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

FIRST SECTION

DECISION

Application no. 17601/12
Ochir Danilovich SHOVGUROV
against Russia

The European Court of Human Rights (First Section), sitting on 25 August 2015 as a Chamber composed of:
Elisabeth Steiner, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and André Wampach, *Deputy Section Registrar,*
Having regard to the above application lodged on 13 February 2012,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ochir Danilovich Shovgurov, is a Russian national, who was born in 1956 and lives in the town of Elista, the Republic of Kalmykia.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Infection with HIV

3. The applicant's son, O. Sh., was born on 23 February 1987.
4. Between 13 and 27 June 1988 O. Sh. was placed in the Republican Children's Hospital with the diagnosis "acute respiratory disease, first

degree stenosis and lacunar tonsillitis". Treatment was administered to him in intramuscular injections by reusable syringes, as a result of which, along with other children, he was infected with HIV.

5. The applicant's son was first diagnosed with HIV in March 1989 at the Infectious Diseases Hospital no. 2 of Moscow.

6. In September 1991 O. Sh. was examined by Dr J. A., professor of allergology and immunology, and Dr M. M., professor of neurology, in New York. They confirmed the diagnosis.

7. On 13 July 1998 O. Sh. was placed in the Republican Centre for the Treatment of AIDS (*ЛДО «РЦ СПИД»*), where on 9 August 1998 he died. According to the postmortem diagnosis, the applicant's son suffered from HIV and a number of accompanying diseases.

2. Criminal proceedings prior to the entry into force of the Convention

(a) First round of the criminal proceedings

8. On 25 January 1989 criminal proceedings were instituted into mass infection with HIV in the Republican Children's Hospital.

9. On 1 November 1990 the investigation was suspended due to the failure to identify the culprits.

(b) Second round of the criminal proceedings

10. On 9 July 1992 the Deputy Prosecutor General set aside the decision to suspend the investigation.

11. On 15 November 1992 the investigation was reopened.

12. On 15 December 1992 the investigation was suspended due to the failure to identify the culprits.

(c) Forensic expert examination

13. On 11 August 1994 the investigating authorities ordered a forensic expert examination. The following questions were put to the expert:

> "1. What is the nature of HIV transmission by medical instruments?
> 2. Was HIV transmission by medical instruments possible in the Republican Children's Hospital and the Republican Children's Infectious Diseases Hospital?
> 2.1 Did the children concerned stay together in the same ward (department, unit or block) and, if so, for how long?
> 2.2 Were the same medical solutions administered to the children placed together at the same time by the same medical staff? If so, how many times?
> 2.3 In what cases is the possibility of HIV transmission by medical instruments ruled out?
> 3. Is the infection through blood and its products ruled out?
> 3.1 How many children received donor blood, how often and in what quantities?
> 3.2 How many donors are subject to examination?
> 4. Is the intrauterine infection ruled out?
> 5. Is the HIV infection through breastfeeding ruled out?"

(i) General observations and theoretical underpinnings

14. Expert K. stated in his report that the forensic examination was focused on the HIV transmission by syringes used in the hospitals as the healthcare authorities had recognised it as the only plausible version of the HIV infection in the hospitals in the south of Russia. In the subsequent analysis he made references to medical doctrinal works on HIV transmission.

15. The analysis was based on the fact that the children, subsequently diagnosed as HIV positive, had been placed together in in-patient departments attached to one treatment unit. Expert K. further proceeded with (i) identification of the possible source of the infection, i.e. of the child infected before his placement in the nidus of infection (see paragraph 17 below); (ii) differentiation of medical manipulations according to the degree of the risk of infection with HIV (high, medium and low degree of risk); (iii) establishing situations where the same member of the hospital staff made injections of the same medicine at the same time, which raised the likelihood of the same needles having been used, and (iv) establishing the sequence of the manipulations: first with the source of the infection (a child that had been infected prior to his/her placement in the hospital) and then with other patients. Expert K. specifically noted that, although it was not difficult to establish that the same member of the hospital staff made injections of the same medicine, it was almost impossible to establish that the same needles and syringes had been used. Therefore, any conclusion as to the possibility of the infection transmission in a given situation would always be relative and based on probability.

