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Gegevens

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Inhoudsindicatie

Recht op leven, Medische fout, Geen schadevergoeding, Geen fout

Ga direct naar

- Samenvatting
- Uitspraak
- Beslissing/besluit
- Noot

Samenvatting

Klaagsters zoon, geboren in 1983, werd in 2006 gediagnosticeerd met een kwaadaardig melanoom. Hij werd daaraan geopereerd. In 2009 werd een metastase verwijderd uit zijn hersenen. Daarna verminderde zijn gezondheid snel, waarop hij wederom in het ziekenhuis werd opgenomen. Hij onderging daar tal van behandelingen, beweerdelijk zonder dat hij of zijn moeder daarvoor ‘informed consent’ hadden gegeven. Volgens zijn moeder, die optreedt als klager, is hij daarbij slecht behandeld en zijn verkeerde beslissingen genomen. De zoon is als gevolg daarvan vroegtijdig komen te overlijden.

Na het overlijden van de zoon is op verzoek van de moeder een onderzoek ingesteld. Aanvankelijk ging het om een gewoon doodsoorzaakonderzoek op, later werd dit gevolgd door een strafrechtelijk onderzoek. Bij dat laatste onderzoek zijn diverse experts en forensische experts gehoord. De openbaar aanklager vond te weinig bewijs dat in dit geval sprake zou zijn geweest van ernstige medische nalatigheid. Gelet daarop is geen strafrechtelijke vervolging ingesteld tegen de artsen die betrokken waren bij de behandeling van de zoon van klaagster, een besluit dat voor de Estse rechters in stand is gebleven.

Klaagster stelt voor het EHRM allereerst dat onvoldoende onderzoek is verricht naar de omstandigheden in het ziekenhuis die van invloed waren op het overlijden van haar zoon. Zij beroept zich daarbij op art. 2 en 3 EVRM. Tevens beroept zij zich op art. 8 EVRM.

Het EHRM bepaalt dat deze zaak moet worden getoetst aan art. 2 EVRM en niet aan art. 3 EVRM. Het EHRM overweegt vervolgens dat het hier gaat om een privaatrechtelijke situatie, waarbij vooral moet worden onderzocht of de staat heeft voorzien in voldoende mogelijkheden om onderzoek te doen en rechtsherstel te bieden voor het

geval daarbij fouten zijn gemaakt. Daarbij merkt het EHRM op dat in Estland zowel een strafrechtelijk als een civielrechtelijk kader bestaat. In het onderhavige geval constateert het EHRM dat de autoriteiten een zorgvuldig strafrechtelijk onderzoek hebben ingesteld, waarbij diverse deskundigen zijn gehoord. Met het deskundigenbewijs is bovendien zorgvuldig omgegaan, zoals ook is vereist in een procedure waarin dit type bewijs zo belangrijk is. De deskundigen moeten dan voldoende competent en onafhankelijk zijn, de aan de deskundigen voorgelegde vragen moeten alle relevante aspecten van de zaak betreffen, en de deskundigenrapporten moeten voldoende zijn gemotiveerd. In deze zaak is niet gebleken dat aan die eisen niet zou zijn voldaan. De procedure heeft bovendien niet onredelijk lang geduurd, zodat geen sprake is van een schending van art. 2 EVRM. Deze klacht wordt daarom afgewezen.
Ten aanzien van art. 8 EVRM constateert het Hof dat klaagster hier klaagt uit naam van zowel haar zoon als haar zelf. De vraag is of zij inderdaad voor haar zoon kan opkomen. Zij kan in dit geval niet als indirect slachtoffer worden aangemerkt, nu de kwestie van het geven van toestemming voor een medische behandeling een kernaspect vormt van het recht op respect voor het privéleven en als zodanig niet als een overdraagbaar recht kan worden beschouwd. De klacht namens de zoon is dan ook niet-ontvankelijk ratione personae. Verder is niet gebleken dat klaagster juridisch gezien bevoegd was om in het ziekenhuis namens haar zoon toestemming te geven, zodat niet kan worden aangetoond dat het ziekenhuis haar had moeten vragen om die toestemming. Gelet daarop is ook geen sprake van een schending van art. 8 EVRM jegens klaagster.

Uitspraak

I. Alleged violation of Article 2 of the Convention

65. Relying on the procedural aspect of Article 2 and on Article 3 of the Convention, the applicant complained of lack of effective investigation into her son's maltreatment and subsequent death in a hospital as a result of alleged medical negligence.
Being the master of characterisation to be given in law to the facts of the case, the Court is not bound by the characterisation given by the applicant or a Government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). The Court considers that the applicant's complaints should be examined from the standpoint of Article 2 of the Convention in as much as they are related to the death of the applicant's son in the hospital.
Article 2, in so far as relevant to the present case, reads as follows:
""1. Everyone's right to life shall be protected by law ..."

