REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2013/2839

Date of Decision: 3/4/2014

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DECISION

President : Serruh KALELİ

Members : Nuri NECİPOĞLU

Hicabi DURSUN

Erdal TERCAN

Zühtü ARSLAN

Rapporteur : Cüneyt DURMAZ

Applicant : Nail ARTUÇ

I. SUBJECT OF APPLICATON

1. The applicant asserted that the right to life and the right to a healthy life were violated on the ground that diagnosis as regards the disease of his father was not made in time and that a criminal case could not be filed on the doctor which he asserted to have given rise to a delay in his treatment as no permission for investigation was granted on the doctor although he filed a complaint to the Prosecutor's Office.

II. APPLICATION PROCESS

2. The application was lodged by the applicant through the 2nd Administrative Court of Bursa on 25/4/2013. In the preliminary examination in terms of administrative aspects, it has been determined that there is no situation to prevent the submission of the application to the Commission.

3. It was decided by the Second Commission of the First Section on 28/11/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

III. FACTS AND CASES

A. Facts

4. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

5. The father of the applicant, Mehmet ARTUÇ became ill on 21/9/2011 and applied to the Emergency Room of Bursa Şevket Yılmaz Training and Research Hospital at approximately 18.00. In the examination of the patient by Dr. N. Ç. who was on duty in the emergency room, a yellow spot of 1 cm2 was observed on the rectal area, a pain killer needle was applied on the patient as he suffered a lot and the patient was discharged by stating that an appointment needed to be made from the general surgery polyclinic.

6. The applicant was able to make an appointment for his sick father from the surgery polyclinic for the date of 23/9/2011 which was 2 days after. In the examination of the patient by Dr. S. S. who was on duty in the polyclinic on this date, it was observed that there was a darkened area of approximately 40 cm2 on the hip part of his body and upon understanding that his state was critical, the patient was taken into operation at approximately 13.00.

7. The applicant's father for whom the diagnosis of Fournier Gangrene was made could not be saved although he went through many operations after his first operation and died on the date of 18/1/2012 approximately 4 months after the date on which the first diagnosis was made.

8. The applicant applied to the Chief Public Prosecutor's Office of Bursa (Prosecutor's Office) on the date of 6/7/2012 and asserted that Dr. N. Ç. who was on duty in the emergency room on the date of the incident gave rise to a delay in the treatment.

9. The Prosecutor's Office requested, through its letter dated 10/7/2012 and numbered 2012/41574, from the Governor's Office of Bursa that an examination be carried out on Dr. N. Ç. who was working at Şevket Yılmaz Training and Research Hospital as regards the crimes of misuse of duty and giving rise to involuntary manslaughter in accordance with articles 3 and 6 of the Code on the Trial of Public Servants and other Public Officials dated 2/12/1999 and numbered 4483 and that the decision on whether a permission for investigation would be granted or not be sent to the Prosecutor's Office.

10. The Directorate of Provincial Administrative Board of the Governor's Office of Bursa assigned, through its letter dated 19/7/2012 and numbered 172-9924, the Deputy Chief Doctor of Bursa Zübeyde Hanım Maternity Hospital, S. H. in order to prepare a preliminary examination report. The investigator S. H. took statements of the applicant Nail ARTUÇ, the general surgery specialist Dr. S. S. and Dr. N. Ç. about whom the complaint was filed in this context and prepared a preliminary examination report by also making a research on the disease by himself/herself. In the preliminary examination report, it was explained "... *that the patient was examined, treated and referred to the polyclinic, the course of the disease was explained and it was rarely observed and it was a fatal disease* ... " and it was stated that no permission for investigation needed to be granted on the doctor.

11. The Directorate of Provincial Administrative Board of the Governor's Office of Bursa decided that no permission for investigation be granted in line with the preliminary examination report through its decision dated 29/8/2012 and numbered D.2012-498-01-02/109.

