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

FIRST SECTION

DECISION

Application no. 3048/14
Jozo and Jagoda EZGETA
against Croatia

The European Court of Human Rights (First Section), sitting on 12 December 2017 as a Committee composed of:

Kristina Pardalos, *President,*
Ksenija Turković,
Pauliine Koskelo, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 December 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Jozo Ezgeta and Ms Jagoda Ezgeta, are Croatian nationals, who were born in 1955 and 1970 respectively and live in Zagreb. They were represented before the Court by Ms M.H. Kordek, a lawyer practising in Sesvete.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

1. Background to the case

4. The applicants are husband and wife.

5. On 13 October 2008 the second applicant gave birth to a son.

6. Due to the child's weak medical condition the second applicant went to see a paediatrician, M.J., on 2 March 2009. The paediatrician examined the child and identified an irregular heartbeat. He instructed the second applicant to seek urgent medical help in the Zagreb Clinic for Child Diseases (*Klinika za dječje bolesti Zagreb*; hereinafter: "the Clinic").

7. On the same day, upon admission to the Clinic, the child died.

8. After the death of the applicants' son, an autopsy was performed by a pathologist, S.S. He found that the child had been suffering from a rare heart malformation.

9. On 17 July 2009 the applicants complained to the Ministry of Health (*Ministarstvo zdravstva i socijalne skrbi*; hereinafter: "the Ministry") of medical malpractice in the postnatal treatment of their child in the Zagreb Clinical Hospital Centre Department of Obstetrics and Gynaecology (*Klinika za ženske bolesti i porode*; hereinafter: "the hospital"), where the child was born, as well as by the paediatrician, M.J., and the Clinic.

10. The Ministry conducted an internal inquiry, which resulted in two reports by an expert commission dated 16 and 28 September 2009. The reports found that: (1) there had been irregularities in the postnatal treatment of the indications of the child's heart problems in the Clinic; (2) there had been no failures in the child's treatment by the paediatrician, M.J.; however, he had failed to properly administer the medical records; (3) the treatment in the hospital had been adequate; and (4) the autopsy report was incomplete; however, after receiving further documents, the commission found that the child had been suffering from a heart malformation.

11. The reports were forwarded to the State Attorney's Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*) on 30 September 2009 and to the competent disciplinary bodies of the Croatian Medical Chamber (*Hrvatska liječnička komora*) on 19 October 2009.

12. On 16 March 2010 the Croatian Medical Chamber informed the Ministry and the applicants that it had found no reason to institute disciplinary proceedings against E.J., who had been in charge of the child's postnatal treatment in the Clinic.

2. The criminal remedies

13. In connection with the information received from the Ministry, the Zagreb Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Zagrebu*) instructed the police to conduct a preliminary investigation into the allegations of medical malpractice in the postnatal treatment of the applicants' child.

14. On the basis of the results of the police investigation, the relevant proceedings continued as indicated below.

(a) Criminal proceedings against the paediatrician M.J. and the pathologist S.S.

15. On 30 June 2011 the Zagreb Municipal State Attorney's Office rejected complaints lodged by the applicants against the paediatrician, M.J., on charges of medical negligence and against the pathologist, S.S., on charges of professional malpractice and forgery of documents. It instructed the applicants that they could take over the prosecution as subsidiary prosecutors by filing an indictment with the competent criminal court.

16. On 19 July 2011 the applicants filed an indictment with the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*) against M.J. on charges of medical negligence and against S.S. on charges of professional misconduct and forgery of documents.

17. On 7 December 2011 the Zagreb Municipal Criminal Court forwarded the part of the case concerning M.J. to an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) for further investigation.

18. The part of the case concerning the charges against S.S. was separated. On 31 March 2014 the Zagreb Municipal Criminal Court acquitted S.S. That decision was upheld on appeal by the relevant appeal court, and subsequently by the Constitutional Court (*Ustavni sud Republike Hrvatske*).

19. Meanwhile, on 3 April 2013 in the criminal case against M.J., the investigating judge forwarded the case file to a three-judge panel of the Zagreb County Court, indicating that he had found no reasonable grounds for suspicion warranting the opening of an investigation against M.J. because neither of the expert reports suggested that any medical malpractice had occurred in the treatment of the applicants' child. The judge relied on the Ministry's expert report (see paragraph 10 above) and a report produced by another expert, V.A (see paragraph 27 below).

20. On 3 April 2013 a three-judge panel of the Zagreb County Court dismissed the request to open an investigation against M.J., endorsing the findings of the investigating judge.

