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

SECOND SECTION

DECISION

Application no. 3853/14
A.V.
against Estonia

The European Court of Human Rights (Second Section), sitting on 29 March 2016 as a Chamber composed of:

Işıl Karakaş, *President,*
Julia Laffranque,
Nebojša Vučinić,
Valeriu Griţco,
Ksenija Turković,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges*,
and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 7 January 2014,

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 A.V., is an Estonian national. The President granted the applicant's request for her identity not to be disclosed to the public (Rule 47 § 4). She was represented before the Court by Ms K. Rekand, a lawyer practising in Tallinn.

2. The Estonian Government ("the Government") were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

4. The applicant's mother E., aged 82, complained about lower back pain. She was diagnosed with radiculitis and hypertension by a general practitioner who also prescribed medicines for her. Since the pain did not disappear, E. was taken to hospital on 15 April 2013. She underwent an X-ray examination and was diagnosed with lumbar spondylosis and osteochondrosis. Medicines were prescribed for her and nursing care was ensured in Tapa Hospital. While in hospital, she developed gangrene. On 4 May 2013 she died in hospital. According to the notice of death the cause of her death was atherosclerosis with gangrene.

5. The applicant filed an offence report with the prosecutor's office, which refused to initiate criminal proceedings, considering that no offence had been committed. On 19 July 2013 the State Prosecutor's Office dismissed the applicant's appeal. It was noted in the decision sent to the applicant that pursuant to Article 208 of the Code of Criminal Procedure, the victim of an alleged offence could lodge a complaint with a court of appeal against a refusal by the Prosecutor's Office to initiate criminal proceedings. It was further stated that such a complaint had to be lodged through a lawyer. The applicant did not lodge a complaint.

6. The applicant also turned to the Expert Committee of Quality of Medical Aid (*Tervishoiuteenuse kvaliteedi ekspertkomisjon*). According to the Expert Committee's opinion given on 21 November 2013 the applicant's doubts and accusations that the staff of Tapa Hospital had not given E. the required treatment and nursing care and had failed in their duty of care and thereby caused E.'s death were groundless. Nevertheless, the Expert Committee noted that there were certain shortcomings in the documentation of E.'s treatment. It made recommendations to Tapa Hospital regarding the medical documentation and prevention and cure of pressure sores. It was noted in the Expert Committee's assessment that the Committee's assessment created no legal rights or obligations but it could be used as evidence in civil proceedings.

B. Relevant domestic law and practice

1. Penal Code

7. Article 117 of the Penal Code (*Karistusseadustik*) lays down that negligent homicide is punishable by up to three years' imprisonment.

8. Article 119 of the Code provides that causing serious health damage through negligence is punishable by a pecuniary punishment or up to one year of imprisonment.

9. Article 123 of the Code provides that placing or leaving another person in a situation that is life-threatening or likely to cause serious damage to the health of the person is punishable by a pecuniary punishment or up to three years' imprisonment.

2. Code of Criminal Procedure

10. Article 6 of the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*) establishes the principle of mandatory criminal proceedings according to which the investigative bodies and the Public Prosecutor's Office are required to conduct criminal proceedings when facts referring to a criminal offence have become evident.

11. The Code of Criminal Procedure further provides:

Article 193 – Commencement of criminal proceedings

"(1) An investigative body or the Public Prosecutor's Office commences criminal proceedings by the first investigative activity or other procedural act if there is reason and grounds therefor and the circumstances provided for in Article 199 § 1 of this Code do not exist."

Article 194 – Reasons and grounds for criminal proceedings

"(1) The reason for the commencement of criminal proceedings is a report of a criminal offence or other information indicating that a criminal offence has taken place.

(2) The grounds for criminal proceedings are constituted by ascertainment of criminal elements in the reason for the criminal proceeding."

Article 196 – Report of violent death

"(2) If a health care professional conducting an autopsy suspects that the person died as a result of a criminal offence, he or she is required to notify an investigative body or the Public Prosecutor's Office of such suspicion immediately."

Article 199 – Circumstances precluding criminal proceedings

"(1) Criminal proceedings shall not be commenced if:

1. there are no grounds for criminal proceedings; ..."

12. Pursuant to Article 208 of the Code of Criminal Procedure, the victim of an alleged offence can lodge a complaint with a court of appeal against a refusal by the Prosecutor's Office to initiate criminal proceedings. Such a complaint must be lodged through a lawyer.

