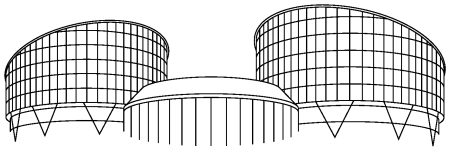

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ELENA COJOCARU v. ROMANIA

(Application no. 74114/12)

JUDGMENT

STRASBOURG

22 March 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Elena Cojocaru v. Romania,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 23 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 74114/12) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Ms Elena Cojocaru ("the applicant"), on 14 November 2012.

2. The applicant was represented by Mr M. Stoleriu, a lawyer practising in Suceava. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. By relying on Articles 2, 6 and 13 of the Convention the applicant complained of the death of her daughter and granddaughter as a result of the Suceava County Hospital medical staff's malpractice. In addition, she argued that the criminal investigation into the two deaths was ineffective, superficial and lacked any promptness.

4. On 11 July 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Roman.

A. The medical treatment received by the applicant's daughter

6. The applicant's daughter was monitored during her pregnancy by Dr I.M., a gynaecologist working at the Suceava County Hospital. She was examined on a monthly basis and her pregnancy developed normally.

7. On 8 October 2001, Dr I.M. performed a routine check-up on the applicant's daughter when she was eight months pregnant. According to the applicant, on that occasion Dr I.M. informed her daughter that she needed to be hospitalised for further investigations because an imminent premature birth was suspected.

8. On the same date the applicant's daughter was admitted to hospital with the diagnosis of imminent premature birth and sub icterus of unknown aetiology.

9. On 9 October 2001 the applicant's daughter was examined and blood samples were collected because it was suspected that she was suffering from viral hepatitis and an internal condition. She was also suffering from pain in the lumbar region and food poisoning was suspected because she had stated that she had eaten mushrooms picked from the forest. She was treated with Duvadilan (a vasodilator, prescribed for peripheral vascular disease associated with cerebrovascular insufficiency and premature labour) and other medication. According to the applicant, as a result of this treatment large ecchymoses caused by the rupture of blood vessels appeared on her daughter's legs and abdomen.

10. On the night of 9 to 10 October 2001 the medical condition of the applicant's daughter worsened.

11. On 10 October 2001 the applicant's daughter was transferred to the intensive care unit and her condition continued to deteriorate.

12. According to the applicant, after repeated requests from her and her son-in-law, Dr I.M. agreed to contact Dr D.D. from the Cuza-Vodă Clinic located in Iaşi. Dr D.D. was a university professor. When he received information about the patient's condition and treatment, Dr D.D. diagnosed the applicant's daughter with Hellp syndrome (an exceptionally serious pre-natal condition) and asked Dr I.M. to perform an emergency C-section in order to save the mother's life.

13. According to the applicant, Dr I.M. refused to perform the emergency C-section, but eventually agreed that the applicant's daughter could be transferred to the Cuza-Vodă Clinic in Iaşi.

14. The applicant's daughter was transferred by ambulance to Iaşi, 150 kilometres away from Suceava, unaccompanied by a doctor. Her condition worsened during the transport.

15. She was admitted to the Cuza-Vodă Clinic in a coma, with the diagnosis of Hellp syndrome. An emergency C-section was performed thirty minutes after she arrived at the hospital. She died ten minutes after the surgery from cardiac arrest, despite resuscitation manoeuvres. The

applicant's granddaughter died on 12 October 2001 from cardiac arrest, despite resuscitation manoeuvres.

B. Criminal investigations concerning the death of the applicant's daughter and granddaughter

1. Ex-officio police investigation

16. On 10 October 2001 the Iaşi Police Department initiated of its own motion a criminal investigation into the death of the applicant's daughter. They carried out an examination of the body, took photographic evidence and they interviewed Dr C.N., who had assisted Dr D.D. during the surgery, as well as the applicant's son-in-law.

17. On 12 October 2001 a post-mortem report was produced in respect of the applicant's daughter's and granddaughter's deaths at the Iaşi Police Department's request. It concluded that the cause of the applicant's daughter's death had been cardio-respiratory and hepatic-renal insufficiency with brain hypoxia. In addition, the applicant's granddaughter's death had been caused by lung and brain hypoxia.

18. On 27 March 2002, the Iaşi Forensics Institute produced a forensic necropsy report. It noted amongst other things that according to the serology examination report no spores of poisonous mushrooms were found. It concluded that the death of the applicant's daughter was pathological and was caused by hepatic-nephritis and generalised haemorrhagic vasculopathy, with cardio-respiratory and circulatory insufficiency. In addition, the assessment of the medical assistance provided to the victim during pregnancy and upon giving birth had to be made, after medical documents were adduced, by a review commission (*comisia de avizare*) composed of obstetrics and gynaecology experts.

19. On 30 May 2002, the Iaşi Forensics Institute, sitting as a review commission, informed the Iaşi Police Department that they approved the conclusions of the forensic necropsy report of 27 March 2002 as scientifically grounded and based on the medical data included in the report. In addition, it found that there had been no omissions in the techno-medical treatment of the victim (*în atitudinea tehnic-medicală față de victimă nu se constată omisiuni*).

2. Investigation under files nos. 670/P/2002 and 2294/P/2002

20. On 6 February 2002, the applicant's son-in-law lodged a criminal complaint, with no civil claims, with the Iaşi Prosecutor's Office, requesting an investigation into his wife's and daughter's deaths following his wife's admission to the Cuza-Vodă Clinic in Iaşi. His complaint was registered on 12 February 2002 with the Iaşi Prosecutor's Office under criminal file no. 670/P/2002.

21. On 27 March 2002, the applicant's son-in-law lodged a second criminal complaint, with no civil claims, with the General Prosecutor's Office attached to the Court of Cassation ("the General Prosecutor's Office") against the medical personnel of the Suceava County Hospital and the Cuza-Vodă Clinic in Iaşi. He relied on Article 178 (2) of the Romanian Criminal Code, and argued that the medical personnel had been medically negligent. In addition, he contended amongst other things that the criminal investigation lacked the required speediness. The complaint was registered on 23 April 2002 with the Iaşi Prosecutor's Office under criminal file no. 2294/P/2002.

