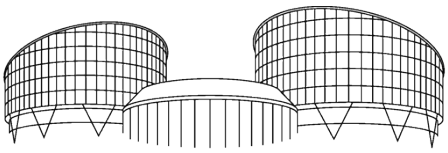

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ARSKAYA v. UKRAINE

(Application no. 45076/05)

JUDGMENT

STRASBOURG

5 December 2013

FINAL

05/03/2014

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

In the case of Arskaya v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 12 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 45076/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian and Russian national, Ms Lyubov Nikolayevna Arskaya ("the applicant"), on 17 October 2005.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mr N. Kulchytskyy.

3. The applicant alleged under Article 2 of the Convention that her son had not been properly treated in a hospital and that the investigation of his death had not been effective.

4. By a decision of 4 October 2011, the Court joined to the merits the Government's objection as to the admissibility of the application and declared the application admissible. By the letter of 14 November 2011 the Government of the Russian Federation informed the Court that at this stage they did not wish to exercise their right under Article 36 § 1 of the Convention to intervene in the Court's proceedings concerning the present application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1937 and lives in Moscow.

A. The hospitalisation of the applicant's son

6. On 22 March 2001 the applicant's son, S., who was forty-two years old, was taken by ambulance to the Simferopol Anti-Tuberculosis Clinic ("the hospital"), a public health-care institution, and hospitalised with the following diagnosis: left-sided pneumonia; tuberculosis of the left lung; haemoptysis; and pulmonary insufficiency.

7. In the morning on 23 March 2001 the doctors noted, among other things, that S. was euphoric, behaved inadequately and complaining of dizziness. On the same date S. was X-rayed. S.'s state of health was characterised as serious. He was prescribed antibacterial, blood clotting and detoxification medicines.

8. On 25 March 2001 the attending doctor noted that S.'s state of health had improved.

9. On 26 March 2001 S. was X-rayed and offered a bronchoscopy, which would allow a specific diagnosis to be achieved and localise the source of bleeding he was suffering. The doctors noted that S. refused to undergo the procedure. They further assessed S.'s condition as serious. According to the medical file, the need for S. to undergo the bronchoscopy was explained to the applicant.

10. On 27 March 2001 S. remained in a serious condition. The doctors noted that S. was excited and suffering from visual hallucinations. A psychiatrist invited by the medical staff noted that S. refused to talk to him.

11. On 28 March 2001 the doctors observed that S. appeared psychologically and emotionally unstable, excitable and that he displayed an aggressive attitude towards the medical staff. They also diagnosed S. with an acute abscess of the left lung.

12. On that date S. again refused to undergo a bronchoscopy and countersigned a note to this effect made in his medical records. As the conservative treatment had not produced the necessary improvement in his condition and S. did not consent to the bronchoscopy, he was taken to the thoracic surgery department of the hospital for a radioscopy and further examination. S., however, left the surgical department of the hospital. According to the medical file, the doctors continued to talk to the applicant on account of the necessity of the treatment which S. had refused.

13. On 29 March 2001 S.'s condition was assessed as extremely serious. On that date he wrote in his personal diary that he had refused to undergo any surgical operations as he was in fear for his life. He noted the following:

> "... I ... declare that I am against any surgery on my recovering body. [This] text has been written because of [my] fear for my life ..."

14. On 30 March 2001 the doctors noted that S. was in a serious condition and was refusing to accept intramuscular and intravenous injections. A thoracic surgeon examined S. and recommended that the patient be persuaded to undergo an X-ray examination in the surgical department for the purpose of subsequent drainage of the abscess and to continue receiving the previously prescribed treatment. The surgeon qualified the condition of S. as serious. The doctors further explained to the applicant that S. required an examination and surgical treatment.

15. On the same date a psychiatrist diagnosed S. with somatogenic paranoid disorder.

16. Between 31 March and 3 April 2001 S. was in an extremely serious condition. The doctors noted that S. had refused penicillin injections. The other medical treatment was provided in accordance with the previous prescriptions.

17. On 3 April 2001 S. was still suffering from an acute abscess of the left lung. His emotional and psychological states were characterised as extremely unstable. At 3 p.m. that day his condition was again assessed as extremely serious. At 10.45 p.m. S. died.