3. Establishment of the Cause of Death Act

13. Section 5 of the Establishment of the Cause of Death Act (*Surma põhjuse tuvastamise seadus*) provides that the death of a person who died at a hospital must be immediately notified to the person's attending physician or doctor on call. Furthermore, if there is reason to believe that a person has

died as a result of a criminal offence or as a result of external causes or a suspicion thereof, an investigative body or the Public Prosecutor's Office must be immediately notified thereof.

14. Section 7 of the Act provides that the doctor having received a notice of death must immediately perform an external examination of the deceased in order to establish death and ascertain the cause thereof. If the cause of death cannot be established as a result of an external examination of the deceased or based on the information concerning his or her latest disease and treatment, the doctor must send the body for a pathoanatomical autopsy.

15. Upon ascertaining the elements of a criminal offence in respect of a death, the investigative body or the Public Prosecutor's Office must commence criminal proceedings and order a forensic medical examination. In the case of a death caused by other external causes or a suspicion thereof or if the cause of death of a person is not established in another manner provided for in the law, the investigative body or the Public Prosecutor's Office must send the body for a forensic medical autopsy (section 9 of the Act).

16. Section 14 of the Act provides that pathoanatomical autopsy is performed to ascertain an unclear cause death or in case of death caused by disease to assess the disease and the course thereof or if it is necessary in view of general health care and treatment quality if the cause of death cannot be established as the result of an external examination of the deceased and based on the information the doctor has on the last disease and treatment of the deceased, and there is no reason for a forensic medical autopsy or forensic medical examination in criminal proceedings. Pursuant to section 14(2) of the Act, a pathoanatomical autopsy must be performed, *inter alia*, in the case of an unclear death if there is no reason to believe that a person has died as a result of a criminal offence or due to external causes, in case of an unclear diagnosis of a disease in the person's lifetime, if the person undergoing hospital treatment died at the hospital within the first twenty-four hours and the doctor has no data on the cause of death, or if the person died as a result of diagnostic or treatment methods. In addition, a pathoanatomical autopsy is performed at the written request of the persons close to the deceased. A pathoanatomical autopsy is not be performed in order to establish the cause of death if the deceased suffered from a chronic illness in his or her lifetime which has been recorded in the documents evidencing the provision of health care services to the person and which caused his or her death due to complications or becoming acute.

4. Obligations Act

17. Section 128 of the Obligations Act (*Võlaõigusseadus*) stipulates that non-pecuniary damage involves primarily the physical and emotional distress and suffering caused to the aggrieved person.

18. Section 134(2) provides that in the case of an obligation to compensate for damage arising from causing bodily injuries to or damage to the health of a person, the aggrieved person must be paid a reasonable amount of money as compensation for non-pecuniary damage. Section 134(3) provides that in the case of an obligation to compensate for damage arising from the death of a person or a serious bodily injury or health damage caused to the person, the persons close to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

19. Section 759 provides that a contract for the provision of health care services is also, *inter alia*, deemed to have been entered into upon commencement of the provision of health care services or assumption of the obligation to provide health care services with the consent of a patient, and also if commencement of the provision of health care services to a patient without the capacity to exercise his or her will corresponds to his or her actual or presumed intention.

20. Section 762 stipulates that health care services must at the very least conform to the general level of medical science at the time the services are provided and the services must be provided with the care which can normally be expected of providers of health care services. If necessary, a provider of health care services must refer a patient to a specialist or involve a specialist in the treatment of the patient.

21. Section 766 sets out an obligation for the provider of health care services to inform the patient and to obtain the patient's consent for his or her examination and the provision of health care services.

22. Section 767 concerns the provision of health care services to patients who are incapable of exercising their will. In such circumstances, the provision of health care services is permitted without the consent of the patient if this is in the interests of the patient and corresponds to the intentions expressed by him or her earlier or to his or her presumed intentions and if failure to provide health care services promptly would put the life of the patient at risk or significantly damage his or her health. The intentions expressed earlier by a patient or his or her presumed intentions must, if possible, be ascertained using the help of his or her immediate family. The immediate family of the patient shall be informed of his or her state of health, the provision of health care services and the associated risks if this is possible in the circumstances.

23. Section 769 sets out the obligation of a provider of health care services to document the provision of health care services.

24. The Obligations Act further provides:

Section 770 – Liability of providers of health care services

"(1) Providers of health care services ... shall be liable only for the wrongful violation of their own obligations, particularly for errors in diagnosis and treatment and for violation of the obligation to inform patients and obtain their consent.

(2) Providers of health care services shall also be liable for the activities of persons assisting them and for any defects in the equipment used upon the provision of health care services.

(3) The burden of proof regarding circumstances which are the basis for the liability of the provider of health care services ... shall lie with the patient unless the provision of health care services to the patient is not documented as required.

