

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

FIRST SECTION

CASE OF MOVSESYAN v. ARMENIA

(Application no. 27524/09)

JUDGMENT

STRASBOURG

16 November 2017

FINAL

16/02/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Movsesyan v. Armenia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 10 October 2017,

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

PROCEDURE

1. The case originated in an application (no. 27524/09) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Albert Movsesyan ("the applicant"), on 22 April 2009.

2. The applicant was represented by Mr M. Manukyan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged, in particular, that the authorities had failed to conduct an effective investigation into his daughter's death.

4. On 21 June 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Yerevan.

6. The applicant had a daughter, K.M., who was born on 19 November 1985.

7. On 7 September 2007 at 10 p.m. K.M., who was in the early weeks of pregnancy at the time, was at home with her parents and husband when she

fainted and began to have convulsions. An ambulance was called, which arrived 40-45 minutes later.

8. Upon arrival, the ambulance doctor, A.G., found K.M. nearly unconscious, with impaired breathing and low blood pressure. According to the applicant, the doctor was told at that point that K.M. was pregnant. A.G. diagnosed a convulsion syndrome, gave K.M. two injections – one of relanium and one of magnesium – and took her to hospital. It appears that neither the doctor nor the nurse nor the driver of the ambulance helped her family carry K.M. downstairs from the eighth floor of the building and put her into the ambulance. Moreover, although K.M. had not regained consciousness after the injections, A.G. chose not to sit beside her during the journey to hospital, but instead sat beside the driver in the driver's cab.

9. On the same day A.G. and the nurse drew up an ambulance visit record stating that they had arrived seven minutes after receiving the ambulance call and that they had administered only one medical injection, of relanium.

10. On 14 September 2007 K.M. died in hospital without ever regaining consciousness.

11. On the same day the Avan and Nor-Nork District Prosecutor's Office of Yerevan launched an inquiry into her death and ordered an autopsy, which was also carried out that day. According to its report (forensic medical opinion no. 728), K.M. died from general intoxication of the organism, caused by an impairment of vital brain function, which in turn had been caused by extensive and diffuse thrombosis of neuro-vessels.

12. During the inquiry, the investigator took statements from the medical personnel who had provided assistance to K.M., including A.G., the nurse, and the driver. In particular, in her statement of 14 November 2007 the nurse stated that the doctor had ordered her to administer an injection of magnesium sulphate but that K.M.'s convulsions had continued, after which the doctor had handed her a phial of relanium, which she had injected. In her statement made on the same day A.G. explained that upon arrival they had found K.M. having seizures and that, from talking to her family, she had learnt that K.M. was pregnant. She had then ordered the nurse to inject relanium and, knowing that K.M. was pregnant, she did not inject any other medication and did not take any further measures since she did not consider it necessary in the circumstances.

13. On 26 November 2007 the ambulance nurse and A.G. were questioned again. The nurse stated, in particular, that the fact that only the injection of relanium and not the one of magnesium had been mentioned in the ambulance visit record could possibly be explained by her having forgotten to remind the doctor about the injection of magnesium. A.G. stated, *inter alia*, that she had ordered the nurse to give two injections.

14. In the course of the inquiry the investigator ordered a forensic medical investigation to be carried out by a panel of experts. According to

the results of the opinion (forensic medical opinion no. 89) produced on 14 January 2008, the injection of relanium 2 mg and magnesium 3 g by the ambulance crew had been correct at the given moment, taking into account the patient's condition − that is to say convulsion syndrome − and the injection of the given quantity of those substances was not contra-indicated. The opinion also stated that K.M.'s medical treatment had been correct and had corresponded to the diagnosis.

15. On 27 February 2008 the investigator decided to reject the institution of criminal proceedings for lack of *corpus delicti*.

16. On 29 February 2008 the applicant lodged an application with the Avan and Nor-Nork District Prosecutor's Office of Yerevan, seeking a new forensic medical investigation in which he would be allowed to participate. In particular, he claimed that his daughter had died as a result of negligence by A.G., who had given her two injections of chemical substances, the use of which was contra-indicated given K.M.'s pregnancy, impaired breathing and low blood pressure. In this respect, the applicant referred to medical instructions on the use of relanium and magnesium and extracts from a medical book, copies of which he attached to his application. The applicant also alleged that the ambulance had arrived belatedly, had lacked essential medical equipment such as an oxygen cylinder, and that the ambulance crew in general had not acted with due diligence.

17. On 3 March 2008 the District Prosecutor's Office decided to quash the decision of 27 February 2008 and remit the case to the investigator for further inquiry. The decision stated, in particular, that the applicant's request for an additional forensic medical investigation involving his participation was well-founded.

