



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

CASE OF CALVELLI AND CIGLIO v. ITALY

(Application no. 32967/96)

JUDGMENT

STRASBOURG

17 January 2002

In the case of Calvelli and Ciglio v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mr C.L. ROZAKIS,

Mr J.-P. COSTA,

Mr G. RESS,

Mr B. CONFORTI

Mr G. BONELLO,

Mrs E. PALM,

Mr R. TÜRMEK,

Mrs V. STRÁŽNICKÁ,

Mr P. LORENZEN,

Mr W. FUHRMANN,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mr B. ZUPANČIČ,

Mrs N. VAJIĆ,

Mr J. HEDIGAN,

Mr E. LEVITS,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 26 September and 28 November 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 32967/96) against the Italian Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Italian nationals, Mr Pietro Calvelli and Ms Sonia Ciglio (“the applicants”), on 29 December 1995.

2. The applicants were represented by Mr Q. Lorelli and subsequently by Mr F. Perna, lawyers practising in Cosenza (Italy). The Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, Head of the Diplomatic Disputes Department, Ministry of Foreign Affairs, assisted by Mr V. Esposito, co-Agent. Having originally been designated before the Commission by the initials P.C. and S.C., the applicants subsequently agreed to the disclosure of their names.

3. The applicants alleged a violation of Articles 2 and 6 § 1 of the Convention on the ground that owing to procedural delays a time-bar had

arisen making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly after birth.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 April 2000 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry]. Subsequently, on 10 July 2001, the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicants and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Grand Chamber decided that no hearing on the merits was required (Rule 59 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The investigation and criminal proceedings

9. Immediately following its birth in a private clinic, “La Madonnina”, in Cosenza the applicant's new-born baby was admitted to the intensive care unit of Cosenza Hospital suffering from serious respiratory and neurological post-asphyxia syndrome induced by the position in which it had become lodged during delivery. The baby died on 9 February 1987, two days after birth.

10. On 10 February 1987 the applicants lodged a complaint. The Cosenza public prosecutor's office started an investigation that same day.

11. On 12 February 1987 Ms Ciglio was questioned as a witness. A team of three expert witnesses was named.

12. As nothing further happened in the proceedings, the applicants made several requests, notably on 16 October 1987, and 12 April and 30 June 1988, for the investigation to be expedited. On 16 November 1988 the

public prosecutor's office itself requested the expert witnesses to lodge their report.

13. On 19 June 1989 the applicants were informed that at the request of the public prosecutor's office, the investigating judge had notified E.C. – the doctor responsible for delivering the baby and the joint owner of the clinic – that charges would be brought against him.

14. Subsequently, the scheduled questioning of certain witnesses on 18 July 1989 did not take place, as the judge dealing with the case was on holiday.

15. Meanwhile, on 7 July 1989, the applicants were joined to the proceedings as civil parties.

16. On 19 January 1990 the prosecution applied for the complaint to be filed away without further action. That application was dismissed on 24 May 1990.

17. On 3 October 1990 the investigating judge instructed the public prosecutor's office to make further inquiries. Consequently, on 29 November 1990 the deputy public prosecutor ordered forensic tests. The results were made available on 5 January 1991.

18. On 12 June 1991 E.C. was committed for trial before the Cosenza Criminal Court on a charge of involuntary manslaughter and the applicants renewed their application to be joined to the proceedings as civil parties.

19. The first hearing was set down for 2 July 1992 but had to be adjourned because of a lawyers' strike. The next hearing on 15 October 1992 was also adjourned due to a delay in service of a summons on the accused to appear.

20. A new hearing date was fixed for 15 January 1993. On that date an order was made for the accused's trial *in absentia*. The trial did not begin, however, until 19 March 1993, as meanwhile the accused had changed lawyers. The hearing scheduled for 29 April 1993 was adjourned until 3 June 1993 as the composition of the bench was not the same as that to which the case had been allocated. The trial thereafter continued with hearings on 27 May, and 10 and 17 June (the latter hearing being adjourned as one of the expert witnesses appointed by the court had to be replaced). A hearing on 15 July 1993 was adjourned to 16 September 1993, again owing to the fact that the composition of the bench was not the same as that to which the case had been allocated. There were further hearings on 14 and 26 October 1993. On the latter date the order for the accused's trial *in absentia* was revoked, but the hearing had to be adjourned as the expert witnesses failed to attend without due cause (they were ordered to pay a fine and to attend the next hearing on 14 December). A final hearing took place on 17 December 1993. The accused, who had attended the hearings on 26 October and 14 December 1993, was not present at that hearing.