18. On 4 April 2001 a post-mortem examination of S.'s body was carried out and it was stated that the clinical and post-mortem diagnosis coincided.

B. Official investigations into the doctors' alleged malpractice

19. On 14 June 2001 the applicant complained to the prosecution authorities that the medical assistance provided to her son had been inadequate and that he had died as a result. The prosecutor's office asked the Ministry of Health for the Autonomous Republic of Crimea to conduct an internal inquiry into the incident.

20. In July 2001 the internal inquiry was completed. It found that S. had died as a result of blood poisoning and increasing respiratory and cardiovascular insufficiency caused by an acute abscess of the left lung. In the board of inquiry's opinion, S. had sought medical treatment belatedly, when he had already been very seriously ill. The inquiry found the following shortcomings on the part of the doctors: on 22 March 2001 no medical treatment plan had been drawn up; on 23 March 2001 the doctors had failed to properly assess the state of S.'s health; the X-ray images made on the same date had been interpreted wrongly; on 24 and 25 March 2001 S.

had been supervised unsatisfactorily; and on 26 March 2001 S. should have been examined by a resuscitation specialist and provided with specialised intensive care. However, this had not been done because the hospital had been required to follow the regulations of the Simferopol Health-Care Department, which provided that patients should be transferred to an intensive care department of another city hospital in only two cases: (a) if a patient had a serious infectious-toxic shock; and (b) if the patient was suffering from an asthma attack. The board further stated that the treatment of S. had been complicated by his repeated refusals to consent to measures of treatment and to take medication.

21. The board therefore considered that: (a) the Head Doctor of the hospital should take measures in respect of the medical staff responsible for the identified shortcomings; (b) the Head of the Simferopol Health-Care Department should review the regulations on admission of patients to the intensive care department of the city hospital; and (c) a thematic conference concerning the medical treatment of abscess of the lungs should be organised for the physicians working in the city.

22. On 11 July 2001 the Head Doctor of the hospital found that a number of doctors had failed to objectively assess S.'s state of health and provide him with adequate medical treatment in the initial period of his hospitalisation; subsequently, S. had repeatedly refused to accept medical treatment and had died. The Head Doctor therefore decided to reprimand three doctors who were treating S. Another doctor was to be assessed by the qualification commission as regards his suitability for his qualification class.

23. By letter of 13 July 2001 the Deputy Minister of Health for the Autonomous Republic of Crimea informed the applicant that between 22 and 26 March 2001 the medical staff had not taken appropriate organisational and treatment measures in respect of S. In particular, on 26 March 2001 he should have been transferred to the resuscitation department for further treatment, but this had not been done. She then added that a number of doctors had been disciplined on this account.

24. On 29 December 2001 the applicant sent another complaint to the prosecutor's office, arguing that the medical treatment of S. had been inappropriate and that the notes made by the doctors in the medical records had been incorrect. She specified that S. had insisted on medical treatment in the hospital and had only refused to consent to surgical operations and penicillin injections. The applicant further claimed that on 3 April 2001 she had demanded that S. be operated upon.

25. On 16 January 2002 the Kyivskyy District Prosecutor's Office of Simferopol applied to the Simferopol Kyivskyy District Court ("the District Court") seeking a decision that criminal proceedings against one of the doctors, Ch., not be instituted in view of the Amnesty Act.

26. On 17 April 2002 the District Court allowed the application and passed a decision to that effect. The applicant appealed.

27. On 13 August 2002 the Court of Appeal for the Autonomous Republic of Crimea quashed the decision of 17 April 2002. It noted that: the District Court had failed to determine the precise reason for the death of the applicant's son; it had not paid attention to section 43 § 2 of the Health Protection Standards Act 1992, providing that a patient's refusal to accept medical treatment could not be a valid excuse for failure to provide such treatment in urgent situations where the patient's life was at a real risk; the behaviour of the rest of the medical staff had not been examined. The court of appeal ordered additional inquiry by the prosecutor's office.

28. On 21 May 2003 a criminal investigation was opened into the alleged malpractice by the medical staff. A forensic medical examination was ordered in the case.

