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STAFF OF THE COURT OF CASSATION
REPUBLIC OF ARMENIA

**5, V. Sargsyan St, 0010, Yerevan, RA,
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‘ԴՂ6-Ե-2514’
№ ‘ԵԿԴ/0077/11/12’

April 23, 2013

To S. Antonyan, the legal successor to the aggrieved party,
/4/13 Narekatsi, Vanadzor/

Hereby, a copy of the ruling by the RA Court of Cassation of February 15, 2013 is submitted.

The enclosed copy of the ruling contains 24 pages.

Assistant Judge

/signature/

E. Vardapetyan

**REPUBLIC OF ARMENIA
COURT OF CASSATION
RULING**

‘ԵԿԴ/0077/11/12’

IN THE NAME OF THE REPUBLIC OF ARMENIA

Republic of Armenia
Court of Criminal Appeals
Ruling on case № ‘ԵԿԴ/0077/11/12’
Presiding Judge M. Rehanyan

The Criminal Chamber of the RA Court of Cassation (hereinafter referred to as the Criminal Court),

presided by D. AVETISYAN

with associate judges:
A. POGHOSYAN
H. ASATRYAN
S. AVETISYAN
Y. DANIELYAN
S. OHANYAN

and secretary M. Petrosyan

Seal

on February 15, 2013

in the city of Yerevan

upon considering at the public hearing the cassation appeal by Susanna Antonyan, the legal successor to the aggrieved party, filed against the ruling of the RA Court of Criminal Appeals (hereinafter also referred to as *Court of Appeal*) of August 31, 2012,

ESTABLISHED

1. Procedural background of the case

1. On June 23, 2010, the Kentron Investigation Division of Yerevan City Investigation Department of RA Police General Investigation Department instigated criminal proceedings (Case № 13130610) under Article 130(2) of the RA Criminal Code, i.e. failure to implement or improper implementation of professional duties by medical and support personnel which through negligence caused the patient's death.

The case proceedings were closed by the decree dated January 22, 2011 of A. Poghosyan, senior investigator at the Kentron Investigation Division of Yerevan City Investigation Department of RA Police General Investigation Department, due to the absence of element of crime.

On February 7, 2011, H. Badalyan, Prosecutor of Yerevan City, ruled to reverse the senior investigator A. Poghosyan's decree of January 22, 2011 on closing the criminal proceedings and submitted the case for supplementary investigation.

2. Following supplementary investigation, the senior investigator A. Poghosyan ruled on March 30, 2012 to dismiss the criminal case and not to initiate criminal prosecution against the sexual pathologist A. Baghdasaryan as well as the medical personnel of the Sexopathologic Rehabilitation City Center LLC, Vanadzor Hospital Complex № 1, Vanadzor Infection Hospital and Yerevan 'Nork' Infection Hospital, due to the absence of element of crime in their actions.

S. Antonyan, the legal successor to the aggrieved party, appealed the above decree to the RA Prosecutor General that was dismissed by ruling of H. Badalyan, Prosecutor of Yerevan City, of April 25, 2012.

3. On May 4, 2012, S. Antonyan appealed to the First Instance Court of General Jurisdiction of Kentron and Nork-Marash administrative districts of Yerevan (hereinafter also referred to as *first instance court*) to reverse senior investigator A. Poghosyan's decree of March 30, 2012 on dismissing the criminal case.

On June 27, 2012, the first instance court dismissed the appeal of the legal successor S. Antonyan.

4. Upon considering the appeal of the legal successor to the aggrieved party, the Court of Appeal ruled on August 31, 2012 to dismiss the appeal and leave the ruling of the first instance court dated June 27, 2012 legally effective.

5. S. Antonyan, the legal successor to the aggrieved party, appealed the ruling of the Court of Appeal to the Court of Cassation. On December 14, 2012, the latter ruled to consider the appeal.

The parties to the trial submitted no response to the appeal.

2. Essential facts for consideration of the cassation appeal

6. On May 31, 2010, S. Antonyan reported to the RA General Prosecutor's Office that after her son A. Antonyan underwent medical examination and treatment by Dr. A. Baghdasaryan at the Sexopathologic Rehabilitation City Center LLC, his state deteriorated rapidly, and he died on April 5, 2010 (*see* criminal case, volume 1, pp. 2-3).

Throughout the criminal investigation, S. Antonyan kept arguing that her son had contracted the disease of hepatitis B that caused his death in course of his examination and treatment by Dr. A. Baghdasaryan (*see* criminal case, volume 1, pp. 36-38, 41-42, 87-90, volume 2, pp. 53, 60-61, 134-135, 144, 200-201, volume 3, pp. 25- 26, 53-54, 75-76, 87-88).

7. The criminal case contains the enclosed records of 3 emergency calls for A. Antonyan seized from the Emergency Unit of the Vanadzor № 1 Hospital Complex CJSC. Accordingly, the ambulance crew who arrived at A. Antonyan's place diagnosed "stenocardia attack" and rendered necessary medical aid (*see* criminal case, volume 1, pp. 228-231).