A. Admissibility

1. The parties' submissions

(a) The Government

66. The Government raised a preliminary objection of non-exhaustion of domestic remedies and submitted that the complaint under Article 2 should be declared inadmissible.
67. The Government noted that although the applicant had reported a criminal offence and contested the termination of the criminal proceedings, this could not be considered sufficient within the meaning of Article 35 of the Convention. The criminal investigation had not established elements of a criminal offence, so the criminal proceedings had been terminated without bringing charges against anyone. In instances where elements of criminal offence were not established, the criminal-law remedy could not be seen as effective. The applicant could therefore not choose to pursue it in place of a civil remedy in order to meet the requirement of exhaustion of domestic remedies.
68. The Government further drew attention to the fact that the termination of criminal proceedings for absence of elements of a criminal offence did not affect the effectiveness of civil-law remedies. However, the applicant had not pursued any civil-law remedies to complain about O.'s medical treatment and subsequent death.
69. Although the applicant had recourse to the Expert Committee on the Quality of Health Care Services, this could not be considered as making use of a legal remedy. The Government noted that the Expert Committee was an advisory body the purpose of which was to assess the quality of health-care services provided to patients. It did not give opinions on issues of law, nor did it resolve claims for damages. The opinions of the Expert Committee were not binding; nor could they be contested. Those opinions could be used as evidence in civil court proceedings, but not in criminal court proceedings, where a separate forensic medical assessment had to be

ordered. According to the Government, regardless of the Expert Committee's opinion, a person could lodge an action with the court and request a new expert opinion.

(b) The applicant

70. Referring to the principle of mandatory criminal proceedings provided for in Article 6 of the Code of Criminal Procedure, the applicant submitted that the sole effective legal remedy to have the cause of death investigated was the submission of an offence report and the consequent criminal proceedings to determine whether a crime had been committed. As the ruling of the Tallinn Court of Appeal of 28 January 2013 had been final, the applicant claimed that she had used all the required domestic remedies.

71. The applicant noted that the lodging of a claim for pecuniary or non-pecuniary damage in a civil court was neither an effective nor an appropriate legal remedy to have a person's death investigated. In any case, the possibility of claiming pecuniary or non-pecuniary damage did not relieve the State from its obligation to establish an effective judicial system for investigating the cause of death in the course of criminal proceedings.

72. Referring to the Court's judgment in the case of *Jasinskis v. Latvia* (no. 45744/08, § 50, 21 December 2010), the applicant pointed out that in the event of there being a number of domestic remedies which an individual could pursue, that person was entitled to choose a remedy which addressed his or her essential grievance.

2. The Court's assessment

73. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see *Vuckovic and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-70, 25 March 2014, and *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Vuckovic and Others*, cited above, §§ 71 and 74, and *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

74. In the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999, and *Jasinskis*, cited above, § 50).

75. The Court has previously noted that in alleged medical negligence cases, the Estonian legal order provided for both civil and criminal remedies. Both of those remedies provide an opportunity to determine the cause of death of patients in the care of the medical profession, address issues of possible medical negligence and make accountable those responsible for wrongful deaths (see *A.V. v. Estonia* (dec.), no. 3853/14, § 72, 29 March 2016)
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76. In the instant case the applicant made use of the criminal-law remedy provided for by Estonian law. She lodged an offence report with the prosecutor's office on 22 March 2010 and criminal proceedings were initiated on 1 April 2010. During the following two years and seven months, until the criminal proceedings were terminated on 25 October 2012, several measures were taken within the framework of the criminal investigation: the applicant herself, O.'s friends who had visited him in the hospital, as well as various doctors and nurses who had been involved in his treatment were interviewed; O.'s medical file was examined and a forensic medical assessment was ordered from the Estonian Forensic Science Institute. By an order of 25 October 2012 the prosecutor terminated the criminal proceedings, stating that the criminal investigation had not proven that O.'s death had been caused by the medical staff or that O. had been tortured during his stay at the hospital. No charges were brought against anyone.

77. The Court notes that in the present case the applicant did not attempt to make use of civil-law remedies.

78. As regards the proceedings before the Expert Committee, the Court points out that the committee is an advisory body that does not by itself have authority to provide redress (see paragraph 49 above). The opinions of the Expert Committee can be used as documentary evidence in civil court proceedings (see paragraph 59 above), but cannot, according to domestic court practice, be used in the capacity of expert opinions in criminal court proceedings (see paragraph 52 above). Based on those findings, recourse to the Expert Committee cannot, when