16. Proceeding from the premise that simultaneous placement of children subsequently diagnosed as HIV positive in the same ward was a precondition for the infection transmission, expert K. proposed the following gradation of probability for the assessment of the factual material:

- the transmission was *probable* if there had been a source of the infection, i.e. a child infected prior to his/her placement in the ward, and the same medicines had been administered by the same member of the hospital staff with the use of manipulations involving high degree of risk of transmission;
- the transmission was *unlikely* if the same medicines had been administered by different members of the hospital staff with the use of manipulations involving medium and low degree of risk of transmission, even if the infected child had been present in the ward;
- the transmission was *impossible* if no medicines had been administered and no manipulations had been carried out at the same time.

(ii) Methodology and materials

17. Expert K. examined 293 medical files. All instances where the children, subsequently diagnosed as HIV positive, had been placed in

hospitals of the Republic of Kalmykia in the period between January 1988 and August 1989 were identified. All situations where HIV infected children had been placed in a hospital simultaneously were also identified. Such instances were analysed and referred to as niduses of infection. All possible sources of infection were established.

18. Each instance was analysed on the basis of the criteria stated above. On this basis a conclusion as to the probability of infection in the given instance was made, i.e. whether it was probable, unlikely or impossible.

19. All the material was subject to computer analysis. On this basis three databases were created: (i) information on HIV infected children; (ii) information on placement in a hospital of HIV infected children in 1988-89; and (iii) information on medical manipulations with respect to HIV infected children while they had been simultaneously placed in hospitals of the Republic of Kalmykia.

(iii) Results and conclusions

20. The expert's research showed that seventy-six children, subsequently diagnosed as HIV positive, were placed for treatment in six children's hospitals in Kalmykia between January 1988 and August 1989. Instances where such children were placed for treatment at the same time were distributed among the six hospitals as follows: 340 instances in the Republican Children's Hospital, fifty-six instances in the Republican Children's Infectious Diseases Hospital, eight instances in the Yashkul District Central Hospital, four instances in the Priozersk District Central Hospital, two instances in the Iki-Burulsk District Central Hospital and one instance in the Kaspiysk District Central Hospital.

21. The analysis of the medical documents showed that the formation of the niduses of infection had been initially connected with almost simultaneous placement in the infant department of the Republican Children's Hospital of several babies born from HIV positive mothers, who had become the source of infection for other children. The further spread of the infection was connected with the children infected in the infant or other departments of the Republican Children's Hospital and in some cases had a chain effect.

22. HIV transmission could only have taken place through the use of medical instruments in breach of the applicable rules if the same syringes and needles had been used consecutively in respect of several children placed in the same ward. However, no indication of such breaches could be found in the medical documents.

23. The overall conclusions of the report were the following:

(i) In Elista, the Republic of Kalmykia, there was an outbreak of HIV infection of children, which began in May 1988 and ended in November

1988, as a result of which seventy-six children were diagnosed as HIV positive.

(ii) The probability of HIV transmission through the use of medical instruments existed in two Elista hospitals: Republican Children's Hospital and the Republican Children's Infectious Diseases Hospital.

(d) Termination of the criminal proceedings

24. On 21 February 1996 the criminal proceedings were terminated under Article 5 § 1 and Article 208 of the RSFSR Code of Criminal Procedure on the ground that there was no indication of a criminal offence.

3. Criminal proceedings after the entry into force of the Convention

(a) Third round of the criminal proceedings

25. On 28 June 2001 the decision of 21 February 1996 was set aside, and on the same date the criminal proceedings were terminated on the ground of expiry of the statutory time-limit.

(b) Fourth round and termination of the criminal proceedings

26. In September 2011 the applicant along with the parents of a number of other children infected with HIV in similar circumstances filed a complaint on the ground that they had not been granted victim status in the proceedings.

27. On 19 September 2011 the decision of 28 June 2001 was set aside and the investigation was reopened for one month.

28. On 17 October 2011 the applicant was granted victim status in the proceedings.

29. On 20 October 2011 the criminal proceedings were terminated on the ground of expiry of the statutory time-limit. According to the decision, it was established that seventy-six children had been infected with HIV while they had been undergoing in-patient treatment in the Republican Children's Hospital and the Infectious Diseases Hospital of Elista in 1988-89. In the course of the investigation it appeared impossible to identify the hospital staff responsible for the negligence which had resulted in the spread of the infection. However, all the children infected and their parents were identified and granted victim status in the criminal proceedings.

30. The decision further stated that the offences in question were qualified as negligence under Article 293 of the Criminal Code, breach of sanitary-hygienic rules leading to mass infection or death under Article 236 §§ 1 and 2 of the Criminal Code, and infection with HIV under Article 122 § 4 of the Criminal Code. Under Articles 15 § 3 and 78 § 1 (b) of the Criminal Code the statute of limitations for these offences was six years. As more than six years had lapsed since the events in question, the criminal

proceedings were discontinued under Article 24 § 3 (1) of the Criminal Code.

