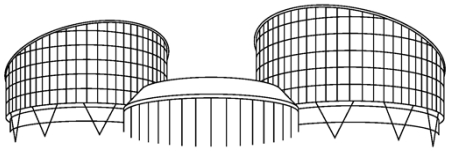

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KAMENOVA v. BULGARIA

(Application no. 62784/09)

JUDGMENT

STRASBOURG

12 July 2018

FINAL

12/10/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kamenova v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 19 June 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 62784/09) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Ms Yordanka Eftimova Kamenova ("the applicant"), on 10 November 2009.

2. The applicant was represented by Mr A. Yankulov, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms V. Hristova, of the Ministry of Justice.

3. The applicant alleged, in particular, that she had been denied access to a court to seek compensation for her daughter's death.

4. On 11 February 2016 the above complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1942 and lives in Montana.

A. The death of the applicant's daughter

6. On 20 August 1997 the applicant's daughter was killed in a traffic accident. Several other people were killed or injured as well. The accident was the fault of H.H., a lorry driver.

B. The criminal proceedings against H.H.

7. Criminal proceedings were opened against H.H. and in 1998 he was indicted and brought to court. At the first court hearing the relatives of the other victims brought civil claims against H.H. and his employer. The applicant did not bring such a claim.

8. In a judgment of 30 June 1999 the Vidin Regional Court (hereinafter "the Regional Court") convicted H.H. of negligently causing the deaths of several people, including the applicant's daughter, and injuring others, and sentenced him to a term of imprisonment. It allowed the civil claims, finding H.H. and his employer jointly liable to pay damages to the civil parties.

9. Upon appeal, the Regional Court's judgment was quashed on 19 April 2000 by the Sofia Court of Appeal (hereinafter "the Court of Appeal"). Finding serious breaches of the procedural rules, it remitted the case to the prosecuting authorities, so that it could be restarted from the stage of the preliminary investigation.

10. On an unspecified date in 2000 or 2001 the prosecution prepared a new indictment against H.H. and he was once again brought to court.

11. The first court hearing was held on 30 March 2001. The Regional Court accepted for examination a civil claim against H.H. and his employer brought by the applicant, and recognised her as civil party to the proceedings.

12. In a judgment of 18 September 2002 the Regional Court convicted H.H. of causing the deaths of several people and injuring others, and sentenced him to a term of imprisonment. In addition, it awarded damages to the remaining civil claimants – damages due jointly from H.H. and his employer – but it did not make any decision in respect of the applicant's claim.

13. On 12 March 2003 the Court of Appeal upheld H.H.'s conviction, reducing his sentence. That part of the judgment became final on 8 October 2003 when it was upheld by the Supreme Court of Cassation. However, as concerns the civil claims, the Court of Appeal quashed the lower court's judgment and remitted the case for fresh examination. It reasoned that the Regional Court had committed serious procedural breaches by, among other things, not taking a decision on the applicant's claim.

14. The Regional Court examined the case for a third time, only in relation to the part concerning the civil claims, and on 6 April 2004 gave a

judgment. It ordered H.H. and his employer to pay damages to the civil parties, including 10,000 Bulgarian levs (BGN – the equivalent of 5,100 euros (EUR)), plus default interest, to the applicant.

15. Upon an appeal by H.H. and his employer, on 8 March 2006 the Court of Appeal quashed the lower court's judgment in so far as it concerned the award made to the applicant, and discontinued the examination of her claim. It found that that claim was inadmissible, on the grounds that it had been submitted outside the time-limit provided for in Article 61 § 4 of the 1974 Code of Criminal Procedure (see paragraph 22 below). It pointed out that the requirement under that provision that a claim should be brought before the commencement of the examination of a case by a court had to be interpreted as referring to the initial examination by a court of first instance. The applicant had brought her claim during the subsequent examination of the case, after its remittal.

16. Upon an appeal by the applicant, that conclusion was upheld by the Supreme Court of Cassation on 4 March 2007.

C. Claim brought by the applicant before the civil courts

17. On 22 August 2007 the applicant brought a tort action against H.H. and his employer before the civil courts. She claimed BGN 10,000 in respect of non-pecuniary damage, plus default interest as of 20 August 1997.