taken alone, be considered as use of a remedy sufficient for meeting the requirement of exhaustion of domestic remedies (see *A.V.*, cited above, § 70).
79. Taking note of the Government's observations, the Court considers that a mere attempt to initiate criminal proceedings by lodging an offence report with the relevant authorities might not be sufficient to consider the domestic remedies to be exhausted. This might be so where, based on the particular facts of a case, it is clear that no elements of a criminal offence exist, no criminal proceedings are ever instituted and this is promptly made known to the person lodging the report.
80. In the instant case, however, criminal proceedings were instituted and continued for a period of two years and seven months, during which several procedural steps were taken to elucidate the facts of the case and establish the possible liability of the medical-care provider and the personnel involved. The decision to terminate the criminal proceedings became final three months later, after appeals to the Office of the Prosecutor General and the Tallinn Court of Appeal had been unsuccessful.
81. Having regard to the manner in which the criminal proceedings were conducted – they cannot be considered to have been merely formalistic or superficial – the Court considers that the applicant could reasonably have expected them to address her grievances. The Court notes in this context that under the domestic law it was also open to her to lodge a civil claim within the criminal proceedings (see paragraph 29 above). Assessing the effectiveness of the criminal remedy within the context of the present case, the fact that the applicant did not lodge a separate civil action cannot be held against her when assessing whether domestic remedies have been exhausted (see, *Bajic v. Croatia*, no. 41108/10, §§ 79 and 81, 13 November 2012, and, *a contrario*, *Karakoca v. Turkey* (dec.), no. 461456/11, ECHR, 21 May 2013).
82. In the light of the foregoing the Court finds that the Government's objection regarding the non-exhaustion of domestic remedies should be dismissed.
83. The Court further considers that the complaint under Article 2 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.
B. Merits
1. The parties' submissions
(a) The applicant
84. The applicant complained under Article 2 of the Convention that the police had refused to institute criminal proceedings following her initial complaint of 15 October 2009 and that when proceedings were finally initiated, they had been unreasonably lengthy. All the steps necessary to secure possible evidence in the case had not been taken. No independent autopsy had been performed and the results of the tests performed in the hospital had not been independently verified. The applicant put into question the official explanation for the cause of her son's death and considered that the medical staff had failed to carry out a sufficiently profound medical examination of her son and to give due consideration to other possible reasons for the deterioration of his health, besides the cancer. For example, they had failed to diagnose pneumonia in due time and to assess whether the deterioration of O.'s condition could have been attributed to a tick-borne disease. Other possible causes of death had also been overlooked by the investigative authorities. The applicant further argued that the experts and authorities had failed to duly consider whether the administration of certain medicines, including sedatives, penicillin and medicines lowering the blood pressure, had been justified and in accordance with clinical safety guidelines. Nor had they considered whether such treatment had in fact had negative effects on O.'s condition, including causing his breathing to stop on 12 October 2013. Not all of the medical staff concerned had been questioned in the course of the investigation, and many of those who had been questioned had lied under oath. In the criminal proceedings the authorities had failed to ascertain whether depriving a person of food and treatment, in spite of objections from his immediate family, could be considered to be manslaughter. The procedure for determining brain death had not been followed and O. had been deprived of any treatment or food on 13 October 2009 without the brain-death procedure even having been commenced as required, let alone having been completed.
85. According to the applicant, the above facts demonstrated that the conclusions reached in the criminal proceedings and the subsequent termination of the proceedings had been based to a large extent on an insufficiently thorough examination of the case as well as on incomplete and falsified information. That illustrated

that there was no effective judicial system in Estonia for establishing the cause of death of a person who had died in a hospital.

(b) The Government

86. The Government submitted that Estonia had an independent and effective system consisting of both criminal-law and civil-law remedies for investigating deaths allegedly arising from medical negligence, as required under Article 2 of the Convention.

87. Firstly, concerning criminal-law remedies, the Government pointed out that under the Code of Criminal Procedure a person could submit a report of a criminal offence to an investigative authority. Criminal proceedings would be initiated if there were reasons and grounds for doing so, namely if a criminal offence was suspected. The principle of legality applied, obliging the investigative authorities always to initiate criminal proceedings where there were elements of a criminal offence and to observe the principle of i*n dubio pro duriore*, that is to say, to interpret each suspicion of a criminal offence in favour of initiating criminal proceedings (see paragraphs 30 and 51 above).

88. Secondly, concerning civil-law remedies, the Government explained that under Estonian law the liability of the health-care provider could be contractual (based on a violation of the contract to provide health-care services) or non-contractual (see paragraph 58 above). Moreover, the Government submitted that non-pecuniary damages could also be claimed by the next-of-kin of a deceased person – both as successors of the deceased for damage caused to the deceased, as well as in their own capacity for the damage caused to them. Although in the latter case the existence of exceptional circumstances was required, the Government pointed out that the existence of such circumstances was assessed on a case-by-case basis. Therefore it was impossible to claim with certainty that those circumstances had existed in the present case without the applicant having had recourse to the national courts first.

89. The Government further submitted that in cases concerning the provision of health-care services, non-legal specialist knowledge was required in the criminal proceedings and a separate expert assessment therefore had to be ordered. The Government noted, however, that the Expert Committee's opinions were not admissible as expert opinions in criminal proceedings and that the refusal to institute criminal proceedings could not be based on the opinion of the Expert Committee (see paragraph 52 above).

90. In the event that criminal proceedings had already been instituted and circumstances which would have precluded criminal proceedings (for example lack of grounds for instituting criminal proceedings) became evident only during the proceedings, the proceedings had to be terminated on the basis of an order from the investigative body with the permission of a prosecutor's office, or by means of an order from a prosecutor's office. In such instances, the victim could contest the termination of the criminal proceedings by lodging a complaint firstly with the Office of the Prosecutor General and ultimately with the Court of Appeal. The Supreme Court had affirmed that, for example, in cases of manslaughter or murder, the next-of-kin of the deceased was also considered to be a victim (see paragraphs 30 to 32 and 54 above).

91. The Government further referred to the procedures to be followed under the Establishment of the Cause of Death Act where a patient had died in a hospital. Under that Act, if there was reason to believe that the person had died as a result of a criminal offence or external causes or a suspicion thereof, an investigative body or the prosecutor's office had to be immediately notified. Furthermore, where the cause of death could not be established as a result of an external examination of the deceased or based on information concerning his or her latest disease and treatment, the doctor had to send the body for a mandatory patho-anatomical autopsy (see paragraphs 33 to 38 above). However, the Government argued that this did not mean that criminal proceedings had to be conducted for each case of death in a hospital.

