THIRD SECTION

CASE OF SARA LIND EGGERTSDÓTTIR v. ICELAND

(Application no. 31930/04)

JUDGMENT

STRASBOURG

5 July 2007

FINAL

05/10/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sara Lind Eggertsdóttir v. Iceland,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE,
Mrs I. BERRO-LEFÈVRE, *judges*,
and Mr S. NAISMITH, *Deputy Section Registrar*.

Having deliberated in private on 14 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 31930/04) against the Republic of Iceland lodged with the Court on 2 September 2004 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Eggert Ísólfsson and Mrs Sigurmunda Skarpheðinsdóttir on behalf of their minor daughter, an Icelandic national, Ms Sara Lind Eggertsdóttir ("the applicant").

2. The applicant, who had been granted legal aid, was represented by Mr H.Ö. Herbertsson, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Mr Thorsteinn Geirsson, of the Ministry of Justice and Ecclesiastical Affairs.

3. The applicant complained under Article 6 § 1 of the Convention that the Supreme Court had not afforded her a fair hearing before an impartial tribunal. In particular, she alleged that it had based its findings on the opinion of the employees of the respondent party.

4. On 9 May 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Sara Lind Eggertsdóttir, is an Icelandic national who lives in Reykjavík.

6. On 5 March 1998 the applicant was born at the National and University Hospital (hereinafter referred to as the NUH) in Reykjavík, which was a State hospital. Soon after her birth it became clear that she was severely handicapped both physically and mentally. Her disability is assessed at 100%.

7. In July 1998 the applicant's parents complained to the Medical Director of Iceland, who in October 1999 concluded that the child had not been given improper treatment.

8. The applicant's parents, who were represented by a lawyer, then brought proceedings on her behalf against the State of Iceland in the Reykjavik District Court. Their arguments can be described as twofold. Firstly, a mistake had been committed in the delivery room in that the doctors had reacted too late to hypoxia despite its having been diagnosed directly on the mother's arrival there. Secondly, paediatricians had made a mistake when attending to the child immediately after birth. The parents alleged that a catheter inserted into the child's umbilical artery had been abnormally bent to a U-shape and left that way for approximately 32 hours. This had been capable of causing the damage that had

occurred to the child's health. Instead the doctors should have partially withdrawn the catheter until it straightened out or, if that was not possible, inserted it into a limb.

9. The respondent requested the District Court to dismiss the applicant's claim, maintaining that the damage she had suffered to her health was a result of hypoxia during pregnancy, before the mother's arrival at the labour ward of the NUH, and that no additional damage could be linked to any possible mistakes on the part of hospital staff. The applicant was already in a serious condition when delivery was performed by caesarean section, by which time hypoxia had already caused arterial thrombosis. The position of the catheter had therefore not caused the damage to the applicant's health.

10. The District Court, sitting with one professional judge and two lay judges, one of whom was a paediatrician and the other a gynaecologist and obstetrician, heard extensive evidence from all the hospital personnel involved and from experts.

11. By a judgment of 24 April 2002, the District Court rejected the first claim described above but upheld the second claim and found the State liable to pay compensation to the applicant. It awarded her 28,522,474 Icelandic Crowns (ISK) in compensation (ISK 20,684,948 for pecuniary damage and ISK 7,756,856 for non-pecuniary damage), plus interest, as well as certain sums for legal costs, to be held by her parents on her behalf. Its reasoning on the merits included the following passages:

> "By reference to the foregoing the court concludes that proof has not been adduced to show that the plaintiff's disability was solely due to her illness following thrombosis of the aorta and the renal arteries. On the other hand, there is a significant probability that her illness following the said thrombosis at least contributed to the serious brain damage she suffered, which caused her disability and non-financial loss. Whether the plaintiff had already suffered brain damage, and the extent to which her illness may have added to that damage, is impossible to ascertain.
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> In view of the plaintiff's difficult situation as regards proof and of the rules of evidence that must be regarded as having been formed in this field of the law of compensation, the onus must be on the defendant to prove that the brain damage from which the plaintiff now suffers would have occurred even if the defendant's employees had not made the mistake of letting the catheter remain in a U-shape in her aorta for up to 32 hours. As the defendant must, in the light of the foregoing, be considered not to have succeeded in adducing such proof, the court accepts the plaintiff's view that the conditions that would render the defendant liable to pay compensation on account of her disability and non-financial loss are fulfilled.
>
> It is not possible on the basis of the available evidence and the above rule of evidence to endorse the defendant's view that only a small part of the disability can be traced to her illness caused by thrombosis of the aorta and the renal arteries. As it has not been demonstrated whether or to what extent the damage to the plaintiff's health was due to other causes, the defendant is deemed liable for her entire loss."

