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

THIRD SECTION

DECISION

This decision was rectified on 16 June 2014,
under Rule 81 of the Rules of Court.

Application no. 39974/10
M.P. and Others
against Romania

The European Court of Human Rights (Third Section), sitting on 15 April 2014 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Kristina Pardalos,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 9 June 2010,

Having regard to the observations submitted by the respondent Government, the observations in reply submitted by the applicants and the written submissions of the third-party interveners, the European Centre for Law and Justice, Pro-Vita Bucharest and Alianţa Familiilor din Romania,[1]

Having regard to the decision to grant the applicants anonymity pursuant to Rule 47 § 3 of the Rules of Court.

Having deliberated, decides as follows:

1. Rectified on 16 June 2014 : the text was : "Having regard to the observations submitted by the respondent Government, the observations in reply submitted by the applicants and the written submissions of the third-party intervener, the European Centre for Law and Justice,"

THE FACTS

1. The applicants are Mrs M.P., her husband Mr M.P., and their son M.-D.P. They are all Romanian nationals, born in 1971, 1974 and 2003 respectively; they all live in Buzău and were represented before the Court by Mr P. Pop, a lawyer practising in Bucharest.

The Romanian Government were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarized as follows.

3. Mrs M.P., mother of a nine year-old child from a previous marriage, had been informed by doctors that she could no longer conceive naturally; together with her husband, Mr M.P., she decided to have recourse to artificial insemination procedures in order to have a child.

The applicants contacted doctor S.P., an obstetrician at the "Prof. Dr Panait Sârbu" Obstetrics and Gynaecology Hospital in Bucharest (hereafter "the hospital") to that end. They informed the doctor that Mrs M.P.'s first child had been born with a congenital malformation (tibial agenesis, or hemimelia) and asked for further information concerning the risk that the future child could be born with the same condition. They explained to the doctor that if such a risk existed they would not proceed with the insemination.

Doctor S.P. assured them that the first child's situation was exceptional and that there was no risk of another child being born with the same disability.

4. They were then referred to doctor A.V. in order to have the standard procedural tests carried out. They enquired again about the risk of having another baby with the same malformation and about the possibility of running genetic tests in order to rule out this issue. The doctor assured them that the chances of it happening were minimal (1/1,000,000); therefore no other tests were performed.

5. The artificial insemination was scheduled for 19 November 2002 and it resulted in the first applicant's pregnancy.

6. In the first trimester of the pregnancy the first applicant underwent several tests recommended by doctor S.P., who also referred her to doctor D.A. for further ultrasound scans. She allegedly told the latter about her fears concerning the risk of the baby developing the same malformation as her first child. However, she was reassured each time that everything concerning the development of the unborn child was normal.

7. During one of the ultrasound scans, performed in the twenty-fourth week of pregnancy, doctor E.S., an echographer, informed the applicants

that he had noticed a difference between the two legs of the foetus, but reassured them that it was likely that that was an error, as the difference was minor and the foetus did present both a tibia and a femoral bone.

This information was conveyed to doctor S.P., who concluded that no special issue arose.

8. The first applicant decided to seek further tests, however. To that aim, she contacted a private clinic, M.R., where on 9 June 2003 she underwent a three-dimensional ultrasound scan, performed by doctor D.A. At the relevant time the applicant was in her thirty-second week of pregnancy.

The doctor detected a peculiar position of the toes in relation to the leg (*planta în poziţie valg faţă de planul frontal al gambei*), reassuring Mrs M.P. nevertheless that the legs of the foetus were normally developed. He further detected foetal distress in the brain (*suferinţă fetală la nivel cerebral*) and recommended that the applicant contact her obstetrician.

After consulting with her obstetrician, on 12 June 2003 the first applicant was hospitalized; Mrs M.P. and the foetus were monitored until 16 June 2003, when she was released from hospital as there were no further indications of foetal distress.

9. On 8 August 2003 the applicant was admitted to hospital for the birth; she was immediately referred to doctor C., who later assisted the applicant during the birth. On 12 August 2003 the applicant gave birth to a baby boy (the third applicant); he presented a malformation of one of his legs that was identical to that of his older brother.

10. Doctor S.P. visited the applicant three days later; referring to the child's disability, the doctor offered his support in finding an association which could help the applicants financially.