18. In a judgment of 17 July 2008 the Sofia District Court dismissed the claim. It held that the applicant's inadmissible civil claim brought in the context of the criminal proceedings could not have interrupted the running of the relevant limitation period, which was five years. Only a claim brought in accordance with the relevant procedural requirements and subsequently found to be well-founded could have had such an effect. In addition, even if the running of the limitation period could be considered to have been interrupted by the applicant's bringing her claim in the context of the criminal proceedings, that interruption had been retroactively invalidated by the Court of Appeal's decision of 8 March 2006 finding that the claim was inadmissible and discontinuing the proceedings. Accordingly, the running of the limitation period – which had started in 1997 because the perpetrator's identity had been known immediately after the accident in which the applicant's daughter had died – had never been validly interrupted. The applicant's claim for damages, brought ten years later, was time-barred. The applicant had brought her claim before a tribunal, namely the criminal court, which had been barred from examining it; this meant that this tribunal had had to transfer the claim to the civil courts with jurisdiction, but this had not been done.

19. The applicant filed an appeal, which was dismissed by a judgment of the Sofia City Court of 13 March 2009. While it considered the applicant's

claim well-founded in principle, since the tort resulting in the liability of H.H. and his employer had been proven, that court agreed that the claim was time-barred. It pointed out that the applicant's bringing her claim in the context of the criminal proceedings could only have interrupted the running of the relevant time-limit if the claim had been allowed. However, after the proceedings had been discontinued, in the absence of recognition of the applicant's right to receive damages, the time-limit had to be considered to have never been interrupted. The applicant had to bear the adverse consequences of having brought her claim in the context of the criminal proceedings in breach of the rules, and this was so notwithstanding the fact that the claim had been, erroneously, initially accepted for examination by the Regional Court.

20. The applicant lodged an appeal on points of law. In a final decision of 9 July 2009 the Supreme Court of Cassation refused to accept the appeal for a cassation review.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil claims in criminal proceedings

1. The Codes of Criminal Procedure of 1974 and 2006

21. Article 60 § 1 of the Code of Criminal Procedure of 1974, in force until 29 April 2006, provided that the victim of an offence could bring a civil claim in respect of the damage resulting from the offence in the context of the criminal proceedings concerning that offence. An identical provision is contained in Article 84 § 1 of new Code of Criminal Procedure, in force as of 29 April 2006. By Article 64 § 2 of the 1974 Code (Article 88 § 2 of the 2006 Code), the criminal court may refuse to accept a civil claim for examination where it considers that this would encumber the examination of the case.

22. Article 61 § 4 of the 1974 Code (Article 85 § 3 of the 2006 Code) provides that a civil claim has to be brought before the commencement of the examination of the case by a court of first instance (*започване на съдебното следствие пред първоинстанционния съд*). The national courts have construed this provision as prohibiting the introduction of a civil claim by the victim after the proceedings have been sent back to the first-instance court by a higher court (*Решение № 7 от 9.02.1998 г. по н. д. № 12/1998 г., ВКС, II н. о.*; *Решение № 767 от 11.11.1991 г. по н. д. № 648/1991 г., ВС, I н. о.*; *Решение № 650 от 24.12.1985 г. по н. д. № 664/1985 г., ВС, Военна колегия*).

23. In some cases where the criminal proceedings were sent back to the stage of the preliminary investigation, the national courts have found that the victim of the offence can validly bring a civil claim once the court

proceedings start anew (*Решение № 450 от 22.10.1980 г. по н. д. № 370/80 г., ВС, I н. о.*; *Присъда № 20 от 23.05.2012 г. на ОС-Пазарджик по н. о. х. д. № 175/2012 г.*).

24. A civil claim cannot be brought before the criminal courts where it has already been brought before the civil courts (Article 60 § 2 of the 1974 Code and Article 84 § 2 of the 2006 Code). The claim is to be examined under the rules of the respective Code of Criminal Procedure, but for matters not regulated by that Code, the rules on civil procedure apply on a subsidiary basis (Article 64 § 1 of the 1974 Code and Article 88 § 1 of the 2006 Code). The criminal court is obliged to rule on a civil claim already accepted for examination even where the criminal prosecution has become time-barred or the accused has been acquitted (Article 305 of the 1974 Code and Article 307 of the 2006 Code).