12. The Solicitor General appealed against the above judgment to the Supreme Court. In support thereof, he filed two statements by certain named doctors of the University Hospital commenting on the District Court's judgment and criticising its conclusion. The statements had been addressed to the Hospital's Chief Medical Executive, who apparently had endorsed them and forwarded them to the Solicitor General.

13. The Supreme Court initially scheduled the oral hearing for 24 January 2003, but on 21 January 2003 informed the applicant's lawyer and the Solicitor General that it had adjourned the hearing pending an opinion it intended to request from the State Medico-Legal Board (SMLB). On this occasion the Supreme Court gave the parties an opportunity to indicate the questions they would like to be put to the SMLB.

14. In reply, by a letter of 24 January 2003, the applicant's lawyer protested, in particular, against the Supreme Court's decision to seek the SMLB's opinion without having first offered the parties an opportunity to express their views on the measure. It was noted that, pursuant to section 1 of the State Medico-Legal Board Act, many doctors associated with the NUH, where the disputed medical services had been provided, had a seat on the Board. Moreover, the Medical Director had already expressed his views on the matter and was therefore disqualified from any further involvement. The lawyer also protested against any consideration of the matter by the hospital's employees, and demanded their withdrawal.

In the event that the Supreme Court were to decide, despite the applicant's protest, to proceed to ask the SMLB for an opinion, the applicant's lawyer specified 11 items for questions that he wished to be

put to the SMLB.

15. The Supreme Court replied on 30 January 2003 that it found no reason not to ask for the SMLB's opinion but that it would consider the applicant's proposal regarding the questions.

16. On 31 January 2003 the Solicitor General indicated 13 questions which he thought should be put to the SMLB, but did not comment on the appropriateness of asking the SMLB for an opinion.

17. On 12 February 2003 the Supreme Court formally decided to obtain an opinion from the SMLB on 19 questions relating to the matter in dispute, giving the following reasons:

> "It was difficult to ascertain from the evidence and testimonies submitted what the cause of the [applicant's] injury was, added to which some points were not as clear as would have been desirable. It was therefore deemed proper, before the case were tried by the Supreme Court, to obtain the opinion of the State Medico-Legal Board under section 2(1) and (2) of the SMLB Act and to seek answers on certain points since, according to the said Act, it is the SMLB's role to provide the courts with opinions on medical matters."

In connection with the above the Supreme Court drew particular attention to the applicant's request of 24 January 2003 for the withdrawal of certain members.

18. The SMLB was composed of the Director of Health (*Landlæknir*) of Iceland, as chair, and eight other members.

19. The SMLB delivered its opinion on 21 November 2003. It found that at the maternity ward an abnormal foetal monitor printout had been reacted to belatedly. On the other hand, there was no reason to criticise the child's treatment at the paediatric clinic following birth. The Board considered that the positioning of the catheter had not caused blood coagulation and that no mistake had been made concerning the manner in which it was placed. Thus, the Board differed from the District Court on points that were material for establishing liability to pay compensation.

20. In the context of the Board's own procedure, the matter had first been referred direct to its Forensic Chamber composed of three Board members, all of whom were employees at the University Hospital and decided that they were not disqualified. The Forensic Chamber had sought two opinions on the applicant's birth, one – by a consultant surgeon and member of the Board – on the child's case history after birth, and the other by an external obstetrician on the mother's pregnancy and the child's birth.

21. At a meeting held on 18 November 2003, the SMLB had discussed and unanimously approved the two doctors' opinions and adopted its final opinion that was transmitted to the Supreme Court. The session had been presided over by one of the Forensic Chamber's three members, who had replaced the SMLB's Chair who had withdrawn on account of his previous involvement with the case as the Medical Director of Iceland.