11. Nine months after giving birth to M.-D.P., and despite the doctors' conclusion that she could not become pregnant naturally, Mrs M.P. discovered that she was expecting a third baby. Together with her husband, she decided to have an abortion, fearing that the third child would be born with the same disability.

12. On 9 May 2005 the applicants brought an action against doctors S.P., D.A., E.S. and A.V., as well as against the hospital, the private clinic M.R., the Ministry of Health and the Romanian State, represented by the Ministry of Finance.

On behalf of their younger son, they requested a monthly lifetime allowance of 20,000,000 old Romanian lei (ROL); in their own name, they asked for ROL 5,000,000,000 in compensation for pecuniary and non-pecuniary damage incurred on account of the birth of a disabled child, who needed frequent medical interventions due to his disability.

The applicants claimed that the defendants were liable for negligence in performing their medical duties, namely, that the doctors had failed to adequately inform them prior to the artificial insemination of the potential risk that the new baby could be born with the same disability as his older

brother; and that they subsequently failed to adequately monitor the development of the foetus and also misinterpreted the results of the ultrasound examinations, telling them that the baby was developing normally and thus misleading them. The applicants reiterated that if they had been aware of the risks involved, they would have not undergone the artificial insemination to begin with, and in any event, they would have decided on an abortion, so as to spare the child of a life of pain and suffering on account of his disability.

Referring to "the doctors' superficiality" in dealing with their case, the applicants highlighted that in spite of the diagnosis according to which Mrs M.P. could no longer become pregnant naturally, she had become pregnant unexpectedly and found herself compelled to have an abortion for fear of having another disabled child.

13. On 7 December 2007 a report containing the conclusions of doctor D.I., an expert in genetics from the National Institute of Forensic Medicine, was adduced as evidence.

In reply to the twenty-five questions put by the court, the expert gave her opinion, which its relevant parts held as follows:

> "The [peculiar] position of the toes in relation to the leg indicate a congenital malformation [question no. 1] ...
>
> "The recommended measure [for diagnosing a genetic anomaly of the specified type] is a foetal morphological ultrasound scan, performed in the 20th-24th week of pregnancy. The lower limbs are visible from the 13th-14th week of pregnancy, but the toes only from the 20th week. The period of 20-24 weeks is optimal for visualising the foetal structures and for making the choice of whether to continue or to terminate the pregnancy. [question no. 9] ...
>
> Pre-conception diagnosis cannot be performed in the case of tibial agenesis (tibial hemimelia) .... The gene responsible for this condition is not known and the genetic defect potentially responsible for tibial agenesis is beneath the resolution threshold of cytogenetic testing (karyotyping).
>
> A prenatal diagnosis can be made by performing an ultrasound scan (foetal morphological ultrasound) in weeks 20-24 of pregnancy. [question no. 25] ...
>
> Conclusions
>
> In a case where the parents of a child with tibial agenesis have given birth to a second child with the same congenital malformation following a pregnancy resulting from artificial insemination, it would have been advisable for a genetic consultation to be carried out before conception of a second child, together with rigorous ultrasound monitoring of the second pregnancy in order for the specific ultrasound warning signs to be identified in time.
>
> It would also have been essential to inform the parents about this anomaly (tibial agenesis) and about the possibilities for treatment, given that surgical orthopaedic treatment is possible."

14. On 25 January 2008 the Bucharest Court of First Instance rendered its judgment. The court held that due to medical negligence, Mrs M.P. had suffered damage, namely, "the birth of a child with a congenital anomaly".

The court stated that her right to be correctly informed about the state of health of her unborn child had been infringed; implicitly, her right to choose whether or not to give birth to a child suffering from a congenital malformation was equally infringed.

15. The court found doctor A.V. responsible in her capacity as a geneticist for not discharging her duty of care in assessing the applicant's condition before the artificial insemination, despite having been informed that her first child had been born with a malformation. It concluded that the doctor had failed to proceed to further testing of the applicant in order to clarify her situation and thus inform her about the existing risks associated with a pregnancy, which would have given the parents the opportunity to assess their options.

Regarding the responsibility of doctor E.S., the court concluded that he had failed to correctly interpret the results of the ultrasound scan performed during the twenty-fourth week of pregnancy, which had revealed a problem with the foetus's legs. It further stated that in such circumstances the doctor had been under an obligation to refer the applicant for further testing and to recommend a three-dimensional ultrasound scan.