22. By an order of 26 July 2002 the Iaşi Prosecutor's Office decided to join the criminal files nos. 670/P/2002 and 2294/P/2002 and not to open criminal proceedings (*neînceperea urmăririi penale*) in the case. It held, on the basis of the medical evidence, the forensic necropsy report and the approval of the review commission of 30 May 2002, that the death of the victim had had natural causes and had not been induced by any medical error. Subsequently, the order was notified to the applicant's son-in-law and he challenged the order before the superior prosecutor.

23. On 31 July 2002, the applicant's son-in-law challenged the order before the Prosecutor General's Office. His complaint was subsequently referred to the Iaşi Prosecutor's Office.

24. On 30 September 2002, the superior prosecutor dismissed the applicant's son-in-law's challenge to the order of 26 July 2002.

3. Investigation under file no. 735/P/2002

25. On an unspecified date in 2002, the applicant's son-in-law lodged a criminal complaint against Dr I.M. with the Suceava Prosecutor's Office for involuntary manslaughter following the deaths of his wife and daughter. The complaint was registered under criminal file no. 735/P/2002.

26. On 8 January 2003 the Suceava Prosecutor's Office informed the applicant's son-in-law that the criminal investigation concerning Dr I.M. was pending; that he would be heard after the medical authorities had submitted the relevant medical and forensic documents; and that once the investigation had ended he would be notified of the outcome.

27. On 22 January 2003 the applicant's son-in-law was heard in respect of the circumstances of his wife's death.

28. On 16 May 2003 the Suceava Police Department asked the Iaşi Forensics Institute to help them clarify certain aspects of the case and to explain: (a) if Dr I.M. had acted correctly by hospitalising the patient and by giving her the treatment he did; (b) if the treatment with Duvadilan was appropriate for the patient's condition and if the treatment had influenced the deterioration of her condition; (c) what were the possible causes of the patient's death occurring soon afterwards; (d) what would have been the

patient's chances of survival, given her diagnosis, if the surgery had been performed as soon as her condition had deteriorated.

29. On 16 May and 21 August 2003, Dr I.M. was heard in respect of the circumstances of his patient's death.

30. On 10 June 2003 the Iaşi Forensics Institute informed the Suceava Police Department that given his patient's diagnosis Dr I.M. had had a duty to carry out haemolysis and other blood tests in order to identify a state of pre-eclampsia, given that the patient had been hospitalised with sub icterus. In addition, the prompt treatment recommended in case of suspicion of Hellp syndrome would have been the immediate evacuation of the pregnancy in order to avoid aggravation of the hepatic and vascular lesions. Furthermore, with careful monitoring of the mother and of the foetus as well as prompt treatment, the deaths might have been avoided. The fact that the patient reached the Cuza-Vodă Clinic in Iaşi in a serious condition suggested inadequate monitoring. The absence of a diagnosis for three days aggravated the patient's condition. Given the doctor's aforementioned duties, he should have been aware of the evolution of a state of pre-eclampsia, and he was obliged to exhaust all the available remedies to avoid it and treat it. The extremely low level of thrombocytes in the patient's blood in Suceava was an important aid to a suspicion of this type of complication and an indication that prompt intervention was necessary.

31. On 25 August 2003, following Dr I.M.'s objections, the Suceava Police Department reiterated before the Higher Forensics Commission attached to the National Forensics Institute in Bucharest ("the Higher Forensics Commission") the same questions raised before the Iaşi Forensics Institute on 16 May 2003, and asked it to help them clarify those aspects of the case and to provide explanations.

32. On 12 January and 8 March 2004, the Suceava Police Department asked the Higher Forensics Commission to provide its conclusions in respect of their request from 25 August 2003. It emphasised that the conclusions were necessary to solve the case, and that the victim's family had complained repeatedly before the domestic authorities about the lack of promptness of the criminal investigation.

33. On 29 January 2004 the applicant complained before the superior prosecutor attached to the Suceava Prosecutor's Office that the criminal investigation lacked promptness and had failed to clarify the circumstances of the victims' deaths. She stated that the last written notification received concerning the case had been the information note of 8 January 2003. She also requested to be informed of the outcome of the investigation.

34. On 6 February 2004 the Suceava Police Department informed the applicant that the Higher Forensics Commission had been asked to produce a forensic expert report in the case. The applicant was also informed that as soon as the Higher Forensics Commission's report was available a lawful

solution would be issued in respect of the case and that she would be notified about it.

35. On 23 April 2004 the Higher Forensics Commission approved the note (*avizul*) produced by the Iași Forensics Institute on 10 June 2003 with additional explanations. In particular, it noted amongst other things that while she was in hospital the applicant's daughter stated that she had eaten forest mushrooms. At the time there was another patient in the hospital suffering from mushroom poisoning. This caused her medical condition to be blamed on the mushrooms, which delayed the Hellp syndrome diagnosis. It also noted that during the applicant's hospitalisation on the intensive therapy unit the applicant's daughter condition worsened. Dr D.D. was contacted by phone and he suggested that the pregnancy should be evacuated. Given the patient's serious condition and the local intensive therapy possibilities (*posibilitățile locale de terapie intensivă*), in order to solve the case, Dr D.D. was contacted and he accepted that the patient be transferred to Iași. It further noted that according to the post-mortem report the patient had displayed symptoms of hepatic-nephritis and generalised haemorrhagic vasculopathy and subsequent cardio-respiratory insufficiency. It concluded that the actions of the Suceava Hospital's staff could be explained from a medical standpoint, in the context of the patient's anamnesis and given that according to the information available and on the basis of the patient's symptoms they could have also concluded that the patient's condition had been caused by mushroom poisoning, and not by Hellp syndrome as turned out to be the case. There were similarities in the symptoms of the two medical conditions.

36. By an order of 4 May 2004 the Suceava Prosecutor's Office decided not to open criminal proceedings against Dr I.M. for involuntary manslaughter, on the ground that such an unlawful act had not taken place.

37. On 13 December 2007 the applicant requested information from the General Prosecutor's Office about the status of the criminal investigation and the measures taken in the case. She also accused the authorities investigating the case of procrastination and of waiting for Dr I.M.'s criminal liability to become time-barred.