92. The Government pointed out that Estonia had legislative grounds and the supporting case-law to confirm that providers of health-care services could be held criminally liable and that the victims had been awarded both pecuniary and non-pecuniary damages. The Penal Code provided for criminal liability for negligent manslaughter, for causing serious damage to health through negligence and for placing or leaving another person in a situation that was life-threatening or likely to cause serious damage to the person's health (see paragraphs 25 to 27 above). The Government admitted that there had not been many cases where health-service providers had been convicted.

93. As to the present case, the Government submitted that the patho-anatomical autopsy of the applicant’s son had been performed in accordance with the law. However, based on its results, as no suspicion had arisen that he had died as a result of a criminal offence, a criminal investigation had not been opened. Criminal proceedings had been instituted later, on 1 April 2010, following an application from the applicant.
94. During the proceedings the applicant and different witnesses (both the medical staff of the hospital as well as O.’s friends) had been interviewed, requests for documentary evidence (the Expert Committee’s opinion, O.’s medical file as well as the autopsy report) had been submitted and a forensic medical assessment had been ordered.
95. The experts on the forensic medical committee had concluded unequivocally that the treatment provided by the NEMC had conformed to the patient’s state of health: the tracheotomy as well as the attaching of O.’s arms to the bed had been necessary and the medication administered had not caused O. to stop breathing independently. In addition, the forensic medical experts concluded that the decision to stop administering medication as well as food, but to continue with the infusion therapy after 13 October 2009 had been justified, and that the patient’s death had not been the result of switching off the mechanical ventilation.
96. On this basis, after assessing all the collected evidence, on 25 October 2012 the North District prosecutor’s office had terminated the criminal proceedings, concluding that there were no grounds for criminal proceedings, that is to say, during the course of the proceedings no elements of a criminal offence had been proven.
97. The decision to terminate the proceedings had been upheld by the Office of the Prosecutor General and by the Court of Appeal. In dismissing the applicant’s complaint, the Prosecutor General had addressed the applicant’s concerns regarding the alleged errors in treatment and had explained that despite the applicant’s disagreement with the outcome of the proceedings, the evidence gathered had not given rise to a suspicion that O. had been given unnecessary treatment or that negligent errors had brought about his premature death. It was also explained that the conclusions of the forensic medical expert committee had been objectively linked to the evidence available, and that there had been no valid grounds to doubt the competence of experts from the Estonian Forensic Science Institute. The Prosecutor General had also explained that not all the witnesses requested by the applicant had been interviewed as they could not have provided additional relevant information. The Court of Appeal had agreed with those findings.
98. The Government emphasised in their observations that any omissions or clerical errors during O.’s treatment, even if such had been made, that had not been relevant in relation to establishing the elements of any punishable act under the Penal Code (that is, which could not bring about criminal liability) did not have to be investigated in the course of criminal proceedings.
99. As regards the initiation and the length of the criminal proceedings, the Government submitted that there had been no obligation to initiate criminal proceedings following the applicant’s call to the police on 15 October 2009. Based on its content, the call had not been treated as a report of a criminal offence. The Government stressed that there was no obligation to initiate criminal proceedings if elements of a criminal offence did not seem to be present, based on the information received. Criminal proceedings had been initiated on 1 April 2010, that is to say within nine days of the submission of the report of a criminal offence, and had been terminated on 25 October 2012. Although the Government admitted that based on the materials of the criminal case, the activeness of the proceedings had varied at different stages, they considered that pre-trial proceedings lasting two and a half years could not be considered unreasonably long. In that regard, the Government pointed out that the applicant had submitted extensive additional correspondence to the investigators during the proceedings and that the time-consuming forensic committee expert assessment had to be prepared.

2. The Court’s assessment

(a) General principles

100. The Court reiterates that the first sentence of Article 2 of the Convention 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. These principles apply also to the area of public health (see *Valeriy Fuklev v. Ukraine*, no. 6318/03, §§ 64–65, 16 January 2014; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).
101. However, where a Contracting State has made adequate provision to secure high professional standards among health professionals and to protect the lives of patients, the Court cannot accept that matters such as error

of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are sufficient of 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 *Powell*, cited above).

102. The positive obligations imposed on the State by Article 2 of the Convention imply that an effective independent judicial system be put in place by which 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 many other authorities, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002‑I, and *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, § 81, ECHR 2013).

103. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural 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 (see *Šilih v. Slovenia* [GC], no. 71463/01, § 194, 9 April 2009, and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII). 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 responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Šilih*, cited above, § 194; *Calvelli and Ciglio*, cited above, § 51; and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII). However, even if the procedural obligation under Article 2 of the Convention does not necessarily require the State to provide for criminal proceedings in medical negligence cases, such proceedings could by themselves have fulfilled the requirements of Article 2 of the Convention (see *Šilih*, cited above, § 202).

104. The State's obligation under 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, and that requires a prompt examination of the case without unnecessary delays (see *Šilih*, cited above, § 195, and *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006).

(b) Application of the principles to the present case

105. In determining whether the State has fulfilled its positive obligation under Article 2 of the Convention to set up an effective independent judicial system, the Court will examine whether the available legal remedies, taken together, as provided for in law and applied in practice, secured the effective legal means capable of establishing the relevant facts, holding accountable those at fault and providing appropriate redress to the victim (see *Bilbija and Blazevic v. Croatia*, no. 62870/13, § 102, 12 January 2016).

106. The Court firstly notes that with regard to potential medical negligence cases, the respondent State has made available both criminal-law and civil-law remedies that in principle enable claims of medical errors resulting in the death of a patient to be addressed and those responsible to be held accountable.