4. Civil proceedings for damages

31. In 2011 the applicant, together with seven other persons, including his wife, Ms Shovgurova, instituted proceedings against the Republican Children's Hospital for compensation of non-pecuniary damage caused by their children's infection with HIV, which led to the latters' death. The applicant and his wife sought 5,000,000 Russian roubles (RUB).

32. On 9 November 2011 the Elista Town Court partially granted the claim. The court noted that, according to the report of the forensic expert examination conducted within the criminal proceedings, there had been an outbreak of HIV infection of children in Elista, which had begun in May 1988 and had ended in November 1988, as a result of which seventy-six children had been diagnosed as HIV positive. The probability of HIV transmission through the use of medical instruments existed in two Elista hospitals: Republican Children's Hospital and the Republican Children's Infectious Diseases Hospital. The eight plaintiffs' children were placed for in-patient treatment in the Republican Children's Hospital in the period concerned. Subsequently they were diagnosed as HIV positive. The court therefore found it established that their children had been infected with HIV in the Republican Children's Hospital, which led to their death.

33. The court further noted that although the criminal investigation had been terminated on 20 October 2011 on account of expiry of the statutory time-limits, the fact that particular culprits had not been established did not deprive the plaintiffs, who had been granted victim status in the criminal proceedings, of the possibility to claim compensation for damage caused by their children's having been infected with HIV in the Republican Children's Hospital.

34. Having regard to Articles 444 and 445 of the Civil Code of the RSFSR, Article 131 of the Fundamentals of the Civil Legislation of the USSR and the Republics and Articles 151, 1064 and 1068 of the Civil Code of the Russian Federation, the court awarded each plaintiff RUB 100,000.

35. The plaintiffs and the defendants appealed.

36. On 15 December 2011 the Supreme Court of Kalmykia reviewed the Elista Town Court's judgment. It upheld the findings of fact to the effect that the plaintiffs' children had been infected with HIV in the Republican Children's Hospital. The appellate court further dismissed the defendant's arguments that the decision to award compensation had not been based on the law in force at the relevant time. It noted that Article 57 of the Constitution of the USSR and Article 63 of the Constitution of the RSFSR, in force at the time when the plaintiffs' children had been infected with HIV, provided for judicial protection from encroachment upon life and health. Article 52 of the Constitution of the Russian Federation likewise

provided for access to justice and the right to compensation for victims of crimes. The appellate court further noted that Article 24 of the Fundamentals of the Criminal Procedure of the USSR and the Republics and Article 53 of the Code of Criminal Procedure of the RSFSR, in force at the material time, as well as Article 42 of the Code of Criminal Procedure of the Russian Federation provided that a person who had sustained physical, pecuniary or non-pecuniary damage as a result of a crime should be recognised as a victim.

37. Having regard to Article 88 of the Fundamentals of the Civil Legislation of the USSR and the Republics, Article 444 of the Civil Code of the RSFSR and Articles 151, 1068 and 1101 of the Civil Code of the Russian Federation, the Supreme Court of Kalmykia altered the lower court's decision in the part concerning the amount of the compensation and awarded each plaintiff RUB 300,000 (approximately 7,245 euros).

38. The applicant's further requests for review of the judgment were refused on 11 July 2012 and 16 August 2012.

B. Relevant domestic and international law

1. Constitutional law

39. Article 57 of the Constitution of the USSR, in force until 26 December 1991 and Article 63 of the Constitution of the RSFSR, in force until 12 December 1993, provided for judicial protection of rights and freedoms. Article 52 of the Constitution of the Russian Federation, in force after 12 December 1993, provides that rights of victims of crimes and of abuse of power are protected by the law. The State shall provide the victims with access to justice and compensation for the damage caused.

2. Criminal law and procedure

40. Under Article 24 of the 1958 Fundamentals of the Criminal Procedure, in force until 1 July 2002, a victim was a person who had suffered moral, physical or pecuniary damage as a result of a crime.

41. The 1960 Code of Criminal Procedure of the RSFSR, in force until 1 January 2003, provided that criminal proceedings could not be opened and pending criminal proceedings should be terminated where there was no indication of a crime (Article 5 § 1). A criminal case should be closed on the grounds provided in Articles 5-9 (Article 208 § 1). A victim was a person who had suffered moral, physical or pecuniary damage (Article 53).

