūja home. In their report of 25 April 2012 the Department noted that at the time of the inspection the number of staff on duty had been lower than required and below what had been put down in their records.

33. With regard to A.P.'s medical records the Department found that the information provided in his social care file was either incomplete or contradictory. There was no information as to which activities, included in A.P.'s client's file, he had been attending, and if so, how frequently. Thus, the Department noted that the evaluation of the social care process had been cursory and that the documents did not provide comprehensive information about the attained results.

34. The Department also concluded that there was a possibility of additions after the fact (his death) to the client's file, as a big part of the information concerning the care was unsigned and/or contradictory.

35. In the light of the above, the Department concluded that in the Rūja home care services had not been properly provided. Shortcomings were found to exist also with regard to the supervision of the care process.

(c) Disciplinary action

36. Following the inspection by the Department, the director of the Vidzeme State Social Care Home took disciplinary action against the staff members of the Rūja home. On 17 May 2012 the head of the Rūja home and the head of the social care and rehabilitation section were disciplined (*izteikts rājiens*) for negligence in carrying out their professional duties and for non-compliance with their job description. In addition, the head of the

Rūja home was also disciplined for non-compliance with internal regulations. The head of the healthcare section, who in the meantime had stepped down from these duties, was disciplined (*piezīme*) for non-compliance with her job description. Reference was made to the conclusions made by the Ministry of Welfare – the failure to provide the full range of social-care services, the shortcomings in the supervision of the care process and the incomplete or contradictory information in the social-care file in respect of A.P. (see paragraphs 32-35 above).

B. Relevant domestic law and practice

1. *Provisions on compensation*

37. Article 92 of the Latvian Constitution (*Satversme*) provides, *inter alia*, that "everyone whose rights are violated without justification has a right to commensurate compensation".

38. Section 1635 of the Civil Law (*Civillikums*) defines a delict as any wrongful act as a result of which damage (which may include non-pecuniary damage) has been caused to a third person. The person who has suffered the damage has the right to claim satisfaction from the person who caused it. Section 1779 of the Civil Law provides that everyone is under an obligation to make good damage caused by his or her act or failure to act. Those provisions (before and after the amendments that were effective from 1 March 2006) are quoted in full in *Zavoloka v. Latvia* (no. 58447/00, §§ 17-18, 7 July 2009).

2. *Burden and means of proof in civil proceedings*

39. Section 10(1) of the Civil Procedure Law provides that civil proceedings are to be conducted on an adversarial basis ("*sacīkstes formā*"). Parties may provide explanations and submit evidence to the court as well as question witnesses and experts (section 10(2)).

40. Section 121(1) provides that the court shall, upon a request from a party, order expert examination in a case where specific knowledge in science, technology, art or another field is required to clarify facts relevant to the case. Parties have the right to put questions to the court regarding which expert opinion must, in their opinion, be provided (section 121(3)).

3. *Criminal Law*

41. Section 138(1) of the Criminal Law (*Krimināllikums*) at the relevant time provided that a healthcare professional (*ārstniecības persona*) who failed to carry out or negligently carried out his or her professional obligations was liable to a custodial sentence of up to two years if, owing to the negligence of the offender, this offence had caused serious or moderate bodily injury to the victim. Under section 138(2), if this offence had

resulted in the infection of the victim with human immunodeficiency virus or hepatitis B or C, or had caused the death of the victim, the maximum punishment was deprivation of liberty for up to five years.

42. The relevant provisions pertaining to the rights of civil parties in criminal proceedings under the Criminal Procedure Law (*Kriminālprocesa likums*) have been quoted in *Elberte v. Latvia* (no. 61243/08, § 55, ECHR 2015). At the material time, the relevant parts of section 351 read as follows:

> “(1) An injured party shall have the right to submit a claim for compensation for harm caused at any stage of criminal proceedings up to the commencement of a judicial investigation in a court of first instance. The claim for pecuniary damage shall contain justification of the amount of compensation requested; the claim for non-pecuniary damage shall merely be indicated.
>
> ...
>
> (4) The failure to ascertain a person, who can be held criminally liable, shall not be an impediment to the submission of a claim for compensation.
>
> ...”

4. Examples of domestic case-law on compensation

43. Case no. C06073505 concerned a claimant who sought compensation for non-pecuniary damage from a hospital where she had given birth to a stillborn child. In a judgment of 27 August 2009 the Civil Cases Chamber of the Supreme Court, referring to the conclusions made by the predecessor of the Health Inspectorate (MADEKKI), held that the hospital was liable for non-pecuniary damage caused by inadequate medical assistance (relating to the failure to carry out a timely caesarean section). The claimant was awarded LVL 5,000 (approximately EUR 7,114) in respect of non-pecuniary damage under Article 92 of the Constitution. Section 1635 of the Civil Law was not applicable because it did not provide compensation for non-pecuniary damage at the relevant time. This judgment took effect on 20 April 2011.