18. On 5 March 2008 the investigator ordered an additional forensic medical investigation by a panel of experts which was asked to determine the following:

> "1. The cause of K.M.'s death, whether she suffered from any illnesses from birth ... whether an illness she had suffered from birth could have caused her death or somehow have a causal link to her death.
>
> 2. Whether the injection of relanium 2 mg and magnesium 3 g by the ambulance crew was correct, whether the quantity was within that allowed and whether injecting magnesium might have entailed negative consequences.
>
> 3. Whether there was any medication (in medical theory, in science) or medical approach the administration of which could have improved K.M.'s condition and whether it should have been administered by the ambulance crew or in hospital. Whether the medical treatment had been appropriate and sufficient or whether omissions had occurred and, if so, who had been responsible for them.
>
> 4. K.M.'s transfer to the hospital took about 40 minutes; whether speedier transfer to the hospital would have made it possible to save K.M.
>
> 5. Whether K.M.'s five-week pregnancy contributed to the emergence and development of her illness, whether the pregnancy and the illness she was diagnosed with had a direct causal link with each other.

6. K.M.'s hospital record ... contained notes concerning the medical assistance, injections and medication and the doctors who had administered them over seven days. Whether the medical treatment provided had been correct, the injected medication correctly chosen with regard to type and quantity and whether these were permissible or not. If not, which doctor was responsible for errors and finally whether the medical treatment administered had brought about death.

7. The scientific methods on which forensic medical opinion no. 728 and the forensic medical opinion no. 89 of the panel of experts were based, whether these were supported by medical literature and which methods had been applied during previous examinations...

8. ... the concrete cause(s) and precondition(s) which resulted in K.M.'s death."

19. On 23 April 2008 the panel of experts delivered its report (forensic medical opinion no. 6), the conclusions of which read as follows:

"1 and 8: No information indicating that K.M. had congenital disorders was discovered, according to the medical documents. K.M.'s death resulted from general intoxication of the organism, caused by an impairment of vital brain function, which in turn was caused by extensive and diffuse thrombosis of neuro-vessels. As regards prior diseases resulting in functional disorders which could have brought about the convulsion syndrome, it was impossible to draw any conclusions in the absence of relevant medical documents.

2. Injection of relanium 2 mg and magnesium 3 g by the emergency care specialists was correct in view of the presence of the convulsion syndrome at the given moment. Not injecting magnesium at the given moment could have entailed negative consequences.

3. In the case in question the medical assistance provided by the ambulance crew and in hospital was appropriate and sufficient, without omissions, which is substantiated by the data contained in the medical documents and by the evidentiary material in the case file.

4. Patient K.M. was transferred to hospital with vital signs and speedier transfer could not have prevented her death.

5. K.M.'s five-week pregnancy was not linked to the cause of her death since the pregnancy and the illnesses did not have a direct causal link with each other either.

6. K.M.'s medical treatment in ... [the hospital] (injections, medication) was administered correctly and in a timely manner.

7. Opinion no. 728 concerning the forensic medical examination of K.M.'s corpse and opinion no. 89 produced by the forensic medical investigation panel are accurate and well-founded; scientific methodologies were applied: histological examinations of the organs of the corpse were performed, and leading specialists of the Ministry of Health participated in the panel examination.

20. On 25 April 2008 the investigator decided to reject the institution of criminal proceedings for lack of *corpus delicti*. The decision stated in particular that the relevant members of the medical personnel, including the emergency care specialists who had provided first aid assistance to K.M., had been questioned. It further reiterated the conclusions of the experts reflected in the forensic medical opinions nos. 89 and 6 and stated that the

initial medical assistance administered as first-aid and the subsequent hospital treatment provided to K.M. had been performed properly, appropriately and in a timely manner without any errors or omissions.

21. On the same day the investigator lodged a request with the director of the "Emergency Medical Service" State Close Joint Stock Company of the Yerevan Municipality ("the Emergency Medical Service") seeking to impose an appropriate penalty on the ambulance crew. In particular, the investigator stated that there had been a 40-minute delay before the ambulance arrived and that only one of two injections given to K.M. had been mentioned by the ambulance doctor in the visit record. Furthermore, the process of taking the patient to hospital had been slow and disorganised. The ambulance driver had not carried the patient downstairs and had not assisted in putting her in the ambulance. Instead of sitting beside K.M., whose condition was extremely critical, the doctor had chosen to sit in the driver's cab next to the driver. The investigator's conclusion was therefore that the ambulance crew had arrived after a serious delay and had not provided proper medical assistance.

22. On 30 April 2008 the applicant lodged a complaint with the Avan and Nor-Nork District Court of Yerevan concerning the investigator's decision of 25 April 2008 seeking the institution of criminal proceedings against A.G. and the nurse. The applicant submitted, in particular, that the panel of experts performing the additional forensic medical investigation had not taken due account of his arguments, which had been based on relevant medical literature and Government decrees. He reiterated his arguments with regard to the contra-indication of relanium and magnesium in cases of pregnancy and low blood pressure and the other arguments previously submitted in his complaint lodged with the District Prosecutor's Office.