21. At the hearing on 17 December the Cosenza Criminal Court found the accused guilty *in absentia* of involuntary manslaughter. Its judgment

was lodged with the registry on 19 February 1994. The Criminal Court sentenced the accused to one year's imprisonment and ordered him to pay the civil parties' costs together with compensation to be assessed at a later date.

22. It found firstly that the accused knew that the birth had to be regarded as high risk since the mother was a level-A diabetic and had a past history of confinements that had been equally difficult because of the size of the foetus. The risks inherent in deliveries in such circumstances, which the expert witnesses appointed by the Criminal Court described as readily foreseeable, meant that precautionary measures should have been taken and that the doctor in charge should have been present. The Criminal Court found, however, that E.C., whom the applicant had consulted during the pregnancy, had made no arrangements for precautionary measures, such as an external examination of the mother, to assess whether the foetus was too large for a natural birth. Above all, he had absented himself during the birth. When the complications had occurred, it had taken the nursing staff six or seven minutes to locate E.C., who was busy seeing patients in another part of the clinic. The intervening delay before E.C. was able to perform the manipulation necessary to extract the foetus had significantly reduced the new-born's chances of survival.

23. The Criminal Court nevertheless suspended the sentence and ordered that the conviction should not appear on E.C.'s criminal record. In addition, it dismissed the civil parties' application for a provisional award of compensation.

24. On 17 March 1994 E.C. appealed to the Catanzaro Court of Appeal.

25. In a judgment of 3 August 1994, which was delivered *in absentia* and lodged with the registry on 17 August 1994, the Court of Appeal declared the appeal inadmissible. Noting that he had been tried *in absentia* at first instance, the Court of Appeal held that E.C. had failed to give his lawyer the authority to act required under the rules applicable in such cases. It ordered him to reimburse the costs incurred by the civil parties in the proceedings.

26. On 7 October 1994 E.C. appealed to the Court of Cassation. In a judgment of 22 December 1994, which was lodged with the registry on 23 January 1995, the Court of Cassation overturned the decision of the Catanzaro Court of Appeal, to which it remitted the case for a retrial. It held that the Court of Appeal had erred in treating E.C. as being absent, as he had been present at the start of the trial and had accordingly to be regarded as having left the court during the trial and not as liable to trial *in absentia*.

27. In a judgment of 3 July 1995, which was lodged with the registry on 10 July 1995, the Catanzaro Court of Appeal ruled that the prosecution of the offence was time-barred.

28. In so doing, it noted that the limitation period for the offence of which E.C. was accused had expired on 9 August 1994, in other words, even before the Court of Cassation had delivered its judgment.

B. The civil proceedings

29. Following E.C.'s conviction at first instance by the Cosenza Criminal Court on 19 February 1994 (see paragraphs 21-22 above), the applicants served a summons requiring E.C. to appear before the civil court of that town.

30. However, on 27 April 1995 the applicants entered into an agreement with the insurers of the doctor and the clinic under which the insurers were to pay 95,000,000 Italian lire (ITL) for any damage sustained by the applicants. Of that sum, ITL 15,000,000 were designated as reparation for the special loss sustained by Ms Ciglio. At that time, the criminal proceedings were pending in the Catanzaro Court of Appeal following the Court of Cassation's judgment of 22 December 1994 (see paragraph 26 above).

31. Subsequently, as the parties failed to attend a hearing on 16 November 1995, the case was struck out of the civil court's list. At that stage, the criminal proceedings had only just ended, the Court of Appeal's ruling that the prosecution of the offence was time-barred having become final on 17 October 1995.

II. RELEVANT DOMESTIC LAW

32. Article 112 of the Italian Constitution provides:

“The public prosecutor's office has a duty to prosecute.”

33. Article 589 of the Criminal Code lays down that the penalty for involuntary manslaughter is imprisonment of between six months and five years.

34. Furthermore, Article 157 § 1, sub-paragraph 4, of the Criminal Code provides that the limitation period for involuntary manslaughter is five years. That period may be extended by one half as a result of any interlocutory matters arising, but may under no circumstances exceed seven and a half years from the date of the offence.

35. Lastly, Article 120 of the Code of Civil Procedure provides:

“In cases in which publishing the decision on the merits may contribute to providing reparation for the damage, the court may, on application by an interested party, order the losing party to publish the decision at its own expense in one or more newspapers determined by the court.