Doctor D.A. was cleared of responsibility on account of the fact that he had been the only doctor to correctly interpret the results of the three-dimensional ultrasound scan performed during the thirty-second week of pregnancy, on 9 June 2003 (see paragraph 8 above).

As regards doctor S.P., the applicant's obstetrician, the court found that he was responsible for not recommending the three-dimensional ultrasound scan in time for the malformation to be promptly discovered (weeks 20-24) and also for misinterpreting and ignoring the results of the scan when it was performed in the thirty-second week of pregnancy, in spite of the fact that it had revealed an anomaly in the foetus's legs.

The hospital was held jointly liable with the doctors in respect of the payment of damages.

16. The court referred only to the first applicant in its reasoning; however, it stated in its conclusion that the damages awarded consisted of the payment of a monthly allowance for the third applicant as requested, as well as of compensation for pecuniary damage (in the amount of 2,499.99 new Romanian lei (RON)) and non-pecuniary damage (in the amount of RON 150,000) for both parents.

17. The parties held responsible appealed against the judgment.

18. In its decision of 20 September 2009, the Bucharest County Court reassessed the merits of the case and dismissed the applicants' action. The court concluded that doctor A.V. had performed her duties in accordance with her professional obligations; the fact that she had not recommended further tests to the applicant did not make her responsible for any damage, in so far as, according to the expert's conclusions, the only way to detect the malformation was by means of a three-dimensional ultrasound scan

performed up to the twenty-fourth week of pregnancy, and that pre-insemination tests would not have revealed with certainty the risk of such a condition.

As to the responsibility of doctor S.P., the court stated that he could not be held liable in so far as the applicants had been informed that there was a risk of 1/1,000,000 of having a second child with the same malformation.

Regarding doctor E.S., the court noted that the problem he had discovered during the ultrasound scan performed on 9 June 2003 concerned the femoral bone, whereas the malformation the third applicant was born with affected the tibia.

The court further stated that in any case, a termination of pregnancy could only be carried out up to the fourteenth week, at which stage it was impossible to detect that kind of malformation.

19. The applicants appealed against that decision.

20. On 9 December 2009 the Bucharest Court of Appeal gave its final judgment, partly allowing the appeal.

The court examined each of the applicants' complaints, namely, that the doctors had not informed them of the risk of giving birth to a child with a malformation; that they had not prescribed all the necessary genetic tests and examinations to detect the risk of a genetic malformation; that they had wrongly interpreted the results of the few ultrasound scans the applicant underwent during her pregnancy.

21. The court rejected the first complaint as ill-founded, in so far as the patients had been informed that the risk of having a child with a genetic anomaly was 1/1,000,000.

22. The second complaint was also dismissed in view of the fact that, as revealed by the medical report adduced in the case, no genetic tests or examinations that could have revealed the above-mentioned risk existed.

23. In relation to the third complaint, the court held that according to the evidence in the case, the patient had been closely monitored during her pregnancy, with ultrasound examinations performed every three weeks. However, the medical report concluded that the lower limbs were visible from week 13-14, while the toes could be seen from week 20, an optimal interval therefore being between weeks 20-24. In such circumstances, the court considered that the interpretation of the ultrasound scans performed was problematic, in so far as more attention should have been paid to the particularities of the case and, potentially, more in-depth ultrasound tests should have been prescribed.

The damage therefore consisted of the birth of a child with a genetic malformation.

24. From this perspective, the court held that concerning the minor child, there was no causal link between the medical wrongdoing and the alleged damage, in so far as the result of a faultless medical procedure would have been an abortion. Thus, and in view of the importance of the right to life, it

could not be considered that it would have been better for the child not to have been born, having regard also to the fact that the malformation in question was not capable of substantially affecting the quality of the child's life. It transpired from the file that the malformation could be corrected in the future by surgery.

25. The parents, however, had incurred concrete damage, in so far as had they known about the disease, they would have been able to decide whether to keep the child or to opt for an abortion.

The court dismissed the claims concerning the pecuniary damage, in so far as the applicants had failed to substantiate it by means of relevant medical bills and documents. Moreover, the state social security system fully covered the costs of the necessary prosthesis for the patient.