42. The 2001 Code of Criminal Procedure of the Russian Federation, in force after 1 January 2003, provides that criminal proceedings should be terminated if the statutory time-limit has expired (Article 24 § 3 (1)). The Code defines a "victim" as a person who has sustained physical, pecuniary or non-pecuniary damage as a result of a crime. The decision to recognise

an individual as a "victim" must be taken by the examiner, investigator, prosecutor or court (Article 42).

43. The 1996 Criminal Code of the Russian Federation, in force after 1 January 1997, provides the following statute of limitations: two years in respect of a minor offence, six years in respect of an offence of medium gravity, ten years in respect of a grave offence and fifteen years in respect of a particularly grave offence (Article 78 § 1). Prior to amendments introduced to the Code by Federal Law no. 420-FZ of 7 December 2011, infection with HIV as a result of undue performance of one's professional duties constituted an offence of medium gravity (Articles 15 § 4 and 122 § 4); a breach of sanitary-hygienic rules leading to mass infection constituted a minor offence (Articles 15 § 4 and 236 § 1); and negligence consisting of undue performance by an official of his/her functions as a result of improper or careless attitude to his/her work, which led to death of two and more persons constituted a grave offence (Articles 15 § 4 and 293 § 3, the latter Article introduced by the Federal Law no. 162-FZ of 8 December 2003).

3. Civil law

44. Under Articles 444 and 445 of the 1964 Civil Code of the RSFSR, in force until 1 March 1996, damage caused to a person, a person's property or an organisation should be compensated for in full by the person who inflicted the damage. An organisation was responsible for compensation of damage caused by its employees in the course of carrying out their work duties.

45. Under Article 131 of the 1991 Fundamentals of the Civil Legislation, in force between 3 August 1992 and 1 January 1995, damage, including physical and mental suffering, caused to a person by unlawful actions should be compensated by the person who inflicted the damage provided it had been caused through his/her fault.

46. The 1994 Civil Code of the Russian Federation, in force after 1 January 1995, provides that a court may order compensation of non-pecuniary damage, including physical and mental suffering, caused to a person to be paid by the person who inflicted it (Article 151). The damage is to be compensated in full (Article 1064 § 1). A juridical or natural person shall compensate damage caused by its/his/her employee in the course of carrying out work duties (Article 1068 § 1).

4. Vienna Convention

47. Article 28 of the 1969 United Nations Convention on the Law of Treaties (Vienna Convention) provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any

situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

COMPLAINTS

48. The applicant complained that the investigation into his son's infection with HIV had been ineffective and excessively long. Furthermore, the amount of compensation awarded to him had been unreasonably low. Finally, he complained about the mental suffering he had endured as he had had to witness his son's physical suffering and cope with his death. The applicant relied on Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1.

THE LAW

A. Criminal investigation

49. Before going into the substance of the applicant's complaint that the investigation into his son's infection with HIV had been ineffective and excessively long, the Court has first to ascertain whether it has temporal jurisdiction to examine it.

1. General principles

50. The Court reiterates that its temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction (see *Blečić v. Croatia* [GC], no. 59532/00, § 77, ECHR 2006-III).

51. Therefore, in cases where the interference pre-dates the ratification of the Convention while the final decision taken in the process of exhausting available domestic remedies post-dates it, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties (ibid. § 79).

52. While it is true that from the ratification date onwards all of the State's acts and omissions must conform to the Convention (see *Yağcı and Sargın v. Turkey*, 8 June 1995, § 40, Series A no. 319-A), the Convention imposes no specific obligation on the Contracting States to provide redress

for wrongs or damage caused prior to that date (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility (see *Blečić*, cited above, § 81).

53. The Court notes that it has examined a complaint related to issues comparable to those raised by the applicant under the angle of the procedural obligation under Article 2 of the Convention in its judgment in *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009. There it clarified that the procedural obligation to carry out an effective investigation under Article 2 constituted a separate and autonomous duty of Contracting States. It therefore considered that an independent obligation capable of binding the State even when the death took place before the critical date arose under Article 2 of the Convention (see, *inter alia*, ibid. § 159; *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 147, ECHR 2009; and *Velcea and Mazăre v. Romania*, no. 64301/01, § 81, 1 December 2009). As the Court has observed, the procedural obligation under Article 2 binds the State throughout the period in which the authorities can reasonably be expected to take measures with the aim of elucidating the circumstances of a death and establish responsibility for it (see *Šilih*, cited above, § 157).

