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Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action report (24/05/2018)

Communication from Slovenia concerning the case of SILIH v. Slovenia (Application No. 71463/01)

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Réunion : 1318e réunion (juin 2018) (DH)

Référence du point : Bilan d'action

Communication de la Slovénie concernant l'affaire SILIH c. Slovénie (requête n° 71463/01)
(anglais uniquement)

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Number: 5111-3/2018
Date: 23 May 2018

Ms Geneviève Mayer

Head of the Department

Department for the Execution of the Judgements of the European Court of Human Rights

COUNCIL OF EUROPE

Subject: Action Report for the case Šilih v. Slovenia (application no. 71463/01, Grand Chamber judgment of 9 April 2009, final on 9 April 2009)

Dear Ms Mayer,

Attached please find Action Report for the case Šilih v. Slovenia. We hope you will be able to proceed with closure of this case.

Yours sincerely,

Tina Brecelj
State Secretary

REPUBLIKA SLOVENIJA MINISTRSTVO ZA PRAVOSODJE 02 Ljubljana

Attach.: Action Report for the case Šilih v. Slovenia

Ljubljana, 23 May 2018

ACTION REPORT

ŠILIH v. Slovenia

Appl. No. 71463/01
Grand Chamber judgment of 9 April 2009, final on 9 April 2009

I CASE DESCRIPTION

1. This case concerns a violation of the applicants' right to life on account of the lack of requisite diligence by the Slovenian courts in dealing with their claim that their son's death in 1993 resulted from medical malpractice (a violation of Article 2 in procedural limb).

2. The applicants' son died in a hospital after suffering anaphylactic shock, allegedly as a result on an allergic reaction to one of the drugs administered to him by a duty doctor in an attempt to treat his urticarial. The applicants instituted criminal proceedings against the doctor and civil proceedings for damages against both the hospital and the doctor. The criminal proceedings, in particular the investigation, were excessively long and lasted from 1993 to 2000, when they were discontinued. The civil proceedings were instituted in 1995 and were still pending before the Constitutional Court when the Court rendered the present judgment.

3. The Court noted that civil proceedings were stayed for three years and seven months pending the outcome of the criminal proceedings; however, for the two years before they were officially stayed, these proceedings were in fact already at the standstill (*Šilih,* § 204). After the criminal proceedings were discontinued it took the domestic courts a further five years and eight months to rule on the applicants' civil claim (*Šilih,* §207). Lastly, the Court considered it unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings (*Šilih,* §210).

II INDIVIDUAL MEASURES

4. The measures have been taken to ensure that the violations at hand are brought to an end and that the applicants are provided adequate redress for the consequences sustained. They are set out below.

A. Bringing the impugned proceedings to an end

5. In response to the Court's findings, the authorities took measures to ensure that the civil proceedings pending when the Court rendered the present judgment are brought to an end.

6. To this end, on 13 December 2016 the Government concluded a settlement with the applicants before the Maribor District Court undertaking to pay to the applicants a compensation under this head. At that occasion, a representative of the State-run hospital in the presence of the Minister of Justice expressed sincere regrets for the loss of the applicants' son in the present case and deplored the fact that his death occurred while he was receiving medical assistance. Following the conclusion of the court settlement, the applicants made a statement to the press

expressing their satisfaction with the settlement reached (www.mp.gov.si/si/medijsko_sredisce/novica/7356/).

7. Within this context, it is recalled that the Court highlighted that the procedural obligation under Article 2 does not necessarily require the State to provide criminal proceedings in similar cases. It confined itself to "noting that the criminal proceedings, in particular the investigation, were excessively long" (*Šilih,* § 202). Against this backdrop, the Court found it significant that the applicants had recourse to civil proceedings in which they were entitled to an adversarial trial enabling any responsibility of the doctors or hospital concerned to be established and any appropriate civil redress to be obtained. The Court went on highlighting that it was common ground that the scope of any civil liability had been significantly broader than the scope of any criminal liability and not necessarily depended on it (*Šilih,* § 203).