23. On 16 May 2008 the medical council of the Emergency Medical Service held a meeting at which the circumstances described in the investigator's decision of 25 April 2008 were discussed. It appears that the members of the ambulance crew submitted written "explanations" (*բացատրություն*) in relation to the events of 7 September 2007. As a result, A.G. received a reprimand for serious breach of work regulations and medical ethics. Also, the head of the relevant emergency department was ordered to improve the supervision of employees as regards respecting work regulations, so as to prevent similar occurrences in future, and to examine every such case.

24. On 26 May 2008 the Avan and Nor-Nork District Court of Yerevan dismissed the applicant's complaint, finding that the inquiry into K.M.'s death had been thorough and adequate. In doing so, the District Court referred to the results of the fresh forensic medical opinion. As regards the late arrival of the ambulance, incorrect completion of the visit record and the doctor's failure to sit beside the patient during the journey to the

hospital, the District Court referred to the fact that A.G. had been reprimanded for poor performance of her duties.

25. On 16 July 2008 the applicant lodged an appeal against this decision with the Criminal Court of Appeal. He argued, in particular, that the District Court had failed to question A.G. and the nurse. Furthermore, the District Court had not adequately addressed their arguments concerning the injection of K.M. with substances that were contra-indicated, given her condition, or the over-dosage thereof which, he alleged, had caused her death.

26. On 4 September 2008 the Criminal Court of Appeal dismissed the applicant's appeal and upheld the decision of the District Court. In doing so, it stated that there was no necessity to summon A.G. and the nurse to testify in court since they had already made statements during the inquiry. As regards the applicant's arguments with regard to the contra-indication of medical substances administered by injection to K.M., the Court of Appeal relied on the forensic medical opinions according to which their administration had been correct, taking into account the convulsion syndrome at that moment.

27. On 30 September 2008 the applicant lodged an appeal with the Court of Cassation against the decision of the Court of Appeal.

28. On 30 October 2008 the Court of Cassation decided to refuse the examination of the appeal on points of law (*վճռաբեկ բողոքը թողնել առանց քննության*) since it had not been lodged by an advocate (*փաստաբան*) licensed to act before the Court of Cassation, as required by Article 404 § 1 (1) of the Code of Criminal Procedure. The applicant claims that he could not afford the costly services of such an advocate.

II. RELEVANT DOMESTIC LAW

A. Criminal Code (as in force at the material time)

29. Article 130 § 2 provides that failure to perform or the improper performance of professional duties by medical and support personnel, as a result of negligence or bad faith, which has negligently caused the death of the patient undergoing treatment is punishable by imprisonment for two to six years, with or without deprivation of the right to hold certain positions or practise certain activities for a maximum of three years.

B. Code of Criminal Procedure (as in force at the material time)

30. Article 10 § 5 provides that the authority conducting the criminal proceedings may decide to provide free legal assistance to a suspect or an accused, taking into account his financial situation.

31. According to Article 27 of the Code, the inquiry panel or the investigator or the prosecutor are obliged, within the scope of their jurisdiction, to institute criminal proceedings whenever the elements of a crime are shown to exist, and to undertake all the measures prescribed by law in order to expose crimes and the perpetrators thereof.

32. Article 31 § 2 provides that the proceedings may be suspended by a court of its own motion, if it finds that an applicable provision or other legal act is incompatible with the Constitution. In such cases, the court is entitled to suspend the proceedings and to initiate the procedure for testing the constitutionality of the provision in question.

33. Article 68 provides that a defence lawyer is an advocate representing a suspect or an accused in a criminal case. Article 69 lists cases in which the participation of a defence lawyer is compulsory, which must be ensured by the authority conducting the proceedings. Article 70 provides that the authority conducting the proceedings must request the Chamber of Advocates to appoint a defence lawyer (a) either upon a request of the suspect or the accused; or (b) in cases where the participation of a defence counsel is compulsory but the suspect or the accused have no defence counsel.

34. Article 180 § 1 provides that reports of crimes must be examined and decided upon without delay, and within a period of ten days in cases where it is necessary to check whether there are lawful and sufficient grounds to institute proceedings. Within this period, additional documents, explanations and other evidentiary material may be requested, the scene of the incident inspected, and forensic examination ordered (Article 180 § 2).

35. Article 185 § 1 of the Code provides that, in the absence of lawful grounds for instituting criminal proceedings, the prosecutor or investigator or inquiry panel must adopt a decision rejecting the institution of criminal proceedings.

36. According to Article 290 §§ 1, 2, 3 and 5, those persons whose rights and freedoms are violated by decisions rejecting the institution of criminal proceedings or discontinuing criminal proceedings, and whose appeals against such decisions have not been granted by a prosecutor, are entitled to lodge complaints against them with a court. Such complaints must be lodged with the court situated in the same district as the authority dealing with the case within one month of receiving notification of the refusal to grant the appeal. If the court establishes that the complaint is well-founded, it must order the authority dealing with the case to quash the decision interfering with the person’s rights and freedoms. If the judge establishes that the contested actions were taken in accordance with the law and the person’s rights and freedoms have not been violated, the court must dismiss the complaint.

37. Article 404 § 1 (1) of the Code provides that parties to the proceedings are entitled to lodge an appeal on points of law through an advocate holding a special license to act before the Court of Cassation.