The court of appeal further awarded Mr and Mrs M.P. RON 20,000 for non-pecuniary damage, to be paid by doctor E.S., ecographer, jointly with the hospital; the doctor was held liable for negligence as he was the only one who could have detected the malformation in time for the applicants to be able to make a decision about terminating the pregnancy. In awarding this amount, the court also took into consideration the fact that the applicants had been informed that the risk of their child being born with a disability was 1/1,000,000, and that they had decided to take that risk.

26. According to the information submitted by the parties, since January 2004 the third applicant has received various prostheses at a general rate of twice per year, meaning that by 2011, he had undergone twenty-two changes of prosthesis. In 2011 he had major surgery, involving an amputation below the knee, which enabled him to be fitted with a more advanced prosthesis in 2012.

B. Relevant domestic law

27. Article 185 of the Romanian Criminal Code on the illegal causing of abortion read at the relevant time as follows:

Article 185

"1. The act of interrupting the course of pregnancy, by any means, committed in one of the following circumstances:[...]

(c) if the age of the embryo has exceeded fourteen weeks;

is punishable by imprisonment from 6 months to 3 years. ...

6. Interruption to the course of pregnancy by a physician is not punishable in the following situations:

(a) if interruption to the course of pregnancy was necessary in order to save the pregnant woman's life, [or protect her] health or bodily integrity from a serious and imminent danger that could not have otherwise been removed;

(b) in the case in para (1) c), when interruption to the course of pregnancy was necessary for therapeutic reasons, in accordance with legal provisions;

(c) in the case in para (2) when the pregnant woman was unable to express her will, and the interruption was necessary for therapeutic reasons, in accordance with legal provisions."

28. The relevant domestic provisions regarding the civil liability of medical staff are described in *Eugenia Lazăr v. Romania*, no. 32146/05, §§ 52-54, 16 February 2010.

29. A draft law on healthy procreation and medically assisted human procreation (no. L334/2004) was rejected by the Senate on 9 February 2006 following a decision of the Constitutional Court finding several sections of the draft law to be in breach of the provisions of the Constitution.

30. Law no. 95/2006 on the healthcare reform indicates in its articles 208-210 that the health insurance system is the main provider of healthcare, prosthetics included.

31. Law no. 448/2006 on the protection of persons with disabilities provides in its articles 35-37 that these persons are entitled to have a personal care giver, remunerated with approximately EUR 130 monthly; article 58 further provides that the families having a disabled child are entitled to a fixed monthly allowance of approximately EUR 47; the disabled child would receive twice the amount of a normal child allowance, reaching about EUR 18 a month.

C. Relevant international texts and case-law

1. *The Council of Europe Convention on Human Rights and Biomedicine, ratified by Romania on 28 February 2001*

Article 5 – General rule

"An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time."

Article 10 – Private life and right to information

"1. Everyone has the right to respect for private life in relation to information about his or her health."

...

Article 24 – Compensation for undue damage

"The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law."

2. The principles adopted by the ad hoc *committee of experts on progress in the biomedical sciences, the expert body within the Council of Europe which preceded the present Steering Committee on Bioethics (CAHBI, 1989)*

Principle 4

"1. The techniques of artificial procreation may be used only if the persons concerned have given their free, informed consent, explicitly and in writing, in accordance with national requirements.

2. Before obtaining such consent, the physician and the establishment using the techniques of artificial procreation must ensure that the persons concerned are given appropriate information and counselling about the possible medical, legal, social and, where relevant, genetic implications of this treatment, particularly, those which might affect the interests of the child to be born."

3. Recommendation No. R (90) 13 of the Committee of Ministers to member States on prenatal genetic screening, prenatal genetic diagnosis and associated genetic counselling (Adopted by the Committee of Ministers on 21 June 1990 at the 442nd meeting of the Ministers' Deputies)

Principle 8

"The information given during the counselling prior to prenatal genetic screening and prenatal genetic diagnosis must be adapted to the person's circumstances and be sufficient to reach a fully informed decision. This information should in particular cover the purpose of the tests and their nature as well as any risks which these tests present."

Principle 14

"Where there is an increased risk of passing on a serious genetic disorder, access to preconception counselling and, if necessary, premarital and preconception screening and diagnostic services should be readily available and widely known."

4. The Universal Declaration on Bioethics and Human Rights

Article 6 – Consent

"(a) Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice."