If the decision is not published within the period fixed by the court, the interested party may arrange for publication and shall retain the right to recover the costs from the losing party.”

III. RELEVANT PROVISIONS OF COMMITTEE OF MINISTERS RESOLUTION (75) 24 ON THE PUNISHMENT OF MANSLAUGHTER AND ACCIDENTAL INJURY ON THE ROAD

36. In the resolution cited above, adopted on 18 September 1975, the Committee of Ministers of the Council of Europe recommended that in their internal legislation and practice the governments of the member States be guided by the following principles:

“1. Criminal proceedings should not be instituted or, if appropriate, sanctions shall not be imposed for manslaughter or accidental bodily injury resulting from a minor traffic offence, that is to say, a driving offence that was not such that its author must have been aware of the danger to which he exposed himself or others;

2. The same should apply, subject to the inexcusable character of the fault committed, in respect of a person who has caused manslaughter or accidental bodily injury if he himself or someone dear to him has been so badly injured that a sanction would be pointless, if not inhuman;

3. Application of the above-mentioned recommendations should in no way prejudice the rights of the victims to obtain compensation.”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

37. The Government argued that the complaint was inadmissible, as the applicants did not have standing as “victims”. They argued that the essence of the applicants' complaint was not the delay in the decision on the civil aspects of the case but solely the fact that the doctor responsible for the death of their child had not been punished. Accordingly, for the purposes of Article 2 in particular, the applicants were not “victims”, as the Convention did not recognise a right to have criminal proceedings instituted against third parties. Nor were they “victims” for the purposes of the complaint of a violation of Article 6, as their complaint did not concern the length of the civil proceedings, which were the only proceedings in respect of which Article 6 could be relied upon.

38. As regards the objection to the complaint under Article 2, the Court considers that the issue whether that provision requires the imposition of

criminal penalties for deaths caused by alleged medical negligence and whether that requirement is satisfied if the prosecution of the offence becomes time-barred turns on the construction of Article 2 and must therefore be examined with the merits of the case.

39. To the extent that the preliminary objection relates to the complaint under Article 6, the Court considers that the question whether that complaint concerns all the proceedings after the applicants were joined as civil parties, or only the criminal limb of those proceedings, is also a matter for examination on the merits.

40. The Government's preliminary objection must therefore be joined to the merits.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

41. The applicants complained, firstly, of a violation of Article 2 of the Convention on the ground that, owing to procedural delays, a time-bar had arisen making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly after birth.

42. The first sentence of Article 2 provides:

“Everyone's right to life shall be protected by law.”

A. Submissions of the parties

1. *The applicants*

43. The applicants maintained that a ruling that prosecution of an offence of homicide was time-barred as a result of the malfunctioning of and delays in the judicial system could not be compatible with Article 2. Had it not been for the fact that the first-instance proceedings alone had taken seven years (including a four-year investigation period for which the Government had given no explanation), prosecution of the offence would not have been time-barred. In those circumstances, the State had compounded its fault by refusing to prosecute the perpetrator of a serious offence. More generally, the applicants argued that limitation periods for the prosecution of offences were in any event of themselves contrary to the requirements of Article 2. Accordingly, the damages awarded to the applicants in the civil proceedings could not compensate them for the fact that the criminal proceedings had become time-barred.

2. *The Government*

44. As to the merits, the Government contended that the time-bar had not prevented the applicants from obtaining an order against E.C. for

damages. In any event, Article 2 of the Convention could not be regarded as imposing an obligation on States to punish offences of involuntary manslaughter in the criminal courts, since the relevant domestic law already laid down civil and administrative penalties. In that connection, the Government said that a criminal penalty was the *extrema ratio* and while it was true that such a penalty appeared to be the only appropriate form of response to very serious infringements of the right to life or to personal integrity (such as voluntary manslaughter), the same did not apply to attenuated forms of responsibility such as involuntary manslaughter, through negligence or by accident. In that connection, the Government referred to Committee of Ministers Resolution (75) 24 and the recommendation made to the States, albeit in the road-traffic sphere, to restrict so far as possible recourse to criminal proceedings for minor offences and to avoid proceedings that might lead to pointless or inhuman sanctions. Accordingly, the Government argued that the protection of human life did not demand the systematic imposition of penalties and that a decision not to prosecute did not necessarily infringe the positive obligations under Article 2 of the Convention. Indeed, on the contrary, recourse to criminal proceedings could even, in certain cases, prove unhelpful or counterproductive when it came to deterrence. Furthermore, in the Government's submission, the fact that the resolution cited above stated that the victim's right to compensation was under no circumstances to be prejudiced implied that it was permissible to substitute civil liability for criminal liability.