107. As regards criminal-law remedies, negligent manslaughter, the causing of serious damage to health by negligence, as well as placing or leaving another person in a dangerous situation constitute criminal offences under the Estonian Penal Code (see paragraphs 25 to 27 above). Furthermore, under the Code of Criminal Procedure, an investigative body or the public prosecutor's office must institute criminal proceedings if they obtain information indicating that a criminal offence may have taken place. Such information may be obtained, for example, through a report made by a victim or the victim's next-of-kin. Also, health-care professionals are under a duty to report suspicious deaths (see paragraphs 28, 30 and paragraph 51 above). The Establishment of the Cause of Death Act provides for further rules relating to death while in hospital (see paragraphs 33 to 38 above).

108. The Court has also taken note of the domestic courts' case-law, referred to by the Government, which indicates that criminal proceedings have been conducted against medical practitioners in medical negligence cases and that those responsible have also been convicted (see paragraphs 52 to 53 and paragraph 56 above). The Court also notes the central role of forensic medical examinations and the importance accorded to medical expert opinions in cases dealing with possible medical errors (see paragraph 52).

109. As for civil remedies, the Court has had regard to domestic law and practice according to which medical errors can be established in civil courts, which also can and do award compensation for non-pecuniary damage

(see paragraphs 58 to 64 above). The Court also notes that under domestic law, a civil claim against the accused can be brought within the framework of criminal proceedings (see paragraph 29 above). The Court observes that in certain circumstances the deceased persons' next-of-kin, as heirs, can claim compensation for non-pecuniary damage caused by the death and, in "exceptional circumstances", can also claim compensation on their own behalf (see paragraphs 40 and 62 above).
110. In the instant case the applicant chose to use the criminal-law remedy. It must thus be assessed whether the criminal proceedings were in accordance with the State's procedural obligation under Article 2 of the Convention.
111. As regards the initiation of the criminal proceedings, it appears from the material submitted to the Court that the applicant's initial phone call to the police on 15 October 2009 was not registered as a report of a criminal offence but rather, based on its content, as a complaint about the medical care received and an expression of a wish to obtain an expert assessment. Thus no criminal proceedings were initiated in October 2009. The Court has no convincing reason to reconsider the initial assessment given to the particular situation by the national authorities. Subsequently, criminal proceedings were instituted on 1 April 2010, nine days after the applicant had lodged an offence report.
112. During the criminal proceedings, the applicant, O.'s friends who had visited him at the hospital and members of the medical staff were heard as witnesses; copies of O.'s medical file and the autopsy report were used as evidence and experts from the Estonian Forensic Science Institute were asked to submit an expert assessment. The questions posed by the prosecutor to the forensic medical experts concerned, *inter alia*, the overall adequacy of the treatment and the cause of O.'s death; the medical justification for the administration of different medicines, including whether they could have caused O.'s breathing to stop; the time at which O.'s brain death was ascertained and the subsequent decision to stop feeding him. The forensic medical assessment concluded that O.'s death had been caused by malignant melanoma with multiple metastases. The forensic experts asserted that O.'s treatment had conformed to his state of health and did not identify any instances of medical negligence or errors of treatment. Based on the material gathered during the proceedings, the criminal investigation was terminated as there was no evidence to suggest that O.'s death could be attributed to the medical staff.
113. The Court notes that the decision to terminate the criminal proceedings does not refer to the Expert Committee's opinion, which cannot be used as an expert opinion in criminal proceedings and which the applicant has contested as including false data. Moreover, there is no compelling evidence that the forensic medical experts from the Estonian Forensic Science Institute would have been incompetent or partial in their work. Following appeals lodged by the applicant, the Prosecutor General and the Court of Appeal upheld the decision to terminate the proceedings and explained why not all the witnesses referred to by the applicant had been heard.
114. As regards the length of the proceedings, the Court considers that although there seem to have been periods of lesser activity during the proceedings, which the Government have also admitted, the total duration of the proceedings – two years and ten months until the final judgment on the termination of the criminal proceedings – cannot be considered excessively long.
115. The Court stresses that medical negligence cases often entail complex medical diagnoses and decisions that might have been taken under pressure or possibly in situations where no course of action would be free from some adverse side effects or would guarantee full recovery. In such instances, the investigative bodies and ultimately the courts, tasked with the responsibility of giving *ex post* legal qualification to previous medical decisions and courses of treatment, cannot assume the position of first-hand medical experts. This is why the medical expert opinions are very likely to carry a crucial weight in the courts' assessment of highly complex issues of medical negligence (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007). Consequently, given the importance of the medical expert opinions, the procedural aspects of obtaining such opinions are essential. Those aspects concern, *inter alia*, the competence and independence of the experts, ensuring that the questions posed to the experts cover all the medically relevant aspects of the case, and that the expert opinions themselves are sufficiently reasoned.
116. Taking into account the observations of the applicant and the Government and based on the submitted material, the Court does not find sufficient grounds to conclude that the criminal proceedings in the respondent State would have been inadequate or not sufficiently thorough. The prosecutor's decision to terminate the criminal proceedings was not taken hastily or arbitrarily, but rather relied on the evidence gathered, including the forensic medical assessment, which addressed questions posed within the framework of the criminal proceedings and

matters regarding O.’s treatment and the cause of his death. The Court considers that although the forensic medical opinion might not have addressed all the questions that the applicant herself considered important, the national prosecution authorities should be allowed a certain discretion in deciding which questions are relevant in establishing criminal liability. The fact that the criminal proceedings did not lead to conviction does not in itself necessarily mean that the investigation was ineffective and in breach of the respondent State’s obligations under Article 2 of the Convention (see *Istratoiu v. Romania* (dec.), no. 56556/10, § 80, 27 January 2015).
117. In conclusion, taking into account that the respondent State has demonstrated that both the civil-law and criminal-law remedies exist and function in practice, and considering that the criminal-law remedy used by the applicant in the present case cannot be said to have been applied ineffectively, the Court finds no violation of Article 2 of the Convention.