44. Case no. C02036209 concerned a mother who sought compensation for non-pecuniary damage from a hospital where her son had died from pneumonia. In a judgment of 26 January 2012 the Civil Cases Chamber of the Supreme Court held that the hospital was liable for non-pecuniary damage caused by medical negligence. Criminal proceedings had been instituted for medical negligence causing death under section 138(2) of the Criminal Law. An expert conclusion had been made that a doctor had been liable for the patient’s death. However, the doctor had died and those criminal proceedings had been discontinued in the pre-trial stage. The civil courts established a causal connection between unlawful omission on the part of the doctor (grossly inadequate medical care and breaches in relation to record-keeping) and the death of the patient. The hospital was liable for

the breach of the patient's rights in such circumstances. The claimant was awarded EUR 20,000 in respect of non-pecuniary damage under section 1635 of the Civil Law. This judgment took effect on 22 March 2013.

45. Case no. C20272512 concerned a claimant who sought compensation for non-pecuniary damage from a dentist for inadequate medical treatment (relating to a tooth extraction). In a judgment of 16 April 2015 the Kurzeme Regional Court held that the dentist had failed to inform the claimant about the overall condition of the oral cavity and the necessity to extract the tooth and had failed to correctly reflect that work in the medical records. The claimant was awarded EUR 300 in respect of non-pecuniary damage under section 1635 of the Civil Law. This judgment took effect on 2 June 2015.

46. Case no. C20461010 concerned a mother who sought compensation for non-pecuniary damage from a hospital where her underage son had been treated after having fallen off a motorbike. In a judgment of 5 December 2014 the Kurzeme Regional Court held that the hospital was liable for non-pecuniary damage caused by inadequate medical assistance (relating to the failure to provide timely diagnosis) leading to removal of his kidney. There was evidence that a trainee doctor (*ārsts stažieris*) and a junior doctor (*ārsts rezidents*) had been carelessly negligent (*vieglprātīga nevērība*), had not carried out all the necessary tests in due time and had not prescribed the necessary medication for a child with multiple injuries in breach of sections 1(4), 2 and 37 of the Medical Treatment Law. The hospital was liable for the breach of the patient's rights in such circumstances. The claimant was awarded EUR 3,000 in respect of non-pecuniary damage under section 1635 of the Civil Law. This judgment took effect on 15 December 2015.

47. Case no. C35050714 concerned a claimant who sought compensation for pecuniary and non-pecuniary damage from a hospital for inadequate medical assistance by a certified doctor (relating to a broken foot). In a judgment of 28 September 2015 the Riga Regional Court, referring to the conclusions made by the Health Inspectorate (failure to carry out the necessary x-ray examination and so forth), held that the hospital was liable for inadequate medical assistance. The claimant was awarded EUR 6,020 in respect of pecuniary and EUR 2,000 in respect of non-pecuniary damage under section 1635 of the Civil Law. This judgment took effect on 9 February 2016.

COMPLAINT

48. The applicant complained that her son, who had been placed in a State social care institution, had died because he had not been provided with

adequate medical assistance. In particular, the personnel and the general practitioner had not reacted to the deterioration of his health condition. She also complained that the investigation into her son's death had concentrated on a potential negligence on the part of the medical personnel in carrying out their duties and had not addressed the question of whether the death had been caused by the inadequate care. She relied on Article 2 of the Convention.

THE LAW

Admissibility

1. Submissions by the parties

49. The Government argued that the applicant had not exhausted the domestic remedies. Under sections 1635 and 1779 of the Civil Law, the applicant had had the right to seek compensation from the Rūja home for the damages caused by its medical staff. The report of 19 June 2012 could have been used as evidence in such civil proceedings. Referring to the cases of *Blumberga v. Latvia* (no. 70930/01, § 68, 14 October 2008) and *Y v. Latvia* (no. 61183/08, § 71, 21 October 2014), the Government argued that the outcome of criminal proceedings, in particular discontinued criminal proceedings due to the lack of *corpus delicti* as in the present case, was not decisive for the outcome of compensation proceedings.

50. The Government provided several examples of domestic case-law pertaining to the application of section 1635 of the Civil Law in practice (see paragraphs 43-47 above).