C. Civil Code

1. Relevant provisions as in force at the material time

38. According to Article 17 § 1, a person whose rights have been violated may claim full compensation for the damage suffered, unless the relevant law or contract provides for a lower amount of compensation.

39. According to Article 17 § 2, damage is defined as past or future expenses which are incurred by the person whose rights have been violated for the purpose of remedying the violated rights, or the loss of his property or the damage to it (material damage), including lost income.

40. Article 1058 § 1 provides that damage caused to a person or his property, as well as damage caused to the property of a legal entity, is amenable to compensation in full by the person who has caused such damage. A person who was not responsible for causing the damage may also be obliged to provide compensation where stated by law.

41. According to Article 1058 § 2, a person who has caused damage is exempted from providing compensation if it is established that the damage was caused without guilt on that person's part.

2. Amendments introduced by Law no. HO-21-N of 19 May 2014

42. Since 1 November 2014 Article 17 § 2 has included non-pecuniary damage in the list of the types of civil damage for which compensation can be claimed in civil proceedings. The Civil Code was supplemented by new Articles 162.1 and 1087.2 which regulate the procedure for claiming compensation for non-pecuniary damage. Until the introduction of further amendments on 30 December 2015 (in force from 1 January 2016), compensation in respect of non-pecuniary damage could be claimed where it had been established by a judicial ruling that a person's rights guaranteed by Articles 2, 3 and 5 of the Convention had been violated, and also in cases of wrongful conviction.

D. Constitutional Court Act

43. Section 64 § 1 (11) of the Act of 1 July 2006 provides that a decision of the Constitutional Court must indicate that it enters into legal force from the moment of its delivery or fix a deadline by which a provision, found to be incompatible with the Constitution, loses its force.

E. Advocacy Act

44. Section 6 provides that an advocate is entitled to receive remuneration for his services. The amount and mode of payment for legal services are decided by a written contract concluded between the advocate and the client in accordance with the Civil Code. The State guarantees free legal assistance in criminal cases in cases and in accordance with a procedure prescribed by the Code of Criminal Procedure (see paragraphs 30 and 33 above), as well as in accordance with a procedure prescribed by the Code of Civil Procedure in the following cases: (1) recovery of alimony payments; and (2) infliction of damage to health or compensation for damage caused as a result of the breadwinner's death. The Chamber of Advocates ensures free legal assistance, which is paid by the State. Free legal assistance may be provided also upon the initiative of an advocate.

45. Section 29.1 provided at the material time that an advocate was granted a special licence in order to carry out legal services in the Court of Cassation in cases and according to a procedure prescribed by law.

F. Regulations on healthcare and emergency medical assistance

46. Article 2 of the Law of 4 March 1996 on medical assistance and benefits for the population ("the Law") provides for two types of medical assistance: primary and specialist. According to Article 2 (a), primary medical assistance is ensured to every person by the State free of charge.

47. Article 6 of the Law states that every person has the right to receive compensation for damage caused to his health during the organisation and provision of medical assistance, in accordance with the procedure prescribed by the legislation of the Republic of Armenia.

48. At the relevant time the provision of emergency medical assistance was regulated by the Standard on Organisation of Publicly Funded Emergency Care as adopted by Order no. 1529-A of 27 December 2006 of the Minister of Health. The standard stated, in particular, that the State ensured the provision of publicly funded emergency medical assistance and hospitalisation for the entire population of the country. The main tasks of the emergency medical service department included − within thirty minutes of receiving a call − the provision of urgent medical assistance both at the scene of the occurrence and during transfer of the patient to a medical institution, which should occur as soon as possible.

G. The decision of the Constitutional Court of 8 October 2008 on the compatibility of, *inter alia*, Article 404 § 1 (1) of the Code of Criminal Procedure with the Constitution, adopted on the basis of applications lodged by a number of individuals

49. The Constitutional Court found, *inter alia*, Article 404 § 1 (1) of the Code of Criminal Procedure and Section 29.1 of the Advocacy Act incompatible with Articles 18 and 19 of the Constitution as they disproportionately restricted access to the Court of Cassation by making the possibility of obtaining judicial protection of rights conditional on an appellant's financial means. The Constitutional Court abolished the institute of advocates holding a special license to act before the Court of Cassation by finding unconstitutional the relevant provisions but fixed a deadline of 31 December 2008 by which such provisions would lose their force. The amendments to the Code of Criminal Procedure definitively abolishing that requirement, enacted on the basis of the Constitutional Court's decision, entered into force on 1 January 2009.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

50. The applicant complained that the authorities had failed to conduct an effective investigation into his daughter's death. He relied on Articles 6, 7, 13 and 17 of the Convention. The Court considers that this complaint falls to be examined under the procedural limb of Article 2 of the Convention, the relevant part of which is worded as follows:

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

A. Admissibility

1. The parties' arguments

51. The Government submitted that the applicant had failed to exhaust the domestic remedies available to him since he had breached the procedural rules by lodging an appeal on points of law himself, directly with the Court of Cassation, in violation of the requirements of Article 404 § 1 (1) of the Code of Criminal Procedure. As regards the applicant's allegation that he could not afford the services of an advocate licensed to act before the Court of Cassation, he had not shown that he had ever applied to such a licensed advocate or that his request for the lodging of an appeal on points of law had been refused because of his inability to pay the fee. The

Government also pointed out that there was a possibility for the applicant to receive free legal assistance at the behest of an advocate. However, the applicant had not produced any evidence that he had sought such *pro bono* legal services and that his attempts had proved unsuccessful.