(4) If there is an error in diagnosis or treatment and a patient develops a health disorder which could probably have been avoided by ordinary treatment, the damage is presumed to have resulted from the error. In this case, the burden of proof regarding the damage resulting from the health disorder shall also lie with the patient."

25. The rules on the non-contractual (delict-based) liability of the Obligations Act provide:

Section 1043 – Compensation for unlawfully caused damage

"A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to the law."

Section 1044 – Claims filed on other basis

"(3) If the death, bodily injury or damage to the health of a person is caused as a result of the violation of a contractual obligation, the tortfeasor shall also be liable for such damage on the basis provided in this Chapter."

Section 1045 – Unlawfulness of causing of damage

"(1) The causing of damage is unlawful if, above all, the damage is caused by:

1. causing the death of the victim;

2. causing bodily injury to or damage to the health of the victim;"

Section 1050 – Culpability as basis for liability

"(1) Unless otherwise provided by law, a tortfeasor is not liable for the causing of damage if the tortfeasor proves that he or she is not culpable of causing the damage."

5. Health Services Organisation Act

26. Health Services Organisation Act (*Tervishoiuteenuste korraldamise seadus*) provides:

Section 50-2 – Expert Committee on Quality of Health Services

"(1) The Expert Committee on Quality of Health Services ... is an advisory committee the purpose of which is to assess the quality of health care services provided to patients and to make proposals arising from the assessment to the Health Board, the Estonian Health Insurance Fund and the health care providers.

(2) The Committee is competent to:

1. assess the quality of a health care service provided to a patient;

2. make propositions to the Health Board for initiation of supervision proceedings over the activity of a health care provider; ...”

27. Under section 60 of the Health Services Organisation Act, the Health Board, a governmental authority operating within the purview of the Ministry of Social Affairs, shall exercise supervision over compliance with the requirements established for health care providers. Individuals have a right to submit complaints to the Health Board regarding compliance with those requirements.

6. Case-law of the domestic courts

(a) Case-law in criminal matters

28. The Supreme Court in its judgment of 22 September 2010 (case no. 3-1-1-60-10) reiterated the principle of mandatory criminal proceedings provided for in Article 6 of the Code of Criminal Procedure. It noted that while the principle *in dubio pro reo* required that the accused was to be given the benefit of the doubt when a judgment was made, the principle *in dubio pro duriore* applied in respect of initiation of criminal proceedings and at that stage any suspicion of crime was to be interpreted in favour of initiation of the proceedings. Nevertheless, due to the prevailing attitudes in society persons could also be stigmatized by merely initiating criminal proceedings in respect of them. Therefore, it was objectionable to initiate criminal proceedings in a situation where no suspicion of a crime existed at all or was merely theoretical.

29. The Tallinn Court of Appeal in its decision of 14 February 2011 (case no. 1-10-15692) examined a complaint against the refusal of the Public Prosecutor’s Office to initiate criminal proceedings related to serious health damage allegedly caused by a medical error. The Court of Appeal ordered the Public Prosecutor’s Office to initiate criminal proceedings in order to clarify the circumstances described in the offence report. It noted, *inter alia*, with reference to a Supreme Court’s judgment of 29 November 2010 (case no. 3-1-1-79-10), that if non-legal specialist knowledge had to be applied in criminal proceedings, an expert opinion had to be sought, whereas the decisions of the Expert Committee on Quality of Health Services were not admissible as expert opinions in criminal proceedings. In that case the Court of Appeal had granted legal aid to the alleged victim for filing the complaint with it against the decision of the Public Prosecutor’s Office.

30. The Supreme Court in its decision of 11 April 2011 (case no. 3-1-1-97-10) confirmed the generally recognized concept that, for example, in

case of manslaughter or murder the next-of-kin of the killed person was to be considered a victim.

31. The Tallinn Court of Appeal in its judgment of 19 October 2011 (case no. 1-09-21700), in a case concerning manslaughter, agreed with the lower court that had awarded the victim's next-of-kin non-pecuniary damages. The Court of Appeal found that unlawful causing of the death of a person's very close next-of-kin (the person's son) should be considered an exceptional circumstance within the meaning of section 134(3) of the Obligations Act (see paragraph 18 above).