22. At the oral hearing on 27 February 2004 before the Supreme Court, the applicant's lawyer complained of the procedure before the SMLB, but to no avail.

23. By a judgment of 11 March 2004 the Supreme Court overturned the District Court's finding that the State was liable to pay compensation to the applicant for negligence by the University Hospital.

24. Before turning to the merits, the Supreme Court dealt with the issue of disqualification:

> "As regards the conclusion of the SMLB and its Forensic Chamber, the respondent [the applicant] observes that doctors employed at the National and University Hospital took part in handling the matter and bringing it to a conclusion; that they, as employees of the appellant, were disqualified from doing so, and that consequently the SMLB's opinion was to be entirely disregarded.
>
> As noted above, it is the role of the SMLB to provide the courts with opinions on medical matters. The situation in Iceland is such that most experts in the field of medical science are employed at the National and University Hospital. Of the SMLB's nine members four are employed at the hospital, but none of the members taking part in this matter is employed at the department of obstetrics and gynaecology, nor at the Barnaspítali Hringsins paediatric hospital, and none was involved with the treatment of the respondent's illness, or of her mother. Furthermore, none of them is a member of the hospital's highest management, which has taken a stand with respect to this matter in conformity with the opinion of the doctors of the departments of obstetrics and neonatology. It has not been demonstrated that the Board's handling of the case was contrary to the SMLB Act and Regulation no. 192/1942 on the Procedure of the SMLB, or that the Board's resolution was influenced by any extraneous considerations. The Board's opinion and all other opinions provided in this case will have to be assessed in the light of the positions occupied by those who provide them."

25. As to the merits, the Supreme Court concluded:

"It is generally acknowledged that the use of arterial catheters may entail a danger of thrombosis. The respondent was dangerously ill and had been placed in a respirator, which demanded a monitoring of blood oxygen and acid/base levels and blood pressure, and the administration of fluids and drugs. The situation in which the doctors found themselves when they decided to leave the catheter alone must be kept in mind; as noted above, this provided the only arterial access, as matters had developed. It has not been established that a catheter lying in a loop entails an increased risk of thrombosis.

As explained above, the experts consider that the respondent's brain damage was first and foremost due to hypoxia. The damage revealed by examinations of her brain is consistent with hypoxia, and it must be regarded as highly likely that this was the cause of her loss. Brain damage that might have followed thrombosis in the fifth day after the respondent's birth would on the other hand have appeared as haemorrhage due to hypertension, but such brain damage is not extensive. It is not, therefore, possible to say that there is a causal relationship between the positioning of the catheter and the respondent's brain damage. It has not been demonstrated that the respondent's loss is traceable to a fault on the part of the appellant's employees."

II. RELEVANT DOMESTIC LAW

26. The respondent Government drew particular attention to the following provisions of the Code of Civil Procedure, no. 91/1991:

Article 44

"The judge shall in each case determine, by an assessment of the evidence adduced, whether an assertion relating to the facts at issue shall be regarded as proven, subject to any binding rules in this respect which may be expressly laid down by statute."

Article 46

"The parties shall collect evidence in so far as they are able to determine the subject matter of the action. The judge may, as he may consider necessary for purposes of clarification, invite the parties to collect evidence relating to particular facts of the case. If the judge deems that a fact, which a party desires to establish, is obviously irrelevant or that such evidence does not serve a purpose, he may prevent the party from adducing such evidence."

Article 104

"If the judge discovers, after he has received a case for adjudication, that the submissions of a party or the information on the facts provided by a party is seriously lacking in clarity, and the deficiency can be regarded as being due to the judge not having provided the parties with adequate guidance or made his observations known to them, he shall summon the parties to appear in court and, as the case may be, question them or draw their attention to the need for further evidence. The proceedings may be deferred as necessary; finally, the judge shall provide the parties with an opportunity to make observations supplementing their previous oral argumentation, and receive the case for adjudication anew."

Article 111

"The judge shall not, in his judgment or decision, grant any remedy that goes beyond that sought by the parties, except on points he raises on his own initiative. Any claim that has not been made in the summons shall be dismissed by the court, unless the defendant has agreed that the judge may consider it. The same shall apply to any increase in a monetary claim or any other changes to the defendant's detriment.