52. The applicant argued that licensed advocates were entitled to provide *pro bono* legal assistance but were not obliged to do so. He further submitted that it was established practice that legal aid was available only in relation to civil proceedings concerning alimony payments, infliction of damage to health, or the loss of a breadwinner. Moreover, his case involved complex issues and his representation would therefore require substantial legal fees, which he was unable to afford.

2. The Court's assessment

53. The Court reiterates that applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (see, among other authorities, *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)).

54. The Court notes that at the material time the applicant was entitled to lodge an appeal on points of law with the Court of Cassation only through an advocate holding a special license to act before that court. The applicant, however, lodged his appeal on points of law in person, alleging that he had no means to pay for the services of such an advocate.

55. The Court notes that it has already examined this issue in relation to civil cases and found that, in the absence of a possibility to apply for legal aid, the requirement that appeals on points of law may be lodged by advocates holding a special license to act before the Court of Cassation placed a disproportionate restriction on the applicant's effective access to that court, since it made the applicant's access to that court conditional on her financial situation (see *Shamoyan v. Armenia*, no. 18499/08, §§ 32-39, 7 July 2015). The applicant in the present case similarly claimed that he was not able to afford the services of a specially licensed advocate and the Court has no reason doubt it. The Court further notes that, while the present case does not concern a civil case like in the case of *Shamoyan*, the applicant was nevertheless not entitled to apply for legal aid, such possibility having been reserved only for suspects or accused in criminal cases (see paragraphs 30, 33 and 44 above). The Government did not allege that the applicant was eligible for legal aid either, but argued that he should have nevertheless tried to apply to a specially licensed advocate and sought *pro bono* legal services. However, an identical argument was already examined and dismissed in the case of *Shamoyan* (see *Shamoyan*, cited above, § 33). In the present case, the Government similarly failed to provide any concrete examples or

evidence of cases where specially licensed advocates had agreed to provide *pro bono* legal services to persons willing to lodge an appeal on points of law. This argument therefore is speculative and must be similarly dismissed. It therefore appears that an appeal on points of law to the Court of Cassation was not an accessible remedy at the material time.

56. The Court considers that a question arises in such circumstances as to whether the applicant should have used that remedy. It reiterates in this respect, however, the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism, making due allowance for the fact that it is being applied in the context of machinery for the protection of human rights (see, among other authorities, *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 224, ECHR 2014 (extracts)). The Court notes that, shortly after the applicant lodged his appeal on points of law, the Constitutional Court declared unconstitutional the provision which required him to use the services of a specially licensed advocate, namely Article 404 § 1 (1) of the Code of Criminal Procedure, abolishing that requirement, since it disproportionately restricted access to the Court of Cassation (see paragraph 49 above). It is true that, according to the same decision, Article 404 § 1 (1) remained in force and hence applicable until 31 December 2008. Nevertheless, the domestic law allowed the courts to suspend proceedings if they found that an applicable provision was incompatible with the Constitution (see paragraph 32 above). However, the Court of Cassation appears to have shown excessive formalism by not applying this rule and deciding instead to refuse the examination of the applicant's appeal on points of law.

57. In such circumstances, the Court does not consider the applicant's complaint under Article 2 of the Convention to be incompatible with the requirements of Article 35 § 1 of the Convention and decides to dismiss the Government's objection.

58. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

59. The applicant submitted that the authorities had failed to conduct an effective investigation into his daughter's death. He argued, in particular, that the investigating authority had neither included nor addressed the evidentiary material submitted by him in the case file. Furthermore, the investigator decided that it was not necessary to institute criminal proceedings − despite the fact that the emergency doctor and the nurse had

given contradictory statements − notwithstanding the evidence that the doctor had falsified documents. Also, the ambulance doctor and the nurse had not been questioned by the courts. In conclusion, the applicant maintained that the State had failed to put in place an effective judicial system, capable of holding accountable those responsible for his daughter's death.

60. The Government argued that the authorities had complied with their positive obligation. In particular, an autopsy and a forensic medical examination had been ordered and statements had been taken from the ambulance crew, including the emergency doctor and the nurse. Furthermore, an additional forensic medical examination had been ordered after the District Prosecutor's Office quashed the investigator's decision of 27 February 2008 by which the institution of criminal proceedings had been refused. The result of all the measures undertaken was that no direct causal link was established between the actions of the ambulance crew and the death of the applicant's daughter. In the absence of an established criminal act, there could be no possibility of redress for the applicant either within the framework of the criminal proceedings via a civil claim or in separate civil proceedings. The Government pointed to the fact that the ambulance doctor had been reprimanded for serious breach of work regulations and medical ethics in relation to the medical assistance provided to the applicant's daughter.