12. Upon the opposition of the applicant against this decision, The Regional Administrative Court of Bursa (Court), through its decision dated 13/11/2012 and numbered M.2012/444, D.2012/460, decided on the admission of the opposition on the ground "... *that compliance with the legislation was not observed in the decision of the authorized instance delivered on the basis of the preliminary examination report prepared based on deficient examination without performing the relevant evaluations while whether the procedures performed by Dr. N. Ç. were performed in line with the requirements of the science of medicine or not needed to be evaluated following a report to be received from impartial experts to be selected from the specialists of the subject although it was stated in the preliminary examination report that the patient was examined, treated and referred to the polyclinic, that the course of the disease was explained and that it was rarely observed and it*

was a fatal disease and the decision which is the subject of the opposition was formed based on this report ..." and returned the file to the Governor's Office of Bursa in order for a decision to be delivered again.

13. Through the letter of the Directorate of Provincial Administrative Board of the Governor's Office of Bursa dated 4/12/2012, S. H. was assigned to prepare a preliminary examination report again.

14. By considering the deficiencies specified in the decision of the court, an expert opinion (through 7 questions asked as regards the incident) was received from a panel composed of 3 lecturers working at the Departments of General Surgery, Emergency Medicine and Urology of Uludağ University so as to evaluate whether the procedures performed by Dr. N. Ç. were performed in accordance with the requirements of the science of medicine or not, the statements of the relevant individuals were included and a new preliminary examination report was prepared.

15. The Directorate of Provincial Administrative Board of the Governor's Office of Bursa examined the preliminary examination report and decided that no permission for investigation be granted through its decision dated 18/1/2013 and numbered D.2013-498-01-02/08 in line with the report.

16. The opposition filed against this decision was dismissed, through the decision of the Court dated 12/3/2013 and numbered M.2013/80, D.2013/148, on the ground that "... *it does not have the quality and sufficiency that will require an investigation to be carried out by the Chief Public Prosecutor's Office due to the alleged action...* ".

17. The aforementioned decision was notified to the applicant on the date of 9/4/2013 and an individual application was lodged to the Constitutional Court within due period.

B. Relevant Law

18. Subparagraph (e) of paragraph one and the last paragraph of article 3 of the Code numbered 4483 with the heading of *"Authorities that are authorized to grant permission"* are as follows:

> *"The authority to grant permission for investigation*
>
> …
>
> *b) Governor on the public servants and other public officials working in the province and central district,*
>
> …"

19. Paragraph three of article 5 of the Code numbered 4483 with the heading of *"Preliminary examination"* is as follows:

> *"While a preliminary examination can be performed by the authority that is authorized to grant permission itself, it can also be made to be performed through one or more of the inspection personnel to be assigned by it or one or more of the public servants and public officials who are superior than the one on whom the examination is performed. It shall be essential that those who will perform an examination be determined from inside the public*

institution or organization under which the authority that is authorized to grant permission is affiliated. Depending on the quality of the work, this authority can also request from the relevant institution that the aforementioned examination be made to be performed through the personnel of a public institution or organization. The fulfillment of this request shall depend on the discretion of the relevant institution."

20. 27. Article 6 of the Code numbered 4483 with the heading of *"The authority of those who perform preliminary examination and report"* is as follows:

"An individual or individuals who are assigned with preliminary examination shall have all the authorities of the inspectors of the ministry and the authority which assign them, can undertake due action according to the Code of Criminal Procedure as for the matters for which there is no provision in this Code; shall collect necessary information and documents within their authorities by also taking statement of the public servant or other public official on whom the examination is performed, prepare a report which includes their views and present the situation to the authority that is authorized to grant permission. If the preliminary examination is performed by more than one person, different views shall be separately specified in the report together with their justifications.

The authority shall decide to grant or not to grant permission for investigation depending on this report. It shall be compulsory to show justifications in these decisions."

21. Paragraph (1) of article 13 of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 with the heading of *"Directly filing a full remedy action"* is as follows:

"Those whose rights are violated due to administrative actions need to request the fulfillment of the rights thereof by applying to the related administration within one year following the date on which they are informed about these procedures upon the notification or in any other way and within five years following the date of the action in any case before they file an administrative case. In the event that these requests are partly or fully dismissed, a case can be filed within the period starting from the date following the notification of the action about this matter or, if no response is provided about the request within sixty days, following the date on which the period for response expires."