The judge may not base his decision on a statement of facts or an objection which was not made during the proceedings, when it could have been. The judge shall assess, in the light of the circumstances, to what extent account should be taken of a fact referred to in a submitted document which was not specifically mentioned in support of the application or claim during oral pleadings.

The judge shall assess, in the light of the circumstances, whether a party's silence with respect to an assertion or claim made by his adversary shall be regarded as an admission."

Article 163

"1. Judgments of the Supreme Court shall be based on the matters submitted in the relevant case and the facts that have been proved or admitted. The provisions of Article 111 shall apply to the Supreme Court's judgments.

2. The Supreme Court may base its resolution of a case on requests or factual submissions which were not made to the district court, provided they were referred to in the party's statement of case, the basis of the litigation remains unaltered,

the failure to make them to the district court was excusable, and the party's rights would be adversely affected if they were not considered."

27. The State Medico-Legal Board Act, No. 14/1942 ("the SMLB Act"), contains *inter alia* the following provisions:

Section 2

"The State Medico-Legal Board shall have the role of providing the courts, the prosecution authorities and the supreme health authorities with expert opinions on medical matters.

Among its functions shall be the provision of opinions on any medical certificates submitted to the courts, provided these are sent to the Board in accordance with a judicial decision.

The State Medico-Legal Board shall provide the supreme health authorities with its opinions as to the propriety of a particular measure, action or conduct on the part of a doctor, dentist, masseur, pharmacist nurse, midwife or other similar health professional.

The State Medico-Legal Board shall provide the supreme health authorities with its opinions relating to health measures of extensive scope, in particular measures to check the spread of infectious diseases."

Section 3

"The State Medico-Legal Board shall only attend to matters referred to the Board in accordance with the provisions of section 2 by the parties stated therein.

The Board shall not provide opinions on the mental condition or criminal responsibility of any person, unless an expert opinion following suitable examination has already been obtained, assuming such examination was possible.

The Board shall not provide an opinion on a person's cause of death, unless an expert opinion following an autopsy, or a report on loss of life in accordance with the applicable legislation in cases of violent or sudden death, has already been obtained, assuming such evidence was available."

Section 4

"The State Medico-Legal Board shall seek the opinions of outside experts on matters that are not within the specialist knowledge of its members.

Before invalidating a doctor's certificate the board shall, if possible, offer the doctor in question an opportunity to put forward his arguments in support of his view.

The Board shall, if possible, consult the person in question, and his professional organisation, on any matters specifically relating to a measure, an action or the conduct of a doctor or other health professional (cf. section 2, third paragraph), before providing its opinion."

Section 5

"No member of the State Medico-Legal Board shall take part in deciding a matter relating to himself or his principal, or with respect to which he has previously taken a stand, personally or in an official capacity. If the Board is prevented from carrying out its function as a result of any of its expert members being unable to take part in deciding a matter within his speciality, the Minister shall appoint such other expert as the Board may propose to replace him for the consideration of that particular matter."

THE LAW

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

28. The applicant complained that, in the proceedings before the Supreme Court, she had not been afforded a fair hearing before an impartial tribunal as required by Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

29. The Government contested that argument.

A. Admissibility

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

B. Merits

1. *Submissions of the parties*

(i) The applicant

31. The applicant complained under Article 6 § 1 of the Convention that the Supreme Court had not afforded her a fair hearing before an impartial tribunal in that: (1) it had decided of its own accord to take evidence without any involvement of the parties; (2) without giving the parties an opportunity to comment on the measure; (3) and with the aim of overturning the expert conclusions reached at first instance thereby favouring the applicant's adversary, the NUH; (4) it had based its findings on the opinion of the employees of the respondent party; and (5) decided the issue of disqualification on the basis of the wrong standard, namely that it had not been demonstrated that extraneous considerations had influenced the Board's opinion.