21. The applicants appealed against that judgment to the Supreme Court (*Vrhovni sud Republike Hrvatske*), arguing, *inter alia*, that the investigating judge had not examined all the available evidence and that the expert reports relied upon were deficient.

22. On 5 June 2013 the Supreme Court dismissed the applicants' appeal as unfounded, endorsing the reasoning of the Zagreb County Court.

23. The applicants then reiterated their above-mentioned complaints before the Constitutional Court. On 24 October 2013 the Constitutional Court declared their constitutional complaint inadmissible on the grounds

that a constitutional complaint could not be lodged against the impugned decision.

24. The decision of the Constitutional Court was served on the applicants on 15 November 2013.

(b) Criminal proceedings against the hospital's medical staff, E.J., V.V. and N.P.M.

25. On 18 August 2010 the Zagreb Municipal State Attorney's Office asked an investigating judge of the Zagreb County Court to open an investigation in respect of three doctors, E.J., V.V. and N.P.M., medical staff at the hospital, on suspicion of medical negligence concerning the death of the applicants' son.

26. After having heard the suspects, the investigating judge opened an investigation on 25 October 2010.

27. During the investigation the applicants gave their evidence to the investigating judge and the judge obtained two expert reports. One was produced by Z.Z., who had taken part in the Ministry's expert commission that had produced the reports of 16 and 28 September 2009 (see paragraph 10 above). Z.Z. reiterated what she had stated in the context of the Ministry's report. The other expert report was obtained from V.A., who did not find any irregularities in the child's postnatal treatment in the hospital.

28. On 30 June 2011 the Zagreb Municipal State Attorney's Office, relying on V.A.'s expert report, asked the investigating judge to discontinue the proceedings on the grounds that the expert had not found any irregularities in the medical treatment of the applicants' son by the defendants.

29. The investigating judge accepted the request and discontinued the investigation on 4 October 2011. She also informed the applicants that they could take over the prosecution as subsidiary prosecutors by filing an indictment with the competent criminal court.

30. On 17 October 2011 the applicants filed an indictment with the Zagreb Municipal Criminal Court against the doctors, E.J., V.V. and N.P.M. on charges of medical negligence.

31. On 17 February 2012, following the applicants' complaints to the State Attorney's Office of the Republic of Croatia, the Zagreb Municipal State Attorney's Office informed the Zagreb Municipal Criminal Court that it wished to participate in the proceedings by taking over the prosecution from the applicants.

32. In the meantime, the Zagreb Municipal Criminal Court instructed the applicants to make the necessary corrections in the indictment, with which they complied. The Zagreb Municipal Criminal Court also obtained further documents concerning the case and forwarded the indictment to the accused, allowing them to lodge their objections against it.

33. In the period between August 2013 and April 2014 the accused lodged objections against the indictment. The objections were dismissed and the indictment confirmed by a decision of a three-judge panel of the Zagreb Municipal Criminal Court of 15 May 2014.

34. At a hearing on 4 September 2014 the applicants' representative asked that an expert report concerning the medical treatment of the applicants' child be commissioned from a university from abroad. She explained that the experts from universities in Croatia had been excluded from the proceedings before the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*).

35. After enquiring into the possibility of obtaining an expert report from the Sarajevo University School of Medicine (Bosnia and Herzegovina), on 13 April 2015 an expert report was commissioned from that university.

36. The Sarajevo University School of Medicine produced a report on 29 February 2016. It found no failures in the postnatal treatment of the applicants' child.

37. In the further course of the proceedings, the experts were cross-examined by the parties, and the trial court examined the material evidence and heard the parties' closing arguments.

38. On 22 December 2016 the Zagreb Municipal Criminal Court acquitted the accused of the charges of medical negligence. The judgment was served on the applicants on 20 February 2017.

39. The applicant appealed against the first-instance judgment and the proceedings are still pending.

3. The civil proceedings

40. On 31 May 2010 the applicants lodged a civil action in the Zagreb Municipal Civil Court against the hospital and the paediatrician, M.J., seeking damages in connection with medical negligence in the postnatal treatment of their child.

41. In the course of the proceedings, the trial court heard the parties and several witnesses. It also ordered an expert report from the Zagreb University School of Medicine, which declined the assignment because it had an institutional relationship with the defendant hospital. The report was then ordered from the Split University School of Medicine, but it declined the assignment due to lack of an appropriate expert for the matter. The trial court then ordered an expert report from the Rijeka University School of Medicine, but it declined on the grounds that its experts had taken part in the work of the Ministry's commission (see paragraph 10 above).