45. The Government therefore maintained that, once it was accepted that States were free to choose other forms of liability for less serious violations of the right to life and that a criminal penalty was not the only form of liability possible (that was the position under Italian law), the reasons why a criminal penalty was not imposed in a particular case became irrelevant for the purposes of Article 2. Furthermore, the doctor responsible for the death of the applicant's child had been held liable in civil proceedings, and could as a result also be subject to disciplinary action.

46. The Government added that limitation periods were the strongest possible affirmation of the right to a speedy and equitable trial, as they prevented undue delays before conviction and expired when it was no longer imperative for a sentence to be imposed for the purposes of retribution, deterrence and rehabilitation. In that regard, the Government referred to the decision of the European Commission of Human Rights in *Dujardin and Others v. France* (no. 16734/90, Commission decision of 2 September 1991, Decisions and Reports (DR) 72, p. 236). The Government said that it would make no sense to find a violation of Article 2 of the Convention in the instant case, since the fact that the prosecution of the offence had become time-barred had not prevented the facts from being established, or the doctor being held liable and ordered to pay damages.

47. The Government further said that the States' entitlement to determine priorities for criminal investigations depending on the gravity of the offence also had to be taken into account. In other words, the fact that the present case had occurred in Calabria, a region seriously affected by the presence of a dangerous Mafia organisation (the *n'drangheta*) whose activities posed a far greater threat to the right guaranteed by Article 2 than involuntary manslaughter, was not to be underestimated. The Government did not therefore find it surprising that that concern and the excessive workload it entailed for the judicial authorities should have led the authorities to treat Mafia offences as a priority, despite the danger that other offences might become time-barred.

B. Applicability of Article 2 of the Convention

48. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see, among other authorities, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), enjoins the State not only to refrain from the “intentional” taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).

49. Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among authorities, *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999; and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; see also *Işıltañ v. Turkey*, no. 20948/92, Commission decision of 22 May 1995, DR 81-B, p. 35).

50. The Court therefore considers that Article 2 is applicable. It must now determine what judicial response was required in the specific circumstances of the present case.

C. Compliance with Article 2 of the Convention

51. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said on a number of occasions that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal

law (see, among other authorities, *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III). Accordingly, the Government's preliminary objection, which the Court has joined to the merits (see paragraph 38 above), must be dismissed. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.

52. In the instant case, it was not contested that legal provisions, including criminal-law measures, existed for protecting patients' lives. The applicants' complaint was essentially that no criminal penalty was imposed on the doctor found liable for the death of their child in the criminal proceedings at first instance because of the operation of the time-bar. Nor do the applicants in any way suggest that their child's death was intentional.

53. The Court notes that, in cases of death through medical negligence, the Italian legal system affords injured parties both mandatory criminal proceedings and the possibility of bringing an action in the relevant civil court (see paragraphs 32-33 above). The Government also affirmed, and the applicants did not deny, that disciplinary proceedings could be brought if the doctor was held liable in the civil courts. Consequently, the Italian system offers litigants remedies which, in theory, meet the requirements of Article 2. However, that provision will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice within a time-span such that the courts can complete their examination of the merits of each individual case.

54. In the instant case, the Court notes that the criminal proceedings instituted against the doctor concerned became time-barred because of procedural shortcomings that led to delays, particularly during the police inquiry and judicial investigation. However, the applicants were also entitled to issue proceedings in the civil courts and that is what they did (see paragraph 29 above). It is true that no finding of liability was ever made against the doctor by a civil court. However, the case file shows that in the civil proceedings in the Cosenza Court of First Instance, the applicants entered into a settlement agreement with the doctor's and the clinic's insurers and voluntarily waived their right to pursue those proceedings (see paragraphs 30-31 above). This could have led to an order against the doctor for the payment of damages and possibly to the publication of the judgment in the press (see paragraph 35 above). As the Government have indicated

(see paragraph 45 above), a judgment in the civil court could also have led to disciplinary action against the doctor.