Article 20 Risk assessment and management

"Appropriate assessment and adequate management of risk related to medicine, life sciences and associated technologies should be promoted."

COMPLAINTS

32. On behalf of their child, the first and second applicants complained that his right to life was infringed by his birth as a disabled child as a result of medical negligence. They relied on Articles 2 and 8 of the Convention.

33. In their own name, the first and second applicants complained under Article 8 of the Convention that the birth of their disabled child as a result of medical negligence had infringed their right to the protection of their private and family life.

34. Under Article 6 of the Convention, all the applicants complained about the fairness and the length of the proceedings.

THE LAW

A. Articles 2 and 8 of the Convention

35. The applicants complained that their rights protected by Article 8 of the Convention, and respectively by Articles 2 and 8 of the Convention concerning the minor applicant, M.-D. P, were infringed as a result of medical negligence.

Articles 2 and 8 read in their relevant parts as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law ...

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. Victim status of the third applicant, M.-D. P.

(a) The parties' submissions

36. The Government maintained that the Bucharest Court of Appeal's decision to dismiss the claims brought on behalf of the minor child was in consonance with a wider stream of legal thinking among the Council of Europe member States. They referred to examples from the jurisprudence of

the United Kingdom, the Netherlands, Germany and France, in which a clear line was drawn between "wrongful birth" claims – which were accepted in a more permissive manner, and "wrongful life" claims, as the ones in the present case, which were considered admissible in very exceptional circumstances (that is, where mitigating action that would have spared the child from disability had been negligently absent).

The Government further argued that the foetus was protected against medical negligence through the physician's liability towards its parents, a solution considered as an effective remedy in the Court's judgment of *Vo v. France* [GC] (no. 53924/00, §§ 91-95, ECHR 2004-VIII); the same approach was adopted by the Bucharest Court of Appeal in its judgment.

It is therefore submitted that the complaint in respect of the child M.-D.P. should be dismissed as incompatible *ratione personae*.

37. The applicants disagreed. They argued that the lack of a homogenous jurisprudence and legislation at the European level required clarification by means of a landmark judgment on the matter. They referred to a judgment by the Brussels Court of Appeal upheld on 21 September 2010, in which the right of the parents to obtain compensation for the damage suffered by the child was accepted.

They maintained that the child was a victim of medical negligence; his right – whether that of not being born, or that of not being the result of the doctor's mistake, or that to be alive, healthy and not suffering as a result of another's negligence – had therefore been infringed.

(b) The European Centre for Law and Justice, Pro-Vita Bucharest and Alianţa Familiilor din Romania

38. While maintaining that the Convention protected the right to life, and not the right not to be born, and that according to Romanian law the right to life of the child was protected from the 14th week of pregnancy, the ECLJ, Pro-Vita Bucharest and Alianţa Familiilor din Romania submitted jointly a summary of relevant international case-law concerning wrongful life and wrongful birth claims, as follows[1].

"Wrongful birth" claims referred to requests submitted by parents alleging that a third party's negligence either led to the conception of a child (like in the case of faulty sterilization) or failed to provide sufficient information which would have allowed them to make an informed choice as to whether or not to abort the child at a time when such abortion was legally permitted.

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The "wrongful life" claims were those brought by or on behalf of a person arguing that he or she should not have been born.

39. In its *Kelly* case of 2005, the Supreme Court of the Netherlands granted compensation for pecuniary and non-pecuniary damage to the parents and to the child, who was born with a handicap due to a chromosomal deformity; the compensation for pecuniary damage included the costs of the care and education of the child and relating to her handicap.

England and Wales did not recognize "wrongful life" claims (for relevant legislation see *Reeve v. United Kingdom*, no. 24844/94, Commission decision of 30 November 1994); wrongful birth claims, however, were allowed in a few cases (for example, Rees v. Darlington Memorial Hospital NHS Trust of 2003).

Following the Perruche case of 2001, in which the Cour de Cassation accepted both types of claim, the French legislation was changed, expressly prohibiting wrongful life claims (for details, see *Draon v. France* [GC], no. 1513/03, §§ 49-50, 6 October 2005).

Wrongful life claims were equally dismissed in Germany, while wrongful birth requests had been accepted, under certain conditions, in a few cases assessed by the Bundesgerichtshof (Supreme Court).