32. The applicant maintained that it was contrary to the principle reflected in Articles 46, 104, 111 and 163 of the Code of Civil Procedure on the parties' rights to determine the subject matter of a civil case for a court to decide of its own accord to seek further evidence in the case. It was incomprehensible that such a decision should have been taken without giving the parties an opportunity to comment on the measure beforehand. A large number of similar cases had been decided without first obtaining the SMLB's opinion. It had been the view of both parties that the evidence that had already been submitted was sufficient for the Supreme Court's examination. In the applicant's view, since the parties had, in accordance with their right to determine the subject matter of the dispute, been in agreement as to what evidence should constitute the basis for the Supreme Court's adjudication, the latter had had no authority to take investigative measures of its own. When the Supreme Court had, contrary to the principles of Icelandic procedural law, nevertheless sought of its own accord the opinion of the SMLB, the applicant had had legitimate grounds to fear that it lacked the impartiality required by Article 6 § 1.

33. Moreover, in the applicant's submission, it had to be considered incompatible with the requirement of impartiality laid down by Article 6 § 1 and the principle of equality of arms inherent in the notion of fairness in that provision for a national court to seek the opinion of experts who were employees of a party to a case and subsequently to base its judgment on their opinion. Four of the SMLB members had been employees of the adversary, the NUH, where the alleged wrongdoing had occurred. Even though they had not been previously involved in the case, their employer, on whom they depended for their livelihood, had already taken a stance on the matter. The likelihood of these employees disagreeing with the firmly stated views of their employer and colleagues at the NUH was negligible.

34. The applicant further submitted that three of the four SMLB members who were employees of the NUH had constituted the Forensic Chamber, whose opinion had been endorsed by the SMLB before being transmitted to the Supreme Court. Since the Supreme Court had based its judgment solely on the SMLB's opinion, that body should have satisfied the requirements of independence and impartiality. However, it did not do so.

35. The applicant disputed the Government's contention that it was impossible to find experts to provide an opinion on such specialised and complicated medical issues as those in the present case without any of them having links to the NUH. There were a number of Icelandic medical experts working abroad who could have been called upon to take part in the SMLB's examination. For example,

before the publication of its own opinion, the Directorate of Health, which had dealt with her case at the administrative level, had sought the opinion of two Icelandic doctors working abroad. Nothing in the SMLB Act would have prevented this. The Government's submission was especially peculiar in view of the fact that none of the nine members of the SMLB who had been involved was a specialist in the relevant field, paediatrics, despite the District Court's finding that it was in the paediatric unit that liability had arisen.

(ii) The Government

36. The Government maintained that the requirements of a fair trial had been fulfilled in every respect, both as regards any individual aspects of the case, and in relation to the trial as a whole.

37. The Government emphasised that, before the domestic courts, the applicant's case had been characterised by great uncertainty as regards proof, with the conclusion depending on the resolution of the disputed medical issue whether the inaccurate positioning of a catheter in the newborn infant's umbilical artery had led to permanent brain damage, whether the brain damage had occurred before the applicant's birth or whether it had been a result of concurrent causes. The Supreme Court's conclusion was obviously based on a comprehensive assessment of the evidence as a whole, i.e. both the expert opinions submitted to the District Court, provided by doctors from both the NUH and elsewhere, and those provided by the SMLB in the form of answers to particular questions, where four of the nine members were employees of the NUH. The applicant's contention that the Supreme Court had taken sides with one of the parties and therefore sought the SMLB's predictable opinion was groundless.

38. The Government invited the Court also to reject, as being unsubstantiated, the applicant's allegation that the parties had agreed that the case should be adjudicated by the Supreme Court on the basis of the evidence at hand. Nor was it correct, as had been suggested by the applicant, that in the absence of any request to that effect by any of the parties the Supreme Court did not have the power to seek an opinion from the SMLB. In fact, it clearly followed from sections 2 and 3 of the SMLB Act that in civil proceedings, as in the instant case, it was not the parties but only the Supreme Court that was empowered to make such a request. To that extent the SMLB Act provided for a narrow and longstanding exemption from the general rule of Icelandic law on civil procedure, that the parties in a civil case had the power to determine the subject matter of the action.