25. In domestic practice, victims of an offence are considered to be in a more advantageous position when their claims in respect of damage resulting from an offence are examined in the context of the criminal proceedings concerning that offence. The reasons for that, summarised in an interpretative decision of the Supreme Court of Cassation of 4 February 2013 (*Тълкувателно решение № 1 от 4.02.2013 г. на ВКС по тълк. д. № 2/2012 г., ОСНК*), are as follows: in criminal proceedings, victims are not liable to pay the court fees payable at the start of civil proceedings; they can rely on the evidence collected and presented by the prosecution in so far as it substantiates the civil claims; the rules on the admissibility of evidence are more lenient; and lastly, the avenue provides more rapid redress, as a second set of proceedings specifically concerning claims in respect of damage becomes unnecessary.

2. The Code of Civil Procedure

26. Article 95 § 1 of the Code of Civil Procedure of 1952, in force until 1 March 2008, prohibited the examination of the same claim by two different tribunals, stating that if two sets of proceedings concerning the same claim were ongoing, the proceedings initiated on a later date were to be discontinued.

27. Article 182 § 1 (d) of the Code provided that civil proceedings were to be stayed where:

> "criminal elements, the determination of which is decisive for the outcome of the civil dispute, are discovered in the course of the civil proceedings."

This provision has been seen as obliging the civil courts to stay the examination of claims where an alleged civil right was derived from a fact which constituted an offence under the Criminal Code and criminal proceedings in relation to that offence were ongoing.

28. Article 93 § 1 of the Code of Civil Procedure provided that where a claim had been lodged with a court lacking the jurisdiction to examine that

claim (*делото не е подсъдно нему*), the court had to transfer the claim to a court with jurisdiction. In such a case, the claim was considered to have been brought on the date it had been lodged before the court lacking jurisdiction.

B. Limitation period

29. Section 110 of the Obligations and Contracts Act provides that the limitation period for all claims is five years, save for those for which a special period is set out. By section 114(3) of the same Act, with regard to claims in respect of damage, the limitation period starts running from the moment the identity of the person responsible for the damage has become known. Limitation periods are not to be applied by the courts of their own motion, but only when an objection has been raised by the interested party (section 120 of the Act).

30. Section 116(b) of the Act provides that the running of the limitation period is interrupted by the bringing of a claim. However, if the claim is not allowed, it is considered that the running of the limitation period was never interrupted.

31. By section 115(1)(g) of the Act, the time-limit ceases to run during the "pendency of the judicial proceedings relating to the [tort] claim". Before 2006 the application of this rule in relation to criminal proceedings was unclear and there were two different approaches. On certain occasions the courts construed the rule as meaning that the time-limit stopped running not only during the pendency of a civil suit, but also during the pendency of criminal proceedings relating to the same facts, even at their preliminary investigation phase and in the absence of a civil-party claim. On other occasions it was held that under section 115(1)(g) of the Obligations and Contracts Act time stopped running only when the victim brought a claim for damages, whether in the context of criminal proceedings or in separate civil proceedings. The issue was conclusively settled by the General Assembly of the Civil and the Commercial Chambers of the Supreme Court of Cassation, which, in a binding interpretative decision of 5 April 2006, endorsed the latter view (*Тълкувателно решение № 5 от 5 април 2006 г. по тълк.д. № 5/2005 г., ОСГК и ОСТК на ВКС*).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. The applicant complained that she had been denied access to a court because her claim in respect of damage related to her daughter's death had

never been decided upon by the national courts. She relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Arguments of the parties

1. The Government

33. The Government contested the complaint. They pointed out that the applicant's claim had been thoroughly examined in the criminal proceedings against H.H., in full compliance with the Convention requirements.