II. Alleged violation of Article 8 of the Convention

118. The applicant complained under Article 8 of the Convention that various medicines were administered without O.’s consent or the consent of the applicant herself. According to the applicant, the authorities failed to address that issue during the proceedings.
119. Under Article 3, the applicant additionally complained about the medical procedures of intubation and tracheotomy performed on her son and the use of physical restraints to attach O.’s hands to the bed against his will as well as that of the applicant. According to the applicant, the unnecessary suffering caused by those medical acts was never sufficiently addressed during the criminal proceedings.
120. Being the master of characterisation to be given in law to the facts of the case, the Court is not bound by the characterisation given by the applicant or a government (see *Guerra and Others*, cited above, § 44). The Court considers that the applicant’s complaints raised under Article 3 should be examined from the standpoint of Article 8 in as much as they relate to the alleged involuntary treatment administered to her son.
121. Article 8 of the Convention reads as follows:
“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Admissibility

1. The parties’ submissions

122. The Government firstly raised the objection of non-exhaustion of domestic remedies. They argued that the alleged violation consisting of failure to obtain informed consent from a patient was a matter of civil liability under national law and that the applicant had not made use of the civil-law remedies to complain of O.’s involuntary treatment. According to the Government, the remedy of claiming compensation for non-pecuniary damage would have been available to the applicant under national law. The Government submitted that although the applicant had submitted her complaints within criminal proceedings, this could not be considered an effective remedy as no elements of a criminal offence had been found with regard to the acts complained of.
123. The Government further argued that the applicant could not be considered to be a victim with regard to the complaints addressed under Article 8 about the administration of medicines and the performance of various procedures without her consent or that of her son. The Government pointed out that O. had been conscious and capable of expressing his will as regards his treatment, at least until 5 October 2009. Even thereafter the right to represent O. in such matters had never been transferred to the applicant. The Government referred to sections 766 and 767 of the Obligations Act, which provided for the general rule of obtaining a patient’s consent, but also set out a special regulation for instances where a patient was incapable of expressing his or her will. In the latter case, the provision of health-care services was permitted without the consent of the patient if it was in the interests of the patient and corresponded to the intentions expressed by him or her earlier, or to his or her presumed intentions, and if failure to provide health-care services promptly would put the life of the patient at risk or significantly damage his or her health (see paragraphs 43–44 above). The Government submitted that the fact that O. had been admitted to hospital for treatment of his own free will had formed the basis for the subsequent treatment measures, even after he was no longer capable of expressing his will directly.

124. The applicant considered that she had exhausted the effective domestic legal remedies. As to her victim status, she submitted that the Court had recognised the right of the next-of-kin of the deceased to submit an application to the Court where an individual had died in a medical facility and the State had failed to conduct an effective investigation into the death. Hence, her application should be considered admissible.

2. The Court's assessment

125. The Court notes that the applicant complained under Article 8 that no consent had been obtained from either her son or herself before certain medicines had been administered and medical procedures carried out. In other words, the applicant has firstly submitted a complaint as an indirect victim on behalf of her son and secondly as a direct victim of not having been asked for consent. The Court points out that the applicant did not specify any particular time periods during O.'s stay at the hospital when consent should have been obtained from her son or herself.

126. As regards the standing of direct and indirect victims, the Court's approach has been summarised in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, §§ 96-100, ECHR 2014).

127. In so far as the complaint relates to the lack of consent from the applicant's deceased son, the Court considers that the complaint is incompatible *ratione personae* with the provisions of the Convention. The question of consent to medical treatment concerns the core of a person's right to respect for his private life and belongs to the category of non-transferable rights (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI; *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 100; and, *mutatis mutandis, Elberte v. Latvia*, no. 61243/08, § 65, ECHR 2015, where the Court considered incompatible *ratione personae* the applicant's complaint that her deceased husband had not consented to tissue removal). Thus the applicant cannot rely on that right on behalf of her son in the context of proceedings under Article 8 of the Convention.

128. With regard to the part of the complaint concerning failure to obtain consent from the applicant herself, the Court observes that the Government's argument that the applicant was not her son's legal representative has not been contested by the applicant. Against that background, it must be considered that the applicant did not have the authority to act on her son's behalf, including in the area of medical treatment. In those circumstances, although her son's time in the hospital must undoubtedly have been emotionally difficult for her, the Court is not satisfied that the applicant's own rights under Article 8 were directly affected by the fact that she was not asked for consent to her son's treatment (see *A.V.*, cited above, § 82, with further references).

129. It follows that complaint under Article 8 in its entirety is incompatible *ratione personae* and must be declared inadmissible, without there being a need to address the question of the exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

1. *Declares* the complaint under Article 2 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 2 of the Convention.