54. The following criteria were set out in the *Šilih* case:

> "162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
>
> 163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
>
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.
>
> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

55. These criteria have been further developed by the Court in *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21 October 2013):

> **"(a) Procedural acts and omissions in the post-entry into force period**
>
> 142. ... [T]he Court's temporal jurisdiction extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent Government.

144. ... [The] obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible (see *Gutiérrez Dorado and Dorado Ortiz v. Spain* (dec.), no. 30141/09, §§ 39-41, 27 March 2012; *Çakir and Others v. Cyprus* (dec.), no. 7864/06, 29 April 2010; and *Brecknell v. the United Kingdom*, no. 32457/04, §§ 66-72, 27 November 2007). Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law. However, if the triggering event lies outside the Court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the "genuine connection" test or the "Convention values" test, discussed below, has been met.

(b) The "genuine connection" test

146. The Court considers that the time factor is the first and most crucial indicator of the "genuine" nature of the connection. It notes, as it previously did in the Chamber judgment, that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard ...

147. The duration of the time period between the triggering event and the critical date is however not decisive, in itself, for determining whether the connection was a "genuine" one. As the second sentence of paragraph 163 of the *Šilih* judgment indicates, the connection will be established if much of the investigation into the death took place or ought to have taken place in the period following the entry into force of the Convention ... If, however, a major part of the proceedings or the most important procedural steps took place before the entry into force, this may irretrievably undermine the Court's ability to make a global assessment of the effectiveness of the investigation from the standpoint of the procedural requirements of Article 2 of the Convention.

148. Having regard to the above, the Court finds that, for a "genuine connection" to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.

(c) The "Convention values" test

149. The Court further accepts that there may be extraordinary situations which do not satisfy the "genuine connection" standard as outlined above, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection ...

> 150. ... This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments."

2. Application to the present case

56. Having regard to the applicant's complaint that the investigation into his son's infection with HIV was ineffective and excessively long, the Court observes that his son was placed in the Republican Children's Hospital in June 1988, where, according to the results of the domestic investigation, he was infected with HIV. The triggering event therefore took place almost ten years prior to the Convention's entry into force in respect of Russia on 5 May 1998 and lies outside the Court's jurisdiction *ratione temporis*.

57. The subsequent investigation conducted by the domestic authorities was opened on 25 June 1989. After two cycles of suspensions and reopenings of the investigation, in 1994 a comprehensive expert examination was conducted, which established that between May and November 1988 seventy-six children had been diagnosed as HIV positive as a result of probable transmission of HIV through the use of medical instruments in two Elista hospitals, one of them being the Republican Children's Hospital. On 21 February 1996 the criminal proceedings were terminated on the ground that there was no indication of a criminal offence (see paragraph 24 above).

58. The span of the investigation between 25 June 1989 and 21 February 1996 took place before the Convention's entry into force in respect of Russia and therefore lies outside the Court's jurisdiction *ratione temporis*.

59. The Court further observes that the criminal proceedings were reopened on 28 June 2001, but terminated on the same date on the ground of expiry of the statutory time-limit (see paragraph 25 above). On 19 September 2011 the criminal proceedings were again reopened for one month after the applicant and other parents of the children infected with HIV in similar circumstances had complained that they had not been granted victim status in the proceedings. The applicant had been granted victim status on 17 October 2011, and the criminal proceedings were again closed on 20 October 2011 (see paragraphs 26-30 above).

60. In the Court's view, virtually all substantial investigative steps into the applicant's son's infection with HIV took place prior to 5 May 1998, the date of the Convention's entry into force in respect of Russia. The reopenings of the criminal proceedings in 2001 and 2011 were of purely procedural nature: first to alter the ground of termination of the investigation, and then to remedy the fact that not all the parents had been granted victim status in the proceedings, so as to enable them to bring a claim for compensation. There is no evidence of any new allegation, piece of evidence or item of information that would come to light in the post-entry

into force period and warrant a new round of proceedings (see *Janowiec and Others*, cited above, § 144). The procedural acts that took place after the entry into force of the Convention were not aimed at conducting any meaningful investigation efforts, nor is it possible to hold that any investigation efforts ought to have been carried out after that date. The Court is therefore unable to detect any element that could in principle bring the criminal investigation in the present case within the Court's competence *ratione temporis*.