2. The Court's assessment

61. The Court reiterates that the procedural obligation under Article 2 requires 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 held accountable (see, among other authorities, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). This procedural obligation is not an obligation as to result but as to means only (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

62. Even if the Convention does not as such guarantee the right to have criminal proceedings instituted against third parties, the Court has said on a number of occasions 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 positive 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. In the specific sphere of medical negligence the obligation may, for instance, also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability on

the part of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and the publication of the decision, to be obtained. Disciplinary measures may also be imposed (see *Calvelli and Ciglio*, cited above, § 51, and *Z v. Poland*, no. 46132/08, § 94, 13 November 2012).

63. Turning to the facts of the present case, the Court observes that on the evening of 7 September 2007 the applicant's daughter, K.M., who was about five weeks pregnant, felt unwell and started to have convulsions. An ambulance was called; she was diagnosed with convulsion syndrome, given two injections and transferred to hospital, where she died on 14 September 2007. She never regained consciousness. The applicant did not allege or imply that his daughter had not received requisite medical treatment after being transferred to hospital. However, he alleged that the emergency doctor and the nurse had failed to undertake the necessary measures to provide first aid to his daughter and had moreover injected substances which were contra-indicated given her pregnancy, breathing problems and low blood pressure.

64. The Court notes at the outset that it is not its function under Article 2 of the Convention to scrutinise the doctors' assessment of K.M.'s condition, nor their decisions regarding her treatment, including their choice of medication against the background of the deceased's state of health at the time.

65. However, the events leading to the death of the applicant's daughter and the alleged responsibility of the health professionals involved are matters which must also be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events, allowing the facts of the case to be exposed to public scrutiny – not least for the benefit of the applicant (see *Powell v. the United Kingdom*, cited above). The Court must examine, therefore, whether or not an issue of State responsibility under Article 2 of the Convention may arise in respect of the alleged inability of the legal system to establish accountability for negligent acts that had led to the death of the applicant's daughter. It must examine whether the available legal remedies, taken together, could be said to have provided legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see *Dodov v. Bulgaria*, no. 59548/00, §§ 79-98, 17 January 2008, and *Byrzykowski v. Poland*, no. 11562/05, §§ 104-118, 27 June 2006)

66. The Court notes at the outset that no criminal proceedings as such were instituted in relation to the death of the applicant's daughter but rather, on the day that K.M. died, the District Prosecutor's Office launched an inquiry into her death during which an autopsy was ordered and the medical personnel involved in K.M.'s treatment were interviewed. The Court observes in this regard that in the absence of formally instituted criminal proceedings the persons interviewed, including the emergency doctor and

the nurse, were simply asked to give their account of the events. Moreover, even though the accounts of the events given by the emergency doctor and the nurse contradicted each other with regard to the type and amount of medical substances injected, the investigator did not make a serious attempt to clarify the discrepancies between their initial statements (see paragraphs 12 and 13 above). The Court further observes that none of the medical practitioners questioned during the inquiry was later called to testify under oath in court − despite the applicant's specific request in that regard − which could have allowed the credibility of their statements to be checked. It is noteworthy that both the investigating authorities and the courts relied on the above statements of the members of the medical personnel in their decisions (see paragraphs 20 and 26 above).

67. The Court also notes the failure of the investigating authority to secure the applicant's genuine participation in the inquiry. Since no criminal proceedings were instituted, the applicant did not have the official status of a victim in the proceedings, which would have allowed him to exercise the rights inherent in that status such as, for instance, submitting documents or other materials to be included in the case file or putting questions to experts. In fact, on several occasions the applicant submitted copies of relevant medical instructions and excerpts from medical literature to the investigating authority and referred to them later in court, but his arguments were never addressed. Moreover, despite the fact that the applicant's participation in the additional forensic investigation was eventually allowed by the District Prosecutor's decision of 3 March 2008, it appears that his participation was a pure formality since his arguments, supported by relevant documentary evidence, were not addressed by the panel of experts in their conclusions (see paragraphs 16 and 22 above). Therefore, it cannot be considered that the applicant, given his close interest and personal concern about the subject matter of the inquiry, was involved in the procedure to the extent necessary to safeguard his interests.

