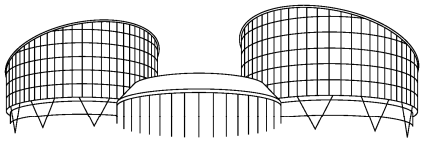

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 38572/17
Milan POPOVIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 22 February 2022 as a Committee composed of:

Jovan Ilievski, *President,*
Branko Lubarda,
Diana Sârcu, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 38572/17) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 17 May 2017 by a Serbian national, Mr Milan Popović, who was born in 1966 and lives in Kraljevo ("the applicant") and was represented before the Court by Mr M. Mijailović, a lawyer practising in Valjevo;

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 applicant, relying on expert reports, complained that the doctors in the present case had not carried out some of the most basic medical tests in good time, which, in turn, had endangered the health of his wife and caused or contributed to her death in the course of a subsequent caesarean delivery.

2. The doctors in question were acquitted in the criminal proceedings which were ultimately taken over by the applicant personally in his capacity as a subsidiary prosecutor, and the Constitutional Court rejected an appeal lodged thereafter by the applicant. The applicant did not raise a civil claim as

part of the criminal proceedings and there is also no evidence in the case file that he had brought a separate civil action for damages.

3. Under Article 2 of the Convention, the applicant complained of the lack of an effective official investigation into his wife's death. Furthermore, he complained under Article 6 of the Convention as regards the length of the related criminal and constitutional proceedings.

THE COURT'S ASSESSMENT

A. Alleged violation of Article 2 of the Convention

4. 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 his 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 his complaint.

5. 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).

6. In this connection, the Court notes that there is nothing in the case file to indicate that the death of the applicant's wife was caused intentionally. Indeed, the applicant's complaint itself pertains to the alleged medical negligence in the treatment provided to his wife. 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 the death of the applicant's wife 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*).

7. 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).

8. 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).

9. 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).

10. In the light of the findings concerning the course of the 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 his 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).

11. 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.

B. Alleged violations of Article 6 of the Convention

12. As regards the applicant's complaint under Article 6 § 1 of the Convention regarding the length of the criminal proceedings, the Court notes that the death of his wife occurred on 27 September 2008 and that by 8 December 2011 the public prosecution service had dropped their charges in respect of the three doctors concerned. The applicant subsequently took over the prosecution of the case in the capacity of a subsidiary prosecutor and by 26 August 2015 both the Kraljevo Court of First Instance and the Kragujevac Appeals Court acquitted the defendants. The applicant was thus the injured party in the proceedings, not the defendant, and the criminal limb of Article 6 § 1 was not applicable. Also, the applicant had never raised a civil claim of any sort as part of those proceedings and under Serbian law a criminal conviction was not a formal precondition for obtaining damages in a separate civil action, meaning that the outcome of the criminal case was likewise not decisive for the applicant's "civil rights and obligations" referred to in Article 6 § 1 (see *Perez v. France* [GC], no. 47287/99, §§ 57-72, ECHR 2004-I, and *Ristić v. Serbia*, no. 32181/08, § 44, 18 January 2011; see also, *mutatis mutandis*, *Đekić and Others v. Serbia*, no. 32277/07, § 41 and § 42 *in fine*, 29 April 2014, and compare and contrast *Bistrović-Nastić v. Serbia* (dec.), no. 47040/07, §§ 28 and 29, 11 September 2018).

13. Accordingly, the applicant's complaint about the length of the criminal proceedings is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

14. Turning to the length of proceedings before the Constitutional Court, in respect of which Article 6 § 1 of the Convention is applicable (see, for example, *Tešić v. Serbia*, nos. 4678/07 and 50591/12, § 77, 11 February 2014), the Court notes that they lasted from 9 October 2015 to 18 November 2016, that is for a period of approximately thirteen months, which cannot be deemed excessive and as such in breach of the reasonable-time requirement contained in that provision (compare and contrast, among other authorities, *Tešić*, cited above, § 77, with further references).

15. In view of the foregoing, the Court rejects this part of the application as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 17 March 2022.

Hasan Bakırcı Deputy Registrar	Jovan Ilievski President