34. Nevertheless, that claim had eventually been found to be inadmissible, and such a finding was in line with the consistent practice of the domestic courts. The Government submitted several domestic decisions and judgments where the courts had found inadmissible civil claims in criminal proceedings brought after a remittal (some of which cited in paragraph 22 above), and argued on their basis that the Regional Court had acted in breach of the law when accepting the applicant's civil claim for examination in the criminal proceedings. Some of these decisions concerned remittals by a court of appeal or the Supreme Court of Cassation to a first-instance court; in others, it was not specified at what stage the proceedings had had to restart.

35. The Government stated in addition that, even though the applicant had not received any compensation for the psychological damage suffered on account of the death of her daughter, her right to a court had not been unjustifiably restricted. She had failed to duly lodge her claim in the context of the criminal proceedings against H.H., which had resulted in the expiry of the applicable limitation period.

2. The applicant

36. The applicant pointed out that her claim in respect of damage caused by her daughter's death had been well-founded in principle, and submitted that this had been recognised by the Sofia City Court in its judgment of 13 March 2009, and had not been disputed by the Government.

37. The applicant pointed out that her claim had not been decided upon in the context of the criminal proceedings against H.H., and argued that the national courts' conclusion that it was inadmissible was contrary to domestic law. While not contesting the Government's argument that any civil claim in the context of criminal proceedings had to be brought at the beginning of the initial examination of a case by a first-instance court, and not after a remittal, she pointed out that this was only applicable where a case had been sent back to a first-instance court. In her case, by contrast, in its judgment of 19 April 2000 the Sofia Court of Appeal had remitted the

case to the prosecuting authorities, to be restarted from the stage of the preliminary investigation. The applicant pointed out that she had chosen to have her claim examined in the criminal proceedings because this had been the more advantageous avenue. The applicant also disputed the civil courts' conclusion that the claim she had brought before them in 2007 had been time-barred.

38. In addition, the applicant was of the view that, in accordance with the rules of the Code of Civil Procedure, the criminal courts had been obliged to transfer her claim to the civil courts if they considered that they lacked the jurisdiction to examine it. In such a case the claim would have been considered lodged on the date she had brought it in the context of the criminal proceedings, namely before the expiry of the five-year limitation period. The criminal courts had thus deprived her of the advantage of having brought her claim in time.

39. Lastly, the applicant pointed out that statutory limitations were aimed at penalising people who had been inactive in the pursuit of their rights. This had not been the situation in her case.

B. The Court's assessment

1. Admissibility

40. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

41. On the merits, the Court notes at the outset that the proceedings initiated by the applicant concerned a genuine dispute about her right to compensation. Moreover, the right to compensation is, by its very nature, of a civil character (see *Georgiadis v. Greece*, 29 May 1997, § 35, *Reports of Judgments and Decisions* 1997-III, and *Shulepova v. Russia*, no. 34449/03, § 60, 11 December 2008). The Court is therefore satisfied that the case at hand concerned a determination of the applicant's civil rights, and that Article 6 § 1 of the Convention is applicable.

42. Article 6 § 1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This "right to a court" may be relied on by anyone who considers that an interference with the exercise of his or her civil rights is unlawful and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (see *Lupeni Greek Catholic Parish and Others*

v. Romania [GC], no. 76943/11, § 85, ECHR 2016 (extracts)). The right of access to a court also includes the right to obtain a determination of the dispute by a court (see *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II).

43. The right of access to a court is not absolute, but may be subject to limitations. Nevertheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see *Lupeni Greek Catholic Parish and Others*, cited above, § 89). Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Sabeh El Leil v. France* [GC], no. 34869/05, § 47, 29 June 2011, and *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018).

44. In the present case, the Government argued that the applicant's claim had been adequately examined in the criminal proceedings against H.H. (see paragraph 33 above). Indeed, after that claim was accepted for examination in those proceedings, on 6 April 2004 the Regional Court awarded the applicant BGN 10,000 in damages, plus default interest (see paragraph 14 above). However, that decision was later on quashed and the Court of Appeal discontinued the examination of the applicant's claim, on the grounds that it was inadmissible, as it had not been lodged within the time-limit provided for in Article 61 § 4 of the 1974 Code of Criminal Procedure. That decision was upheld by way of a final decision by the Supreme Court of Cassation (see paragraphs 15-16 above). In the subsequent civil proceedings, the courts found that the applicant's claim was time-barred, without taking any decision on its merits (see paragraphs 18-20 above). Accordingly, the Court concludes that the applicant did not have the merits of her claim determined by a court, and that her access to a court was restricted.