51. They further explained that the term "compensation" under section 1635 of the Civil Law did not merely refer to monetary compensation, but also to satisfaction (*apmierinājuma došana*) for the victims. Domestic courts applied different criteria for establishing guilt (*vaina*) in criminal and civil proceedings.

52. The applicant considered that she had exhausted domestic remedies. The cases referred to by the Government were to be distinguished from hers as they had concerned damage to property (*Blumberga*, cited above) and minor injuries caused by the police (*Y v. Latvia*, cited above). The domestic case-law, referred to by the Government, was not comparable as those cases had concerned damage to health caused by healthcare professionals and not – as in the present case – a person's death. The applicant did not comment on case no. C02036209 (see paragraph 44 above), but submitted that only a criminal investigation could elucidate death-related circumstances.

53. Referring to the case of *Jasinskis v. Latvia* (no. 45744/08, §§ 50-51, 21 December 2010), the applicant explained that she had chosen the criminal-law remedy because it had been the most appropriate one. She submitted, in particular, that a criminal investigation had been necessary in order to establish the circumstances of her son's death. She had limited access to the relevant material – only the investigating authorities or court could obtain and examine them properly. Also, she could lodge a civil claim in the criminal proceedings and request compensation for damage therein.

54. As to the civil proceedings, the applicant was of the opinion that they would have been of limited use in the circumstances of the present case. She would have had to prove the circumstances of her son's death and to provide expert evidence at her own expense. Civil proceedings would not provide substantially different result than the criminal proceedings. Specific individuals could be prosecuted only in criminal proceedings.

2. Court's assessment

55. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court are thus obliged to use first the remedies provided by the national legal system (see, among many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV). Whether a domestic procedure constitutes an effective remedy within the meaning of Article 35 § 1, which an applicant must exhaust, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 134, ECHR 2017). If there are a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *O'Keeffe v. Ireland* [GC], no. 35810/09, § 109, ECHR 2014 (extracts)).

56. The Court notes that there is nothing to indicate, and it has not been suggested by the applicant, that the death of her son was caused intentionally. Furthermore, this case should be distinguished from cases where the domestic authorities had been aware of the appalling conditions that later led to the deaths of young people placed in social care homes or hospitals and had nonetheless unreasonably put the lives of those people in danger (see *Nencheva and Others v. Bulgaria*, no. 48609/06, §§ 113, 121-24, 18 June 2013, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, §§ 141-44, ECHR 2014). The Court would also distinguish the present case from *Jasinskis*, invoked by the

applicant, as that case concerned a deaf and mute applicant, who was placed in a police cell overnight after having sustained a head injury; he died after having been denied a possibility to communicate with the police officers. Thus, it concerned the authorities' failure to provide a detained individual with the emergency medical care necessary to safeguard his life (see *Jasinskis,* cited above, § 67).

57. In contrast, here the applicant argued that her son, who suffered from several serious illnesses, died owing to the social care home´s, in particular its medical staff´s failure to provide him adequate medical care when his health condition deteriorated. Accordingly, the Court considers that the applicant's complaint pertains to medical negligence in the care provided to her son.

58. Further, the Court observes that the applicant did not argue that the State had failed in its obligation to put in place an effective regulatory framework. Her complaints also do not fall under the very exceptional circumstances in which the responsibility of the State may be engaged under the substantive limb of Article 2 (see, concerning health-care providers, *Lopes de Sousa Fernandes*, cited above, §§ 190-92). Accordingly, the examination of the circumstances leading to the death of the applicant's son and the alleged responsibility of the healthcare professionals involved are matters which must be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events. These aspects fall to be examined under the procedural obligation of the State (ibid., § 199).

59. In medical negligence cases the procedural obligation imposed by Article 2, which concerns the requirement to set up an effective judicial system, will 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 responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained. Disciplinary measures may also be envisaged (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII). In such cases, therefore, the Court, having regard to the particular features of a respondent State's legal system, has required the applicants to exhaust the legal avenues whereby they could have their complaints duly considered. This is because of the rebuttable presumption that any of those procedures, notably civil redress, are in principle apt to satisfy the State's obligation under Article 2 of the Convention to provide an effective judicial system (see *Lopes de Sousa Fernandes*, cited above, § 137). Therefore, Article 2 did not necessarily call for a criminal-law remedy on the facts of the instant case.

