



## Lack of an effective investigation into allegations of medical negligence concerning a new-born baby suffering from a permanent disability

In today's **Chamber** judgment<sup>1</sup> in the case of [Ulusoy v. Turkey](#) (application no. 54969/09) the European Court of Human Rights held, unanimously, that there had been:

**a violation of the procedural limb of Article 8 (right to respect for private life) of the European Convention on Human Rights, and no violation of the substantive limb of Article 8.**

In this case Mr and Ms Ulusoy attributed their son's permanent and irreversible disability to medical negligence during the prenatal and delivery phases of Ms Ulusoy's pregnancy. They also complained about the lack of an effective investigation into their allegations.

The Court considered these complaints under Article 8, which covers issues relating to the protection of the moral and physical integrity of individuals in the context of the provision of medical care.

**Concerning the procedural limb (investigation into the allegations of medical negligence)**, the Court held that no authority had been able to provide a consistent and scientifically based response to the applicants' allegations and complaints or to assess the possible responsibility of the health professionals with full knowledge of the facts.

**Concerning the substantive limb (protection of the moral and physical integrity of individuals in the context of the provision of medical care)**, the Court noted that the applicants' complaints broadly concerned an erroneous evaluation of the prenatal risks during the labour and childbirth phases. The Court considered therefore that the case primarily concerned allegations of simple medical errors or negligence. In that connection, reiterating its findings in the case of *Lopes de Sousa Fernandes v. Portugal*<sup>2</sup>, the Court pointed out that the substantive positive obligations on Turkey were confined to the effective introduction and implementation of a statutory framework capable of protecting patients. It then noted that the statutory framework in force at the material time did not, *per se*, point to any infringement on the part of the State.

### Principal facts

The applicants, Zeynep Ulusoy and Sebahattin Ulusoy, are Turkish nationals who were born 1979 and 1970 respectively and live in Malatya (Turkey). They were acting on their own behalf and on that of their son, Mehmet Ulusoy, who was born in 2001 and has been suffering from a psychomotor impairment and a permanent mental deficiency since birth.

In 2001, during the first months of her pregnancy, Ms Ulusoy attended Regional Health Centre no. 2 in Nevşehir, complaining of oedema and high blood pressure. Subsequently she moved to Malatya, where she was examined on 3, 13 and 17 July 2001 (eight month of pregnancy) at the civilian hospital, once again complaining of diffuse oedema and high blood pressure.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

2 *Lopes de Sousa Fernandes v. Portugal* ([GC], no. 56080/13, 19 December 2017).

On 20 July 2001 Ms Ulusoy lost consciousness and was taken to hospital. However, she went back home without being examined. According to the Government, she decided, on her own initiative, not to undergo an examination owing to her prejudice against being examined by a male doctor. According to the applicants, the doctors had refused to examine her and to prescribe tests (ultrasound scan and X-ray), suggesting that she should attend their private surgeries.

On 30 July 2001, ten days before the presumed date of birth, Ms Ulusoy returned to hospital, where she was immediately prepared for a normal delivery. Finding herself unable to give birth, she underwent a major episiotomy. On birth the child, who was displaying cyanosis and asphyxia, and had to be revived and placed in an incubator. The next day his state of health worsened, and he was transferred to the İnönü university hospital, where physicians observed that his brain functions had been damaged owing to a lack of oxygenation.

At various dates the applicants unsuccessfully commenced disciplinary proceedings, criminal proceedings (lodging a complaint) and administrative proceedings (claim for damages). During these proceedings Ms Ulusoy's medical file went missing.

## Complaints, procedure and composition of the Court

Relying on Article 1 (obligation to respect human rights), Article 3 (prohibition of inhuman or degrading treatment), Article 6 (right to a fair trial) and Article 17 (prohibition of abuse of rights) of the Convention, the applicants attributed Mehmet Ulusoy's permanent mental and physical deficiencies to medical negligence. They also complained that the healthcare staff whom they accuse of negligence had never been brought to justice in the absence of an investigation. The Court decided to examine those complaints under Article 8 (right to respect for private life).

The application was lodged with the European Court of Human Rights on 6 October 2009.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,  
Marko **Bošnjak** (Slovenia),  
İşıl **Karakaş** (Turkey),  
Julia **Laffranque** (Estonia),  
Valeriu **Griţco** (the Republic of Moldova),  
Ivana **Jelić** (Montenegro),  
Arnfinn **Bårdsen** (Norway),

and also Stanley **Naismith**, *Section Registrar*.