29. On 10 June 2003 the applicant was granted the status of victim in the criminal proceedings.

30. On 30 March 2004 the forensic medical experts issued their report, concluding that during his hospitalisation S. had been diagnosed correctly; even though S. had not initially been provided with the most effective medication, the examinations and treatment had been appropriately prescribed and carried out in due time; S.'s state of health had worsened due to both the seriousness of the chronic condition affecting his lungs and his baseless refusals to undergo diagnostic tests and treatment. The report specified that S.'s condition had required surgery, including abscess cavity drainage and endotracheal suctioning, and that his refusal to undergo that treatment had substantially contributed to the progress of the inflammatory process in his lungs. The experts concluded that there had been no causal link between the treatment offered to S. in the hospital and his death, noting that domestic law required a patient's advance consent to medical procedures and this implied the right to refuse medical assistance.

31. On 6 May 2005 the Kyivskyy District Prosecutor's Office of Simferopol found that S.'s death had been caused by a serious chronic lung disease, which had required surgery. This had been offered to S. but he had refused to undergo it. The refusal of treatment had worsened his condition and had resulted in his death. It followed that there had been no causal link between the doctors' behaviour and S.'s death. The proceedings in the case were therefore terminated for lack of *corpus delicti*. The applicant challenged that decision before the supervising prosecutor's office.

32. On 11 October 2005 the Deputy Prosecutor for the Autonomous Republic of Crimea reversed the decision of 6 May 2005, noting that the veracity of the material which had been provided for the forensic expert examination had been disputed. Furthermore, the conclusions of the forensic medical examination had conflicted with the findings of the internal inquiry

conducted by the health-care authorities. The further investigation of the case was therefore ordered.

33. On 3 April 2006 the Kyivskyy District Prosecutor's Office of Simferopol found that the forensic medical experts had been provided with appropriate material for their examination and their conclusions had not conflicted with the results of the internal inquiry. In particular, the shortcomings in medical treatment identified by the board of inquiry had not resulted in the fatal outcome for S., given that S. had died as a result of a serious chronic lung disease which had required surgery; this had been repeatedly offered to S., but he had refused to consent to it. It was further concluded there had been no causal link between the doctors' behaviour and S.'s death. The proceedings in the case were therefore terminated. The applicant challenged that decision before the courts and the supervising prosecutor's office.

34. On 16 June 2006 the District Court upheld the decision of 3 April 2006. On 25 July 2005 the Court of Appeal for the Autonomous Republic of Crimea dismissed the applicant's appeal against the decision of the District Court. The applicant appealed on points of law to the Supreme Court.

35. In September 2006 the Prosecutor for the Autonomous Republic of Crimea reversed the decision of 3 April 2006 as unsubstantiated and ordered further investigation to be conducted by the Zaliznychnyy District Prosecutor's Office of Simferopol. He specified, among other things, that it was necessary to find and examine the X-ray images of S., to question the psychiatrist who had examined S. and to conduct confrontations between the doctors and the applicant.

36. In November 2006 the Deputy Minister of Health for the Autonomous Republic of Crimea informed the investigator that the X-ray images of S. made on 23 and 26 March 2001 and requested by the prosecutor's office could not be found. He noted that the retention period for such files had expired in 2004.

37. On 30 November 2006 the Supreme Court dismissed the applicant's appeal on points of law against the decisions of the lower courts of 16 June and 25 July 2006, given that the impugned decision of the District Prosecutor's Office of 3 April 2006 had been already quashed by the supervising prosecutor.

38. On 28 December 2006 the Zaliznychnyy District Prosecutor's Office of Simferopol terminated the criminal proceedings in the case for the reason that no causal link had been identified between the doctors' conduct and S.'s death. It was specified that S. had repeatedly refused appropriate medical treatment which had been offered to him.

39. On 17 May 2007 the General Prosecutor's Office reversed the decision of 28 December 2006 on the ground that the investigation was incomplete. It was specified that the contradictions in the medical evidence had not been resolved and a number of witnesses had not been questioned.

In addition, the applicant's further supposition that S. might have been killed in order to harvest his organs for transplantation had not been examined.

40. By letter of 2 July 2007 the Ministry of Health for the Autonomous Republic of Crimea informed the applicant's lawyer that in 2001 S.'s X-ray images had been forwarded to the prosecutor's office dealing with the case.