38. On 13 August 2008, the Suceava Prosecutor's Office informed the applicant that the criminal investigation against Dr I.M. had been terminated by the order of 4 May 2004, and that the aforementioned order had been communicated to her son-in-law. Also, it noted that the same information had been communicated to the applicant on 6 February 2008.

39. On an unspecified date, the applicant challenged the order of 4 May 2004 before the superior prosecutor attached to the Suceava Prosecutor's Office.

40. On 1 September 2008, the superior prosecutor attached to the Suceava Prosecutor's Office dismissed the applicant's challenge.

C. Court proceedings and subsequent investigation of the case

41. On 26 September 2008, the applicant challenged the orders of 26 July and 30 September 2002 as well as those of 4 May 2004 and 1 September 2008 before the Suceava County Court.

42. On 12 November 2008 the Suceava County Court declined jurisdiction to examine the case in favour of the Suceava District Court, on account of the nature of the offence under investigation.

43. On 25 November 2008, the applicant lodged a request with the Court of Cassation seeking the transfer of the file to a different district court.

44. On 4 February 2009, the Court of Cassation allowed the applicant's request and ordered the transfer of the file for examination to the Iaşi District Court.

45. On 22 May 2009 the file was registered with the Iaşi District Court.

46. By a judgment of 20 November 2009, the Iaşi District Court allowed the applicant's and her son-in-law's challenge against the order of 4 May 2004, cancelled the order, and referred the file back to the prosecutor's office for criminal proceedings to be opened against Dr I.M. for involuntary manslaughter. The challenge to the order of 26 July 2002 rendered by the Iaşi Prosecutor's Office was dismissed as lodged out of time.

47. The court considered that the criminal investigation had not been complete, and that additional evidence was needed. It held that the decision not to open criminal proceedings had been based on the two forensic expert reports, but forensic expert reports had in fact not been asked for by the investigating authorities and had not been produced in the case. The document produced on 10 June 2003 was in fact a note of the Iaşi Forensic Service in response to the investigating authorities' request for clarification of some aspects of the case. The aforementioned documents did not have the content of a forensic expert report produced according to law. The same considerations applied to the document issued by the Higher Forensic Commission on 23 April 2004.

48. According to the court, a forensic expert report was essential evidence in cases of suspected involuntary manslaughter and it was required when medical negligence had supposedly been the cause of death. Also, the content of the Iaşi Forensic Service's note of 10 June 2003 which indicated a possible medical error by Dr I.M. made a forensic expert report even more necessary.

49. The court considered that essential aspects of the case needed to be clarified, namely to establish the cause of death and to examine whether Dr I.M. had administered medical treatment in accordance with his professional obligations, and, if such treatment had been inappropriate, whether this had had any causal link with the deaths of the applicant's daughter and grand-daughter. In addition, the question of whether the applicant's daughter had eaten forest mushrooms had not been entirely

clarified. Dr I.M.'s statement that the applicant's daughter had eaten the aforementioned mushrooms had not been confirmed or rebutted by any other evidence. The information concerning the consumption of mushrooms found in the clinical observation chart was also added there by Dr I.M. Furthermore, the reasons why the applicant's daughter was not accompanied by a doctor during her transfer by ambulance remained unclear. Consequently, the court ordered a forensic expert report to be produced which would establish whether: (a) the doctor had been diligent enough to correctly establish the diagnosis; (b) the actual diagnosis had been established on the basis of the symptoms and the investigations made in the case; (c) the correct diagnosis could have been established on the basis of supplementary tests and examinations which should have been performed; (d) the medical treatment had been appropriate; (e) the medical intervention should have been performed at the Suceava County Hospital; (f) the applicant's daughter's health had deteriorated during her transfer to the clinic in Iaşi because she was not assisted by a doctor throughout the transportation; (g) any of the aspects above, or others, had any causal link with the death of the applicant's daughter and her new born granddaughter. If the expert report established a causal link between the death and the fact that the transfer by ambulance had not been done with a doctor present, the reason why the patient had not been accompanied by a doctor and the identity of those responsible should be established. Consequently, the medical staff responsible for the transfer by ambulance should be heard. The court also ordered that the notes on the clinical observation chart should be checked for accuracy against the doctor's statements regarding the consumption of forest mushrooms, and accordingly the victim's mother and husband should be heard.

50. The Iaşi Prosecutor's Office lodged an appeal on points of law (*recurs*) against the judgment.

51. On 30 March 2010, the Iaşi County Court dismissed the Iaşi Prosecutor's Office's appeal on points of law and upheld the judgment of the district court.

52. By an order of 21 December 2010, the Suceava Prosecutor's Office decided not to open criminal proceedings against Dr I.M., on the ground that his criminal liability had become time-barred.

53. The applicant challenged the order before the superior prosecutor. She argued amongst other things, that the investigating authorities had delayed the investigation of the case, although she had repeatedly asked for a speedy investigation. Also, she had not been notified without undue delay of the outcome of the criminal investigation, although on 6 February 2004 the Suceava Police Department had informed her that she would be notified about the outcome of the investigation.

54. On 1 February 2011, the superior prosecutor attached to the Suceava Prosecutor's Office dismissed the applicant's challenge and upheld the

order of 21 December 2010. It held amongst other things that the proceedings had not been abandoned by the authorities, since they had finished the investigation on 4 May 2004. The length of proceedings had been affected by the forensic expert reports, the last one being produced on 23 April 2004.

55. The applicant challenged the order before the Iaşi District Court.

56. On 22 April 2011, the Iaşi District Court declined jurisdiction in the case in favour of the Suceava District Court.

57. On 21 July 2011, the file was registered with the Suceava District Court.

58. On 21 September 2011, the Suceava District Court considered that only the Iaşi District Court was competent *ratione loci* to examine the case. Consequently, it referred the case to the Court of Cassation to examine and decide on the conflict of competence between the two district courts.

59. On 25 January 2012, the Court of Cassation decided that the Suceava District Court was competent to examine the case.