39. As to the applicant's objections regarding the composition of the SMLB, the Government pointed out that in view of the small size of the population of Iceland, which is inhabited by some 300,000 people, it was not possible to find experts to provide an opinion on medical questions as specialised and complicated as those at issue in the applicant's case, without any of them having links to the NUH, which was by far the largest and most advanced hospital in Iceland. In the Government's opinion, there was ample support in the Convention institutions' case-law for the view that it would not be practicable for an expert to be disqualified from providing an opinion to a court simply because he or she was employed by a public institution involved in the case. Thus it was not possible to apply the same standards to experts as to judges. In this regard the Government prayed in aid the decisions in the cases of *Beleggings- en Beheersmaatschappij Indiana B.V. v. the Netherlands* (dec.), no. 21491/93, of 29 November 1995, and *Wolfgang Blum and Klaus Ignaz Jacobi v. Austria* (dec.) no. 26527/95 of 18 November 1995.

40. The Government emphasised that both parties had been afforded a reasonable opportunity to present their case, including evidence, under conditions that had not placed them at a disadvantage vis-à-vis their adversary. There was no doubt, either, that the status of the parties had been equal and that they had had the same opportunities to adduce evidence and to submit questions to the SMLB. The equal right of the parties to have questions put to the SMLB had been fully respected, and both had exercised that right. They had also had unlimited and equal access to the evidence and the case had been argued orally at a public hearing.

2. Assessment by the Court

41. In their pleadings, the Government emphasised the need to take into account the particular demographic situation in Iceland, with its relatively small population, and the difficulty of finding suitable experts who did not have any ties to the NUH. Inasmuch as it implies that variable standards should apply to the competent "tribunal" depending on practical considerations, the Court does not accept the Government's reasoning (see *Walston v. Norway*, no. 37372/97 (dec.), 11 December 2001). The question whether a tribunal is impartial for the purposes of Article 6 § 1 must be determined solely according to the principles laid down in the Court's case-law, namely according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Pétur Thór Sigurðsson v. Iceland*, no. 39731/98, § 37, ECHR 2003-IV; and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

42. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary.

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid.).

43. The Court notes that in disputing the Supreme Court's impartiality in the present case, the applicant advanced a variety of arguments, all related to the SMLB. These can be divided into two groups, one relating to the manner and purpose of the consultation of the SMLB by the Supreme Court and the other concerning the SMLB's composition and its position and role in the proceedings before the Supreme Court.

44. As to the first group of arguments, the Court is not convinced by the applicant's submission that the Supreme Court's decision to request an expert opinion from the SMLB without the parties' consent gave rise to any misgivings under Article 6 § 1. The Court sees no reason to call into doubt the correctness of the Supreme Court's interpretation and application of domestic law to the effect that it was empowered to request an opinion from the SMLB irrespective of the parties' stance on that question. As explained by the Government, the impugned request had a legal basis in sections 2 and 3 of the SMLB Act and this was an exception to the general rule of Icelandic law on civil procedure that the parties to a civil case had the right to determine the subject matter of the action. The Court further reiterates that the Convention does not lay down rules on evidence as such. In the Court's view, a decision to appoint an expert, be it with or without the parties' consent, is a matter that normally falls within the national court's discretion under Article 6 § 1 in assessing the admissibility and relevance of evidence, which has been recognised by the Court in its case-law (see *Eskelinen and Others v. Finland*, no. 43803/98, § 31, 8 August 2006; and *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 46).

45. Nor does the Court find any support for the applicant's argument that the Supreme Court's purpose in appointing the SMLB to give an expert opinion was to overturn the District Court's findings made on the basis of the expert conclusions at first instance. As can be seen from the Supreme Court's decision, the reasons for seeking the SMLB's opinion related to the complexity and unclearness of the evidence submitted to it. The applicant has adduced no proof that the decision was founded on any personal bias against her. Nor are there any objective grounds for doubting the Supreme Court's impartiality in taking that decision.

46. In these circumstances, the Court is satisfied that the Supreme Court's decision to commission an expert opinion from the SMLB clearly fell within its discretion under Article 6 § 1 of the Convention and disclosed no lack of impartiality or unfairness for the purposes of this provision.

47. The second group of arguments is more problematic, in that it does not concern the composition of the Supreme Court but that of the SMLB and its procedural position and role in the proceedings

before the Supreme Court. It should be noted that Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial "tribunal" and does not expressly require that an expert heard by that tribunal fulfils the same requirements (see, *mutatis mutandis*, *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 436, § 33). However, the opinion of an expert who has been appointed by the competent court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues. In its case-law the Court has recognised that the lack of neutrality on the part of a court appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial (see *Bönisch v. Austria*, judgment of 6 May 1985 (Merits), Series A no. 92, §§ 30-35; and *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 21, § 33). In particular, regard must be had to such factors as the expert's procedural position and role in the relevant proceedings (see *Bönisch*, cited above, §§ 31-35).

