

With a judgement of 4th November 2021, the Fifth Section of the European Court of Human Rights (ECHR), ruled against Ukraine for a violation of the procedural limb of art. 2 of the European Convention on Human Rights that guarantees the right to life.

The applicant complained that her mother had died as a result of medical negligence and that there had been no effective investigation in that regard. Therefore, the European Court decided to examine the case under art. 2 of the Convention which reads, in so far as relevant, as follows: «Everyone's right to life shall be protected by law».

It was reiterated that if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by art. 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case: in the 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 to be obtained. Disciplinary measures may also be envisaged. In any case, the provisions of art. 2 of the Convention are not satisfied if the protection afforded by the domestic law of the individual Member States exists only theoretically. For this reason, the ECHR assessed the available legal remedies not in abstracto but as a whole, as provided for by Ukrainian law and applied in practice, with a view to establishing whether they were capable of ascertaining the facts, the possible responsibility of the doctor who treated the applicant's deceased mother as well as to provide adequate redress to her.

In the present case, the applicant could make use of the criminal, disciplinary and civil remedies in respect of her allegations of medical negligence. The Strasbourg Court observed that, although the positive obligations deriving from art. 2 of the Convention do not necessarily require a criminal-law remedy, the woman consistently pursued her allegations within the framework of a criminal procedure. Given that the domestic rules on criminal procedure afforded the possibility of a joint examination of criminal responsibility and civil liability arising from the same culpable actions, the Court did not consider that the applicant acted inappropriately when choosing to pursue the case under the Code of Criminal Procedure. In assessing the effectiveness of the criminal procedures, the ECHR noted that for about five and a half years the incident was investigated by means of pre-investigation inquiries. They do not comply with the principles of an effective remedy, because the inquiry officer can only take a limited number of steps and the victims, having no formal status, are excluded from effective participation in the procedure. Following the full-scale investigation, which began in 2008 and concluded in 2012, the Ukrainian authorities admitted that the treatment of the applicant's mother had not been correct, however they discontinued the proceedings as it had been no longer possible to prove the causal link between the medical error and the death of the patient. The absence of an autopsy was apparently one of the essential reasons for the discontinuation of the case. It followed that the manner in which the criminal inquiries and investigations were conducted undermined the principle of a thorough examination of the basic facts of the case. Moreover, the European Court found that when the first-instance court adopted its decision upholding the decision to close the investigation, the overall length of proceedings had exceeded nine years and eight months, in violation of the principle of effectiveness enshrined in the positive obligations deriving from art. 2 of the Convention. Even the inquiries held by the hospital and the healthcare authorities did not meet the procedural requirements of art. 2 since the disciplinary procedure did not establish all the relevant facts or examined the causal link between the doctor's conduct and the death of the patient.

Finally, the European Court affirmed that it would have been onerous to expect the applicant to subsequently institute autonomous civil proceedings after the termination of the criminal one, given that its duration was excessive and that the civil claims could be examined in that same forum. Therefore, the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's mother, failed to provide an effective response consonant with the State's obligation under art. 2, thus violating its procedural limb.



Right to life: the ineffectiveness of the investigations relating to a case of medical negligence violates the procedural limb of art. 2 of the European Convention on Human Rights

Diritto civile Responsabilità

Denise Campagna

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Riferimenti Normativi:

- art. 2 Convenzione Europea dei Diritti dell'Uomo