22. Article 49 of the Turkish Code of Obligations dated 11/1/2011 and numbered 6098 with the heading of "*Responsibility*" which regulates obligation relations arising from tort actions is as follows:

"Those who incur damages on others as a result of negligent and illegal acts shall be responsible for compensating for such damages.

Even though in case of absence of a rule of law that prohibits damaging acts, those who intentionally harm others as a result of unethical deeds and actions shall be responsible for compensating for such acts."

23. Article 74 of the Code numbered 6098 which regulates the relation of obligation relations arising from tort actions with the Criminal Law is as follows:

"As the judge decides on the fault of the damaging party, on whether or not the latter has a discerning power or whatsoever, s/he shall neither be bound by the provisions on responsibility of the criminal law nor shall s/he be bound by the acquittal decision as ruled by

the criminal judge. Similarly, the decision of the criminal judge concerning the evaluation of the fault and establishment of the damage shall not be binding on the judge of common law."

24. The decision of the Assembly of Civil Chambers of the Supreme Court of Appeals dated 13/4/2011 and numbered M.2010/13-717, D.2011/129 is as follows:

"…

Qualifying the physical facts relied upon in a case in terms of legal aspects and finding and implementing the legal provisions to be applied is directly the duty of the judge in accordance with article 76 of the Code of Civil Procedure. The plaintiff requested material and spiritual damages by asserting that s/he was obliged to go through an operation again as a foreign body was left in the area of operation due to the operation performed by the defendant doctor. ***The basis of the case is the contract of agency and it is based on the breach of responsibility of care.*** *(The Code of Obligations - 386-390)* ***If an agent is not responsible for the failure to obtain the outcome that s/he has headed towards while dealing with an assignment which is the subject of his/her duty, s/he shall be responsible for the damages arising out of the fact that the effort that s/he has exhorted, the procedures, actions and behaviors that s/he has performed in order to achieve this outcome are not diligent. The responsibility of an agent shall be generally based on the rules as regards the responsibility of an employee. An agent shall be obliged to act diligently just as an employee and be responsible for his/her slightest negligence*** *(The Code of Obligations, article 321/1)* ***For this reason, all the negligences, even if they are slight, of a doctor within his/her field of profession should be accepted as an element of responsibility.*** *A doctor shall be obliged to fulfill all professional conditions, to determine the status of the patient in terms of medical aspects in time and without delay, to take the measures required by the concrete case in a complete way, to determine and apply the appropriate treatment without delay in order to ensure that his/her patient is not damaged. In cases which give rise to hesitation even if at minimum level, s/he shall be obliged to make researches to eliminate this hesitation of his/hers and to also take protective measures. While making a selection among various treatment methods, by considering the characteristics of the patient and the illness, attitudes and behaviors that will put him/her at risk should be avoided and the safest method should be selected. Indeed, a client (patient) shall have the right to expect from the agent who is a doctor that performs a professional job to show a diligent care and attention in all stages of treatment. An agent who fails to show necessary diligence should be considered not to have duly executed the agency in accordance with the provision of article 394/1 of the Code of Obligations. If the outcome does not change in spite of acting in accordance with the requirements and rules of medicine, the doctor should not be held responsible.*

…"

25. The decision of the Assembly of Civil Chambers of the Supreme Court dated 1/2/2012 and numbered M.2011/4-592, D.2012/25 is as follows:

"The case is related to a request for compensation based on the claim that the sponsor died as a result of a wrong treatment. The dispute is concentrated on the point of whether the hostility in the current action for compensation filed because of the act of the doctor who is a public official can be directed towards the doctor in question or not.

The plaintiff party filed the current action for compensation with the claim that during his/her duty the defendant doctor did not intervene the patient who was their sponsor although she was bleeding and in an emergency situation and that s/he took care of another patient who

had ectopic pregnancy, that thus s/he resulted in the death of the sponsor due to his/her carelessness and imprudence and by showing the doctor as adversary.