8. Bearing in mind the Court's indications above, the Government considers that the court settlement concluded on 13 December 2016 clearly indicated that the respondent State acknowledged the violation of the Convention and in effort to provide an appropriate redress agreed to pay an amount acceptable to the applicants.

9. In view of the above, the authorities consider that the violation at hand has been brought to an end and that the Court's indications have been fully complied with.

B. Redress for the applicants

10. As regards the applicant's redress, the authorities would like to highlight that the Court awarded them just satisfaction in respect of non-pecuniary damage amounting to EUR 7,540 (*Šilih,* § 222). The applicants did not claim pecuniary damage in the proceedings before the Grand Chamber. The authorities therefore consider that the applicants have been fully redressed for the damage sustained.

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11. In view of the above, the authorities therefore consider that the violation at hand has ceased and that the applicants were fully redressed for their negative consequences.

III GENERAL MEASURES

12. The violation in the present case resulted from:

- the authorities' failure to prevent excessively long criminal proceedings, in particular the investigation (*Šilih*, § 202);
- excessively long civil proceedings, as a result of the failure of the civil court to have weighed the advantages of the continued stay of the proceedings and lack of procedural activities in the proceedings once they were resumed (*Šilih*, §§ 205, 206); and
- frequent changes of the sitting judge in the civil proceedings which impeded the effective processing of the case (*Šilih*, § 210).

13. The Government would like to point out that there are no other similar applications before the Court related to ineffectiveness of proceedings relating to medical malpractice cases. Nevertheless, the measures have been taken to address the above shortcomings identified by the Court and prevent similar violations.

14. Furthermore, in January 2017 the Government launched a so-called "Šilih Project" which goes beyond the Court's findings and is aimed to address the root causes of medical malpractice cases. The measures taken are set out below.

A. MEASURES TAKEN IN RESPONSE TO THE SHORTCOMINGS IDENTIFIED BY THE COURT

15. At outset, the Government would like to recall that the Republic of Slovenia has taken a series of legislative, IT, capacity-building, awareness-raising and other measures to prevent the excessive length of criminal and civil proceedings and to introduce an effective remedy in this respect within the context of the *Lukenda group of cases* (See Final Resolution CM/ResDH(2016)354 and Action report (DD(2016)1212)).

16. In addition, the Government would like to point out that additional measures have been taken to address particular shortcomings identified by the Court and expedite judicial proceedings in similar cases. To this end, in 2017 the Patient Rights Act was amended (*Zakon o pacientovih pravicah*; Official Gazette of the Republic of Slovenia no. 55/17). Pursuant to its he revised Article 48 the courts shall attach priority to cases relating to patients who sustained grievous bodily injury or death during their medical treatment. In case of criminal proceedings, when a patient sustains grievous bodily injury or death during a medical treatment, the authorities involved in pre-trial or criminal proceedings must proceed with particular promptness.

17. The domestic courts further readily made use of the Court's findings in the present case highlighting the special diligence required in medical practice cases. To this end, in unrelated cases concerning medical malpractice the domestic courts frequently made reference to the Court's indications in this judgment (e.g. Constituional Court's decisions no. Up-2443/08, no. Up-680/14, no. Up-511/05, Up-512/05, no. U-I-303/07, Supreme Court's decision no. II Ips 281/2016 and Higher Court's decisions no. II Cp 1508/2015, no. II Cp 1439/2016).

18. The Court noted that frequent change of the sitting judge impeded the effective processing of the case (*Šilih*, §210). The Government would like to point out that the Supreme Court in December 2017, as part of the measures in Šilih Project, notified the judges of the above amendments to the Patient Rights Act. In addition, the Supreme Court specifically drew the judges' attention to the need to avoid changing the sitting judge (taking into account the procedural possibilities of the parties regarding the exclusion of a judge or the transfer of territorial jurisdiction).