41. On 12 July 2007 the Zaliznychnyy District Prosecutor's Office of Simferopol terminated the criminal proceedings in the case finding that there had been no *corpus delicti* in the conduct of the medical staff. It was once again concluded that S. had repeatedly refused to undergo diagnostic tests and treatment and this had substantially contributed to the serious aggravation of his condition and had finally resulted in a fatal outcome. As to the missing X-ray images, the investigator who had previously dealt with the case explained that he had asked for the images from the hospital but that they had not been found there. As to the alleged harvesting of S.'s organs, those allegations were found to be unsubstantiated, as the expert who had conducted the post-mortem examination of S.'s body had recorded that there had been no external injuries of the necessary type on the body and it was considered that if any of the organs had been missing the expert would have stated this in the report of the post-mortem examination.

42. On 1 August 2007 the Prosecutor's Office for the Autonomous Republic of Crimea reversed the decision of 12 July 2007 as unsubstantiated. It resumed the investigation and ordered, *inter alia*, that all the measures which had previously been ordered by the General Prosecutor's Office be undertaken, including questioning of the medical staff as regards S.'s psychiatric condition and his comportment during his hospitalisation; that a forensic psychiatric examination be carried out in order to establish S.'s mental state at the relevant time; and that additional measures be taken in order to investigate the applicant's allegations of possible harvesting of organs for transplantation.

43. On 14 September 2007 a post-mortem forensic psychiatric assessment was carried out. The experts noted that during his life S. had not sought any psychiatric assistance on account of any mental illness. They concluded that while there had been indications of a temporary state of mental disease during his hospitalisation, S. had been able to understand the consequences of his actions and his mind had been clear at that time. They added that S.'s refusals to accept treatment had not been caused by his mental condition.

44. On 4 October 2007 the District Prosecutor's Office terminated the criminal proceedings in the case for the reason that there had been no *corpus delicti* in the conduct of the medical staff. It was found that S. had refused necessary medical treatment which had been offered to him and this had resulted in the aggravation of his condition and his death. His ability to

take decisions about his treatment had been confirmed by the findings of the post-mortem psychiatric examination.

45. On 7 November 2007 the Prosecutor's Office for the Autonomous Republic of Crimea reversed the decision of 4 October 2007 and ordered further investigation. The investigator was instructed, among other things, to find and question witnesses who could give evidence concerning the attitude of the medical staff and S. in relation to the prescribed medical treatment; to scrutinise the veracity of the medical evidence; and to question the applicant once again.

46. Between January and April 2008 an additional forensic medical examination was conducted. On 14 April 2008 the experts issued their report, stating that S. had been diagnosed correctly and that he had been examined and treated appropriately by the medical staff. S.'s death had been caused by the seriousness of his chronic lung disease and by his repeated refusals to undergo appropriate surgical treatment, including abscess cavity drainage and endotracheal suctioning. If S. had agreed to undergo surgery the outcome might have been different.

47. In May 2008 the case was transferred to the local police for further investigation.

48. On 13 August 2008 the local police investigator, relying on the latest forensic medical expert report and all the other evidence in the file, found that there had been no causal link between the conduct of the medical staff and S.'s death. He therefore terminated the criminal proceedings for lack of *corpus delicti* in the actions of the medical staff.

49. The applicant challenged that decision before the supervising prosecutors' offices.

50. On 30 September 2008 the Deputy Prosecutor General informed the applicant that the decision of 13 August 2008 was lawful and reasoned.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of 28 December 1960 (in force at the material time)

51. Article 113 of the Code provided as follows:

> "A failure to provide assistance to an ill person without a valid reason by a medical practitioner, who, according to the established rules, was obliged to provide such assistance, if such a failure could result in serious consequences for the ill person and the medical practitioner was aware of that [risk], shall be punishable by correctional work for up to two years or by public reprimand.
>
> The same conduct, if it resulted in serious consequences, shall be punishable by imprisonment for up to three years."

B. Code of Criminal Procedure of 28 December 1960 (in force at the material time)

52. Article 4 of the Code provided that a court, prosecutor, investigator or body of inquiry, to the extent that it is within their power to do so, had to institute criminal proceedings in every case where signs of a crime had been discovered, take all necessary measures provided by law to establish whether a crime had been committed, identify the perpetrators and punish them.

53. According to Article 28 of the Code, a person who had sustained damage as a result of a crime could lodge a civil claim against an accused at any stage of criminal proceedings before the beginning of the consideration of the case on the merits by a court. A civil claimant within criminal proceedings was exempt from the court fee for lodging a civil claim.