45. In so far as the applicant contested the application of domestic law by the national courts, namely their conclusion that her claim brought in the context of the criminal proceedings against H.H. was inadmissible, and their finding that her subsequent claim brought before the civil courts was time-barred, the Court reiterates that it falls in the first place on the national authorities, and notably the courts, to interpret and apply the domestic law (see, among others, *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 82, ECHR 2000-XII). This applies in particular to the interpretation by courts of rules of a procedural nature (see *Baničević v. Croatia* (dec.), no. 44252/10, § 30, 2 October 2012). The Court's own task is to assess whether the effects of this interpretation were compatible with the Convention requirements as to the permissible restrictions to the right to access to a court (see *Atanasova v. Bulgaria*, no. 72001/01, § 38, 2 October 2008).

46. In the case at hand, the time-limit for the applicant to bring her civil claim was five years (see paragraph 29 above). These started to run at the time of her daughter's death in 1997, since the person responsible was known from the outset. In 2001, before the expiry of that time-limit, the applicant brought a tort claim in the criminal proceedings, but it was eventually found to be inadmissible by the criminal courts, and the civil courts, seised by her in 2007, held that the bringing of such an inadmissible claim could not have interrupted the running of the applicable limitation period, which had therefore expired already in 2002.

47. The Court has held that statutory limitation periods serve several important purposes, namely to ensure legal certainty and finality, to protect potential respondents from stale claims which might be difficult to counter and to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, *Reports of Judgments and Decisions* 1996-IV). Therefore, litigants should expect those rules to be applied (see *Miragall Escolano and Others v. Spain*, nos. 38366/97 and 9 others, § 33, ECHR 2000-I, and *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, § 37, ECHR 2009 (extracts)).

48. The above means that the existence of a limitation period *per se* is not incompatible with the Convention. What the Court needs to ascertain in a given case is whether the nature of the time-limit in question and the manner in which it was applied are compatible with the Convention. This means, among others, that the application of the statutory limitation periods must have been foreseeable for the applicants, having regard to the relevant legislation and case-law and the particular circumstances (see *Baničević*, cited above, § 32).

49. The applicant's claim was declared inadmissible in the criminal proceedings because she had not brought it at the first court hearing in 1998, but after H.H. was convicted and following a decision in 2000 to quash that conviction and send the case back to the prosecution authorities (see paragraphs 8 and 15-16 above). The 1974 Code of Criminal Procedure, applicable at the time, stated expressly that any civil claim had to be brought before the commencement of the examination of the case by the court of first instance, and the domestic case-law reiterated that requirement (see paragraph 22 above). While, indeed, there is also case-law accepting that in situations where the case has been sent back to the prosecution authorities the victims of the respective offence can validly lodge a civil claim after the case reaches once again the courts (see paragraph 23 above), it is scarce, and the parties have not specified whether the national courts have reached such conclusions on any constant basis. Accordingly, the Court concludes that the applicant should have been aware, in 2001 when she brought her

civil action in the criminal proceedings only after a remittal of the case, that, at the least, she ran a risk to have that action declared inadmissible. Pursuant to section 116(b) of the Obligations and Contracts Act (see paragraph 30 above), this would in turn mean that the bringing of the action in 2001 could not have interrupted the running of the limitation period. Accordingly, the Court concludes that the application of the rules on limitation periods was sufficiently foreseeable.

50. As already pointed out, the applicant failed to bring her claim for damages against H.H. and his employer in the context of the criminal proceedings in 1998, when the Regional Court started examining the case for the first time, as did other victims of the offence (see paragraph 7 above). She has presented no explanation for this failure, and has not in particular referred to any obstruction on her right to access to a court at that time. Bringing an action in the context of the criminal proceedings in 1998 clearly was an available and advantageous avenue (see paragraph 25 above) – a conclusion illustrated by the fact that the other victims' claims, brought at that time, were accepted for examination by the criminal courts and allowed, and their admissibility was apparently not challenged (see paragraphs 7 and 14-15 above).