60. On 5 April 2012, the file was registered once again with the Suceava District Court.

61. By a final judgment of 6 June 2012 the Suceava District Court dismissed the applicant's action as ill-founded and upheld the prosecutor's office's order. It held that according to the relevant criminal law provisions and given the nature of the offence he had been suspected of, Dr I.M.'s criminal liability had become time-barred eight years after the unfortunate event. The statute of limitations had not been suspended or interrupted by any act carried out in the case that had to be communicated to the accused (*învinuitului*) or to the defendant (*inculpatului*). Criminal proceedings against Dr I.M. had not been opened and therefore he had not been considered either an accused or a defendant, as the investigation against him had been carried out at the preliminary investigation (*acte premergătoare*) stage of the proceedings.

62. The court considered that the applicant's argument that an expert medical report could be requested only after a criminal investigation had been opened was not supported by any legal provision. Also, it could not be accepted that the running of the statutory limit had been stopped or suspended, either by the request for a medical expert report to be produced or by the judgment of 20 November 2009. The judgment of a court quashing an order of the prosecutor's office to discontinue a criminal investigation was not one of the lawfully permissible reasons to suspend the running of the statutory limit.

63. The court also held that the Suceava Prosecutor's Office had been competent to investigate the case. The fact that the Court of Cassation had transferred the case for examination to a different district court would not have justified an investigation of the case by a different prosecutor's office from the one which had initially investigated the case, once the examining

court had referred the case back to the prosecutor. Furthermore, the prosecutor was legally bound to open criminal proceedings only if, after the evidence indicated by the court was adduced to the file, it did not appear that there were circumstances that would impede it. Also, even if the prosecutor's office had taken into account the applicant's granddaughter's death and had requalified Dr I.M.'s acts from involuntary manslaughter to aggravated involuntary manslaughter and the maximum penalty had been increased by three years, the offence would still have been time-barred.

64. The applicant appealed on points of law against the judgment.

65. On 26 September 2012 the Suceava Court of Appeal dismissed as inadmissible the applicant's appeal on points of law, on the ground that the domestic legislation did not allow a second level of jurisdiction in respect of court proceedings initiated against the prosecutor's office's orders or decisions.

D. Disciplinary proceedings

66. On 16 May 2002, following Dr I.M.'s request, the Professional Jurisdiction Commission attached to the Suceava County College of Doctors (*Comisia de Jursidicţie Profesională a Colegiului Judeţean al Medicilor Suceava*) established that there were no elements to suggest medical error or other deficiencies in the medical treatment and investigations provided to the applicant's daughter at the Suceava County Hospital. Her illness had been identified promptly once she was hospitalised, and she had been transferred to intensive care and afterwards to Iaşi. However, the seriousness of her illness led to her death. In addition, there had been no other case before the Romanian College of Doctors in which Dr I.M. had been accused of medical error or breaches of the code of medical ethics.

67. On 30 May 2002, the Suceava County College of Doctors validated the Professional Jurisdiction Commission's decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law

68. The relevant domestic law concerning forensic expert reports and the competent authorities to issue them, as well as the civil liability of medical staff, is described in *Eugenia Lazăr v. Romania* (no. 32146/05, §§ 41-54, 16 February 2010).

69. The relevant provisions of the former Romanian Criminal Code regarding involuntary manslaughter and the statute of limitation read as follows:

Article 122

"(1) The terms for the statute of limitations shall be ...

c) eight years, when the law punishes the criminal offence by imprisonment of more than five years but less than ten years ...

(2) The terms provided in this article shall run from the date of perpetration of the criminal offence. In the case of continuing offences, the term shall start from the date when the action or inaction ceased, and in the case of continued offences from the date when the last action or inaction was performed."

Article 123

"(1) The lapse of the term for the statute of limitations provided in Article 122 shall be interrupted by any act which, according to the law, must be communicated to the person accused or indicted during the conduct of the criminal proceedings.

(2) After every interruption a new term for the statute of limitations shall start running. The interruption of the statute of limitations affects all the offenders, even if the interruption act concerns only some of them."

Article 128

"(1) The lapse of the term for the statute of limitations provided in Article 122 shall be stayed for as long as a legal provision or an unpredictable or unavoidable circumstance impedes the commencement of the criminal proceedings or the continuation of the criminal trial ...

(3) The statute of limitations shall resume running when the cause of the suspension ceases."

Article 178[1]

"(1) The involuntary manslaughter of a person shall be punished by imprisonment of from one to five years.

(2) Involuntary manslaughter caused by failure to observe legal provisions or the precautionary measures for the exercise of a profession or for the performance of a certain activity shall be punished by imprisonment of two to seven years ...

(5) If the deed caused the death of two or more persons, a further three years shall be applied to the maximum of the sanctions provided in the previous paragraphs."

70. The relevant provisions of the former Romanian Civil Code concerning civil liability for tort read as follows:

Article 998

"Any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it."

Article 999

"Everyone shall be liable for damage he has caused not only through his own actions but also through failure to act or negligence."

71. The provisions of the former Romanian Code of Criminal Procedure regarding the possibility of opening civil proceedings separately from or jointly with criminal proceedings read as follows:

Article 15

"(1) A victim may lodge civil claims during criminal proceedings against the accused, the defendant or the civilly liable person.

(2) Civil claims may be lodged during criminal proceedings, as well as before the trial court until the indictment has been read out in court."

Article 19

"(1) If a victim has not joined criminal proceedings as a civil party, he or she can initiate separate proceedings before the civil courts for damages arising from the offence.

(2) Civil proceedings shall be stayed pending a final judgment of the criminal courts.

(3) A victim who has joined criminal proceedings as a civil party may also initiate separate civil proceedings if the criminal proceedings are stayed. If the criminal proceedings are reopened the civil proceedings opened before the civil courts shall be stayed.

(4) A victim who has initiated civil proceedings before a civil court may abandon these proceedings and lodge a request with the investigating authorities or the trial court if criminal proceedings have subsequently been opened...The civil proceedings may not be abandoned if the civil court has delivered a judgment, even if the judgment is not a final one."

72. The relevant provisions of Law Decree no. 167/1958 on the statute of limitations read as follows:

Article 1

"The right to bring an action with pecuniary effect shall be time-barred if it is not used within the lawful timeline."