19. The Court noted that the criminal proceedings**,** in particular the investigation, were excessively long (*Šilih*, § 202). The Court also noted that domestic courts found sufficient grounds to open criminal investigation requested by the applicants in their capacity as "subsidiary" prosecutors, despite public prosecutor's refusal to institute criminal proceedings (§ 201). The authorities would like to highlight that in 2017 within the context of the Šilih Project described above the Office of the State Prosecutor General conducted an analysis and highlighted the importance for the prosecutors to justify the refusal to institute criminal proceedings and to reconsider their decision to initiate prosecution, in case when a court investigation is instituted or

proceedings continue based on the request of a victim as a subsidiary prosecutor, especially if another and different expert opinion is provided.

20. Along the lines, the Government would like to recall that in 2001 the Constitutional Court dismissed the applicants' appeal lodged on the ground that after the final discontinuance of criminal proceedings a "subsidiary" prosecutor could not appeal to Constitutional Court, as he had no *locus standi* before that court (*Šilih*, §44). In response to the present judgment, in 2017 the Constitutional Court changed its practice and recognised that a "subsidiary" prosecutor could appeal to the Constitutional Court in similar cases (decision no. Up-320/14, U-I-5/17 of 14 September 2017). The authorities thus consider that individuals in similar situation will thus have at their disposal an effective remedy within the framework of criminal proceedings.

B. THE ŠILIH PROJECT

21. Šilih Project was initiated in January 2017 and approved by the Government in October 2017 (Government decision No. 02400-1/2017/4 of 26 October 2017). The aim of the Šilih Project is to define a) measures to prevent adverse events during medical treatment and to ensure effective exercise of the right to adequate, high-quality and safe medical treatment; and b) measures aimed at ensuring effective judicial proceedings with a view to establishing, without undue delay, the responsibility of a healthcare provider or a healthcare professional for death or serious bodily injury sustained during a medical treatment. The Šilih Project is therefore comprised of medical and justice part, with adequate cooperation among the Ministry of Justice, the Ministry of Health, the Supreme Court and the Office of the State Prosecutor General. The Šilih Project thus goes beyond the Court's judgment and the shortcomings identified by the Court in the impugned proceedings, as it also addresses the root causes of medical mistakes and the administrative mechanisms for their prevention, identification and conflict resolution in order to avoid necessity to revert always to judicial proceedings.

22. Within the framework of the justice part of the Šilih Project, several measures have been taken. In addition to the adoption of the amendments to the Patient Rights Act, in March 2018 a new Court Experts, Certified Appraisers and Court Interpreters Act was adopted (Official Gazette of the Republic of Slovenia no. 22/18). It will enter into force on 1 January 2019. The new act pursues several goals, including providing high quality levels of expert opinions; strengthening of the court experts' responsibility; and providing greater role of profession when dealing with professional questions.

23. Additional measures were also envisaged in the health administration area. The Ministry of Health is currently drafting a new Healthcare Quality and Safety Act with a view of preventing mistakes that might occur during the medical treatment. It is creating also a centralised database of the judicial proceedings related to malpractice cases with a purpose to strengthen the supervision over the violations of patients' rights.

24. Ministry of Health is devoting special attention to the annual reports on complaint procedures based on the Patient Rights Act and disciplinary procedures conducted before the Medical Chamber of Slovenia. Both of them provide for an avenue for patients to claim their rights in administrative procedure.

25. The Government would like to point out that the 2008 Patient Rights Act (*Zakon o pacientovih pravicah*; Official Gazette of the Republic of Slovenia no. 15/08) governs the procedure for the protection of patient's rights in the event of violations. At the end of these proceedings, the

parties can reach a settlement, decide to continue the proceedings through mediation or with a hearing before the chamber. The chamber can end the procedure with various decisions (*inter alia* it might instruct the hospital in question to issue an apology, to remedy the violations, suggests a professional supervision or disciplinary procedure before medical or another professional chamber).