Noot

1. De recente rechtspraak van het EHRM maakt duidelijk dat een land verschillende wegen heeft om vast te stellen of er sprake is geweest van een medische fout rond een overlijden. Ook deze zaak uit Estland laat dit weer zien. In deze zaak heeft de moeder van een 29e jarige zoon een strafrechtelijk traject ingezet nadat de zoon was overleden. De Estse rechter doet niet onnodig lang over de behandeling van het onderzoek. Alle bij de behandeling betrokken hulpverleners worden door de rechter vrijgesproken wegens gebrek aan bewijs. Staat dit niet in contrast met andere uitspraken van het Hof, waarin overledenen door hun nabestaanden worden bijgestaan? Hadden de ouders bij gebrek aan *informed consent* van hun zoon of dochter geen toestemming moeten geven? En was er anderszins geen sprake geweest van een schending van art. 8 EVRM? Nee, aldus een unaniem oordelend Hof.

2. Uit de zaak *Rõigas* komt naar voren dat de zoon van mevrouw Rõigas, in 1983 geboren, in 2006 in het ziekenhuis was beland. Hij had toen een kwaadaardige melanomie. Datzelfde jaar werd hij daaraan geopereerd, zonder dat duidelijk werd of het nadien beter dan wel slechter met hem ging. In 2009 werd hij nogmaals geopereerd aan een metastase in zijn hoofd. Hij kreeg toen radiotietherapie. Omdat zijn gezondheid enige tijd later wederom achteruit ging, werd hij opgenomen in het ziekenhuis. Aldaar werd hij aan diverse geneesmiddelen en behandelingen onderworpen zonder duidelijk resultaat. Volgens de moeder werd noch hem, noch zijn moeder om toestemming gevraagd voor die ingrepen. Uiteindelijk kwam hij ruim een maand na zijn opname te overlijden.

Omdat de moeder volgens de Estse rechter na een strafrechtelijk traject geen gelijk kreeg, legt zij haar zaak om in aanmerking te komen voor schadevergoeding voor aan het Hof in Straatsburg.
3. De wijze waarop het Hof de klachten van mevrouw Rõigas ontleedt, getuigt van een vorm van 'excessive formalism' (zie reeds *Neumeister* t. *Oostenrijk*, EHRM 27 juni 1968, nr. 1936/63, ECLI:CE:ECHR:1968:0627JUD000193663, par. 7). Dat belooft meestal weinig goeds voor de aangeklaagde staat, maar in dit geval loopt dat anders af. Mevrouw Rõigas had als nabestaande van de heer O. een reeks klachten geformuleerd, waarop de autoriteiten haars inziens hadden nagelaten te reageren. Nadat het Hof de zaak ontvankelijk heeft verklaard, legt het al die klachten terzijde. Volgens het Hof moet er bij klachten over het recht op leven, op grond van art. 2 EVRM, een onderscheid worden gemaakt tussen klachten door de nabestaande zelf en klachten door nabestaanden over het zorgsysteem. Indien zorgprofessionals hun hoge professionele standaarden niet nakomen en zij het recht op leven van patiënten niet waarborgen, hoeft dat nog geen reden te zijn voor een strafrechtelijke procedure door de moeder van een volwassen man. Voor zover al nodig kan de moeder namens de zoon eventueel via een civielrechtelijke weg ingrijpen, maar dit vraagt dan om instemming namens de zoon. Dit was in deze zaak niet gebeurd. In de bovenstaande zaak had de klaagster uitsluitend voor de strafrechtelijke route gekozen (par. 110). Waarom zij aldus had gekozen wordt niet duidelijk. Had de politie haar gewezen op de civielrechtelijke weg? Was zij eentueel gewezen op andere mogelijkheden om te trachten in het gelijk te worden gesteld? Het antwoord op die vragen kunnen wij niet afleiden uit de zaak.
4. Nu mevrouw Rõigas had ingezet op de strafrechtelijke route, richt het Hof zich uitsluitend op de stappen die de Estse rechter daarbij tegenkomt. Daarbij wordt al snel duidelijk dat de strafrechtelijke kwalificaties, te weten 'de onmenselijke behandeling en de omstandigheden van zijn dood' buiten zicht blijven (par. 18). Het Hof neemt in dit verband aan dat de Estse autoriteiten hoge eisen stellen aan zorgprofessionals, afgaande op de door de Estse autoriteiten geciteerde zaken. Uit deze overgelegde uitspraken komt bovendien naar voren dat indien een zorgprofessional in een ziekenhuis een fout maakt, deze zo nodig kan rekenen op een forse straf. Het Hof gaat echter niet in op het feit dat dit in de meeste gevallen niet blijkt te leiden tot een strafrechtelijke of andere maatregel. In ziekenhuizen worden vaak 'complex medical diagnoses' gesteld, zonder dat een individuele zorgverlener veel tijd heeft om goed na te denken over alle voors en tegens. Deze wel erg oppervlakkige beoordeling van de Estse praktijk maakt, in combinatie met de keuze om uitsluitend de strafrechtelijke mogelijkheden te onderzoeken, dat het Hof klaagster erg gemakkelijk zonder schadevergoeding naar huis stuurt.
5. Ook haar andere klacht, namelijk die met betrekking tot de toediening van bepaalde geneesmiddelen en het aanbrengen van geneeskundige procedures zonder toestemming van haarzelf, levert mevrouw Rõigas niets op. Onder verwijzing naar de zaak *Centre for Legal Resources on behalf of Valentin Câmpeanu* t. *Roemenië* wijst het Hof deze aanklacht zelfs onmiddellijk af (EHRM 17 juli 2014 (GK), nr. 47848/08, ECLI:CE:ECHR:2014:0717JUD004784808, «EHRC» 2014/212 m.nt. De Vylder). Niet zij, maar haar overleden zoon had hierover kunnen klagen, gesteld dat hij nog wilsbekwaam was. Of dit alles zo was, laat het Hof in het midden. Het oordeelt slechts dat, nu de ruimschoots volwassen zoon niet had geklaagd over zijn behandeling, zijn moeder na zijn overlijden niet alsnog een klacht kan indienen over het toedienen van bepaalde geneesmiddelen en het aanbrengen van geneeskundige procedures. Dit ware wellicht nog anders geweest indien de Estse inspectie voor de gezondheidszorg soortgelijke klachten had ontvangen, maar ook daarover zegt het Hof niets. Kort samengevat wijst het Hof de tweede klacht van mevrouw Rõigas eveneens af.
6. Concluderend kan worden opgemerkt dat het Hof stelt dat de moeder zich had moeten realiseren dat zij met betrekking tot de eerste klacht voor een andere – maar vermoedelijk dan wel langere – route had kunnen kiezen. Het Hof doet dit onder verwijzing naar meer recentere uitspraken van zichzelf. Daarbij moet wel worden opgemerkt dat het Hof niet expliciet verwijst naar zaken als *Glass*, *V.C.* en *Ionita* (*Glass* t. *Verenigd Koninkrijk*, EHRM 9 maart 2004, nr. 61827/00, ECLI:CE:ECHR:2004:0309JUD006182700; *V.C.* t. *Slowakije*, EHRM 8 november 2011, nr. 18968/07, ECLI:CE:ECHR:2011:1108JUD001896807, «EHRC» 2012/18 m.nt. Hendriks, *NTM/NJCM-Bull*. 2012, p. 59 m.nt. Hendriks en Mackic; *Ionita* t. *Roemenië*, EHRM 10 januari 2017, nr. 81270/12, ECLI:CE:ECHR:2017:0110JUD008127012). In al die zaken ging het om *informed consent* van (bijna) volwassen kinderen, waar het ontbreken van die toestemming door het kind en de ouders een grote impact had op het leven van de betrokkene. Die zaken verschillen over het geven van *informed consent* door een nabestaande over het doneren van organen, zoals aan de orde was in de eveneens recente zaak *Petrova* (*Petrova* t. *Letland*, EHRM 24 juni 2014, nr. 4605/05, ECLI:CE:ECHR:2014:0624JUD000460505, «EHRC» 2014/220). Dat geldt ook met