68. The Court further notes that neither the autopsy nor the subsequent forensic medical investigations conclusively determined the cause of the death of the applicant's daughter. Thus, according to the autopsy report, she had died from general intoxication of the organism caused by an impairment of vital brain function as a result of extensive and diffuse thrombosis of neuro-vessels. Two further forensic medical investigations were ordered – one during the initial inquiry, which resulted in forensic medical opinion no. 89, and one during the additional inquiry following the prosecutor's decision of 3 March 2008, which resulted in forensic medical opinion no. 6. Although the Court was not provided with a full and accurate copy of forensic medical opinion no. 89 by the respondent Government, according to the available material this opinion stated that K.M.'s medical treatment had been correct and symptom-based. It does not appear, however, that this forensic medical opinion established the cause of the general intoxication of

the organism brought about by an impairment of vital brain function as a result of extensive and diffuse thrombosis of neuro-vessels which was believed to have caused K.M.'s death. Furthermore, forensic medical opinion no. 6 likewise failed to definitively determine exactly what had caused the thrombosis of K.M.'s neuro-vessels which brought about the impairment of vital brain function that resulted in the general intoxication of the body. At the same time, this opinion stated that it did not appear that K.M. was suffering from any congenital disorder which could possibly be linked to her death, and that in the absence of relevant medical documentation it had not been possible to determine whether she was suffering from any functional disorder which could have caused the convulsion syndrome (see paragraph 19 above). The Court observes in this regard that the investigating authority and the courts did not institute any attempts to elucidate the reasons for the deceased's critical condition which resulted in her death and found it sufficient to refer, without further reasoning, to the conclusions of forensic experts which, as already noted, merely confirmed the eventual cause of death as established by the autopsy but did not provide any explanation of why the condition had arisen in the first place. The Court further observes that the applicant and other relatives of the deceased were never questioned, either during the inquiry or the court proceedings, with a view to clarifying whether she had previously suffered from any disorders that could possibly have resulted in extensive and diffuse thrombosis of neuro-vessels. In such circumstances, the Court finds that the authorities may not be regarded as having acted with sufficient diligence and care in order to establish the cause of the death of the applicant's daughter.

69. The Court lastly notes that it was established in the course of the inquiry that the ambulance crew had not provided proper medical assistance to the applicant's daughter. It is surprising, however, that this fact was not mentioned at all or taken into consideration in the investigator's decision refusing the institution of criminal proceedings. Moreover, this decision, which was later endorsed by the courts, found that K.M. had been provided with proper first aid assistance, whereas at the same time the doctor was reprimanded for poor performance of her duties following the request by the investigator. In such circumstances, it appears that the investigating authority reached inaccurate findings as regards the adequacy of emergency assistance provided to the applicant's daughter and that the courts simply endorsed these findings without further considering whether the poor performance of the ambulance crew had any crucial negative effect on the deceased's condition (see paragraphs 20, 21, 23 and 24 above).

70. In these circumstances, the Court considers that the criminal-law remedy did not result in the determination of the cause of death of the applicant's daughter and the accountability of those responsible. The Court

must examine, therefore, whether the respondent State made available other legal remedies that satisfied the relevant Convention requirements.

71. The Court notes that A.G. was reprimanded by the administration of the Emergency Medical Service for poor performance of her duties as an ambulance doctor (see paragraph 23 above). It observes, however, that the disciplinary penalty imposed on A.G. concerned breach of internal work regulations and medical ethics and did not as such establish her responsibility for the alleged medical malpractice. Therefore, it does not appear, and it has not been so argued by the Government, that the disciplinary penalty imposed on A.G. by her employer − not a professional body having the relevant authority to examine cases of medical malpractice − provided appropriate redress to the applicant by conferring on him a right to claim any type of compensation for the loss of his daughter.

72. The Court observes that at the relevant time it was not open to the applicant to bring a civil action against the State seeking compensation for non-pecuniary damage suffered as a result of the death of his daughter because non-pecuniary damage was not considered as a type of damage that could be claimed in civil proceedings (see paragraphs 39 and 42 above) until the amendments to the Civil Code introduced in 2014. As regards the possibility of claiming compensation in respect of pecuniary damage, the Government claimed that such a possibility depended on the outcome of the criminal proceedings (see paragraph 60 above).

73. The Court reiterates in this respect that in cases involving a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage resulting from the breach should, in principle, be available as part of the range of redress (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 97, ECHR 2002-II, and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V).

74. In circumstances where the applicant had no possibility of claiming compensation in respect of non-pecuniary damage, while the possibility of obtaining compensation for pecuniary damage, as claimed by the Government, was dependent on the results of the criminal proceedings (see, *mutatis mutandis*, *Byrzykowski*, cited above, §§ 112-116) the Court considers that the civil remedies were not capable of bringing about the result sought by Article 2 of the Convention, that is to say establishing the circumstances surrounding the death of the applicant's daughter and holding those responsible to account.

75. There has accordingly been a violation of the procedural obligation of Article 2 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

76. The applicant relied on Articles 6, 7, 13 and 17 of the Convention to complain that he had been denied access to the Court of Cassation because his appeal on points of law had been turned down as not having been lodged by an advocate licensed to act before the Court of Cassation, the services of whom he could not afford.

77. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

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

A. Damage

79. The applicant claimed 8,000 euros (EUR) by way of compensation in respect of pecuniary damage, including expenses for funeral services and the installation of a gravestone. He also claimed EUR 15,000 to 20,000 in respect of non-pecuniary damage suffered by him and his wife as a result of the loss of their daughter.