A similar approach was reported for Italy, where under contract law, claims for wrongful birth were allowed, the parents being entitled to recover their expenses for medical care, loss of income and also non-pecuniary damage. Wrongful life claims were not accepted.

In so far as it didn't recognize the right not to be born, the Portuguese Supreme Court dismissed a case in which wrongful life claims were brought (decision 1008/01, unpublished).

(c) The Court's assessment

(i) Article 2

40. In so far as the complaints brought on behalf of the applicant M.–D.P. refer to his right not to be born, the Court holds that such a right cannot be derived from Article 2 of the Convention. As already stated in its case-law, "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life" (*Pretty v. the United Kingdom*, no. 2346/02, § 39, ECHR 2002-III).

However, even if Article 2 of the Convention is unconcerned with issues such as the quality of living or what a person chooses to do with his or her life, "to the extent that they are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments". (ibid., § 39). Without in any

way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance (see *Pretty*, cited above, § 65, and *Koch v. Germany*, no. 497/09, § 51, 19 July 2012).

41. The Court accordingly considers it appropriate to examine the third applicant's complaints under Article 8 of the Convention.

(ii) Article 8

42. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91). The Court has also considered that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees contained in Article 8 of the Convention (see *Pretty*, cited above, § 61).

In the case of *Haas v. Switzerland* (no. 31322/07, § 51, ECHR 2011), the Court further developed this case-law by acknowledging that an individual's right to decide how and when his or her life should end, provided that he or she was in a position freely to form his or her own will and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.

43. Turning to the present case, the Court notes that the complaint brought on behalf of the child relates to an alleged right of "not being born, or that of not being the result of the doctor's mistake, or that to be alive, healthy and not suffering as a result of another's negligence" (see paragraphs 32 and 37 above).

Notwithstanding whether the alleged right could be included in or contrasted with the above-mentioned rights already acknowledged as falling under the limb of Article 8 of the Convention, the Court considers it unnecessary to deal with this issue because the complaint is inadmissible in view of the following.

44. The Court notes that the final judgment given by the Bucharest Court of Appeal dismissed the claims submitted on behalf of the child because he was not a victim of the damage claimed.

The judgment is amply reasoned. The court's conclusions were based on the balancing not only of the various interests of those involved, but also of the principles relevant to the decision, namely, the civil responsibility for damage. In holding that the child was not a victim of the medical negligence complained of, the court considered that no protection was to be offered to an alleged right of the child not to be born, especially since the child's malformation was not of a nature to substantially affect the quality of his life. Such decision does not appear to have been arbitrary or manifestly unreasonable.

45. Furthermore, having regard to the moral and ethical considerations involved in this area and to the wide margin of appreciation allowed to States in such sensitive matters where, in addition, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, the Court finds that the restrictive approach taken by the domestic court must be considered as falling within the State's margin of appreciation (see, *mutatis mutandis*, *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).

The Court further finds the above-mentioned approach to be reasonably proportionate, given that insofar as the wrongful act affected the parents, they had the right to bring an action for the damage which they had suffered (see, *mutatis mutandis*, *Reeve*, cited above).

46. It therefore holds that this part of the application is inadmissible as manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention. This conclusion dispenses the Court from examining the Government's preliminary objection concerning the lack of victim status of the third applicant.

2. Victim status of Mrs M.P. and Mr M.P.

(a) The parties' submissions

47. While acknowledging, in consonance with the domestic courts, that the medical negligence had constituted an interference with the applicants' right to private life as protected by Article 8 of the Convention, the Government argued that Mr and Mrs M.P. could no longer claim to be victims of a breach of those rights, as it had been redressed at the domestic level.

The court of appeal had identified doctor E.S. as responsible for the damage complained of by the applicants; it further insured an effective enforcement of the award by finding that the hospital was also objectively responsible for the acts of doctor E.S. as its employee. The applicants were awarded RON 20,000, their claims for compensation for pecuniary damage being dismissed as unsubstantiated.

It followed that the authorities had discharged their positive obligations under Article 8 by expressly acknowledging the breach and by redressing it appropriately. Consequently, Mr and Mrs M.P. had lost their victim status.

48. In upholding their victim status, the applicants referred to the first instance court's judgment, which had awarded them compensation for both pecuniary and non-pecuniary damage in a much larger amount. They claimed that in view of the seriousness of the damage suffered and of that which they will continue to incur, the breach of their rights was far from having been remedied.