61. The Court reiterates that where the infringement of the right to life or physical 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 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 of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

62. The Court observes that in 2011 the applicant instituted civil proceedings for compensation of non-pecuniary damage caused by his son's infection with HIV, which led to the latter's death. By a final decision of 15 December 2011 the Supreme Court of Kalmykia awarded the applicant the amount of RUB 300,000.

63. The Court notes, firstly, that the civil proceedings in the present case were instituted twenty-three years after the triggering event. Furthermore, the civil courts did not carry out independent fact finding for the purpose of determining the cause of the death and holding those responsible to account (see, by contrast, *Šilih*, cited above, § 163). They did not examine any new facts but fully relied on the findings of the criminal investigation made in 1996, including the fact that particular culprits had not been established, having emphasised that the latter did not deprive the applicant of the possibility to claim damages from the Republican Children's Hospital (see paragraphs 32-33 above).

64. Accordingly, having regard to the significant lapse of time between the triggering event and the institution of the civil proceedings, and the fact that the civil courts relied on the findings of the criminal investigation made two years prior to the Convention's entry into force in respect of Russia, the Court finds that, in the circumstances of the present case, the proceedings for damages which took place in 2011 may not bring the events of 1988 within its temporal jurisdiction either. To hold otherwise would be in breach

of the principle of non-retroactivity of treaties (see *Blečić*, cited above, §§ 79 and 81).

65. The Court finds therefore that it does not have temporal jurisdiction to examine the applicant's complaint concerning the domestic investigation.

B. The civil proceedings

66. Insofar as the applicant complained under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 that the amount of compensation awarded to him had been unreasonably low, the Court reiterates that it is not its task to review alleged errors of fact and law committed by the domestic judicial authorities and that, as a general rule, it is for the national courts to assess the evidence before them and to apply domestic law. The Court's task under Article 6 is to ascertain whether the proceedings as a whole were fair (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008).

67. The Court finds that in the present case the domestic courts at two levels of jurisdiction carefully examined the materials in their possession and reached reasoned conclusions concerning the applicant's claim. There is no evidence of any unfairness within the meaning of Article 6 in this respect.

68. As regards Article 1 of Protocol No. 1, the Court has no grounds to consider that the applicant had a legitimate expectation to receive an amount exceeding the one awarded by the domestic courts.

69. Accordingly, the Court finds that this part of the application is manifestly ill-founded.

70. Insofar as the applicant relied on Article 13 of the Convention, the Court recalls that it applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

71. Having regard to the Court's findings above that it was precluded from examining a part of the applicant's complaints on the ground of lack of temporal jurisdiction and that they were manifestly ill-founded in the remaining part, the Court concludes that the applicant did not have an "arguable claim", and that therefore Article 13 is inapplicable to the case.

72. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. The applicant's mental suffering

73. The applicant also complained about the mental suffering he had endured as he had had to witness his son's physical suffering and cope with his death. The Court considers that the complaint falls to be examined under Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

74. The Court has always been sensitive in its case-law to the profound psychological impact of a serious human rights violation on the victim's family members who are applicants before the Court. However, in order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself (see *Janowiec and Others*, cited above, § 177).

75. The majority of cases where the Court found a separate violation of Article 3 in respect of the victim's relatives concerned forced disappearances followed by a long period of uncertainty (ibid. § 178). Nevertheless, the Court has considered a separate finding of a violation of Article 3 to be justified in a number of other cases which concerned situations of confirmed death where the applicants were direct witnesses to the suffering of their family members (see references in ibid. § 181).

76. In the case at hand the applicant had to witness the suffering of his son caused by the latter's illness, which was a direct result of his being infected with HIV in the Republican Children's Hospital in 1988 and eventually led to his death in 1998. The Court does not in any way question the profound grief and distress that the applicant has experienced as a consequence of the illness and loss of his son.

77. However, the Court cannot disregard the fact that the cause of the applicant's grief was an instantaneous act that happened ten years before the entry into force of the Convention in respect of Russia. Even though the applicant's son's tragic death took place several months after the Convention's entry into force, the Court considers that proceeding with finding a separate violation of Article 3 in the present case would be tantamount to holding the State responsible for a fact that occurred ten years prior to its acceptance of the obligations conferred upon it by the Convention. This would undermine the principle of non-retroactivity in the law of treaties in breach of Article 28 of the Vienna Convention (see paragraph 47 above).

78. Accordingly, the Court cannot but conclude that it is precluded from examining this complaint by lack of temporal jurisdiction.

79. It follows that this part of the application should also be rejected pursuant to Article 35 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 17 September 2015.

André Wampach
Deputy Registrar

Elisabeth Steiner
President