C. Civil legislation

54. The civil legislation does not provide for specific regulations on compensation for non-pecuniary damage caused by medical negligence.

In accordance with the general principle laid down in Article 440-1 of the Civil Code of 18 July 1963 (in force until 1 January 2004), non-pecuniary damage caused to an individual or an organisation should be compensated by the person who has caused that damage, unless the latter proves not to have been guilty of the civil tort.

55. Article 1167 of the Civil Code of 16 January 2003 (in force as from 1 January 2004), provides, *inter alia*, that non-pecuniary damage caused to an individual or legal person by illegal decisions, activity or inactivity should be compensated by the person who caused it, if that person is guilty of the civil tort.

D. The Law "On the Fundamentals of Health Protection Legislation" of 19 November 1992 ("the Health Protection Standards Act 1992") (as worded at the relevant time)

56. The relevant provisions of the Act read as follows:

Section 39. The obligation to provide medical information

> "A doctor shall be obliged to explain to a patient, in an understandable manner, the state of his or her health, the purpose of [any] proposed examinations and medical treatment, and the prognosis for the possible development of his or her illness, including any risk to life and health.

The patient shall be entitled to familiarise himself with the records of his or her medical history and other documents which may be of use for his or her further treatment.

The doctor may restrict access to the patient's medical information if such access could be detrimental to the patient's health. In that case, the doctor, taking into account the patient's personal interests, shall inform the members of the patient's family or the patient's legal representative accordingly. The doctor shall act in the same way when the patient is unconscious."

Section 43. Consent to medical treatment

"Diagnostic and preventive measures and medical treatment shall be carried out with the consent of the patient, who shall have been provided with the information required in accordance with section 39 of this Act. Medical treatment with respect to patients who are under the age of fifteen and patients who have been recognised, in accordance with the procedure established by law, as incapable shall be carried out with the consent of their legal representatives.

In urgent situations when there is a real risk to the patient's life, the consent of the patient or his or her legal representative to medical treatment shall not be required.

If a lack of consent to medical treatment may result in serious consequences for the patient, the doctor shall be obliged to explain this to the patient. If the patient continues to refuse the treatment, the doctor shall be entitled to insist on written confirmation of the refusal by the patient, and if it is impossible to obtain that confirmation the doctor shall be entitled to attest to the patient's refusal in writing in the presence of witnesses. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

57. The applicant complained that her son had died due to a lack of adequate medical treatment and that there had been no effective investigation into the circumstances in which he had died. She relied on Articles 2, 6 and 7 of the Convention.

58. The Court decided to examine the complaint exclusively under Article 2 of the Convention, which provides, in so far as relevant, as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

A. The parties' submissions

59. In their objections to the admissibility of the application, joined to the merits, the Government submitted that the applicant had not exhausted domestic remedies. In particular, the applicant had failed to challenge the investigator's decision of 13 August 2008 before the courts. Moreover, she had failed to lodge a separate civil claim seeking compensation for the alleged medical negligence in respect of her son. The Government provided copies of domestic court decisions which in their opinion proved the availability of the civil remedy in the applicant's case.

60. As to the merits of the application, the Government argued that the measures taken by the investigative authorities had been appropriate and sufficient to comply with the requirements of Article 2 of the Convention. They insisted that all necessary steps had been taken to protect the applicant's son's life. They specified that domestic law had offered an appropriate legal framework concerning the provision of medical information to patients, documentation of a refusal to accept medical treatment, and cases in which such refusal had no binding effect on medical staff. Moreover, the reports of the forensic medical experts had suggested that the case of S. had not amounted to an urgent situation within the meaning of section 43 of the Health Protection Standards Act 1992 and the doctors had therefore validly relied on S.'s refusals to undergo treatment.

61. The applicant claimed that by pursuing the criminal investigation of the case for a considerable period of time, she had complied with the rule of exhaustion of domestic remedies. As to the merits of the application, the applicant contended that the investigation had not been effective and her son's life had not been properly protected from wrongdoing on the part of the medical staff.

B. The Court's assessment

62. The Court reiterates that the first sentence of Article 2 enjoins the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

63. Those principles also apply in the sphere of public health. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible

made accountable (see, among authorities, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I).