60. Nonetheless, the criminal-law remedy was made available to the applicant and she pursued it. In view of the facts of the case and the domestic criminal-law provisions (see paragraph 41 above), her recourse to

the criminal-law remedy does not appear unreasonable. This is also evident from the fact that the domestic authorities instituted criminal proceedings and carried out a criminal investigation into the possibility that the applicant's son's death had been caused by negligent performance of professional obligations on the part of the healthcare professionals. While this investigation identified various violations in A.P.'s medical care, no causal connection between these violations and A.P.'s death could be established. Accordingly, after approximately one year of investigation the criminal proceedings were terminated (see paragraphs 14-25 above). The Court notes here that, except in cases of manifest arbitrariness or error, it is not the Court's function to call into question findings of fact made by the domestic authorities, particularly when it comes to scientific expert assessments, which by definition call for specific and detailed knowledge of the subject (see *Počkajevs v. Latvia* (dec.), no. 76774/01, 21 October 2004).

61. Thus, the applicant having pursued the criminal-law remedy, the Court has to determine whether in this particular case it was incumbent on her to pursue the civil-law remedy in order to dispose of the obligation to exhaust the domestic remedies. This requires establishing, firstly, whether the civil-law remedy was effective in theory and in practice at the relevant time; that is to say that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, for example, *Nada v. Switzerland* [GC], no. 10593/08, § 141, ECHR 2012) and, secondly, whether it would pursue essentially the same objective as the criminal-law remedy, that is to say, whether the civil-law remedy would add any essential elements that were unavailable through the use of the criminal-law remedy (see *Jasinskis*, cited above, § 50).

(a) Whether the civil-law remedy was effective

62. The Government argued that the applicant could have relied on sections 1635 and 1779 of the Civil Law to claim compensation from the Rūja home for the damage caused by its medical staff. The Court would further add that section 1635 of the Civil Law has been amended and since 1 March 2006 has expressly provided that compensation for non-pecuniary damage is included in the general right to compensation (see *Zavoloka*, cited above, §§ 17 and 41, and contrast *Počkajevs*, cited above).

63. The Court notes that the domestic case-law relied on by the Government shows that it is, in principle, possible to claim compensation for inadequate medical assistance, including for failure to provide a timely diagnosis (case no. C20461010, see paragraph 46 above), a timely examination (case no. C35050714, see paragraph 47 above) or an emergency operation (cases no. C06073505, see paragraph 43 above). Compensation claims have also been successful as regards the failure to ensure the completion of the relevant medical records (case nos. C02036209

and C20272512, see paragraphs 44 and 45 above). One case specifically pertained to a death in a hospital and the quality of medical assistance provided there (case no. C02036209, see paragraph 44 above).

64. The last mentioned case relied on by the Government allows the Court to dismiss the applicant's allegation that only a criminal investigation could elucidate death-related circumstances. In that case the criminal proceedings had been discontinued owing to the death of the alleged perpetrator, nevertheless the claim against the hospital turned out to be successful (ibid.). The Court notes that the decision to terminate criminal proceedings in the present case excluded only criminal liability and did not exclude potential civil contractual or non-contractual liability of the Rūja home, its staff or healthcare professionals. The civil courts would not have been constrained by the decision to terminate criminal proceedings and would have been free to examine the facts of the case in the light of the evidence produced before them (contrast *Tarariyeva v. Russia*, no. 4353/03, § 97, ECHR 2006-XV (extracts)). Indeed, the Court's case-law suggests that adjudication of civil matters without a final judgment in criminal proceedings relating to those civil matters is, in principle, possible in Latvia (see *Y v. Latvia*, cited above, § 71; *Blumberga*, cited above, § 68; and *Plotiņa v. Latvia* (dec.), no. 16825/02, §§ 62-63, 3 June 2008).

65. In the present case the relevant domestic authority – the Health Inspectorate – examined the quality of medical care provided to A.P. and found serious violations thereto (see paragraphs 26-30 above). As emphasised by the Government and evidenced by the domestic case-law (see paragraphs 43 and 47 above), the report of the Health Inspectorate could have been used as evidence in civil proceedings. There is also further evidence from the administrative offence proceedings that the general practitioner and a nurse have been sanctioned with monetary fines for the failure to provide an objective assessment of A.P.'s state of health and for failing to call an ambulance (see paragraph 31 above).

66. As regards the applicant's allegation pertaining to the failure to provide adequate basic care to A.P. in the Rūja home, further reports have been made available, in particular, by the Ministry of Welfare, establishing a number of shortcomings in this connection (see paragraphs 32-35 above). There is also further evidence from the disciplinary proceedings against the head of the Rūja home and two other staff members for the failure to provide the full range of social care services, the shortcomings in the supervision of the care process and the incomplete or contradictory information in the A.P.'s social care file (see paragraph 36 above).