Article 3

"The term of the statute of limitations is three years."

B. Domestic practice

73. The Government submitted examples of a large number of decisions delivered by the Superior Disciplinary Commission between 2005 and 2011 concerning reviews of the conduct of doctors and medical staff in respect of their patients. The aforementioned decisions concluded that doctors or the medical staff had breached good medical and disciplinary practice. The Government also submitted a statistic concerning the Superior Disciplinary Commission's national activity from 2001 to 2012, which showed that some

of the cases examined during that period had resulted in doctors being punished for their actions.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

74. The applicant complained under Articles 2, 6 and 13 of the Convention that the deaths of her daughter and granddaughter were attributable to the Suceava County Hospital medical staff's malpractice, in particular that of Dr I.M. In addition, she argued that the criminal investigation into the two deaths was ineffective, superficial and was laggard.

75. The Court considers that the applicant's allegations fall to be examined exclusively under Article 2 of the Convention (see *Istrățoiu v. Romania* (dec.), no. 56556/10, § 56, 27 January 2015), the relevant part of which reads:

> "Everyone's right to life shall be protected by law..."

A. Admissibility

1. The parties' submissions

(a) The Government

76. The Government raised a preliminary objection of non-exhaustion of domestic remedies, arguing that the applicant could have lodged a general tort law action under Articles 998 and 999 of the former Romanian Civil Code against Dr I.M. or other persons she considered responsible for the deaths of her daughter and granddaughter. The remedy in question would have been available to the applicant, particularly because it was exempted from judicial tax, and according to the Court's case-law was adequate, given the circumstances of the case. They also contended that according to the relevant domestic legal doctrine criminal law considered the fault (*culpa*) a form of guilt only where it met a high level of severity. However, tort liability could be engaged even for the slightest negligence (*culpa cea mai uşoară*). Therefore, the scope of application of tort liability is wider than that of criminal liability. Consequently, the findings of the domestic authorities excluded only Dr I.M.'s criminal liability, and not his tort liability. They also submitted that, according to the relevant criminal procedure rules, since criminal proceedings against Dr I.M. had never been opened, separate general tort law proceedings would not have been suspended pending the outcome of the criminal proceedings.

77. In addition, the Government contended that the applicant had failed to open disciplinary proceedings against Dr I.M., although that remedy was also available and effective. They argued that the applicant could have lodged a disciplinary complaint with the College of Doctors. Her complaint would have been joined to the disciplinary proceedings initiated by Dr I.M. himself. Subsequently, if the applicant was dissatisfied by any potentially unfavourable decision she could have appealed against it before the Superior Disciplinary Commission, and afterwards before the administrative courts.

78. The Government supported their arguments that the general tort law proceedings and the disciplinary proceedings would have been effective remedies in the circumstances of the case by referring to the relevant domestic practice submitted before the Court in the cases of *Csoma v. Romania*, no. 8759/05, §§ 24-25, 15 January 2013; *Stihi-Boos v. Romania* (dec.), no. 7823/06, §§ 42-43, 11 October 2011; and *Istrățoiu*, cited above, §§ 52-53.

(b) The applicant

79. The applicant contested the Government's position. She argued that disciplinary proceedings would have been unlikely to succeed, since the Iaşi and Suceava College of Doctors had never applied any sanctions to doctors for medical negligence, and the Government's submissions had not rebutted that fact. In addition, she did not need to exhaust disciplinary proceedings before she could lodge a criminal complaint. She further argued that the disciplinary proceedings instituted on Dr I.M.'s initiative had not been adversarial, had been carried out in private without her involvement, and the decision had not been communicated to her. Consequently, the aforementioned investigation was null and void.

80. The applicant stated that she could have raised civil claims at any stage of the criminal proceedings, up to the day the indictment was read in court, but the proceedings never reached that stage. Also, the excessive delays in the criminal investigation had had a prejudicial impact on the civil proceedings, and the failure to criminally punish the responsible medical personnel impeded the applicant from opening subsequent civil proceedings for compensation for pecuniary and non-pecuniary damage.

2. The Court's assessment

81. The Court recalls that in *T.W. v. Malta* ([GC], no. 25644/94, § 34, 29 April 1999) it had stated 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. The Court has also stated (see *Bajić v. Croatia*, no. 41108/10, § 74, 13 November 2012 and the case law there cited) that 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.

82. The Court notes that there is no evidence in the file that the applicant initiated any disciplinary proceedings or a general tort law action against Dr I.M. or any of the medical staff she considered responsible for the deaths in her family. The question is therefore whether in the present case the applicant should have raised the matter before the civil or administrative courts, as the Government contended.

83. The Court considers that the Government's objection is closely linked to the substance of the applicant's complaints. It therefore joins the objection to the merits.

84. The Court further notes that the application 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

85. The applicant contended that Dr I.M. had refused to follow Dr D.D.'s recommendation that emergency surgery be performed and thus to save her daughter's life, despite the fact that his professional duty obliged him to do so. Consequently, he intentionally and not negligently refused to fulfil his professional responsibilities, although he was aware of the consequences. In these circumstances, the authorities failed to take into account that Dr I.M.'s acts amounted to a more serious offence, of aggravated manslaughter, which also carried a more severe prison sentence.

86. The applicant also contended that Dr I.M. had failed to correctly diagnose her daughter for three days, and had blamed her condition on mushroom poisoning. The applicant stated that Dr I.M. had never been informed by the patient that she had eaten mushrooms prior to hospitalisation. It was the patient's uncle who had suggested that to him, without providing any supporting evidence.

87. The applicant further argued that once Dr I.M. had agreed to her daughter being transferred to Iaşi the transfer was carried out by an ambulance that lacked the necessary medical equipment, and without an accompanying doctor. Although after her daughter's and granddaughter's deaths she had lodged repeated complaints with the relevant domestic authorities, all of them refused to actively investigate the case.

88. The applicant submitted that the investigations initiated into her relatives' deaths were assigned to police officers who either acted

superficially or did not have the required level of training to investigate this type of case. Consequently, the investigation lacked any promptness and she received notification of the measures taken in the case only in February 2004. In addition, although the domestic authorities had taken it upon themselves in 2004 to notify the applicant about the outcome of the investigation, they failed to do so. They contented themselves with waiting for the suspect's criminal liability to become time-barred.

