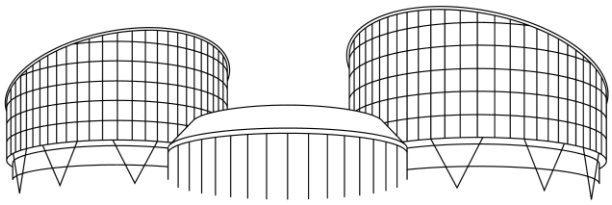

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

Application no. 39974/10
M.P. and Others
against Romania
lodged on 9 June 2010

STATEMENT OF FACTS

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

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. Owing to the fact that the first applicant had been told by doctors that she could not conceive naturally, she and her husband (the second applicant) decided to have recourse to artificial insemination in order to have a child; they contacted doctor S.P. from the "Prof. Dr Panait Sârbu" Obstetrics and Gynaecology Hospital in Bucharest ("the hospital") to that end. They informed the doctor that the first applicant already had a child from a previous marriage who had been born with a congenital malformation (tibia agenesis[1]) and sought further information about the risk of a second child being born with the same condition. They also informed the doctor that if such a risk existed they would not proceed with the insemination.

4. The doctor 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.

5. They were 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

[1] Hemimelia is a congenital absence or gross shortening (aplasia) of the distal portion of the arms or legs. Sometimes only one of the two bones of the distal arm (radius and ulna) or leg (tibia and fibula) may be affected (Oxford Concise Medical Dictionary).

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), and no other tests were performed.

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

7. In the first trimester of the pregnancy the first applicant underwent several tests recommended by doctor S.P., who also referred the applicant 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.

8. During one of the ultrasound scans, performed in the twenty-fourth week of pregnancy, doctor E.S. informed the applicants that he had noticed a difference between the two legs of the foetus, but reassured them that it was likely it was an error, as the difference was minor and the foetus did present both a tibia and a femoral bone.

9. This information was conveyed to doctor S.P., who concluded that there was no problem.

10. The first applicant decided to seek further tests and contacted a private clinic for a three-dimensional ultrasound scan, which was performed on 9 June 2003 (during her thirty-second week of pregnancy) by doctor D.A.. Upon analysis, the doctor discovered foetal brain distress (*suferinţă fetală la nivel cerebral*) and recommended that the applicant contact her obstetrician, reassuring her nevertheless that the legs of the foetus were normally developed.

11. After consulting her obstetrician, the first applicant was kept in hospital from 12 to 16 June 2003, where she and the foetus were monitored.

12. On 8 August 2003 the applicant was admitted to hospital for the birth and was referred to doctor C. On 12 August 2003, doctor C. assisted the applicant during the birth and a baby boy (the third applicant) was born with a malformation of one of his legs identical to that of his older brother.

13. Doctor S.P. visited the applicant three days later and offered his support in finding an association which could help the applicants financially.

14. Nine months after giving birth to the third applicant, and despite the doctors' conclusion that she could not become pregnant naturally, the applicant discovered that she was expecting a third baby. Together with her husband, she decided to have an abortion, fearing they would have a third child with the same disability.

15. 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 where the ultrasound scans were performed, the Ministry of Health, and the Romanian State, represented by the Ministry of Finance, seeking damages and a monthly allowance for their younger son. They claimed that these parties were liable for negligence when informing the applicants as to the risk of having a child with a congenital malformation, especially since the applicants had repeatedly drawn the doctors' attention to their first child's situation and insisted on the fact that if such a risk existed they would not proceed with the insemination.

16. After several remittals between courts owing to refusals to assume jurisdiction, the Bucharest Court of First Instance was declared competent on 31 May 2006.

17. On 8 May 2007 the applicants' action against the Ministry of Finance was rejected for lack of *locus standi*.

18. On 7 December 2007 a report containing the conclusions of an expert from the National Institute of Forensic Medicine was adduced as evidence.