64. The Court will therefore examine whether these positive obligations were fulfilled by the State.

1. The procedural obligations

65. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently, the Court has stated on a number of occasions that an effective judicial system, as 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 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 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 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. Disciplinary measures may also be envisaged (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII, with further references).

66. Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (see *Calvelli and Ciglio*, cited above, § 53). Therefore the Court is called to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In other words, rather than assessing the legal regime *in abstracto*, the Court must examine whether the legal system as a whole adequately dealt with the case at hand (see *Byrzykowski v. Poland*, no. 11562/05, § 107, 27 June 2006, and *Dodov v. Bulgaria*, no. 59548/00, §§ 83 and 86, 17 January 2008).

(a) Internal inquiry and disciplinary proceedings

67. Following the applicant's complaint to the prosecutor's office, the health-care authorities conducted an internal inquiry and found a number of shortcomings in the first days of the applicant's son's treatment (see paragraph 20 above). For his part, the Head Doctor of the hospital decided to impose disciplinary measures on the medical staff (see paragraph 22 above).

68. However, the report of the board of inquiry and the disciplinary decision did not in themselves elaborate on who bore responsibility for the

fatal outcome. In particular, no express conclusion was made as to whether or not the death of the applicant's son had resulted from the identified shortcomings in his medical treatment.

69. To the extent that the considerations of the board of inquiry and the Head Doctor of the hospital suggest that it was the applicant's son who was responsible for the fatal outcome because he repeatedly refused medical treatment, the Court notes that the freedom to accept or refuse specific medical treatment is vital to the principles of self-determination and personal autonomy (see *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, § 136, 10 June 2010). In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention (see *Pretty v. the United Kingdom*, no. 2346/02, § 63, ECHR 2002-III). However, Article 2 of the Convention enshrines the principle of sanctity of life, which is especially evident in the case of a doctor, who exercises his or her skills to save lives and should act in the best interests of his or her patients. The Court has therefore held that this Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved (see *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011). It follows that one of the central issues in determining the validity of a refusal to undergo medical treatment by a patient is the issue of his or her decision-making capacity.

70. In the present case, however, the board of inquiry and the Head Doctor of the hospital did not examine whether S. was competent to make a rational decision regarding his medical treatment and, consequently, whether the doctors were indeed bound by S.'s refusals and had to refrain from taking the measures required to prevent his death. They did not examine the issue of S.'s capacity to understand, even though the file clearly put his mental soundness into question (see paragraphs 7, 10, 11, 15 and 17 above). Furthermore, the fact that the doctors arranged for a psychiatrist to visit S. suggests that they doubted S.'s mental capacity to take rational decisions. It is remarkable that the psychiatrist made a finding that S. suffered from a mental disorder (see paragraph 15 above) and did not reach any finding to the effect that S. was mentally sound so as to form a judgment as to his treatment. Nevertheless, the symptoms observed by the medical staff and the findings of the psychiatrist did not prevent the doctors and the persons conducting the inquiry from taking the patient's refusals to undergo treatment at face value.

71. In these circumstances, it cannot be concluded that the board of inquiry and the Head Doctor of the hospital made an appropriate attempt to examine all the relevant facts concerning the death of the applicant's son

and to identify the persons responsible, as required by Article 2 of the Convention.

(b) Criminal proceedings

72. As to the criminal proceedings, the Court notes that the full-scale investigation into the applicant's allegations was instituted belatedly, on 21 May 2003. That investigation was finally terminated on 13 August 2008, more than seven years and four months after the death of the applicant's son. In the meantime, the X-ray images of the applicant's son – important medical evidence – had been lost. The supervising authorities reversed numerous decisions terminating the criminal proceedings for the reason that the case had not been comprehensively investigated and a number of substantial investigative measures still had to be undertaken (see paragraphs 32, 35, 39, 42 and 45 above). The repeated need for such remittal orders discloses a serious deficiency in the criminal investigation (see *Byrzykowski,* cited above, § 111).

73. It is remarkable that the abovementioned question of S.'s mental capacity to refuse treatment was finally taken up for specific examination more than six years after the incident (see paragraph 42 above). It is not for the Court to examine the reliability of the forensic psychiatric expert report of 14 September 2007 which, after a considerable period of time, had to deal with such a difficult question on the basis of limited material. Nevertheless, the Court points out that the most reliable answer to this question could have been obtained in the course of direct assessment of the patient during his hospitalisation.