51. Moreover, even after the applicant missed, for whatever reasons, the chance to bring her claim for damage in the context of the criminal proceedings at the commencement of their judicial stage in 1998, it remained open for her, until the expiration of the limitation period in 2002, to bring a separate claim before the civil courts. Even though the examination of such a claim would have been stayed to await the conclusion of the criminal proceedings as to H.H.'s guilt (see paragraph 27 above), it has not been argued that the delay thus incurred would, in itself, impermissibly restrict the applicant's right to access to a court, nor that the civil courts would in any way be prevented from examining the merits of the applicant's claim.

52. Despite the existence of two clearly available avenues to seek the examination of her claim, the applicant took the risk to bring a potentially inadmissible action in the criminal proceedings after the case had been remitted for re-examination.

53. It is true that the manner in which the national courts treated the case is also open to critique. In particular, in 2001 the Regional Court accepted to examine the applicant's claim in the criminal proceedings, which was later on considered by the higher courts to be an error (see paragraphs 11 and 15-16 above). Once the claim was accepted for examination in the criminal proceedings the applicant was prevented under Article 95 § 1 of the Code of Civil Procedure from bringing the same claim before the civil courts (see paragraph 26 above). That claim remained pending before the criminal courts until 2007, and it was only after it had been found inadmissible in the criminal proceedings by way of a final decision (see paragraphs 15-16

above), long after the date on which the limitation period was eventually considered to have expired, that the applicant was able to initiate separate civil proceedings. If the Regional Court had refused to accept the claim for examination, or it had been declared inadmissible on an earlier date, or had the criminal courts transferred it to the civil courts following the procedure under Article 93 § 1 of the 1952 Code of Civil Procedure (see paragraph 28 above), the applicant could have been able to bring her claim before the civil courts in due time and have it examined on merits.

54. Nevertheless, any mistakes on the part of the national courts cannot alter the conclusion reached above that the applicant failed, without any justification, to make use of the clear and indisputable possibilities to have her claim duly examined. While the outcome of the procedures initiated by her was unfortunate, her claim for compensation for the death of her daughter being refused despite the perpetrator having been found guilty, the fact remains that the applicant placed herself in this position. By failing to bring her claim for damage before the criminal courts at the start of the procedure, as did the other victims, and by not filing her claim later directly with the civil courts, the applicant placed herself in a position where she risked having it declared time-barred.

55. Therefore, it cannot be said that the statutory limitation period applicable in the case, or the manner in which it was interpreted and applied by the national courts, impaired the very essence of the applicant's right of access to a court (see *Baničević*, cited above, § 37).

56. In view of the above, the Court concludes that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 12 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Grozev, Mits and Hüseynov is annexed to this judgment.

A.N.
M.B.

JOINT DISSENTING OPINION OF JUDGES GROZEV, MITS AND HÜSEYNOV

I. Introduction

In the present case the applicant complained of the failure of the domestic courts to consider on the merits her claim for damages. This failure, which according to the applicant was attributable to the domestic courts, deprived her of effective access to court. The majority concluded that there had been no violation of Article 6 of the Convention. For the reasons expressed below, we disagreed with this conclusion. In our view, the majority placed excessive emphasis on the fact that the applicant had an opportunity to file a claim at the start of the criminal proceedings but failed to do so. Such an approach limits the right of access to court in an excessive manner and does not correspond to the standards developed by the Court. Rather than focusing on this initial episode, the majority should have analysed the reasonableness of the choice of avenue made by the applicant when she did file her claim and the adequacy of the reaction of the national courts. From such a perspective, the conclusion of a violation of Article 6 of the Convention seems to us straightforward.

We consider such an approach essential in the present case, as at the time when the applicant filed her claim the statute of limitations on that claim had not run out. However, her claim was eventually declared inadmissible precisely on this ground. Thus, the choice of avenue which the applicant made in filing her claim becomes crucial in answering the question whether the applicant's right of access to court was limited to such an extent that the very essence of the right was impaired.