42. In 2015 an expert report was eventually commissioned from the Ljubljana University School of Medicine (Slovenia) after the applicants, as plaintiffs, had had the relevant files translated into the Slovenian language and paid the costs for the commissioning of the report.

43. On 28 May 2015 the Ljubljana University School of Medicine produced a report indicating failures in the child's postnatal treatment. The applicants, as plaintiffs, were required to have the report translated and the trial court allowed the parties to exchange views on the findings of the report. The court also forwarded the parties' observations to the experts and obtained further submissions from them.

44. At a hearing on 12 July 2016 the experts were questioned by the trial court and the parties.

45. In the further course of the proceedings, the applicants requested that a further expert report be commissioned from the Graz University School of Medicine (Austria).

46. A further hearing was held in December 2016 at which the trial court heard the applicants. It also requested further documents concerning the medical treatment of the applicant's son.

47. The civil proceedings are still pending.

4. Other proceedings instituted by the applicants

48. In 2012 the applicants lodged a number of criminal complaints against several other individuals employed in the hospital. The criminal complaints were rejected by the relevant State Attorney's Office in September 2012 and March 2013. The applicants exercised their right to take over the prosecution as subsidiary prosecutors and the proceedings are pending before the relevant courts.

49. The applicants also lodged a criminal complaint against the expert, V.A. (see paragraph 27 above), and against an expert who had produced a report in the criminal proceedings against the pathologist (see paragraph 18 above) for perjury. The criminal complaint was rejected by the relevant State Attorney's Office in August 2013.

50. On 25 February 2011 the applicants filed an indictment against M.J. in the Zagreb Minor Offences Court (*Prekršajni sud u Zagrebu*) on charges of failure to administer properly the relevant medical records concerning the treatment of their son. On 2 November 2012 the Zagreb Minor Offences Court found M.J. guilty and fined him. This judgment was upheld by the High Minor Offences Court (*Visoki prekršajni sud Republike Hrvatske*) on 23 January 2013.

51. The applicants also filed indictments against the hospital and several medical staff with the Zagreb Minor Offences Court on charges of failure to administer properly the relevant medical records. These proceedings were discontinued as the statutory prescription period had expired.

B. Relevant domestic law and practice

52. The relevant domestic law and practice concerning medical negligence is set out in the case of *Jurica v. Croatia* (no. 30376/13, §§ 45-60, 2 May 2017, with further references).

53. Further amendments were made to the general provisions on civil responsibility under the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette nos. 35/2005 and 41/2008), and read as follows:

Section 1045

"(1) Anyone who causes damage to another shall be liable to pay compensation unless he or she proves that the damage occurred through no fault of his or her own.

..."

Section 1046

"Damage is the diminution of one's property ([in the form of] actual damage) or the prevention of its increase ([in the form of] lost profits), as well as the infringement of one's right to personal integrity (non-pecuniary damage)."

COMPLAINTS

54. The applicants complained, under Articles 2 and 13 of the Convention, of a lack of an effective domestic procedure concerning the death of their son, allegedly caused by medical negligence.

THE LAW

55. Complaining of lack of an effective domestic procedure concerning the death of their son, allegedly caused by medical negligence, the applicants relied on Articles 2 and 13 of the Convention, which, in so far as relevant read as follows:

Article 2

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority

notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' arguments

56. The Government submitted that the domestic legal system provided effective criminal and civil remedies concerning cases of medical negligence. They thus considered that the applicants had been required to allow the domestic authorities to examine the substance of their allegations of medical negligence before bringing their case to the Court. However, the applicants had lodged their application with the Court before the final determination of the relevant criminal case against the hospital's doctors and before the conclusion of their civil case against the hospital and the paediatrician. Accordingly, in the Government's view, their application to the Court was premature. With regard to the criminal proceedings against the paediatrician, the Government considered that those proceedings had been effectively conducted and had not disclosed any medical malpractice on his part. The applicants had therefore no reason to consider that those proceedings should be considered relevant for the calculation of the time-limit for lodging their application with the Court. In this connection, the Government also argued that there had been no reason for the applicants to lodge a constitutional complaint concerning the proceedings against the paediatrician. By availing themselves of that remedy, they had failed to comply with the six-month time-limit for bringing their case to the Court. Lastly, the Government stressed that the case concerning the death of the applicants' son had been very complex and that the relevant pending domestic criminal and civil proceedings had so far been effectively conducted.