89. The applicant also argued that the domestic authorities investigating the case lacked impartiality on account of the social position of Dr I.M., and that they failed to follow the mandatory instructions delivered by the domestic courts on 20 November 2009 and to clarify essential circumstances of the case. In addition, they eventually discontinued the criminal investigation by unlawfully relying on the argument that the doctor's criminal liability had become time-barred. Furthermore, seven years had to elapse for them to notify her of the outcome of the criminal investigation.

90. The applicant contended that both she and her son-in-law had repeatedly and unsuccessfully complained before the domestic authorities about the lack of promptness of the investigation.

(b) The Government

91. The Government argued that the domestic authorities had set up an adequate legal framework for protecting patients' lives, for regulating the medical profession and for punishing any faulty behaviour.

92. They submitted that the domestic authorities reacted promptly and opened a criminal investigation on their own motion. In addition, they had taken all necessary steps to clarify the circumstances of the victims' deaths and to identify those responsible. Also, the authorities in Suceava had become aware of the applicant's relatives' deaths only after her son-in-law had lodged his complaint with them.

93. The Government stated that the criminal investigation had been carried out by independent investigators who had no connection with the individuals involved in the events being investigated and had adduced to the file all the evidence requested by the parties. Also, the length of the criminal investigation had not been excessive. The investigation in file no. 735/P/2002 had been concluded in two years by order of 4 May 2004. The order had been communicated to the applicant's son-in-law, who had been continuously involved in the proceedings and who had not challenged it.

94. In respect of the applicant's involvement in the proceedings, the Government argued that the applicant had not taken part in the investigation carried out under files nos. 670/P/2002 and 2294/P/2002 and had not challenged the order of 26 July 2002. She had intervened in the investigation carried out in file no. 735/P/2002 only on 29 January 2004.

However, she did not state any intention to take part in the proceedings as a victim or a civil party. The fact that in her letter she referred to a document sent by the authorities to her son-in-law could have reasonably led the authorities to believe that documents communicated to her son-in-law had also reached the applicant and that therefore it was not necessary to notify them to her.

95. Moreover, the Government submitted that the time which had elapsed between 29 January 2004 and 13 December 2007, appears unreasonably long for a diligent person interested in the development of the investigation. They also considered that the aforementioned period and the fact that after the reopening of the proceedings she had lodged a complaint with a non-competent court contributed significantly to the lapse of the statute of limitation for the criminal liability of Dr I.M.

96. The Government further considered that the criminal investigation had ended in 2004, and given the applicant's conduct the time which had elapsed subsequent to that date should not be taken into account in any assessment of the investigation carried out by the domestic authorities.

97. The Government also submitted that although the investigation authorities had not ordered a forensic expert report in file no. 735/P/2002 all the available medical documents in the case had been submitted to the Iași Forensic Service, which had provided reasoned answers to the investigating authorities' questions. Subsequently, all the medical documents were submitted to the highest forensic authority in the country, namely the Higher Forensic Commission, which had established the absence of any medical fault.

98. Lastly, the Government acknowledged that the domestic courts had asked the investigating authorities to establish the reason why the applicant's daughter had not been accompanied by a doctor while being transferred by ambulance, and to clarify the allegations of mushroom consumption. However, several documents from file no. 735/P/2002, namely the clinical observation chart and the report prepared by another doctor than Dr I.M., attested to the consumption of mushrooms. Also, the report prepared by the aforementioned doctor attested that the applicant was assisted during the ambulance transfer by medical personnel. Consequently, the existence of some potential errors during the investigation could not alter its impartial and thorough character.

2. The Court's assessment

(a) General principles

99. 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. These principles apply also to the area of public health (see *L.C.B. v. the*

United Kingdom, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Valeriy Fuklev v. Ukraine*, no. 6318/03, § 64, 16 January 2014). It cannot be excluded that the acts and omissions of the authorities in the context of public-health policies may, in certain circumstances, engage their responsibility under the substantive limb of Article 2 (see *Powell*, cited above).

100. However, where a Contracting State has made adequate provision to secure high professional standards among health professionals and to protect the lives of patients, it 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 (ibid.).

101. That being so, the Court reiterates that the positive obligations imposed on the State by Article 2 of the Convention imply that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected. They also imply the obligation to put in place an effective independent judicial system 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 authorities, *Arskaya v. Ukraine*, no. 45076/05, § 63, 5 December 2013; and *Mehmet Şentürk et Bekir Şentürk v. Turkey*, no. 13423/09, § 81, ECHR 2013).

102. 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; and *Bajić*, cited above, § 76).

103. 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 v. Italy*,

no. 32867/96, § 53, 17 January 2002). 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 *Arskaya*, cited above, § 66).

(b) Application of the principles to the present case

104. The Court observes that in the instant case the applicant claimed in her submissions before the Court that Dr I.M. had intentionally and not negligently refused to fulfil his professional duties and to perform the emergency surgery that could have saved her daughter and granddaughter's life.

105. However, it is impossible for the Court to establish, on the basis of the evidence before it, whether or not the applicant's daughter and granddaughter had been intentionally deprived of their lives, contrary to Article 2 of the Convention, as she alleged.

106. The Court observes, nonetheless, that, irrespective if Dr I.M. had acted intentionally or not, the evidence available to the file suggests certain dysfunctionalities in the coordination of the medical services involved in her treatment and a delay of the appropriate emergency treatment required by her condition.

107. In this connection, the Court points out that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general (see *Cyprus v. Turkey* [GC], no. 25781/94, § 219, ECHR 2001-IV, *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002, and *Mehmet Şentürk et Bekir Şentürk*, cited above, § 88).

108. In the circumstances of this case, the Court is therefore required to determine whether the domestic authorities did what could reasonably be expected of them and whether, in particular, they fulfilled, as a matter of principle, their obligation to protect the patient's physical integrity, particularly through the administration of appropriate medical treatment. In so doing, the Court attaches weight to the sequence of the events which led to the applicant daughter and granddaughter's tragic deaths as set out in the case file, and to the available evidence.