26. The Court noted that in the sphere of medical negligence, the domestic legal system must afford victims a remedy before civil courts (alone or in conjunction with a remedy in the criminal courts) and that disciplinary measures may also be envisaged (§ 194 of the judgment). The Government would therefore like to explain that in medical malpractice cases a special disciplinary procedure before the Medical Chamber of Slovenia may be conducted. The chamber has its own tribunal, which may impose disciplinary and/or protective measures, which includes *inter alia* (public) reminder, the suspension or revocation of suspension of licence, apology or redress to the damaged party. The disciplinary procedure therefore allows to investigate, if a medical malpractice has occurred and redress to the damaged party can be ordered. If the damaged party is satisfied with the outcome, the proceedings in medical malpractice case can thus be ended.

27. The Court noted the importance of prompt examination of cases concerning medical negligence for maintaining public confidence in adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (§ 195), for preventing similar errors and for the safety of users of all health services (§ 196). The Government would like to point out the relevance of the administrative proceedings in that regard, as they allow for addressing and identifying errors within the health system. The institutions concerned and medical staff may be able to better and faster remedy the potential deficiencies and prevent similar errors. If all the above-mentioned procedures are not able to solve the consequences of medical error during medical treatment, rights can be nonetheless enforced within the context of the judicial proceedings.

IV AWARENESS RAISING MEAUSURES AND PUBLICATION AND DISSEMINATION

28. In addition to the above-mentioned measures, the present judgment was translated into Slovenian.

29. The translated judgment was communicated to the relevant courts that were dealing with the case in question as well as to the Supreme Court, the Prosecutor General and the Ministry of Justice.

30. The Slovenian translation of the judgment has also been published on the website of the State Attorney's Office (http://www2.gov.si/dp-rs/escp.nsf). It was therefore made accessible to judges, other legal professionals and public at large.

31. With a view to preventing similar violations the Ministry of Justice included the relevant case in the training programme of judges and prosecutors in the course of 2010. The focus of this training programme was on the criminal procedures in cases where a reasonable suspicion existed that medical treatment caused the death by negligence.

32. The Court's judgment was widely quoted in leading national legal journals, including in *Pravna praksa*:

- Neučinkovit odziv sodnega sistema na sumljivo smrt v bolnišnični oskrbi (Translation: Ineffective response of the judicial system to the suspicious death during hospital care), Pravna praksa, 2009, no. 15, p. 26;
- Predolg kazenski postopek krši pravico do družinskega življenja (Translation: Excessively long criminal procedure violates the right to family life), Pravna praksa, 2011, no. 33, p. 28;
- Poudarek na pomenu neodvisnosti sodišča in kakovosti odločitev (Translation: Emphasis on the importance of the independence of the court and the quality of decisions), Pravna praksa, 2011, no. 46, p. 27;
- Slovenija pred ESČP (Translation: Slovenia before ECHR), Pravna praksa, 2012, no. 11, p. 33;
- Odgovornost gradbinca za smrt v potresu (Translation: Builder's responsibility for death in the earthquake), Pravna praksa, 2016, no. 31-32, p. 37);
- Reforma pravne države (Translation: Rule of law reform), Pravna praksa, 2016, no. 47, pp. 30-32;
- Slovenija pred ESČP – Kratek pregled za obdobje 1994 – 2016 (Translation: Slovenia before ECtHR – A brief overview for the period 1994 – 2016), Judicial Bulletin, 2016, no. 3, pp. 175-190.

33. The Šilih Project of 2017 also contributed to awareness raising within the health sector, prosecution and judiciary. The court settlement and the adoption of the Šilih Project also seized attention of the media.

34. The authorities consider that the above measures ensured that domestic courts are aware of the Court's findings in this case and the need to comply with the Court's findings and Convention standards in similar cases.

V JUST SATISFACTION

35. The amount of just satisfaction awarded to the applicants in this case has been disbursed on 9 July 2009. The payment has been thus made within the time-limit set by the European Court.

VI CONCLUSIONS

36. The authorities of Republic of Slovenia consider that the violation at hand has ceased and that the applicants have been fully redressed for their negative consequences.

37. The authorities furthermore deem that the above-mentioned general measures taken are capable of preventing similar violations.

38. It is therefore considered that the Republic of Slovenia has complied with its obligations under article 46 § 1 of the Convention.