32. Further cases provide examples concerning medical negligence and related issues, such as conviction of a doctor of causing serious health damage through negligence under Article 119 of the Penal Code (Supreme Court's judgment of 29 November 2010, case no. 3-1-1-79-10, followed by the Tallinn Court of Appeal's judgment of 27 June 2013 in the same case (no. 1-12-5377) in which also pecuniary and non-pecuniary damages were awarded), and conviction of an employee of the emergency call centre for leaving a person in a life-threatening situation under Article 123 of the Penal Code (Tartu County Court's judgment of 16 September 2009, case no. 1-09-9063; subsequent to the criminal proceedings, the spouse of the deceased also initiated administrative court proceedings, was granted legal aid and awarded pecuniary and non-pecuniary damages). The Tallinn Court of Appeal, by a judgment of 18 May 2007 (case no. 1-06-4949), acquitted an ambulance worker who had been charged with negligent homicide under Article 117 of the Penal Code for not having taken an intoxicated person with signs of trauma and problems of consciousness to the hospital but instead having handed the person over to the police.

33. As regards the connection between the criminal and civil proceedings in alleged medical malpractice cases, Tartu Court of Appeal in its decision of 24 April 2007 (case no. 1-07-4017) confirmed the State Prosecutor's Office's decision that failure of a doctor to comply with the duty of notification about medical treatment or keeping a documentary record of the treatment can be unlawful under civil law, but cannot entail a criminal liability. The Court of Appeal stressed that the violation of a duty under the Obligations Act entails liability under civil law, but that type of liability falls outside the scope of criminal proceedings.

(b) Case-law in civil matters

34. As regards civil liability, the Supreme Court in its judgment of 8 April 2011 (no. 3-2-1-171-10) noted that a victim may claim compensation for the damage caused by the non-conforming health care service first and foremost on the basis of a breach of the health care services contract. In addition, in the case of causing health damage to a person as a result of a violation of contractual obligations the health care provider may also be liable under the provisions concerning compensation for unlawfully caused

damage (non-contractual liability) (section 1044 et seq. of the Obligations Act; see paragraph 25 above). In such a case, the victims may submit their claims alternatively and the legal basis of the claim has to be determined by a court regardless of the arguments of the parties.

35. The Tallinn Court of Appeal in its judgment of 22 September 2008 (case no. 2-05-2059) reiterated that in the case of an error in diagnosis or treatment resulting in health damage to the patient, which could have probably been avoided by ordinary treatment, it is presumed that the damage occurred as a result of the error. The absence of the causal link must be proved by the defendant. In that case, the plaintiff was awarded compensation for non-pecuniary damage. The court also noted that an opinion of the Expert Committee on Quality of Health Services constituted documentary evidence in civil court proceedings.

36. In several medical negligence cases non-pecuniary damages have been awarded. These include cases in which the duty of notifying the plaintiffs and obtaining their consent had been breached (Tartu Court of Appeal's judgment of 2 December 2013 (case no. 2-10-61884), and Tartu Court of Appeal's judgment of 9 October 2013 (case no. 2-06-9959); in the latter case the Supreme Court also granted the complainant's request for legal aid for filing an appeal with it).

37. In a judgment of 15 February 2014 (case no. 2-14-13101) the Viru County Court dealt with the liability related to the provision of health care services. The court relied, *inter alia*, on the opinion of the Expert Committee on Quality of Health Services. It noted that breach of the duty to notify the patient or to obtain the patient's consent did not serve as sufficient grounds for awarding damages if the patient had not sustained health damage as a result thereof. In that case the plaintiff had been granted legal aid.

38. The Supreme Court in its judgment of 9 April 2008 (case no. 3-2-1-19-08) noted that a person who had unlawfully been the victim of a bodily injury or health damage but who had only died later due to this also acquired the right to claim monetary compensation for non-pecuniary damage under section 130(2) of the Obligations Act. Under the conditions provided for in section 166(1) of the Obligations Act, such claims could be transferred or bequeathed, that is the successors of the deceased person could also file such a claim. In this case, the plaintiff had not acted as a successor in claiming compensation for the possible non-pecuniary damage caused to her spouse. The Supreme Court further noted that under section 134(3) of the Obligations Act the next-of-kin of a person who had died or sustained a serious injury or health damage could also claim compensation for non-pecuniary damage if payment of such compensation was justified by exceptional circumstances. Analysing the notion of "exceptional circumstances", the Supreme Court found that these did not comprise causing of death or serious health damage as such and noted that

grief inevitably accompanied the death of a close person. Rather, a compensation claim of next-of-kin was justified in case of spatial proximity with the next-of-kin at the time of causing of the damage or being a direct witness of an accident or its consequences as well as subsequent distress caused by seeing the injuries or suffering of the died or injured next-of-kin.