55. The Court accordingly considers that the applicants denied themselves access to the best means – and one that, in the special circumstances of the instant case, would have satisfied the positive obligations arising under Article 2 – of elucidating the extent of the doctor's responsibility for the death of their child. In that connection, the Court reiterates, *mutatis mutandis*, that “where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim” (see *Powell*, decision cited above).

56. That conclusion makes it unnecessary for the Court to examine, in the special circumstances of the instant case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2.

57. The Court therefore holds that no violation of Article 2 of the Convention has been established in the instant case.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

58. The applicants also complained about the length of the proceedings as a complaint in its own right, alleging a violation of Article 6 § 1 of the Convention, the relevant part of which reads:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

A. Submissions of the parties

59. The Government argued that the applicants' complaint under Article 6 § 1 in the instant case did not concern the Italian courts' decisions on their civil rights and obligations, since, although the applicants had been joined to the criminal proceedings as civil parties, the thrust of their complaint was that the allegedly unreasonable length of the criminal proceedings instituted by the public prosecutor had resulted in the prosecution of the offence becoming time-barred. Since the decision concerning the doctor's civil liability had been issued in separate proceedings, the applicants could not rely on Article 6 § 1 in connection with the criminal proceedings.

60. Should the Court nevertheless consider Article 6 to be applicable, the Government said that the period to be taken into consideration had begun when the applicants were joined as civil parties. Regard being had to the complexity of the case, the caseload of the Cosenza Court of First

Instance and the fact that some of the adjournments had not been attributable to the authorities, that period (which, by the Government's calculation, taking the applicants' renewed request to be joined as civil parties as the starting-point, was three years and three months for four levels of jurisdiction) could not be regarded as unreasonable. Furthermore, the proceedings before the Court of Appeal and the Court of Cassation had been conducted with exemplary speed.

61. The applicants expressed no opinion on this issue.

B. Applicability of Article 6 § 1 of the Convention

62. The Court has joined to the merits the examination of the Government's preliminary objection that Article 6 § 1 is not applicable to the facts of the case (see paragraph 39 above). It notes that it is common ground that the applicants were joined as civil parties and that, accordingly, even though the proceedings in the criminal courts concerned only the determination of the criminal charge against the doctor, they were apt to have repercussions on the claims made by the applicants as civil parties. The Court considers that Article 6 § 1 is applicable to the criminal proceedings, the decisive factor being that, from the moment the applicants were joined as civil parties until the conclusion of those proceedings by a final ruling that prosecution of the offence was time-barred, the civil limb of those proceedings remained closely linked to the criminal limb. In that connection, the applicants were entitled, in accordance with the Court's settled case-law, to rely on Article 6 § 1 (see, among many other authorities, *Torri v. Italy*, judgment of 1 July 1997, *Reports 1997-IV*, p. 1179, § 23). It follows that the Government's preliminary objection must be dismissed.

C. Compliance with Article 6 § 1 of the Convention

1. Period to be taken into consideration

63. The period to be taken into consideration began on 7 July 1989, when the applicants were first joined as civil parties to the criminal proceedings, and ended on 17 October 1995 when the Catanzaro Court of Appeal's judgment of 3 July 1995 became final (see paragraph 31 above). It therefore lasted six years, three months and ten days.

2. Whether the length of the proceedings was reasonable

64. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the

case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *Torri*, cited above, p. 1179, § 24).

65. In the instant case the Court notes that the proceedings concerned were undeniably complex. Further, although after the applicants were initially joined as civil parties to the proceedings on 7 July 1989 the proceedings at first instance were affected by regrettable delays (notably, between E.C.'s committal on 12 June 1991 and the first hearing – a year later, on 2 July 1992 – see paragraphs 18-19 above), there were no further significant periods of inactivity attributable to the authorities (apart from the adjournment of the first hearing, which was caused by a lawyers' strike – see paragraph 19 above).

66. In those circumstances the Court considers that a period of six years, three months and ten days for proceedings before four levels of jurisdiction cannot be regarded as unreasonable.

67. Consequently, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins* unanimously to the merits the Government's preliminary objections;
2. *Holds* by fourteen votes to three that Article 2 of the Convention is applicable but has not been violated;
3. *Holds* by sixteen votes to one that Article 6 § 1 of the Convention is applicable but has not been violated.

Done in English and in French, and notified in writing on 17 January 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Paul MAHONEY
Registrar

Luzius WILDHABER
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Zupančič;

- (b) partly dissenting opinion of Mr Rozakis joined by Mr Bonello and Mrs Strážnická;
- (c) partly dissenting opinion of Mr Costa.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I agree with the majority's opinion albeit not for wholly identical reasons.