67. It has not been argued that the above-mentioned reports could not be used as evidence in civil proceedings to substantiate the applicant's claim about allegedly inadequate basic care and medical assistance to A.P. in the Rūja home. Accordingly, while the burden of proof in civil proceedings would rest on the applicant, the Court does not regard the applicant's

contention that she would have to prove the circumstances of her son's death and to provide expert evidence at her own expense as establishing ineffectiveness of this domestic remedy.

68. Regardless of the availability and use of the above-mentioned reports as evidence, the Court considers that the civil procedure provides the parties with a possibility to participate actively in the assessment of any expert evidence before the civil courts (see *Počkajevs*, cited above). For example, the applicant would be able to request the civil court to order another medical examination, propose questions to be put to the experts and to question any experts in the course of the civil proceedings (see paragraphs 39-40 above).

69. In view of the foregoing the Court considers that the applicant had reasonable prospects of success to claim compensation for allegedly inadequate basic care and medical assistance to A.P. in the Rūja home in the civil proceedings. In such proceedings the circumstances surrounding his death could be examined in the light of arguments which she considered relevant and any civil liability of those involved could be established. The Government have, accordingly, met the burden incumbent on them to prove the effectiveness of the remedy in theory and practice.

(b) Whether the civil-law remedy pursued the same objective as the criminal-law remedy

70. After the criminal proceedings were terminated the applicant did not proceed with the civil-law remedy, arguing that it would not have provided a substantially different result. The Government, for their part, maintained that the civil-law remedy had been better suited to protecting the applicant's rights and obtaining redress, and that it still offered the applicant reasonable prospects of success.

71. Firstly, the Court can accept the Government's argument that the domestic courts applied different criteria for establishing liability in criminal and civil proceedings (compare *Šilih v. Slovenia* [GC], no. 71463/01, § 203, 9 April 2009, and *Molga v. Poland* (dec.), no. 78388/12, § 88, 17 January 2017). The applicant did not contest this contention.

72. Further, the Court draws attention to the particular purpose and limits of the criminal investigation, specifically of establishing whether A.P.'s death had been caused by negligent actions or omissions on the part of the healthcare professionals (see paragraphs 20, 22, 24, 25 and 41 above). Accordingly, the criminal investigation was inherently limited to determining the individual criminal responsibility of the potential perpetrators. While the criminal proceedings – coupled with the investigations carried out by other State institutions – were instrumental in clarifying the circumstances of A.P.'s demise and in dispelling any doubts about any potential criminal conduct, the criminal-law remedy is of limited

effectiveness when the person's death is caused by a multitude of factors and the possibility of a collective liability falls to be examined. In Latvia, the civil-law remedy is better suited for addressing such circumstances (see the cases summarised in paragraphs 43-44 and 46-47 above).

73. The Court finds it important to note here that the applicant's complaint about the criminal investigation before this Court was limited to the scope of that investigation (see paragraph 48 above). In fact, the applicant explicitly submitted that the investigation had been speedy and independent, and she did not argue that its effectiveness had lacked in any other manner. The applicant only complained of the fact that the investigation had concentrated on the question of whether the medical personnel had caused her son's death by performing their duties negligently. She believed that the authorities should have enquired into how her son's state of health could have deteriorated to such an extent and whether it had not been a lack of proper care that had led to his death.

74. The Court observes that this type of enquiry would have gone beyond the scope of the criminal-law remedy, as it was established in Latvia (see paragraph 25 above). The Court reiterates that the choice of means for ensuring the positive obligations under Article 2 of the Convention is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means (see *Sarishvili-Bolkvadze v. Georgia*, no. 58240/08, § 90, 19 July 2018). Furthermore, Article 2 does not entail the right to have third parties prosecuted – or convicted – for a criminal offence. Rather, the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by Article 2 of the Convention (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 257, ECHR 2016).

75. In light of the findings concerning the course of the criminal and other investigations, the Court cannot conclude that civil proceedings would have pursued the same objective as the criminal-law remedy. On the contrary, considering the broader range of admissible claims, the potential defendants, and the difference in the substantial conditions of liability, it was the civil-law remedy that would have allowed the domestic authorities to submit the case to the most careful scrutiny and would have permitted the State to put matters right through its own legal system.

76. Under these circumstances, the Court finds that the applicant was under an obligation to have recourse to the civil-law remedy. The Court notes in this context that the possibility of having recourse to domestic civil proceedings still appears to be open to the applicant (see *Plotiņa*, cited above, § 46, with regard to ten-year limitation period for lodging civil claims).

77. The Court upholds the Government's objection. The applicant's complaint under Article 2 of the Convention must be therefore rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 15 November 2018.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President