48. In the instant case, the four members of the SMLB who were employed as doctors at the NUH, but who had not had any prior involvement in the case, did not withdraw, unlike the chairperson who withdrew because he had been involved in his capacity as the Medical Director of Iceland. Three of the four members in question had also been members of the Board's Forensic Chamber and (with the assistance of two other experts) had prepared the Board's own examination before it submitted its final report to the Supreme Court. The Court considers that the ties of those four members to the NUH could give rise to certain apprehensions on the part of the applicant. While such apprehensions may have a certain importance, they are not decisive; what is decisive is whether the doubts raised by appearances can be held to be objectively justified (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 21, § 44).

49. In this connection, the Court notes that in view of the SMLB's special statutory role as provider of medical opinions to *inter alia* the courts, it can be assumed that the SMLB's opinions on matters referred to it carry greater weight in their assessment than those of an expert witness called by one of the parties (see *Bönisch v. Austria*, judgment of 6 May 1985, Series A no. 92, pp. 15-16, § 33). Indeed, as is apparent from its own reasoning, the Supreme Court attached significant weight to the SMLB's expert opinion in its decision to quash the award of compensation made by the District Court and to reject the applicant's compensation claim (see paragraph 25 above).

50. An additional factor illustrating the SMLB's dominant role in the proceedings, albeit not as such incompatible with the notion of fairness within the meaning of Article 6 of the Convention (see *Sigurdur Gudmundsson v. Iceland* (dec.), 31 August 2006), was the fact that, as already mentioned above, the Supreme Court was empowered to request an opinion from the SMLB irrespective of the parties' stance on the matter and that it was the Supreme Court and not the parties that formulated and put the written questions to the SMLB.

51. It is also to be noted that the issue to be determined in the relevant proceedings before the Supreme Court was whether the State was liable to pay compensation on account of medical negligence in connection with the applicant's birth at the very hospital where the four members were employed, the NUH. Their task was not simply to give an expert opinion on any given subject that might or might not differ from an opinion previously stated by their colleagues and the management at the NUH on the same subject. In preparing the SMLB's expert opinion for the Supreme Court, the four members in question were called upon to do something more intricate, namely to analyse and assess the performance of their colleagues at the NUH with the aim of assisting the Supreme Court in determining the question of their employer's liability. Therefore, the Court is unable to share the Government's view that this was merely a question of experts being employed by the same administrative authority as that involved in the case (see *Bönisch*, cited above, § 32; cf. *Brandstetter*, cited above, p. 21, §§ 44-45; *Zumtobel v. Austria*, Commission's report of 30 June 1992, § 86, ECHR Series A no. 268-A; *Beleggings- en Beheersmaatschappij Indiana B.V. v. the Netherlands* (dec.) no. 21491/93, 29 November 1995; and *Wolfgang Blum and Klaus Ignaz Jacobi v. Austria* (dec.) no. 26527/95 of 18 November 1995).

52. Furthermore, while the doctors in question were not assigned to the hospital department where the disputed events had taken place, their hierarchical superior, the Chief Medical Executive, had taken a

clear stance against the District Court's judgment by endorsing critical statements (see paragraph 12 above) by two hospital doctors that were forwarded to the Solicitor General and annexed to the State's appeal to the Supreme Court (see, *mutatis mutandis*, *Sramek v. Austria*, judgment of 22 October 1984, Series A no. 84, pp. 19-20, §§ 41-42, relating to the independence of civil servant members of a tribunal in a subordinate position vis-à-vis one of the parties). In the Court's view, that endorsement is an important consideration. Conversely, the Court sees no need to consider the applicant's additional argument that the Supreme Court's refusal to exclude the said statements from the case-file disclosed a lack of fairness in the proceedings. Indeed, this was not specifically mentioned as a complaint in her initial application under the Convention.