80. The Government argued that the amount claimed in respect of pecuniary damage was not supported by any evidence and that the amount of compensation claimed in respect of non-pecuniary damage was excessive. The Government further submitted that the applicant had also claimed compensation for non-pecuniary damage allegedly suffered by his wife, who was not a party to the proceedings before the Court.

81. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. The applicant did not claim any costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, by majority, the complaint concerning the lack of an effective investigation into the applicant's daughter's death admissible;

2. *Declares*, unanimously, the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been a procedural violation of Article 2 of the Convention;

4. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros), to be converted into Armenian drams at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage.
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Wojtyczek and Eicke is annexed to this judgment.

L.-A.S.
A.C.

JOINT PARTLY DISSENTING OPINION OF JUDGES WOJTYCZEK AND EICKE

1. In the instant case, we agree with the majority that the Respondent State failed to observe its procedural obligations under Article 2 of the Convention; however, we do not share the view that the application was admissible.

2. It seems to us that there is a contradiction in the reasoning in respect of the exhaustion of remedies. On one hand, the majority states in paragraph 55 *in fine*: "It therefore appears that an appeal on points of law to the Court of Cassation was not an accessible remedy at the material time." On the other hand, in paragraph 56 the majority states as follows: "the Court of Cassation appears to have shown excessive formalism by not applying this rule [allowing the courts to suspend proceedings if they found that an applicable provision was incompatible with the Constitution] and deciding instead to refuse the examination of the applicant's appeal on points of law". The second assumption necessarily implies that the remedy was not ineffective and, if properly applied, could have been effective.

3. If the first assumption is correct and the cassation appeal was not an accessible remedy at the time when the application was lodged (as the majority considers this Court to have concluded in *Shamoyan v. Armenia*, no. 18499/08, § 33, 7 July 2015), then the applicant should not have pursued an ineffective remedy (see, for instance, the inadmissibility decisions in the cases of *Glinski v. Poland*, no. 21062/05, and *Fernie v. the United Kingdom*, no. 14881/04). In consequence, the deadline for lodging the application with the European Court of Human Rights falls to be counted from the day on which the decision of Criminal Court of Appeal was served on the applicant.

On 4 September 2008 the Criminal Court of Appeal dismissed the applicant's appeal and on 30 September 2008 the applicant lodged a cassation appeal with the Court of Cassation. Assuming that the judgment of the Criminal Court of Appeal was served on the applicant on 30 September at the latest, the applicant should have lodged the application by 30 March 2009 at the latest. As the application was not, however, lodged until 22 April 2009, it should have been declared inadmissible as out of time.

4. By contrast, if the second assumption is correct and the Court of Cassation could have examined the cassation appeal in spite of the fact that it was not introduced by a licensed lawyer, it appears to us that, on the available evidence, the applicant has failed to exhaust that remedy effectively. After all, despite the existence of the above rule, confirmed by the Constitutional Court's judgment of 8 October 2008 declaring Article 404 § 1 (1) of the Code of Criminal Procedure and section 29.1 of the Advocacy Act incompatible with Articles 18 and 19 of the Constitution

in that they disproportionately restricted access to the Court of Cassation (see paragraph 49 of the present judgment), it appears that the applicant not only failed to invite the Court of Cassation to suspend or adjourn the proceedings in his case in view of the apparent incompatibility with the Constitution, until such time as that incompatibility had been remedied or the deadline set by the Constitutional Court (31 December 2008) had expired, but he also, more generally, failed to invite the Court of Cassation to take his financial situation into account. We note in this context that the Court of Cassation's decision in the applicant's case was not taken until 30 October 2008, that is, some three weeks after the Constitutional Court's judgment and two months before the expiry of the deadline set by the Constitutional Court.

5. In any event, the ineffectiveness (if any) of the remedy in question, as established by the majority, was not absolute but relative, given that its accessibility depended upon the applicant's ability to bear the costs of the fees charged by licensed lawyers. The applicant asserts that he was unable to pay the fee likely to be charged by a licensed lawyer. We are very sensitive to this argument. Access to court should never be blocked by excessive financial burdens and any such allegation deserves the Court's careful attention.

In the instant case, however, the applicant's assertion that the financial burden placed on him was excessive has not been sufficiently substantiated. On this point the reasoning remains completely unpersuasive, in that it appears that the majority accepted the applicant's allegations about his inability to pay the lawyer's fees without seeking to assess his real situation. After all, we have no information about either the applicant's financial situation or the fees he would have been charged in order to lodge his appeal with the Court of Cassation. Moreover, there is no evidence that, despite the apparently clear statutory requirement, the applicant ever approached a licensed lawyer to enquire about the likely costs of lodging such an appeal.

6. Concerning the question of compensation, Judge Wojtyczek voted against awarding to the applicant the amount of 14,000 euros in respect of non-pecuniary damage. Taking into account the amount of compensation awarded in similar cases, he found the amount awarded to the applicant excessive. Judge Eicke agreed with the majority on this issue.