109. The Court notes that once Dr I.M. became fully aware after his conversation with Dr D.D. that the applicant's daughter's condition might have been cause by the Hellp syndrome and not a mushroom poisoning, a certain medical protocol had to be followed and an emergency C-section had to be performed in order to save the mother's life. The Court also notes

that the aforementioned emergency C-section was not performed in Suceava and that the patient was transferred by ambulance to Iaşi, 150 kilometres away. The Court cannot speculated whether Dr I.M.'s decision to transfer the patient to another city, even though she was in a very serious condition, was prompted by his blatant refusal to perform the emergency C-section as stated by the applicant (see paragraph 13 above) or by the intensive therapy possibilities in Suceava and therefore the insufficient material conditions for patient treatment in Suceava Hospital as suggested by the Higher Forensic Commission on 23 April 2004 (see paragraph 35 above). The Court notes, however, that irrespective of the reason, the patient's transfer delayed the emergency treatment needed by the applicant's daughter and granddaughter.

110. Moreover, the Court notes that, although before and during the transfer to Iaşi her condition was very serious, the applicant's daughter was accompanied during her transfer only by medical personnel and not by a doctor and that her medical condition seems to have worsened during the transfer.

111. Even though it remains unclear why a doctor did not accompany the patient's transfer and the Court is not prepared to speculate on the applicant's relatives' chances of survival if the impugned condition had been diagnosed sooner or if the emergency treatment had been performed without delay, it considers that the apparent lack of coordination of the medical services and the delay in administering the appropriate emergency treatment attest to a dysfunctionality of the public hospital services.

112. Nevertheless, in the instant case, apart from the issue of the potential criminal liability of the doctor concerned, the Court considers that it is important to also examine the domestic judicial and non-judicial authorities' reaction when faced with the applicant's complaints and the effectiveness of the ensuing investigation.

113. The Court reiterates that the requirements of an effective investigation include, among other things, that of "thoroughness", which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident (see, for example, *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, § 271, ECHR 2011 (extracts)). Furthermore, the requirement of promptness and reasonable expedition is implicit in this context (see *Šilih*, cited above, § 195; and *Valeriy Fuklev*, cited above, § 72).

114. In this regard, the Court notes that it is undeniable that a substantial criminal investigation was carried out in file no. 735/P/2002 by the domestic authorities at the request of the victims' family. The case was initially investigated by way of preliminary investigation measures which ended by a prosecutor office's decision refusing to institute criminal proceedings.

115. However, on 30 March 2010 the aforementioned prosecutor office's decision was quashed by the domestic courts which ordered the opening of criminal proceedings against Dr I.M.

116. The Court notes that when ordering the opening of criminal proceedings against Dr I.M., the domestic courts pinpointed numerous deficiencies in the criminal investigation and ordered specific measures to be taken by the domestic authorities in order to clarify the cause of the two deaths and to identify the persons responsible.

117. The Court, like the domestic courts, observes that the investigation authorities had failed to produce a forensic expert report in respect of the circumstances of the applicant's relative's deaths even though such reports were essential evidence in cases of suspected involuntary manslaughter and they were required when medical negligence had supposedly been the cause of death. Moreover, the domestic authorities had failed to clarify essential aspects of the case, including the cause of death, whether Dr I.M. had administered medical treatment in accordance with his professional obligations and if such treatment had been inappropriate. Furthermore, the reasons why the applicant's daughter had not been accompanied by a doctor during her transfer by ambulance in spite of her serious condition had remained unexplored.

118. The Court further notes that in spite of the specific instructions given by the domestic courts in their judgments, the criminal investigation was closed on the ground that Dr I.M.'s criminal liability had become time-barred. Moreover, it appears that no additional efforts have been made by the authorities to clarify the circumstances of the case. Consequently, the aspects touched upon by the domestic courts remained unresolved.

119. In respect of the promptness of the investigation, the Court notes that the criminal proceedings in file no. 735/P/2002 started in 2002 and ended in June 2012, approximately ten years later. Also, the Court notes that the domestic authorities informed the applicant about the prosecutor office's decision of 4 May 2004 only in 2008 (see paragraph 38, above) and only after in December 2007 she reiterated her request to be informed about the investigation's outcome. It should be also underlined that from the moment the applicant contacted the authorities again in December 2007 another four years and six months lapsed before the criminal proceedings opened against Dr I.M. reached a conclusion.

120. The Court agrees with the Government when they argue that the applicant's participation in the proceedings might not have been exemplary or that her partial inactivity might have confused the authorities as to whether she was actually a party to the proceedings and that therefore she might had contributed to some extent to the delay in the proceedings. However, it considers that her behaviour did not release the authorities from the obligation to carry out a speedy and comprehensive investigation capable of clarifying all the aspects of the case in the first place.

121. Having regard to the manner in which the case was investigated and the length of the criminal investigations, the Court considers that the authorities failed to show the requisite diligence in dealing with the criminal case, as required by Article 2 of the Convention (see *Valeriy Fuklev*, cited above, § 76).

122. That said, the Court does not consider that the applicant acted inappropriately when choosing to pursue the case under the Code of Criminal Procedure. It notes that the impugned proceedings 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. Under the circumstances, it is not surprising that the introduction of the civil claim in the criminal case appeared preferable for the applicant as the investigative authorities were under an obligation to collect evidence in those proceedings and the evidence that should have been collected by them in the criminal case was essential for the determination of the applicant's potential civil claim.

123. 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, and was not obliged to embark on a separate civil or disciplinary action. The Court's conclusion that these proceedings turned out to be ineffective cannot be held against her.

124. In the light of the foregoing, the Court finds that the Government's preliminary objection should be dismissed and that the applicant was not provided with an effective legal procedure compatible with the requirements of Article 2 of the Convention.

125. Consequently, given on the one hand the apparent circumstances that have led to the failure to provide adequate emergency treatment for the applicant's relatives and on the other hand the ineffectiveness of the domestic legal procedure, the Court considers that the respondent State has failed to comply with the obligations imposed by Article 2 of the Convention.