74. Having regard to the shortcomings in the criminal investigation and its excessive length, the Court finds that the criminal proceedings in the present case turned out to be ineffective and the applicant ought not to have been expected to pursue them, at least after the decision of 13 August 2008. It follows that the applicant was not required to challenge that decision before the courts, as contended by the Government. The relevant objection of the Government is therefore dismissed.

(c) Civil proceedings

75. The applicant did not lodge a civil claim with the courts. Meanwhile, as noted above (see paragraph 65 above), Article 2 of the Convention does not necessarily require the provision of a criminal-law remedy in every case of medical negligence. The question is therefore whether in the present case the applicant should have raised the matter before the civil courts.

76. The Court takes note of the Government's argument that the applicant could have instituted civil proceedings claiming damages for the alleged medical malpractice. Instead of taking that course of action, the applicant decided to apply to the prosecutor's office seeking the criminal prosecution of the medical staff. In view of the facts of the case and the

domestic criminal-law provisions (see paragraph 51 above), her recourse to a criminal-law remedy does not appear to be unreasonable. Nor was it regarded as such by the domestic authorities, who considered for a substantial period of time that there were grounds for a criminal investigation into the medical malpractice.

77. The Court reiterates that an applicant who has exhausted a remedy that is apparently effective and sufficient cannot also be required to have tried others that were available but probably no more likely to be successful (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999). This principle was followed in the case of *Sergiyenko v. Ukraine* (no. 47690/07, 19 April 2012), which concerned allegations of the ineffectiveness of a criminal investigation into a road-traffic accident resulting in the death of the applicant's son. Rejecting the Government's argument concerning the applicant's failure to institute a separate civil action, the Court noted that the applicant had exhausted a civil remedy in the course of the criminal proceedings and that even if the applicant could have had recourse to a separate civil remedy which was not dependent on the outcome of any criminal investigation in that particular case, any relevant findings in the criminal proceedings would have influenced the outcome of the civil proceedings and the amount of compensation (ibid., §§ 42 and 43).

78. In the present case, the Court, examining the applicant's choice of action, emphasises that the criminal proceedings pursued by the applicant afforded a joint examination of criminal responsibility and civil liability arising from the same culpable conduct, thus facilitating the overall procedural protection of the rights at stake (see paragraph 53 above). The introduction of the civil claim in the criminal case may well have been preferable for the applicant from the standpoint of court fees and other costs and expenses. Furthermore, the investigative authorities were under an obligation to collect evidence in those proceedings. In this regard it has to be noted that the expert opinions requested by the investigating bodies and the other evidence collected by them in the criminal case would have been essential for the determination of the applicant's civil claim. Accordingly, the Court does not consider that the applicant acted inappropriately when choosing to pursue the case under the Code of Criminal Procedure.

79. The Court therefore does not need to determine whether the civil courts would have effectively dealt with a separate civil claim by the applicant throughout the period in which the criminal investigations concerning the same facts were being conducted by the authorities. The above considerations at least do not suggest that the applicant should be reproached for consistently following the criminal proceedings. The Court's conclusion that these proceedings turned out to be ineffective cannot be held against the applicant. On the whole, the applicant should be viewed as having legitimately pursued the criminal proceedings, reasonably expecting that she would be able to raise her civil claims in the criminal case.

80. The Court finally considers that, having pursued criminal investigations for more than seven years, it would be onerous to expect the applicant to subsequently institute civil proceedings.

81. In the light of the above considerations, the Court finds that in the circumstances of the present case the applicant was not obliged to embark on a separate civil action. The Government's objection in this respect should therefore be dismissed.

(d) Conclusion

82. In the light of the foregoing, the Court finds that the applicant was not provided with effective legal procedures compatible with the procedural requirements of Article 2 of the Convention.

83. There has therefore been a violation of the procedural aspect of Article 2 of the Convention.

2. The obligation to ensure adequate health-care regulations

84. It follows from the principles developed by the Court in its case-law (see paragraph 63 above) that, apart from the procedural issues arising under Article 2 of the Convention, another issue concerning the State's positive obligations under Article 2 is the adequacy of the health-care regulations which were applied to the applicant's son's case.