39. In a judgment of 14 February 2012 (case no. 2-06-17756) the Tallinn Court of Appeal dealt with a claim against the hospital for compensation for damage due to the causing of the death of the plaintiff's mother. The court, *inter alia*, considered that an opinion of the Expert Committee on Quality of Health Services was admissible as documentary evidence. Relying on the said opinion, expert assessment ordered by the first-instance court and other evidence, the courts found that there was no causal link between the provision of the health care service and the death of the plaintiff's mother. As regards the damage, the Court of Appeal noted that under section 134(3) of the Obligations Act the next-of-kin of the deceased also had an independent right of claim but held that the plaintiff had to substantiate and prove the existence of "exceptional circumstances" within the meaning of section 134(3).

40. In a case decided by the Supreme Court on 15 November 2013 (case no. 3-2-1-131-13) the courts established an error in treatment by a hospital that had caused the death of the plaintiffs' new-born child and ordered the defendant to pay EUR 7,000 to the mother and EUR 3,000 to the father for non-pecuniary damage.

41. Lastly, further examples show that plaintiffs have been granted legal aid in proceedings related to compensation claims in medical negligence cases (cases nos. 2-09-9677 and 2-09-1724).

COMPLAINTS

42. The applicant complained under Article 2 of the Convention about the refusal of the authorities to initiate a criminal investigation into her mother's death. She referred to the shortcomings noted in the assessment by the Expert Panel of Quality of Medical Aid.

43. She also complained under Article 8 about the administration of medicines (sedatives) without E.'s or the applicant's consent.

THE LAW

A. Alleged violation of Article 2 of the Convention

44. The applicant complained about the refusal to open a criminal investigation into her mother's death. She relied on Article 2, which reads as follows:

> "1. Everyone's right to life shall be protected by law. ...
> ..."

1. The parties' submissions

(a) The Government

45. The Government contended that the applicant had failed to have recourse to the court, despite the existence of remedies under both civil and criminal law. As she had failed to exhaust any and all domestic remedies, which were sufficiently certain in law and in practice, and the Estonian courts had been unable to express their views in this case, the Government asked the Court to declare the application inadmissible under Article 35 §§ 1 and 4 of the Convention.

46. The Government noted that the applicant had only had recourse to the Expert Committee, which, however, was an advisory body not a judicial one. Having recourse to it could not be considered as making use of a legal remedy; a person could file an action with a court regardless of the Expert Committee's assessment.

47. As regards civil remedies, the Government pointed out that according to Estonian law the liability of a health care provider could be contractual (that is based on a violation of the contract to provide health care services) or non-contractual. The Estonian courts had clearly found that a person could file alternative claims and it was the duty of the court to determine the legal basis of the claim.

48. Furthermore, non-pecuniary damages could also be claimed by the next-of-kin of a deceased person – both as successors of the deceased for the damage caused to the deceased as well as in their own capacity for the damage caused to them. Although in the latter case existence of exceptional circumstances was required, the Government noted that the existence of such circumstances was assessed on a case-by-case basis. Therefore it was impossible to claim with certainty whether exceptional circumstances existed or not without having recourse to the courts.

49. The Government also pointed out that state legal aid could be granted for filing an action in civil cases. It was possible to request exemption from the state fee or its payment by instalments as well as appointment of a lawyer free of charge.

50. The Government concluded, as regards civil remedies, that the applicant had at her disposal various remedies under civil law which could have been successful. Having regard to the limitation periods for filing an action (three years), the applicant could still have had recourse to a court in Estonia at the time of the Government's submission of their observations.

51. As regards criminal law remedies, the Government referred to the Court's case-law according to which, if the infringement of the right to life or to personal integrity was not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system did not necessarily require the provision of a criminal law remedy in every case (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I).

52. The Government explained that Estonia had an effective criminal law system for cases requiring criminal law intervention, and referred to case-law concerning the conviction of health care professionals and the awarding of damages to victims (see paragraph 32 above).

53. The Government pointed out that a person could submit a report of a criminal offence to an investigative authority, which was obliged to initiate criminal proceedings in the event of the existence of elements of a criminal offence and observe the principle of *in dubio pro duriore*. In cases concerning the provision of health care services, in order to apply non-legal specialist knowledge in criminal proceedings, an expert assessment had to be ordered. Refusal to initiate criminal proceedings could not be based on the opinion of the Expert Committee. However, in a situation where circumstances precluding criminal proceedings were evident based on the information received by the competent authorities, it was not justified for the investigative body and the prosecutor's office to initiate criminal proceedings.