57. The applicants argued that the domestic authorities had not properly instituted and conducted the criminal proceedings concerning the death of their son. In their view, the criminal proceedings against the paediatrician had been ineffective and the outcome had been based on deficient expert reports. The failures in those proceedings had thus created adverse effects on the other proceedings instituted, which could no longer be remedied at the domestic level. They had therefore lodged their complaint with the Court so as to comply with the requirements of the six-month time-limit. In this connection, the applicants stressed that their application had complied with the six-month time-limit irrespective of whether the date of receipt of the Supreme Court's or the Constitutional Court's decisions was taken into account in the calculation. Lastly, the applicants argued that the domestic system, taken as a whole, had failed to secure the effective obtaining of expert reports concerning their allegations of medical malpractice in the postnatal treatment of their son. They also contended that the inadequate conclusions of the domestic authorities in the cases which they had brought

had been a result of inertia and failure to apply a logical, valid and lawful approach to the relevant legal issues arising in those cases.

B. The Court's assessment

58. The Court finds it unnecessary to address all of the Government's objections, as the complaints are in any event inadmissible for the following reasons.

59. The Court refers to the general principles on the requirement of exhaustion of domestic remedies set out in the case of *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

60. The Court reiterates that in cases of medical negligence concerning unintentional deprivation of life, an effective procedural response may 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/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Šilih v. Slovenia* [GC], no. 71463/01, § 194, 9 April 2009, with further references).

61. Accordingly, when an applicant has had recourse to several such procedural avenues available in the domestic order, the Court must examine 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 secure accountability for negligent acts that had led to death. It must 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, for instance, *Dodov v. Bulgaria*, no. 59548/00, § 83, 17 January 2008, and *Eugenia Lazăr v. Romania*, no. 32146/05, § 72, 16 February 2010).

62. The Court has already found that the Croatian legal system provided for a possibility of seeking accountability for medical negligence through criminal, disciplinary and civil proceedings (see *Bajić v. Croatia*, no. 41108/10, § 81, 13 November 2012, and *Jurica*, cited above, § 97). It also notes that the applicants have availed themselves of the criminal and civil remedies by instituting a number of sets of proceedings at the domestic level.

63. However, only the criminal proceedings against the paediatrician, M.J., have come to an end (see paragraph 23 above). At present, the two principal sets of proceedings, namely the criminal proceedings against the hospital's medical staff who had participated in the postnatal treatment of the applicants' son and the civil proceedings against the hospital and the

paediatrician, are still pending at different levels of national jurisdiction (see paragraphs 39, 46-47 above).

64. The Court has to assess whether the respondent State 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, for instance, *Kaya and Others v. Turkey* (dec.), no. 73296/01, 4 October 2005). In these circumstances, the Court considers that the outcome of the criminal proceedings against the paediatrician M.J., particularly in view of the pending civil proceedings against him, cannot be viewed in isolation from the other pending proceedings.

65. Accordingly, given the present stage of the relevant criminal and civil proceedings at the domestic level, an examination of the effectiveness of the domestic system for the applicants' allegations of medical negligence would be premature (see, for instance, *Öz v. Turkey* (dec.), no. 31214/09, 4 September 2012).

66. Having said that, the Court is mindful of the length of the relevant criminal and civil proceedings at the domestic level. However, it would stress that the length of proceedings, in the context of the State's procedural obligation concerning medical negligence must be viewed against the particular circumstances of the case, taken as a whole (see, for instance, *Jurica*, cited above, § 97). It therefore finds, given the complexity of the case and the current stage of the domestic proceedings, that it would be premature to draw any firm conclusions from this perspective as to the effectiveness of the domestic system for the applicants' allegations of medical negligence.

67. The Court would also stress that it remains open for the applicants, following the termination of the relevant proceedings instituted by them at the domestic level, and the exhaustion of the domestic remedies in this respect (see, in particular, *Pavlović and Others v. Croatia*, no. 13274/11, § 32, 2 April 2015), or if the proceedings continue to be unreasonably protracted by the domestic authorities, to bring their complaints before the Court if they still consider themselves to be victims of a violation of Article 2 of the Convention.

68. Against the above background, the Court finds that the applicants' complaint under Article 2 of the Convention is premature and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

69. With regard to the applicants' complaint under Article 13 of the Convention, the Court finds, having regard to the reasoning and conclusions set out above, that this complaint is manifestly ill-founded. It must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 11 January 2018.

Renata Degener
Deputy Registrar

Kristina Pardalos
President