85. Indeed, the Court has in the past examined the quality of legal frameworks in order to determine whether the right to life has been appropriately protected "by law" (see, for example, *Makaratzis v. Greece* [GC], no. 50385/99, § 62, ECHR 2004-XI). By way of contrast, where a Contracting State has made adequate provision to secure high professional standards among health professionals and the protection of the lives of patients, it cannot be accepted that matters such as an error of judgment on the part of a health professional or lack of coordination among health professionals in the treatment of a particular patient are sufficient in themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see *Dodov,* cited above, § 82).

86. In the present case, it can be seen from the reviews conducted by the health-care authorities that one of the factors which contributed to S. failing to receive proper treatment was the inadequacy of the city health-care regulations governing cooperation between the city hospitals in a situation where intensive medical care was only available in one city hospital (see paragraph 20 above). In particular, based on the case of the applicant's son, the board of inquiry found it appropriate to recommend amendments to those regulations concerning the admission of patients to intensive care (see paragraph 21 above). In the light of these considerations and developments, the Court, for its part, has no reason to assume that the local regulations in that area were fit for purpose.

87. The Court further notes that when examining the alleged medical malpractice, the domestic authorities largely relied on the fact that the applicant's son repeatedly refused to consent to vitally important treatment that was offered to him in good time. As noted above, despite S. showing symptoms of a mental disorder, the doctors took those refusals at face value without putting in question S.'s capacity to take rational decisions concerning his treatment. Notably, if S. had agreed to undergo the treatment, the outcome might have been different (see paragraph 46 above).

88. Even though long after S.'s death the domestic authorities eventually concluded that his mental state had not affected his decision-making capacity, the Court considers that the question of the validity of S.'s refusals to accept vitally important treatment should have been properly answered at the right time, namely before the medical staff refrained from pursuing the proposed treatment in relying on the patient's decision. From the standpoint of Article 2 of the Convention a clear stance on this issue was necessary at that time in order to remove the risk that the patient had made his decision without a full understanding of what was involved. To a large extent, this key question was not duly addressed by the doctors during S.'s hospitalisation because the domestic regulations in this field did not sufficiently elaborate on the conditions under which refusal to undergo treatment was valid and binding on medical staff. The present case suggests in particular that the regulatory framework did not adequately ensure that a patient's decision-making capacity was promptly and objectively established in the course of a fair and proper procedure.

89. Furthermore, assuming that the applicant had the capacity to make decisions with regard to his treatment (see paragraph 43 above), his statement in his personal diary referring to his "recovering body" suggests that he might not have been properly informed of the real state of his health (see paragraph 13 above). In the Court's view the present case demonstrates that the guarantees ensuring patients' informed consent to treatment in life-threatening situation did not prove to be sufficient.

90. Accordingly, having regard to the inadequacy of the local regulations governing patients' admission to intensive care and the lack of appropriate rules for establishing patients' decision-making capacity including their informed consent to treatment, the Court finds that the authorities had not taken sufficient steps to put in place a regulatory framework ensuring that the applicant's son's life was properly protected by law as required by Article 2 of the Convention.

91. There has therefore been violation of this provision of the Convention in respect of the State's positive obligation to ensure adequate health-care regulations.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed one million euros (EUR) in respect of non-pecuniary damage.

94. The Government submitted that this claim was excessive and unsubstantiated.

95. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of a violation in the present case that cannot be made good by a finding of a violation alone. Ruling on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. The applicant claimed the reimbursement of EUR 915 and, additionally, EUR 210.40 in respect of: (a) travel expenses in connection with the case; (b) postal expenses; and (c) photocopying expenses.

97. The Government objected to this claim and submitted that only expenses which were necessarily incurred by the applicant within the proceedings before the Court could be reimbursed.

98. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 200 for costs and expenses for the proceedings before the Court.

C. Default interest

99. 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 UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections as to the non-exhaustion of domestic remedies;

2. *Holds* that there has been a violation of Article 2 of the Convention in respect of the State's procedural obligations;

3. *Holds* that there has been a violation of Article 2 of the Convention in respect of the State's positive obligation to ensure adequate health-care regulations;

4. *Holds*
   (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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 200 (two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 5 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President