54. The Government further referred to the procedures to be followed under the Establishment of the Cause of Death Act in the case of the death of a patient in a hospital. In cases where the cause of death could not be established as a result of an external examination of the deceased or based on the information concerning his or her latest disease and treatment, the doctor had to send the body for a mandatory pathoanatomical autopsy. However, the Government argued that this did not mean that each case of death in a hospital required the conduct of criminal proceedings.

55. In the present case the hospital had not considered the death of the applicant's mother to have occurred in suspicious circumstances. Furthermore, no autopsy had to be performed if the death resulted from a chronic disease as it was found by the hospital in the present case. Nor had the public prosecutor's office, with which the applicant had filed a report of a criminal offence, found suspicious circumstances requiring a criminal investigation. After the higher ranking prosecutor had dismissed the applicant's complaint, she had not filed a complaint with an appellate court and had thus failed to exhaust the available criminal law remedies. She also

did not request legal aid from the appellate court, whose refusal to grant such aid would have been subject to appeal to the Supreme Court.

56. The Government concluded that Estonia had an independent and effective system of remedies for investigating deaths arising from medical errors with both civil and criminal law remedies being available.

(b) The applicant

57. The applicant considered that by not opening a criminal investigation the authorities had violated the State's positive obligation under Article 2 to investigate deaths. An ordinary person was not in a position to gather pertinent information and evidence, analyse it and submit it to the investigating bodies. Such inquiry should be carried out by the investigating body itself.

58. The applicant emphasized that her interest was and had always been the investigation of her mother's death in order to identify the circumstances and the actual cause of her death, and not to get compensation for damage. Therefore, she filed no claim with the civil courts.

59. The applicant was of the opinion that the authorities, without proper investigation, or indeed any investigation at all, had assumed that her mother's treatment and diagnoses were correct and had not caused her death. However, the applicant considered that the death of her mother had been unexpected and suspicious, and the documents provided by the hospital were not adequate and clear. The Expert Committee did not have any means and resources to carry out its own independent investigation that would qualify as sufficient.

60. As regards the exhaustion of criminal law remedies, the applicant argued that she had no means to hire a lawyer required for filing an appeal to the appellate court. At the same time, she did not qualify for State legal aid under the State Legal Aid Act. It was clear that she would have been refused such aid. The applicant considered that she had exhausted all domestic remedies that were available to her.

2. The Court's assessment

(a) General principles

61. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). However, the obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate

and accessible. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, among other references, *Sejdovic v. Italy* [GC], no. 56581/00, §§ 45 and 46, ECHR 2006-II).

62. The Court reiterates that the procedural obligation of Article 2 requires the States to set up an effective independent judicial system 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, among other authorities, *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009; *Calvelli and Ciglio*, cited above, § 49; and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

63. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system 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 personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in every case (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII). 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 responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Šilih*, cited above, § 194; *Calvelli and Ciglio*, cited above, § 51; and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII).

64. The State's obligation 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 and that requires a prompt examination of the case without unnecessary delays (see *Šilih,* cited above, § 195; *Calvelli and Ciglio*, cited above, § 53; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006).

(b) Application of these principles to the present case

65. In order to decide on the admissibility of the present complaint, the Court has to examine whether the respondent State has made available effective, adequate and accessible remedies within the framework of a potentially effective independent judicial system set up for the determination of the cause of death of patients in the care of the medical

profession and making those responsible accountable. The Court also has to examine whether the applicant has made use of any of those remedies.

66. As regards criminal law remedies, the Court notes that under the Estonian Penal Code negligent homicide, negligent causing of serious health damage as well as placing or leaving another person in dangerous situation constitute criminal offences (see paragraphs 7 and 9 above). Furthermore, under the Code of Criminal Procedure, an investigative body or the Public Prosecutor's Office must commence criminal proceedings if they obtain information indicating that a criminal offence has taken place. Such information may be obtained, for example, through a report made by a victim or the victim's next-of-kin. Also, health care professionals are under a duty of reporting suspicious deaths (see paragraphs 10 and 11 above). The Establishment of the Cause of Death Act provides for further rules relating to the death of a person at a hospital (see paragraphs 13 to 16 above). The Court has also taken note of the domestic courts' case-law, referred to by the Government, which indicates that criminal proceedings have been conducted against medical practitioners in medical negligence cases and that those responsible have also been convicted (see paragraph 32 above).