53. In the light of the above, the Court considers that the applicant had legitimate reasons to fear that the SMLB had not acted with proper neutrality in the proceedings before the Supreme Court. It further transpires that, as a result of this deficiency and of the SMLB's particular position and role, the applicant's procedural position was not on a par with that of her adversary, the State, as it was required to be by the principle of equality of arms.

54. What is more, the Supreme Court's objective impartiality was compromised by the SMLB's composition, procedural position and role in the proceedings before it.

55. Against this background, the applicant was not afforded a fair hearing before an impartial tribunal before the Supreme Court. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

57. The applicant sought (1) ISK 28,522,474 (approximately 340,000 euros (EUR) in compensation for pecuniary damage, which corresponded to the award made by the District Court under this head. She asked for this amount to be increased by amounts of interest which she specified. The applicant further claimed (2) ISK 10,000,000 (approximately 116,000 euros (EUR)) in respect of non-pecuniary damage on account of suffering and distress occasioned by the violation the Convention. She maintained that after the District Court had ruled in her favour and ordered the State to pay her compensation for pecuniary and non-pecuniary damage, the Supreme Court had deprived her of her award by quashing that ruling in a procedure that had violated her right to a fair trial before an independent and impartial tribunal. Had it not been for the fact that the Supreme Court had obtained and attached decisive weight to the SMLB's opinion, in breach of the Convention, it would most probably have reached the same conclusion as the District Court. There was thus a causal connection between the violation of the Convention and her damage.

58. The Government disputed that any causal link had been demonstrated between the alleged violation of Article 6 of the Convention on the one hand and the conclusion reached in the Supreme Court's judgment on the other. In their view, the claim for pecuniary damage should be rejected. As regards non-pecuniary damage, the Government were of the opinion that the finding of a violation of the Convention would in itself constitute adequate just satisfaction.

59. The Court observes that an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1. It cannot speculate as to the outcome of the trial had the position been otherwise. Nevertheless, the Court does not exclude the possibility that the applicant suffered, as a result of the potential effects of the violation found, a loss of real opportunities of which account must be taken, even if the prospects of realising them were

questionable (see, *mutatis mutandis*, *Bönisch v. Austria* (Article 50), judgment of 2 June 1986, Series A no. 103, p. 8, § 11).

60. In addition, the applicant must have suffered anguish and distress from the violation which this finding cannot adequately compensate (see *Pétur Thór Sigurðsson* , cited above, § 51; and *H. v. Belgium*, judgment of 30 November 1987, Series A no. 127-B, p. 37, § 60). Deciding on an equitable basis, the Court awards the applicant a total amount of EUR 75,000 under this head.

B. Costs and expenses

61. The applicant also claimed altogether ISK 3,850,163 (approximately EUR 45,000) for the costs and expenses incurred before the Court, in respect of the following items:

(a) her lawyer's work (52 hours at an hourly rate of ISK 35,000);

(b) his associate Mrs Hulda Árnadóttir's work (41.75 hours at an hourly rate of ISK 22,000);

(c) and his colleague Mrs Hrafnhildur Kristinsdóttir's (paralegal) work (for 29.5 hours at an hourly rate of ISK 12,000);

(d) ISK 62,250 for the cost of a translation from Icelandic into English of her initial complaint.

She also asked for the above amounts to be increased by 24.5% to cover value added tax (VAT).

62. The Government disputed the claim, arguing that the number of hours was excessive and that the hourly rate charged by the applicant's lawyer was unreasonably high.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court does not find that all of the fees claimed under items (a) to (c) were necessary (see paragraphs 44 to 46 above, compare paragraphs 47 to 55). Item (d) should be granted in its entirety. Regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the total sum of EUR 18,000 (inclusive of VAT) for costs and expenses incurred in the proceedings before the Court, from which EUR 850 received in legal aid from the Council of Europe falls to be deducted.

C. Default interest

64. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 75,000 (seventy five thousand euros) in respect of damage;

(ii) EUR 18,000 (eighteen thousand euros) in respect of costs and expenses, less the EUR 850 (eight hundred and fifty euros) she has received by way of legal aid from the Council of Europe;

(iii) any tax that may be chargeable on the above amounts;

(b) that these sums are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley NAISMITH Boštjan M. ZUPANČIČ Deputy Registrar President

SARA LIND EGGERTSDÓTTIR v. ICELAND JUDGMENT

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