II. Domestic law

Bulgarian law affords two avenues to applicants such as Mrs Kamenova, namely filing a claim within the pending criminal proceeding or initiating separate civil proceedings. Since the applicant clearly had two alternatives, the Court had to decide whether Bulgarian law at the time when the applicant filed her claim was sufficiently clear and coherent as to the manner in which she could exercise her right of access to court, and thus whether the applicant was able to make a real and effective choice. This requirement of clarity and foreseeability is crucial in assessing whether the limitation of the applicant's right of access was justified by legitimate aims and was proportionate, as required by the Court's case-law.

It is precisely the centrality of the issue of clarity and foreseeability of the domestic law which requires a more detailed analysis of domestic law as it stood at the time when the applicant filed her claim. As described in the

relevant part of the judgment, the criminal route is considered more advantageous for victims of criminal offences with respect to damage resulting from the offence. There are a number of reasons for this, and this position has been stated expressly by the Supreme Court of Cassation (see paragraph 25 of the judgment). As to the issue whether the victim of a criminal offence could file a claim after the case had been sent back to the investigation stage, the existing domestic case-law at the time suggested that the victim could do so (see paragraph 23 of the judgment). No case-law existed at the relevant time taking the opposite position, namely that the victim could not file a civil claim after the case had been sent back to the investigation stage. Finally, there was conflicting case-law of the domestic courts as to whether pending criminal proceedings, without a claim for damages being filed, stopped the running of the five-year limitation period (see paragraph 25 of the judgment).

III. The applicable Convention principles

The applicable principles on access to court are well established. Article 6 § 1 of the Convention embodies the "right to a court", of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). The right of access to a court also includes the right to obtain a determination of the dispute by a court (see *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II). This "right to a court" may be relied on by anyone who considers that an interference with the exercise of his or her civil rights is unlawful and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 85, ECHR 2016 (extracts)). The right of access to a court is not absolute, but may be subject to limitations. Nevertheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (ibid., § 89). Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Sabeh El Leil v. France* [GC], no. 34869/05, § 47, 29 June 2011, and *Cordova v. Italy*, no. 40877/98, § 54, ECHR 2003-I).

The Court will also examine the effectiveness of access to court, which presupposes that an individual has a clear and concrete possibility of challenging an act constituting an interference with his or her rights (see *Lupeni Greek Catholic Parish and Others*, cited above, § 86) and whether the degree of access afforded under the national legislation was sufficient to secure the individual's "right to a court", having regard to the rule of law in

a democratic society (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93). And finally, it will examine the accessibility, clarity and predictability of the domestic legal provisions and case-law which ensure the effectiveness of the right of access to a court (see *Legrand v. France*, no. 23228/08, § 34, 26 May 2011).

IV. Application of these principles to the present case

Applying those standards to the case at hand, it becomes evident that one of the reasons which led to the denial of the applicant's access to court was the lack of clarity and predictability of the domestic law. The second reason was the excessively formalistic approach of the domestic courts, which, faced with a change in the applicable domestic case-law – a change which took place in the course of the proceedings on the applicant's claim – failed to address the issue and assess whether the limitation of the applicant's right of access had been proportionate.

The applicant argued that the domestic courts had erred in finding that her claim brought in the context of the criminal proceedings was inadmissible and that her subsequent claim brought before the civil courts was time-barred (see paragraphs 37 and 39 of the judgment). It is not the Court's task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, for example, *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011). Still, it has to assess whether the effects of such an interpretation are compatible with the Convention (see *Edificaciones March Gallego S.A. v. Spain*, 19 February 1998, § 33, *Reports of Judgments and Decisions* 1998-I) and, in particular, with the principles set out above.

It is true that the applicant failed, unlike other victims of the offence, to bring her claim for damages within the criminal proceedings in 1998, when the Regional Court started examining the case for the first time. But as noted already, unlike the majority we do not find this failure decisive. The applicant still had a valid claim under national law, and taking into account the fact that she always had another procedural avenue available, such failure could by no means be interpreted as a waiver of her claim. When the criminal proceedings were brought before the Regional Court for a second time, the five-year period under section 110 of the Obligations and Contracts Act (see paragraph 29 of the judgment) had not yet expired. In view of the advantages of the criminal route, the applicant's choice in 2001 to attempt to have her claim examined by the criminal courts was justified, and we see no reason to hold it against her. As it was open to the applicant to bring a claim for damages either in the criminal proceedings or in separate civil proceedings, the question before this Court was not whether she should have taken another procedural route that was available to her, but

whether her choice to bring such a claim before the criminal courts was a reasonable one.