19. In its relevant parts it read as follows:

> "The recommended investigation is the foetal morphological ultrasound scan, performed in the 20th-24th week of pregnancy. The lower limbs can be visualised 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 the making the choice of whether to continue or to terminate the pregnancy. ...
>
> Pre-conception diagnosis cannot be performed in the case of tibia agenesis (tibial hemimelia). [...T]he gene responsible for this condition is not known and the genetic defect potentially responsible for tibia agenesis is beneath the resolution threshold of the cytogenetic test (karyotype).
>
> A prenatal diagnosis can be made by performing an ultrasound scan (foetal morphological ultrasound) in weeks 20-24 of the pregnancy. ...
>
> Conclusions
>
> In a case where the parents of a child with tibia 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 have also been essential to inform the parents about this anomaly (tibia agenesis) and about the possibilities for treatment, given that there exists the possibility of surgical orthopaedic treatment."

20. After consideration of the evidence adduced by all the parties, the Bucharest Court of First Instance rendered its judgment on 25 January 2008, holding that the first applicant had suffered a prejudice due to medical negligence, namely "the birth of a child with a congenital anomaly". The court stated that the right of the applicant to be correctly informed as to the chances of the baby being born in good health had been infringed, together with her right to choose whether or not to give birth to a child with a congenital malformation.

21. The court found doctor A.V. responsible in her capacity of 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.

22. 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.

23. 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.

24. 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.

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

26. Despite the fact that the court referred only to the first applicant in its argumentation, it stated in its conclusion that the damages awarded consisted of the payment of a monthly allowance for the third applicant (in the amount of 2,000 Romanian lei (RON))[1], as well as of compensation for pecuniary damage (in the amount of RON 2,499.99[2]) and non-pecuniary damage (in the amount of RON 150,000[3]) for both parents.

27. The parties held responsible appealed against the judgment. By a decision of 20 September 2009 the Bucharest County Court quashed the part of the judgment regarding their responsibility and, reassessing the merits of the case, rejected the applicants' action as a whole. The court concluded that doctor A.V. had performed her duties in accordance with her professional obligations and the fact that she had not recommended further tests to the applicant did not make her responsible for any damage, in so far as the expert had concluded that 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.

28. 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.

29. As to 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.

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

31. The applicants appealed against that decision.

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[1] EUR 530 at the relevant time
[2] EUR 660 at the relevant time
[3] EUR 40,000 at the relevant time

32. By a final judgment of 9 December 2009, the Bucharest Court of Appeal partly allowed the appeal, awarding them RON 20,000[1] for non-pecuniary damage and dismissing the claims in respect of pecuniary damage as unsubstantiated.

33. The court found that only doctor E.S. was liable for negligence as he was the only one who could have discovered the malformation in time for the applicants to be able to make a decision about terminating the pregnancy, as the expert report had concluded that the lower limbs of the foetus could be visualised by the thirteenth or fourteenth week of pregnancy, when a termination was still possible. It further concluded that in this situation the doctor should have paid particular attention while examining the foetus during the ultrasound scans performed in that period, especially since he had been informed of the fact that the first applicant's first baby had been born with a malformation of one of the legs.

34. It therefore ordered the doctor to pay, jointly with the hospital, the sum of RON 20,000 in respect of non-pecuniary damage to the first two applicants, and dismissed the claim with respect to the third applicant, stating that he could not claim prejudice as a result of being born, albeit with a malformation.

35. The claims against the other doctors were dismissed.

B. Relevant domestic law

36. 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.

37. 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.

38. Currently, the law is still pending in draft form before the Parliamentary committee.

C. Relevant international texts and case-law

1. *The Council of Europe Convention on Human Rights and Biomedicine*

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."

[1] EUR 4,700 at the relevant 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

39. The first two applicants complain on behalf of the third one (their child) as regards his right to life, which has allegedly been infringed by his birth as a result of medical negligence. They rely on Articles 2 and 8 of the Convention.

40. The first two applicants also complain under Article 8 of the Convention that the birth of a child with a disability, as a result of medical negligence, infringed their right to the protection of their private and family life.

41. Under Article 6 of the Convention, they complain about the fairness and the length of the proceedings.

QUESTION TO THE PARTIES

Are the applicants victims under the provisions of Article 8 of the Convention? If so, has there been a violation of the applicants' right to respect for their private and family life, contrary to Article 8 of the Convention?

The Government are invited to provide details as to the relevant national regulations and domestic case-law, if any, on the matter of the liability of medical staff for errors related to prenatal diagnosis, as well as on the financial support provided by the State in the benefit of people with such disabilities.