betrekking tot de bovenstaande zaak, te weten *Rõigas*, waar de moeder klaagde over de medische zorg rond het levenseinde. In *Petrova* waren de organen afgenomen van de na een auto-ongeluk overleden 23-jarige zoon van de klaagster. Zij was daar bij toeval achter gekomen. Dit was gebeurd zonder dat klaagster daar toestemming voor had gegeven. Doordat de wettelijke regels aangaande *informed consent* niet waren nageleefd, wordt de klaagster daarvoor achteraf in het gelijk gesteld. Dit was anders dan in de zaak *Rõigas*. Ook in deze laatste zaak werd de moeder van een volwassen jongen in eerste instantie ontvankelijk verklaard, maar het strafrechtelijk onderzoek leverde geen schending van een strafrechtelijke bepaling op. De nationale wetgeving was in de zaak *Rõigas*, anders dan in *Petrova*, goed nageleefd.
Dat het Hof ook de tweede klacht van mevrouw Rõigas afwijst (par. 118 e.v.) levert evenmin een schending op van art. 8 EVRM. Het Hof haalde een soortgelijke zaak uit Roemenië aan, en besluit dan deze klacht niet-ontvankelijk te verklaren. Ook hiermee was mijns inziens niets mis. Dit resulteert in een afwijzing van de klachten van mevrouw Rõigas.
7. Met dit alles wil ik niet zeggen dat ik volledig instem met het oordeel van het unanieme Hof in de zaak *Rõigas*. De Estse rechters hebben zorgvuldig geoordeeld dat alle klachten van mevrouw Rõigas moesten worden afgewezen, en dat alles binnen de tijd die daarvoor stond. Dat is een helder oordeel, maar wij kunnen ons daarbij afvragen waarom de Estse rechter zo weinig overeind hield van de klachten van mevrouw Rõigas bij een strafrechtelijke route. Had het Hof niet kunnen bepalen dat de route van de strafrechter een andere is dan die van een geschilbeslechter bij een civiel geschil, die één partij in het gelijk stelt? Het verschil maken tussen een strafrechtelijke route en een civielrechtelijke route laat het EHRM na. Dit is mogelijk het gevolg van de meer subsidiaire aard van de rechtsgang in Straatsburg. Het had het EHRM echter kunnen sieren dit punt wel uit te werken, al is het maar om meer instemming te krijgen van mevrouw Rõigas, zonder tot een omkering van de bewijslast te komen. Dat brengt met zich dat de redenering van het Hof niet onjuist is, maar de overwegingen daarnaartoe zijn voor verbetering vatbaar.
prof. mr. A.C. Hendriks, Hoogleraar gezondheidsrecht, Universiteit Leiden

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