We find a number of factors relevant in answering that question. First, under the domestic legal system there were clear advantages to using the criminal procedure. Rather than filing a claim with the civil courts only to see it suspended until the end of the criminal proceedings, the applicant had good reasons to prefer filing her claim directly with the criminal court. We consider it crucial from the perspective of the clarity and foreseeability of the domestic law that there was nothing to indicate to the applicant that her choice of avenue was a problematic one. At the time, no case-law of the domestic courts existed suggesting that they might refuse civil claims for examination after the case had been sent back to the preliminary investigation stage (see paragraph 23 of the judgment). In line with the existing case-law at the time, the trial court accepted the applicant's claim, considered it on the merits and granted it.

The reason for which the applicant's claim was eventually declared inadmissible was a reversal of the domestic case-law. Although such evolution of the case-law is not in itself problematic from the perspective of the Convention, it nevertheless happened after the applicant had filed her claim, and the manner in which the domestic courts handled the applicant's claim after that was excessively formalistic. Even though the applicant filed her claim in 2001, less than five years after her daughter's death, that is, within the relevant time-limit, that claim was eventually declared inadmissible precisely for being filed out of time. This was the result of both the reversal of the domestic case-law and the manner in which the domestic courts treated the claim, accepting it at first for consideration in the criminal proceedings, and eventually declaring it inadmissible at a point in time when the five-year time-limit had already expired. The decision of the Regional Court to accept the applicant's claim for examination in the criminal proceedings was later considered by the higher courts to be an error. The applicant, however, had no remedy against this error and against the fact that it resulted in the time-limit for her claim expiring. Had the Regional Court refused to admit the applicant's claim for consideration, or possibly transferred it to the civil courts following the procedure under Article 93 § 1 of the 1952 Code of Civil Procedure (see paragraph 28 of the judgment), this would have allowed the applicant to bring her claim before the civil courts in due time. However, once the claim was accepted for examination in the criminal proceedings she was prevented under Article 95 § 1 of the Code of Civil Procedure from bringing the same claim before the civil courts (see paragraph 26 of the judgment).

That claim remained pending before the criminal courts until 2007, when it was found inadmissible in the criminal proceedings by way of a final decision. In the meantime, the domestic case-law on whether the criminal proceedings stopped the running of the time-limit had also changed, with the Supreme Court taking a stricter approach.

The domestic civil courts also criticised the Regional Court's actions. The Sofia City Court stated that it considered that court's initial decision to accept the applicant's claim for examination in the context of the criminal proceedings to be erroneous (see paragraph 19 of the judgment), and the Sofia District Court criticised the Regional Court for not having transferred the case to the civil courts (see paragraph 18 of the judgment). However, this fact was not taken into account by the civil courts when they declared the applicant's claim time-barred, nor was the fact that before 2006 the applicant could justifiably have believed, since the national courts regularly accepted it to be the case (see paragraph 31 of the judgment), that the running of the limitation period had ceased with the mere opening of the criminal proceedings. The Court has recently held that a restriction on access to a court would be disproportionate where the inadmissibility of a remedy is the result of attribution of a mistake to an applicant for which he or she is not objectively responsible (see *Zubac v. Croatia* [GC], no. 40160/12, § 95, 5 April 2018).

No justification was offered for the situation in which the applicant found herself. The Court has also held that limitation periods serve, in principle, important purposes, notably to ensure legal certainty and finality (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, *Reports* 1996-IV). However, it has not been shown that there was any reasonable relationship of proportionality between the measure complained of – the denial of the applicant's access to a court – and any such aim sought to be achieved in the case. It must furthermore be noted that the domestic courts' rulings impaired the very essence of the applicant's right of access to a court.

V. Conclusion

In view of the above, we conclude that there has been a violation of Article 6 § 1 of the Convention.