The issue could also be defined as one of standing, that is to say, whether the *de facto* victim of an act of criminal negligence may claim the right to have the alleged perpetrator of the criminal act prosecuted, convicted, sentenced and punished. The days when criminal prosecutions were conducted in order to satisfy private appetites for retribution are over.

Under the Convention, however, the victim may still have standing to allege that the State has failed to satisfy its positive obligation to protect life under Article 2. If the State's judicial system – intentionally or inadvertently – fails to react to life-endangering criminal acts it may be seen to be wanting in its duty to provide special and general deterrence of such acts. In such circumstances the victim of a life-endangering act will have standing before our Court. This does not imply any personal right to retribution.

It follows, logically, that the issue in this case is not whether the State is generally obliged to prosecute cases of medical negligence that result in death. The real issue is narrower: *Has Italy's judicial system shown sufficient assiduousness?*

The ruling in this, as in every case, is strictly limited to its own factual confines. To say that there was no violation in this case does not mean that medical negligence is hence somehow immune from criminal prosecution.

It only means that there is no violation of the Convention in a case in which medical negligence has resulted in death and the State has duly investigated, prosecuted and convicted the doctor, if for procedural reasons the conviction never became final.

PARTLY DISSENTING OPINION OF JUDGE ROZAKIS JOINED BY JUDGES BONELLO AND STRÁŽNICKÁ

While I have voted in favour of finding no violation of Article 6 § 1 of the Convention on the issue of the length of proceedings, I am unable to follow the majority in finding that there has been no violation of Article 2 in this case. As clearly transpires from paragraph 54 of the judgment, the majority reached the conclusion of a non-violation on the basis that, although the criminal proceedings instituted against the doctor ended unsatisfactorily through the application of the statute of limitations (prescription), the Italian State did not fail in its obligation to provide effective means to discharge its positive obligation to provide effective recourse to establish the cause of death of the child, as required by Article 2 of the Convention (procedural limb of the protection of the right to life). According to the majority, the applicants had at their disposal the procedural instrument of civil proceedings to establish the responsibility of the doctor. The fact that the applicants opted for a financial settlement of their grievances with the doctor's insurance company, a matter which finally led to the termination of the civil proceedings after the criminal action against the doctor had lapsed through prescription, cannot be attributed to the Italian State, which had provided them with proceedings satisfying the requirements of Article 2.

With all due respect to the majority, I am obliged to depart from such a conclusion for the following reasons.

First of all, and as a matter of principle, criminal proceedings are, *par excellence*, the most suitable remedy for satisfying the procedural requirements of Article 2 of the Convention. The Strasbourg case-law clearly demonstrates that a positive obligation exists for the States parties to the Convention to provide a procedure for effectively investigating deaths and establishing what responsibility, if any, the person(s) had in the taking of human life. Although this rule may not limit the nature of this recourse to criminal proceedings, it is difficult for one to deduce that the existing case-law equates criminal proceedings with civil proceedings as being remedies which both satisfy the requirements of Article 2 of the Convention with equal force (see paragraph 51 of the judgment); that remark holds good quite independently of the fact that the taking of life may be intentional or unintentional, a matter which after all must definitely be decided during and by the proceedings.

Indeed, it is difficult for one to accept that respect for the right to life, as provided for by Article 2, can, in principle, be satisfied by proceedings, which by their nature, are not designed to protect the fundamental values of society, to show public disapproval of the taking of life or – on the other side of the coin – to establish any liability through a thorough

examination of the circumstances which led to the death. Criminal proceedings contain exactly these safeguards. While, in contrast, civil proceedings are basically intended to satisfy private interests, material aspects of human transactions, they do not satisfy the requirement of expressing public disapproval of a serious offence, such as the taking of life, and do not usually guarantee a complete and exhaustive investigation into the cause of death, and the full factual background. Under these circumstances, considering civil proceedings as a satisfactory means of recourse satisfying the requirements of Article 2 amounts to a debasement of the protection of the right to life provided for by this Article; it amounts to a “privatisation” of the protection of the right to life.