67. In the instant case the applicant filed an offence report with the prosecutor's office, which refused to initiate criminal proceedings, finding that no offence had been committed. The applicant's appeal to the State Prosecutor's Office was to no avail. The Court observes that under Article 208 of the Code of Criminal Procedure an appeal to an appellate court lies against a decision of the State Prosecutor's Office, whereas such appeal must be lodged through a lawyer (see paragraph 12 above). The Court has taken note of the applicant's argument that she had no means to hire a lawyer, whereas she would not have qualified for legal aid. However, it has also had regard to the case-law referred to by the Government according to which legal aid has been granted to a victim in a criminal case concerning a medical error (see paragraph 29 above). The Court cannot speculate whether the applicant would have qualified for legal aid or whether or not she would have been granted such aid. It reiterates that when there is a mere doubt about the effectiveness of a remedy, such remedy has to be tried for the requirement of the exhaustion of the domestic remedies to be met (see, *mutatis mutandis*, *Vučković and Others v. Serbia* [GC], no. 17153/11, §§ 74 and 84, 25 March 2014). However, in the present case the applicant did not ask for legal aid and therefore did not give the domestic courts a possibility to grant it and subsequently to entertain her complaint. Moreover, it does not appear that the applicant made an attempt to find herself a lawyer as well as to find out the costs of lodging an appeal with arguments which would not have been considerably different from those which she had already herself submitted to the State Prosecutor's Office. The Court therefore considers that the applicant has not exhausted available criminal law remedies.

68. As regards civil remedies, the Court has had regard to domestic law and practice according to which medical errors can be established in civil courts which also can and do award compensation for non-pecuniary damage (see paragraphs 34 to 41 above). The Court also observes that next-of-kin of deceased persons can claim compensation for non-pecuniary damage caused by the death as heirs and, in "exceptional circumstances", also on their own behalf. Moreover, in several of the cases referred to legal aid was granted to the plaintiffs.

69. The Court notes that in the present case the applicant has not attempted to make use of the civil law remedies. It has taken note, in this connection, of the applicant's argument that the civil law remedies were designed for claims for damages whereas she never wished to seek compensation for damages but rather the establishment of the circumstances and the actual cause of her mother's death. However, the Court considers that regardless of whether or not compensation for damage is seen as the primary goal of a civil claim in cases like the one at hand, awarding such compensation inevitably presupposes establishment of the circumstances and the cause of the death of the deceased. For this purpose forensic medical expert assessments could have been ordered within the framework of civil proceedings. The Court further notes that the decision not to institute criminal proceedings excluded only criminal liability and did not exclude potential civil contractual or non-contractual liability of the hospital or of the medical personnel. The civil courts would not have been constrained by the decision not to initiate criminal proceedings and would have been free to examine the facts of the case in the light of the evidence produced before them. The Court therefore considers that the civil law remedy was an available and potentially effective one for the applicant. However, the applicant did not use it.

70. As regards the proceedings before the Expert Committee and its opinion, the Court notes that domestic law and practice make it clear that the committee is an advisory body (see paragraph 26 above) whose opinion can be used as documentary evidence in civil proceedings (see paragraphs 35, 37 and 39 above) but cannot be used in the quality of an expert opinion in criminal proceedings (see paragraph 29 above). Having regard to the committee's role in the domestic legal system, the legal status of its opinions as well as its lack of authority to provide redress to an aggrieved person, the Court considers that even if the proceedings before the Expert Committee are intended to form a part of the mechanism of review of the quality of medical services in Estonia, recourse to the Expert Committee cannot, especially taken alone, be considered as use of a remedy sufficient for meeting the requirement of exhaustion of domestic remedies. In the present case the ineffectiveness of the proceedings before the Expert Committee is further demonstrated by the fact that the Committee, which is competent to make propositions to the Health Board for initiation of

administrative supervisory proceedings (see paragraph 26 above), does not appear to have done that despite its findings of a violation of the requirement to document a patient's treatment (see paragraph 6 above). Nevertheless, given that this Committee is set up to be a part of the mechanism of review of the quality of medical services, it should be ensured that it gives impartial, comprehensive and thoroughly reasoned opinions and that adequate measures by public authorities – notably the Health Board – follow its opinions.

71. The Court notes additionally that the Health Board too is tasked with examining complaints from individuals about the lawfulness of medical services as well as supervising the activities of doctors, hospitals and other providers of health care services (see paragraph 27 above). However, given the Health Board's discretion in opening supervisory proceedings and the limited possibility of contesting its decisions before the administrative courts, recourse to it cannot, again especially taken alone, be considered as use of a remedy sufficient for meeting the requirement of exhaustion of domestic remedies. Nonetheless, in the light of the Health Board's position in the mechanism of review of the quality of medical services, it should be ensured that the Board makes effective use of its supervisory powers.