The hostility in the current case rests with the administration, not the public official as the personal negligence of the defendant outside his/her duty was not brought forward, the act was performed during the duty and is related to the duty even if it was based on carelessness and imprudence and has a quality of service defect. Then, it is necessary to file a case against the administration and to also direct hostility towards the administration. The dismissal by the Court of the case filed by showing the defendant doctor as adversary because of the absence of hostility complies with the law.

…"

26. The decision of the 13th Civil Chamber of the Supreme Court of Appeals dated 16/2/2012 and numbered M.2011/19947, D.2012/3097 is as follows:

"... The contract of agency constitutes the basis of the case depending on the allegation and admission in the case and is based on the breach of responsibility of care (The Code of Obligations 386-390). If an agent is not responsible for the failure to obtain the outcome that s/he has headed towards while dealing with an assignment which is the subject of his/her duty, s/he shall be responsible for the damages arising out of the fact that the effort that s/he has exhorted, the procedures, actions and behaviors that s/he has performed in order to achieve this outcome are not diligent. The responsibility of an agent shall be generally based on the rules as regards the responsibility of an employee (The Code of Obligations art. 290/2). An agent shall be obliged to act diligently just as an employee and be responsible for his/her slight negligence (The Code of Obligations art. 321/1). For this reason, all the negligences, even if they are slight, of a doctor who has a status as an agent within his/her field of profession should be accepted as an element of his/her responsibility. A doctor shall be obliged to fulfill all professional conditions, to determine the status of the patient in terms of medical aspects in time, without delay, to take the measures required by the concrete case in a complete way, to determine and apply the appropriate treatment method without delay in order to ensure that his/her patient is not damaged. In cases which give rise to hesitation even if at minimum level, s/he shall be obliged to make researches to eliminate this hesitation and to also take protective measures. While making a preference among various treatment methods, s/he should consider the characteristics of his/her patient and his/her illness, avoid attitudes and behaviors that will put him/her at risk, the safest method should be selected. Indeed, a patient shall have the right to expect in safety from his/her doctor who is a member of profession that undertakes to perform his/her treatment to show a diligent care and attention required by his/her profession in all stages of treatment, to inform him/her on dangers related to his/her physical and mental health. An agent who fails to show necessary diligence should be considered not to have duly executed the agency in accordance with the provision of article 394/1 of the Code of Obligations. If the outcome does not change in spite of acting in accordance with the requirements and rules of medicine, the doctor should not be held responsible..."

27. The decision of the 13th Civil Chamber of the Supreme Court dated 7/10/2008 and numbered M.2008/11477, D.2008/11825 is as follows:

"…

It is understood that the plaintiffs filed a complaint before the Public Prosecutor's Office due to the incident which is the subject of the case. Although a civil judge shall not be bound by an acquittal decision ruled at a criminal court according to article 53 of the Code of

Obligations, s/he shall be bound by the verdict of conviction to be ruled and the determined physical facts. In this case, while it is necessary for the court to wait for the outcome of the preliminary investigation or the outcome of the criminal case if a case is filed and to issue a decision which complies with the emerging outcome, the rendering of a verdict in writing through incomplete examination is contrary to the procedure and law and requires reversal.

…"

IV. EXAMINATION AND JUSTIFICATION

28. The individual application of the applicant dated 25/4/2013 and numbered 2013/2839 was examined during the session held by the court on 3/4/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

29. The applicant asserted that the right to life and the right to health enshrined in articles 17 and 56 of the Constitution were violated and filed a request for compensation by stating that he filed a complaint about Dr. N. Ç. who gave rise to a delay in treatment by specifying that he applied to the Emergency Room of Bursa Şevket Yılmaz Training and Research Hospital for the treatment of his father who became ill, that Dr. N. Ç. applied a pain killer needle and discharged his father without receiving the opinion of the general surgery specialist although s/he was on duty at the hospital, that the diagnosis of Fournier Gangrene was made on his father at the general surgery polyclinic to which they applied two days later and he was immediately taken into operation, that he died following a series of operations and that however a permission for investigation was not granted on the relevant doctor as regards the crimes of misuse of duty and giving rise to involuntary manslaughter.