## Decision of the Court

### Article 8 (right to respect for private life)

#### **1. Substantive limb (protection of the moral and physical integrity of individuals in the context of the provision of medical care)**

Reiterating its judgment in the case of *Lopes de Sousa Fernandes v. Portugal*<sup>3</sup>, the Court pointed out that in cases of alleged medical negligence, provided that a Contracting State had made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient were not sufficient of themselves to call a Contracting State to account from the standpoint of its positive

<sup>3</sup> *Lopes de Sousa Fernandes v. Portugal* ([GC], no. 56080/13, 19 December 2017).

obligations under Article 8 of the Convention. The substantive positive obligations were limited to the duty to lay down rules, that is to say, to put in place an effective statutory framework requiring both public and private hospitals and health professionals to adopt the appropriate measures to protect their patients' integrity. Thus, even where medical negligence had been established, the Court would normally only find a violation of the substantive limb of Article 8 if the applicable statutory framework failed to duly protect patients, or else if the requisite measures to ensure the effective implementation of the regulations in force had not been adopted<sup>4</sup>.

In the instant case, Mr and Ms Ulusoy neither explicitly nor implicitly alleged that their son's permanent disability had been caused deliberately, or that he had been the victim of a systemic or structural dysfunction affecting the hospitals in question. Nor was there any verifiable evidence to suggest that the health professionals concerned had knowingly deprived them of access to emergency treatment or that the errors which they had allegedly committed had been more than mere medical mistakes or negligence. The applicants' complaints broadly concerned an erroneous evaluation of the prenatal risks during the labour and childbirth phases of Ms Ulusoy's pregnancy. The case therefore primarily concerned allegations of simple medical errors or negligence. Consequently, the substantive positive obligations on Turkey were confined to the effective introduction and implementation of a statutory framework capable of protecting patients. Again, the statutory framework in force at the material time did not, *per se*, display any infringement on the part of the State, nor did the applicants complain of any shortcoming of that nature. **There had therefore been no violation of the substantive limb of Article 8.**

## ***2. Procedural limb (investigation into the allegations of medical negligence)***

The Turkish legal system had provided the applicants with remedies which, theoretically, fulfilled the requirements to be met under the procedural obligations of Article 8. Furthermore, the applicants had availed themselves of all the relevant remedies. However, all the proceedings, of a disciplinary, criminal and administrative nature, had proved ineffective.

First of all, the disciplinary proceedings had been the subject of a discontinuance decision based on an expert report drawn up by the Deputy Head Medical Officer of the hospital. That report had also been central to the criminal investigation which had proved unsuccessful in the absence of authorisation for the opening of proceedings against the medical staff concerned. The regulations laid down in Law no. 4483 highlighted a structural problem as regards the procedural obligations in the present case. Furthermore, the experts who had played a dominant role in obtaining the discontinuance of the criminal investigations had been doctors working in the hospital employing the health professionals involved, which had run counter to the requirement on both formal and practical independence which had to be met in expert assessment procedures.

Secondly, in the framework of the administrative proceedings, the applicants had not been involved in the appointment of the experts or the choice of questions to be put to them. Moreover, despite the incompleteness of the report submitted by the board of experts on 26 May 2006, the administrative court had decided to reject the applicants' request for a fresh expert assessment. Subsequently, the Supreme Administrative Court had disregarded their request for a new report despite their detailed arguments. Lastly, the judgments delivered had remained silent on the matter of any responsibility on the part of the authorities for the loss of the medical file. According to the Supreme Administrative Court, however, that amounted to serious negligence on the part of the authorities and an impediment to judicial review of the question whether the ministry was responsible for the damage caused to the applicants.

Consequently, the Court held that no authority had been able to provide a consistent and scientifically based response to the applicants' allegations and complaints or to assess the possible responsibility of the health professionals with full knowledge of the facts. Indeed, in their decisions

<sup>4</sup> *Lopes de Sousa Fernandes*, cited above, §§ 166, 168 and 186 to 189.

the domestic courts had relied on the official reports which had been established either in breach of the independence requirement or which had avoided or unsatisfactorily addressed the main questions to be decided. Furthermore, the administrative courts had dismissed the applicants' objections by overlooking their arguments, which had been, if not decisive, at least central, requiring specific and explicit responses. Accordingly, the Court considered that, confronted with arguable complaints from the applicants alleging that medical negligence had led to their son's irreversible disability, the national system as a whole had failed to provide an appropriate response that was in accordance with Turkey's obligation under Article 8 of the Convention. **There had therefore been a violation of the procedural limb of that provision.**

#### Article 3 (prohibition of inhuman or degrading treatment)

The applicants had not specifically applied to the domestic authorities to complain of any treatment contrary to Article 3 which they had personally sustained, or mentioned any grievance in that regard during the various sets of proceedings. That complaint was therefore rejected for non-exhaustion of domestic remedies.

#### Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicants 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 103 in respect of costs and expenses.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.