126. Therefore, there has been a violation of the aforementioned Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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

128. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage for the raising and schooling of her daughter, for funeral expenses and for commemoration expenses since 2001. She also claimed EUR 1,000,000 in respect of non-pecuniary damage for the loss of her only daughter and granddaughter and the psychological suffering incurred.

129. The Government considered that there was no causal link between the applicant's claim for the fees paid for her daughter's education and the alleged violation of the Convention. They also argued that the amount submitted by the applicant in respect of pecuniary damage was not supported by any documents. Moreover, they argued that her claim in respect of non-pecuniary damage was excessive.

130. The Court notes that the applicant did not submit any documents supporting her claim for pecuniary damage. It therefore rejects this part of the applicant's claims.

131. Having regard to all the circumstances of the present case, the Court accepts that the applicant must have suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 39,000 in respect of non-pecuniary damage, plus any tax that may be chargeable thereon.

B. Costs and expenses

132. The applicant also claimed EUR 100 and 290 Romanian lei (RON) (approximately EUR 64) for costs and expenses incurred before the Court. She submitted an invoice of RON 290 for the translation of documents into French and two invoices totalling RON 55 (approximately EUR 12) for correspondence with the Court.

133. The Government did not oppose the applicant being awarded the EUR 76 supported by documents. However, they considered that the applicant's remaining claim for costs and expenses should be dismissed.

134. 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 (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). 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 76 covering costs for the proceedings before the Court.

C. Default interest

135. 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. *Joins* to the merits the Government's preliminary objection concerning the exhaustion of domestic remedies and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 2 of the Convention;

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 39,000 (thirty-nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 76 (seventy-six 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 22 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Andras Sajó
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

A.S.
F.E.P.

CONCURRING OPINION OF JUDGE SAJÓ

1. I agree that the Article 2 rights of the applicant were violated in the present case. However, I disagree with my colleagues as I find this violation to be of a strictly procedural nature. The case-law, perfectly summarised in the judgment (§ 103), is as follows:

> "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 v. Italy*, no. 32867/96, § 53, 17 January 2002). 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."

2. The Court finds that there were deficiencies in the criminal procedure that was chosen by applicant. I agree: the legal remedy used by the applicant as applied in practice was not capable of holding those at fault accountable.

3. As to the substantive violation of Article 2, the Court has concluded that no intentional deprivation of life by the doctors can be established. However, the majority claims that the life of the applicant was put at risk due to certain dysfunctions in the coordination of the medical services involved in her treatment and a delay in providing the appropriate emergency treatment required by her condition (§ 106).

4. Of course, an issue may arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual's life at risk by **denying healthcare** which they have undertaken to make available to the population in general. For the Court this is, therefore, a denial of service. The majority refers to *Cyprus v. Turkey* [GC], no. 25781/94, § 219, ECHR 2001-IV, *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002, and *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, § 88, ECHR 2013.

5. However, in the case of *Cyprus v. Turkey* the denial was understood as being deliberate:

> "[T]he Commission was unable to establish on the evidence that the "TRNC" authorities deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment in the south. It observes that during the period under consideration medical visits were indeed **hampered on account of restrictions imposed** by the
>
> "TRNC" authorities on the movement of the populations concerned and that in certain cases delays did occur."

6. Likewise in *Nitecki*, where the State failed to fully fund prescription medication, the issue was again one of (lack of) hampering of medical service. Finally, in *Mehmet Şentürk and Bekir Şentürk* (cited above) medical treatment was denied, on account of the inability to advance the costs, in violation of the law. Again, this was a case of *denial* of medical service and not a medical negligence case.

7. I had the opportunity to express my concerns regarding this departure from the Court's case-law on medical negligence in a joint dissenting opinion prepared together with Judge Tsotsoria, in *Lopes de Sousa Fernandes v. Portugal*, no. 56080/13, 15 December 2015. In the present case too there is a noticeable trend to discreetly impose a duty to provide a specific level of healthcare service under Article 2 (1). Here too the Court disregards the findings of the domestic experts without proper reason and in disregard of the natural boundaries of its capacity to review issues of medical expertise on matters dealt with by the national forensic experts. The Court did not offer any reasons for departing from its own case-law as reaffirmed for a factually similar situation in *Eugenia Lazăr v. Romania*, no. 32146/05, 16 February 2010, quoted in at least a dozen cases. Where a Contracting State has made adequate provision for securing high professional standards among healthcare professionals and the protection of the lives of patients, it cannot accept that matters such as an error of judgment on the part of a healthcare professional or negligent coordination among healthcare 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 *Stihi-Boos v. Romania* (dec.), no. 7823/06, § 54, 11 October 2011, and *Florin Istrățoiu v. Romania*, no. 56556/10, § 74, 27 January 2015).

8. While it is legitimate for an applicant to choose among the domestic remedies available, we should not encourage the use of criminal law in medical negligence cases, whereas the Court has noticed an evolution of the domestic laws in the healthcare field whereby the responsibility of health-care professionals is attached to the risk relating to the exercise of that profession, thus constituting an objective basis for a more efficient legal remedy aimed at compensating the damage caused to a patient's life or health (see *Florin Istrățoiu v. Romania*, § 82, cited above).[1]

[1] In the discussion of the admissibility of the application the present judgment (§ 81) refers to *W. v. Malta* ([GC], no. 25644/94, § 34, 29 April 1999), in which the Court stated 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. It seems to me that in view of the above consideration in *Istrățoiu* the civil remedy is more likely to be successful. However, in view of the specificity of the remedy

9. It is for this reason that, to my regret, I could not agree with the finding of a substantive violation of Article 2. From the perspective of a procedural violation the award of just satisfaction would be unusually high, notwithstanding the undeniable suffering resulting from this tragedy. Not all tragedies amount to violations of the Convention.

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and the finding in *W. v. Malta* I consider that to reject an application on that ground would have been unfair. It is for this reason that the admissibility standards of *Bajić v. Croatia*, no. 41108/10, § 74, 13 November 2012, (a standard that goes back to at least 1985) were found applicable, although the Court leaves open the issue as if the two standards were the same. As the present context indicates, and in view of *Istrățoiu*, they are not.