(b) Third party interveners

49. The ECLJ, Pro-Vita Bucharest and Alianţa Familiilor din Romania submitted jointly that neither the right of a parent not to give birth to a disabled child nor the right to have a healthy child was provided for under Article 8 of the Convention. Simultaneously, the Convention did not provide for an autonomous right to abortion.[1]

(c) The Court's assessment

50. The Court notes at the outset that Article 8 is applicable to the facts of the present case, in so far as it refers to the parents' desire to conceive a child unaffected by a genetic disease, this choice being a form of expression of their private and family life (see, *mutatis mutandis*, *Costa and Pavan v. Italy*, no. 54270/10, § 50, 28 August 2012).

51. The Court must then consider whether the applicants can still claim to be victims of a violation of Article 8 within the meaning of Article 34 of the Convention.

In this connection, it emphasizes that it falls first to the national authorities to redress any alleged violation of the Convention. Thus, an applicant will only cease to have standing as a "victim" within the meaning of Article 34 of the Convention if the national authorities have acknowledged the alleged violations either expressly or in substance and then afforded redress for the breaches of the Convention, the question whether he/she has received reparation for the damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – being an important issue (see, *inter alia*, *R.R. v. Poland*, no. 27617/04, § 97, ECHR 2011 (extracts), and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 259, ECHR 2012 (extracts)).

52. In the present case, the Court notes that the reasoning of the Court of Appeal refers to a breach of the applicants' rights to make an informed choice on keeping the child or not, caused by the medical negligence imputed to doctor E.S. As a consequence of this finding, the domestic court awarded them RON 20,000 in respect of non-pecuniary damage. Concerning the claims related to the pecuniary damage incurred by the applicants, the domestic court found that those claims were not substantiated by any relevant evidence. Moreover, according to the applicable legislation, the state's social security system provided the applicants with assistance in taking care of their child.

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1. Rectified on 16 June 2014 : the text was :
"**(b) Third party intervener**
49. The ECLJ submitted that neither the right of a parent not to give birth to a disabled child nor the right to have a healthy child was provided for under Article 8 of the Convention. Simultaneously, the Convention did not provide for an autonomous right to abortion."

53. The Court considers that these conclusions substantially reveal an acknowledgment of a breach of the applicants' rights protected by Article 8 of the Convention, sanctioned by the domestic courts through the award of non-pecuniary damage.

The Court reiterates that it is not its task to substitute itself for the competent domestic authorities in determining the most appropriate means of offering redress to applicants, once a breach of their rights was acknowledged; nor is it its role to assess the facts which led the courts to adopt one decision rather than another. The Court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, *mutatis mutandis, Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 59, Series A no. 316-B). Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see among many other authorities, *Klass and Others v. Germany*, 6 September 1978, § 30, Series A no. 28).

54. In the present case, the Court finds that it falls within the State's margin of appreciation to interpret the relevant domestic legislation and to consequently establish the amount of money to be awarded in compensation in such a way as to link it to the damage sustained.

In this sense, the Court does not see any reasons of principle to call into question the domestic court's reasoning in dismissing the applicants' claims in respect of pecuniary damage and in awarding them the amount of RON 20,000 in respect of non-pecuniary damage, such conclusions not being manifestly unreasonable.

55. It follows that the applicants can no longer be regarded as victim of the alleged violation of their rights under Article 8 of the Convention; their claims are therefore inadmissible as manifestly ill-founded within the meaning of Article 35 § 4 of the Convention.

B. Article 6 of the Convention

56. The applicants further argued that their rights protected by Article 6 of the Convention had been infringed, in so far as the impugned proceedings were unfair and lasted an unreasonably long time.

57. The Court notes that the applicants had the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations submitted, with a view to influencing the courts' decisions; further, it observes that the applicants' complaints were fully assessed by the domestic courts, before three levels of jurisdiction, the proceedings lasting four years and seven months.

Having carefully examined the applicants' complaints in relation to

Article 6 of the Convention, the Court considers that, in view of the complexity of the present case and in the light of all the material in its possession, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

58. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

Declares unanimously the application inadmissible with respect to the first two applicants ;

Declares by a majority the application inadmissible with respect to the third applicant.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President