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

FOURTH SECTION

DECISION

Application no. 44530/18
Jasmina MOMČILOVIĆ
against Serbia

The European Court of Human Rights (Fourth Section), sitting on 5 March 2024 as a Committee composed of:

Anne Louise Bormann*, President*,
Branko Lubarda,
Sebastian Răduleţu*, judges*,
and Branimir Pleše, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 44530/18) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 13 September 2018 by a Serbian national, Ms Jasmina Momčilović, born in 1965 and living in Belgrade ("the applicant"), who was represented by Mr A. Olenik, a lawyer practising in the same city;

the decision to give notice of the application to the Serbian Government ("the Government"), represented by their Agent, Ms Z. Jadrijević Mladar;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged lack of an effective investigation into the death of the applicant's mother (D.M.) which was allegedly caused by medical negligence.

2. On 17 January 2013 D.M. had surgery regarding a tumour which had been previously diagnosed. The operation took place in a State-run hospital. Several days after her discharge, D.M. was again admitted to a hospital because of her worsening health situation.

3. Between 30 January and 24 May 2013 D.M. was treated in several medical institutions due to her very poor health in general, before being released for home treatment. On 24 August 2013 D.M. passed away.

4. On 16 October 2013 the applicant lodged a criminal complaint with the First-Instance Public Prosecutor's Office in Belgrade against Dr A. who, during or after surgery, had allegedly caused the sepsis which, in the applicant's opinion, had ultimately resulted in the death of D.M.

5. On 16 January 2016 the applicant lodged an objection with the Belgrade Court of First Instance in order to expedite the proceedings before the public prosecutor's office. The objection was rejected as no official criminal proceedings had yet been initiated.

6. On 1 March 2018 the Constitutional Court ruled against the applicant.

7. On 14 October 2020 the First-Instance Public Prosecutor's Office rejected the applicant's criminal complaint.

8. On 18 November 2020 the High Public Prosecutor's Office in Belgrade quashed that decision and ordered that an examination by an expert of the relevant medical documentation be carried out.

9. According to the information contained in the case file, the proceedings before the First-Instance Public Prosecutor's Office are still ongoing and the applicant, also, did not raise a compensation claim as part of those proceedings or bring a separate civil claim for damages.

10. Relying on Article 2 of the Convention, the applicant complained of the lack of an effective official investigation into her mother's death which had allegedly been caused by medical negligence.

THE COURT'S ASSESSMENT

11. The Government maintained under Article 35 § 1 of the Convention that the application should be rejected for non-exhaustion of domestic remedies because the applicant had failed to properly raise her complaints before the Constitutional Court or, alternatively, had not brought a separate civil action for damages. Furthermore, according to the Government, the facts of the present case disclosed no violation of Article 2 of the Convention. The applicant disagreed and reaffirmed her complaint.

12. The Court considers that there is no need for it to examine the Government's objection as regards the exhaustion of domestic remedies since the applicant's complaint is in any event inadmissible as manifestly ill-founded (see, for example, *Milić v. Serbia* (dec.), no. 62876/15, §§ 49 and 50, with further references, 21 May 2019).

13. In this connection, the Court notes that there is nothing in the case file to indicate that the death of D.M. was caused intentionally. Indeed, the applicant's complaint itself pertains to the alleged medical negligence in the treatment provided to her mother. Furthermore, there is nothing to substantiate that the State failed in its obligation to put in place an effective

regulatory framework, and the applicant's complaint also does not fall under the very exceptional circumstances in which the responsibility of the State may be engaged under the substantive limb of Article 2 (see, with respect to healthcare providers, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, §§ 190-92, 19 December 2017). Accordingly, the examination of the circumstances leading to D.M.'s death and the alleged responsibility of the healthcare professionals involved are matters which must be addressed in the context of the adequacy of the mechanisms in place for shedding light on the course of those events, that is, in the context of the procedural obligation of the State under Article 2 of the Convention (see *Milić*, cited above, § 50 in fine).

14. On this point, the Court reiterates that in cases involving medical negligence the procedural obligation imposed by the above-mentioned provision, which concerns the requirement to set up an effective judicial system, will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained. Disciplinary measures may also be envisaged (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII). In such cases, therefore, the Court, having regard to the particular features of a respondent State's legal system, has required the applicants to exhaust the legal avenues whereby they could have their complaints duly considered. This is because of the rebuttable presumption that any of those procedures, notably civil redress, are in principle apt to satisfy the State's obligation under Article 2 of the Convention to provide an effective judicial system (see *Lopes de Sousa Fernandes*, cited above, § 137). Article 2 does not therefore necessarily call for a criminal-law remedy on the facts of the present case (see *Milić,* cited above, § 54).

15. The Court additionally notes that domestic courts apply different criteria for establishing liability in criminal and civil proceedings (compare *Šilih v. Slovenia* [GC], no. 71463/01, § 203, 9 April 2009, and *Molga v. Poland* (dec.), no. 78388/12, § 88, 17 January 2017). In particular, a criminal investigation is inherently limited to determining the individual criminal responsibility of the potential perpetrators. While the criminal proceedings – coupled with other investigations carried out by other State institutions – can be instrumental in clarifying the circumstances of the medical treatment in question and in dispelling any doubts about any potential criminal conduct, a criminal-law remedy is of limited effectiveness when the person's death is caused by a multitude of factors and the possibility of joint and several liability falls to be examined. In such cases, a civil-law remedy would be better suited when it comes to providing adequate redress (see *Milić,* cited above, § 57).

16. The choice of means for ensuring the positive obligations under Article 2 of the Convention is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means (see *Sarishvili-Bolkvadze v. Georgia*, no. 58240/08, § 90, 19 July 2018). Furthermore, Article 2 does not entail the right to have third parties prosecuted – or convicted – for a criminal offence. Rather, the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by Article 2 of the Convention (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 257, ECHR 2016).

17. In the light of the ongoing criminal investigation in the present case, the Court cannot conclude that civil proceedings would have pursued the same objective as the criminal-law remedy. On the contrary, considering the broader range of admissible claims, the potential defendants, and the difference in the substantive conditions of liability, it was the civil-law remedy that would have allowed the domestic authorities to submit the case to the most careful scrutiny and would have permitted the State to put matters right through its own legal system. The domestic legal system therefore offered the applicant the possibility of a civil case which could have adequately addressed her arguments and given an appropriate response. The applicant, however, did not make use of this avenue of redress (see *Milić*,cited above, §§ 59 and 60, and *Popović v. Serbia* (dec.), no. 38572/17, § 10, 22 February 2022).

18. In view of the foregoing, the Court cannot but reject the applicant's complaint under Article 2 of the Convention as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 thereof.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 March 2024.

Branimir Pleše Acting Deputy Registrar	Anne Louise Bormann President