72. The Court thus considers that the Estonian legal order in principle provides for several potentially effective remedies within the framework of an effective independent judicial system set up for the determination of the cause of death of patients in the care of the medical profession and making accountable those responsible for wrongful deaths. The Court reiterates that, in the event of there being 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, among others, *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010, and the case-law cited therein).

73. In the present case the applicant has not made full use of any of the potentially effective remedies available to her. The Court therefore cannot examine the merits of the applicant's complaint. It nevertheless notes in this context that the possibility of having recourse to the domestic civil proceedings still appears to be open to the applicant (see paragraph 50 above).

74. The Court adds that while the use of one remedy can in principle be sufficient for satisfying the admissibility criterion of exhaustion of domestic remedies, in determining whether a complaint such as the one made in the instant case is well-founded, the Court will examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have secured legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see, among others, *Byrzykowski v. Poland*, cited above, §§ 106

and 107; *Dodov v. Bulgaria*, no. 59548/00, §§ 83 and 87, 17 January 2008, see also *Šilih*, cited above, §§ 202 and 203, where the Court considered it significant that in addition to the criminal proceedings, which the Court considered ineffective, the applicants also had recourse to civil proceedings; *Eugenia Lazăr v. Romania*, no. 32146/05, §§ 72, 86-92, 16 February 2010, where the Court examined the availability and effectiveness of other remedies than the criminal proceedings; and *Istrăţoiu v. Romania* (dec.), no. 56556/10, §§ 80-86, 12 September 2013, where a complaint was declared manifestly ill-founded because the criminal proceedings had not been ineffective and the applicant had not made use of potentially effective civil remedies).

75. In conclusion, the applicant's complaint under Article 2 of the Convention must be rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

B. Alleged violation of Article 8 of the Convention

76. The applicant also complained about administration of medicines (sedatives) without her mother's or the applicant's consent. She relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The Government

77. The Government firstly argued that the applicant could not be considered a victim as regards the complaint under Article 8 about administration of medicines without her mother's or the applicant's consent. Secondly, the Government argued that she had failed to exhaust domestic civil remedies in this respect.

(b) The applicant

78. The applicant did not submit any specific arguments as to her victim status in respect of the present complaint. As to the exhaustion of domestic remedies, she argued in substance that she had exhausted criminal law remedies and this had been sufficient also for the purposes of the complaint under Article 8.

2. The Court's assessment

79. The Court notes that the complaint under Article 8 is composed of two parts. Firstly, the applicant complained that she herself had not been asked for any consent to the administration of certain medicines to her mother. Secondly, the applicant complained on behalf of her deceased mother that her mother had not been asked for any consent for the administration of those medicines. In the first part of the complaint the applicant claims standing as a direct victim and in the second part as an indirect victim of an alleged violation of Article 8.

80. In their first objection to the admissibility of this complaint the Government have argued in substance that both parts of the complaint are incompatible *ratione personae* with the Convention.

81. The Court points out that its approach concerning standing of direct and indirect victims has been recently summarised in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, §§ 96-100, ECHR 2014).

82. With regard to the first part of the complaint, the Court observes that it has not been argued that the applicant's mother was unable to give an informed consent to her treatment. Moreover, the applicant was not her mother's guardian. She did not have authority to act on her behalf or to defend her interests, including in the area of medical treatment. In those circumstances the Court is not satisfied that the applicant's own rights under Article 8 – that is to say her own physical and psychological integrity, her involvement in the choice of medical care administered to herself, which are matters falling within the ambit of Article 8 (see, for example, *A.K. v. Latvia*, no. 33011/08, § 63, 24 June 2014, with further references) – were directly affected by the fact that she was not asked for consent to her mother's medical treatment (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96, with further references, where the Court stressed that the individual concerned must be able to show that he or she was "directly affected" by the measure complained of). Accordingly, the first part of the complaint is incompatible *ratione personae* with the provisions of the Convention.

83. In so far as the complaint relates to lack of consent from the applicant's deceased mother, the Court considers that it is equally incompatible *ratione personae* with the provisions of the Convention. The question of consent to a medical treatment concerns the core of a person's right to respect for his private life and belongs to the category of non-transferable rights (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 100; and, *mutatis mutandis*, *Elberte v. Latvia*, no. 61243/08, § 65, ECHR 2015, where the Court considered incompatible *ratione personae* the applicant's complaint relating to a lack of the

applicant's husband's consent for tissue removal from the applicant's deceased husband).

84. The whole complaint is thus incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must therefore be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 4 April 2016.

Abel Campos
Registrar

Işıl Karakaş
President