B. Evaluation

30. In the application, it was asserted that the right to life regulated in article 17 of the Constitution as well as the right to health regulated in article 56 were violated. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. The complaints of the applicant have been examined in terms of the right to life regulated in article 17 of the Constitution.

31. Article 17 with the heading *of "Inviolability and material and spiritual existence of the individual"* of the Constitution is as follows*:*

"*Everyone has the right to life and the right to protect and improve their material and spiritual existence.*"

32. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities about this subject. The state, as a negative liability, has the liability not to terminate the life of any individual within its jurisdiction intentionally and in contrary to the law and, as a positive liability, has the liability to protect the right to life of all individuals within its jurisdiction against the risks arising out of the actions of public institutions, other individuals and the individual himself/herself (App. No: 2012/752, 17/9/2013, § 50-51).

33. According to the basic approach that the Constitutional Court has embraced in terms of the positive liabilities which the state has within the scope of the right to life, in the incidents of death which occur under the conditions which can require the responsibility of the state, article 17 of the Constitution imposes the state the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in this matter is duly applied in order to protect the individuals whose life is in danger and that the violations as regards this right are stopped and punished by making use of all available facilities. This liability is valid for all types of activities, public or not, in which the right to life can be in danger (App. No: 2012/752, 17/9/2013, § 52).

34. The positive liability in question also covers the activities carried out in the field of health. As a matter of fact, it is provided in article 56 of the Constitution that everyone has the right to live in a healthy and balanced environment, that the state "*exclusively plans and regulates the health institutions in order to ensure that everyone leads a physically and mentally healthy life* ..." and carries out this duty by benefiting from and supervising the public and private health and social institutions.

35. The State is obliged to regulate health services, whether they are provided by public or private health institutions, in a way which will ensure that necessary measures can be taken in order to protect the lives of patients (for the judgments of the ECtHR in the same vein, see *Calvelli and Ciglio v. Italy*, App. No: 32967/96, 17/1/2002, § 49, *Sevim Güngör v. Turkey*, App. No. 75173/01, 14/4/2009).

36. The positive liabilities that the state has within the right to life have also a procedural aspect. Within the framework of this procedural liability, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for each incident of death which is not natural are determined and punished, if necessary. The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur under their responsibility (App. No: 2012/752, 17/9/2013, § 54).

37. It is necessary to determine the type of investigation required by procedural liability in an incident depending on whether the liabilities as regards the essence of the right to life require a criminal sanction or not. According to this, as in other deaths which generally occur by way of negligence, in the incidents of death which are asserted to have occurred as a result of medical negligence, the positive liability towards "*the establishment of an effective judicial system*" does not necessarily require the filing of a criminal case in each incident. It can be sufficient that civil, administrative and, even disciplinary legal remedies are open to victims (App. No: 2012/752, 17/9/2013, § 59, for the judgments of the ECtHR in the same vein, see *Vo v. France [BD], 53924/00*, 8/7/2004, § 90; *Calvelli and Ciglio v. Italy*, 32967/96, 17/1/2002, § 51).

38. Such an acceptance does not mean that the criminal investigations carried out in such incidents cannot be evaluated by the Constitutional Court. However, as a principle, the main legal remedy in terms of complaints as regards medical negligences is the remedy of civil or administrative action for compensation to be proceeded so as to determine legal responsibility (for the judgments of the ECtHR in the same vein, see *Karakoca v. Turkey*, App. No: 46156/11, 21/5/2013).

39. In this context, given the conditions of the incident which is the subject of the application, the applicant's father who went to the hospital for treatment on 21/9/2011 for the first time went through his first operation two days later on 23/9/2011, then his treatment was proceeded, but he died on 18/1/2012 although he went through many operations. Thereupon, the applicant applied to the Chief Public Prosecutor's Office of Bursa on the date of 6/7/2012 and asserted that Dr. N. Ç. who was on duty in the emergency room on the date of 21/9/2011 gave rise to a delay in the treatment by not receiving the opinion of the general surgery specialist immediately after the examination.