A second argument militating in favour of a violation of Article 2 in this case is that the Italian legal system, in compliance with the overriding public concern for the protection of the right to life, does provide for recourse to criminal proceedings to establish responsibility for the taking of life, intentional or unintentional. For the Italian legal system this is the correct reading of the protection of the right to life and of Article 2 of the Convention. Ought then the European Court of Human Rights, applying minimal standards of protection, suggest to the Italian State that civil proceedings (which obviously fulfil a distinct function in the Italian legal system in so far as the protection of life is concerned) satisfy the requirements of Article 2? Can the European Court of Human Rights implicitly say to Italy and to all other States which provide for criminal proceedings in cases of the taking of life, that their procedural rules are luxuriously redundant, in so far as unintentional taking of life is concerned, and that their civil proceedings concerning compensation to the victims satisfy fully the needs of the Convention? I do not think so; and for these reasons I consider that the fact that the Italian courts have failed to deal effectively with the establishment of the doctor's liability through the criminal proceedings instituted against him, amounts to a violation of Article 2 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

I agree with the majority of my colleagues that there has been no violation of Article 2 of the Convention in this sad case. However, I do not share their opinion with regard to Article 6 § 1.

The complaint was a familiar one, especially in applications against Italy, namely that the proceedings were unreasonably lengthy. Despite the defects of the Italian judicial system, which it is to be hoped the recent Pinto law will help to remedy domestically, personally I have always been opposed to resorting to a sort of presumption of a violation of Article 6 that would lead to complaints of this type being upheld “automatically” (I refer on this subject to my dissenting opinion annexed to *Di Mauro v. Italy* [GC], no. 34256/96, ECHR 1999-V). The Court must examine each case on its facts using the criteria long since established in its case-law as a yardstick: the complexity of the case, the conduct of the parties (particularly of the applicant or applicants) in the domestic proceedings, the failings or delays attributable to the judicial authorities themselves and, lastly, what was at stake in the dispute.

It seems to me that if the facts of the instant case are examined using those criteria the conclusion must be that the proceedings were unduly long. In my opinion, the case did not give rise to any clearly complex issues (even though the majority categorically affirm the contrary at the beginning of paragraph 65 of the judgment): this was a tragic – but unfortunately all too common – case of post-natal complications leading to a child's death two days after birth. Even though expert witnesses were appointed, as is usual in such cases, the issue of the doctor's liability for involuntary manslaughter does not appear to me to have been complicated either factually or in law. There is no suggestion in the judgment that the parties were responsible for any of the delays (the subject is not even mentioned), but the majority accept, in paragraph 65, that the proceedings were affected by “regrettable delays” attributable to the judicial authorities both directly (an almost thirteen-month gap between the accused's committal and the first hearing and other culpable delays – see paragraphs 18-19 of the judgment) and indirectly (a three-and-a-half-month adjournment because of a lawyers' strike on the date originally scheduled for the hearing). Lastly, a great deal was at stake in the litigation: the applicants sought the doctor's conviction together with an order for damages. For the parents, who lost their child when, according to the domestic courts, the accused had been aware that the birth had to be regarded as high risk in view of the mother's past history, what was at stake was of no small consequence.

I might nonetheless have been able, at a pinch, to accept that the length of the proceedings was not unreasonable, as, if the starting-point is deemed to be the date the parents were joined as civil parties (7 July 1989) and not the date they lodged their criminal complaint (10 February 1987) – and here I agree with paragraph 66 of the judgment – the proceedings lasted “only” six years, three months and ten days for four levels of jurisdiction (compare with *Di Mauro*, cited above).

However, one factor, which in my view is decisive, tilts the balance. At the end of that period, the court of appeal hearing the case on remittal from the Court of Cassation, held that the prosecution of the offence was *time-barred*. It is not a question of examining in the abstract whether the Italian rules of limitation in criminal proceedings are compatible with the Convention, although it is worth observing that under most systems time ceases to run when steps have been taken to prosecute, and *a fortiori* when the criminal proceedings themselves have been instituted. Be that as it may, the practical consequence in the instant case was that the delays in the proceedings proved favourable to the accused and above all extinguished the applicants' right of access to a court, even though that right is afforded no less protection by Article 6 § 1 than the right to proceedings within a reasonable time. That aggravating – and inevitably frustrating – factor, a perverse effect of a system that makes the pursuit of criminal proceedings conditional on their being conducted expeditiously when it is well-known that the procedure is too slow generally, leads me to find that Article 6 § 1 of the Convention was violated in the instant case to the applicants' detriment. This explains why my vote placed me in a (very small) minority on this point.