40. In terms of the complaints asserted in the application as regards the criminal investigation, the procedural aspect of the positive liabilities which the state has to fulfill within the scope of the right to life regulated in article 17 of the Constitution requires the performance of an independent investigation which allows for the revelation of all aspects of the incident of death that occurred and the determination of individuals who are responsible (App. No: 2013/841, 23/1/2014, § 94). In order to ensure the effectiveness and sufficiency of the investigation, the investigation authorities should act *ex officio* and all evidence which can shed light on the incident of death, allow for the determination of those who are responsible should be collected (App. No: 2012/752, 17/9/2013, § 57).

41. In the incident which is the subject of the application, it is observed that an investigation was immediately initiated by the Chief Public Prosecutor's Office of Bursa (Prosecutor's Office) upon a complaint filed approximately 6 months after the date on which the father of the applicant lost his life, that it was requested three days after the opening of the investigation from the Governor's Office of Bursa that an examination be carried out on Dr. N. Ç. who was working at Şevket Yılmaz Training and Research Hospital as regards the crimes of misuse of duty and giving rise to involuntary manslaughter in accordance with the Code numbered 4483 and that the decision on whether a permission for investigation would be granted or not be sent to the Prosecutor's Office.

42. The Governor's Office of Bursa decided that no permission be granted for investigation on the doctor in question based on the preliminary examination report prepared by a doctor who was appointed as investigator (in which the statements of the doctor who was the general surgery specialist that performed the first operation and of Dr. N. Ç. on whom the complaint was filed were also included), upon an opposition filed against this decision, the Regional Administrative Court of Bursa decided on the admission of the opposition on the ground "*... that compliance with the legislation was not observed in the decision of the authorized instance delivered on the basis of the preliminary examination report prepared based on deficient examination without performing the relevant evaluations while whether the procedures performed by Dr. N. Ç. were performed in line with the requirements of the science of medicine or not needed to be evaluated following a report to be received from impartial experts to be selected from the specialists of the subject although it was stated that the patient was examined, treated and referred to the polyclinic, that the course of the disease was explained and that it was rarely observed and it was a fatal disease and the decision which is the subject of the opposition was formed based on this report ...*".

43. Following this decision, in the second preliminary examination report which was prepared for the second time by the doctor assigned as investigator based on the opinions of the lecturers of the Departments of General Surgery, Emergency Medicine and Urology of Uludağ University, it was expressed on which grounds responsibility would not be attributed to the doctor in question in terms of medical aspect and that "*it was deducted and concluded that no permission be granted for investigation*"; in accordance with this report, it was

decided by the Governor's Office of Bursa that no permission be granted for investigation on the ground that "*... that the cases whose diagnosis was delayed by 1 week to 10 days were identified as delayed cases according to the explanations of the expert panel, that Mehmet ARTUÇ who applied with a complaint of pain on the anus on 21/9/2011 ... had a complaint of pain, that it is possible that his physical examination was considered to be normal, but it may clinically progress towards Fornier's Gangrene within two days and become stable ...*". In this decision which was delivered by the Governor's Office of Bursa, it is understood that the deficiency touched upon by the Regional Administrative Court of Bursa in the decision as regards the acceptance of the opposition filed against the first decision was eliminated and that how the incident occurred and whether the relevant doctor had a role in the failure to perform early diagnosis of the disease and the death which occurred were put forth in detail under 7 questions. The opposition filed by the applicant against this decision was dismissed by the Regional Administrative Court of Bursa.

44. When the process as regards the criminal investigation is examined, it is seen that upon the complaint of the applicant the preliminary examination was immediately initiated by the Prosecutor's Office on the doctor who was claimed to be responsible for the death which occurred as regards the crimes of misuse of duty and giving rise to involuntary manslaughter, that thereafter in accordance with the provisions of the Code numbered 4483 the investigation file was sent to the Governor's Office of Bursa, that no permission was granted for investigation on the basis of the preliminary examination report which was prepared by the doctors who were working at a different institution from the health institution of the doctor on whom the complaint was filed and which technically explained on which grounds the doctor in question did not have any responsibility, that the applicant opposed against the decision (through the justifications he also included in the individual application form that he submitted to the Constitutional Court), that however the Regional Administrative Court of Bursa dismissed the opposition filed against the decision of the authorized instance as regards the fact that no permission was granted for investigation on the ground that the action alleged to those concerned did not have a quality which required the performance of an investigation on them according to the preliminary examination report and the documents annexed thereto, that in this way the applicant could be involved in the process of investigation in a way which could ensure the transparency of the investigation and protect his legitimate interests. When the provisions of the Code numbered 4483 as regards the issue are taken into account, there is no deficiency which will reveal that the performed investigation is insufficient or no negligent behavior that can be charged on the officials who carried out the investigation.

45. In such incidents, the aim of criminal investigations which are executed is to ensure that the provisions of the legislation which protects the right to life are implemented in an effective way and that those who are responsible, if any, in the incident which occur are brought before justice in order for their responsibilities to be determined. This is not a conclusive liability, but a liability to use appropriate means (App. No. 2012/752, 17/9/2013, § 56). At the end of an investigation carried out as regards the incidents of death which are claimed to occur as a result of medical negligences, there is not necessarily an obligation to determine the criminal responsibility of any person. The fact that article 17 of the Constitution grants applicants the right to make third persons (the doctor in the incident which is the subject of the application) tried or punished due to a certain crime (the crime of misuse of duty and giving rise to involuntary manslaughter) does not mean that a liability to conclude all trials with a conviction or a certain criminal sentence is imposed.

46. If a violation as regards the right to life is present in terms of the claims that the liability to protect life was violated through the failure to make correct diagnosis in time and

to apply the required treatment as asserted in the application, the elimination of this violation is primarily under the liability of administrative authorities and the courts of instance (App. No: 2013/2075, 4/12/2013, § 75). While the applicant filed a request for the opening of a criminal investigation by filing a criminal complaint on the doctor which he claimed to have negligence in the incident, it is seen that no legal remedy has been resorted to as regards the administrative and legal responsibilities of the doctor or the hospital. Given the aforementioned case-law of the Supreme Court of Appeals (§ 24-27) on the issue, remedies for compensation of the losses inflicted also against the actions and negligences which do not constitute a crime in accordance with criminal codes have been regulated before administrative and civil courts in relation to the administration or persons based on negligence and even absolute liability in accordance with the aforementioned provisions (§ 21-23) of the Code numbered 2577 and the Code numbered 6098 depending on the person towards whom hostility will be directed (App. No: 2013/2075, 4/12/2013, § 74).

47. Also for the applicant who applied to the relevant legal remedy for the determination of criminal responsibility, but failed to obtain a result in the incident which is the subject of the application, there are opportunities of resorting to the aforementioned legal and administrative remedies. For this reason, it cannot be mentioned that all of the administrative and legal remedies prescribed in the law for the procedure, action or negligence which was claimed to have caused the violation in terms of the medical intervention performed had been exhausted before the individual application was lodged.

48. Due to the reasons explained, it should be decided that the claims that the right to life was violated through the failure to provide the service of treatment in a timely and sufficient manner are inadmissible due to the fact that "*legal remedies have not been exhausted*".

V. JUDGMENT

In the light of the reasons explained: it was **UNANIMOUSLY** decided on 3/4/2014

A. That the complaints of the applicant be examined within the scope of article 17 of the Constitution,

B. That the claims that the right to life was violated through the failure to provide the service of treatment in a timely and sufficient manner **ARE INADMISSIBLE** due to the fact that "*legal remedies have not been exhausted*",

C. That the trial expenses be charged on the applicant.

President	Member	Member
Serruh KALELİ	Nuri NECİPOĞLU	Hicabi DURSUN

Member	Member
Erdal TERCAN	Zühtü ARSLAN