8. On July 6, 2010, the preliminary investigative agency submitted a letter to the head of the Sexopathologic Rehabilitation City Center LLC requesting to "... assign the competent staff to make available to the investigative agency copies of all the documents on the late Arman Antonyan (patronymic Samvel) /born 1980 and registered at 4/13 Narekatsi, Vanadzor/ who sought treatment at your Center" (*see* criminal case, volume 1, p. 59).

On July 8, 2010, the preliminary investigative agency was informed by letter that "(...) Arman Antonyan (patronymic Samvel) was treated during the period between January 25 to February 19 of this year inclusive at the Sexopathologic Rehabilitation City Center LLC with the diagnoses below: excretory-toxic infertility, concomitant ureaplasmosis, recurrent urethritis and vesiculitis,

parenchymatous prostatitis. The medical history was handed over to the patient" (*see* criminal case, volume 1, p. 60).

9. Dr. A. Baghdasaryan testified in course of the preliminary investigation that A. Antonyan had undergone medical examination in November 2009 and received a treatment course starting from the mid-January 2010. Throughout the period above, A. Antonyan took pills, received intramuscular injections and massage every day on a 15-day basis. The intramuscular injections were performed by the nurse Sonya Shahsuvaryan. Upon completing the treatment, A. Antonyan's medical records were handed over to him (*see* criminal case, volume 1, pp. 80-82).

Later, A. Baghdasaryan stated that A. Antonyan had applied to their clinic with complaints of a 9-year primary infertility that he had been treated for many times in Yerevan, Vanadzor and Georgia. The patient mentioned in his anamnesis that during the months of September and October 2009 he had received treatment at the Center for Family Planning and Sexual Health. Dr. A. Baghdasaryan also mentioned that for persons suffering with primary infertility for 9 years, extramarital relationships and therefore, contracting hepatitis B through sexual contacts cannot be ruled out (*see* criminal case, volume 2, pp. 1-5).

10. The letter of the Chief of the Vanadzor division of the RA Police Lori marz (region) department dated February 28, 2011 reads as follows: "(...) I hereby report to the effect of the data obtained through the measures under the criminal proceedings that during his lifetime Arman Antonyan (patronymic Samvel) (...) was not involved in any extramarital relationship. The Vanadzor police division has never made records of A. Antonyan.

A. Antonyan had no close friends and mostly interacted exclusively with his family members. He had no predisposition to drug abuse and was not registered as a drug addict at the Vanadzor police division" (*see* criminal case, volume 2, p. 133).

According to the note of March 22, 2011 from the Psychiatric Medical Centre CJSC, A. Antonyan was not registered at the Narcological Clinic (*see* criminal case, volume 2, p. 141).

According to the letter of the Center for Family Planning and Sexual Health dated June 23, 2011, A. Antonyan had neither applied to the center for treatment, nor undergone any medical examination (*see* criminal case, volume 2, p. 196).

The fact that A. Antonyan had neither received infertility treatment at any other clinic, nor abused drugs, nor been involved in any extramarital relationships, was ascertained in the testimonies of Antonyan's mother, wife, friends and neighbors (*see* criminal case, volume 1, pp. 84-85, 87-90; volume 2, pp. 173-184).

The laboratory blood test of A. Antonyan's wife, G. Nikolayeva, revealed that she had no viral hepatitis (*see* criminal case, volume 2, p. 38).

11. The decree of the preliminary investigative agency of August 3, 2010 prescribed a forensic committal examination assigned to the experts of the Forensic Examination Committee of the RA Ministry of Health (*see* criminal case, volume 1, pp. 128-130). S. Antonyan did not familiarize herself with the decree on the forensic examination.

According to the expert opinion following the forensic committal examination, A. Antonyan's death was caused by acute liver failure resulted from the fulminant viral hepatitis B (fulminant malignant form), with focal necrosis of liver cells. The viral hepatitis B is transmitted parenterally; it is transmitted by blood and sexual contacts. The incubation (latent) period lasts from 1.5 to 6 months, and the acute course of the disease, with hepatic coma, might have developed since the very day of the clinical manifestation of the disease. As provided by the records of emergency calls, the clinical picture of the disease was manifested 4 or 5 days before Antonyan's death (*see* criminal case, volume 1, pp. 240-257).

On December 14, the preliminary investigative agency sent a copy of the forensic expert opinion above to S. Antonyan (*see* criminal case, volume 2, p. 26).

12. The decree of the preliminary investigative agency of July 13, 2011, prescribed another forensic committal examination assigned to the experts of the Republican Scientific-Practical Center of Forensic Medicine of the RA MoH (*see* criminal case, volume 2, pp. 219/1-219/5). Again, S. Antonyan did not become familiar with the decree on the reexamination.

According to the expert opinion № '127/22' of December 29, 2011 resulting from the forensic committal reexamination, A. Antonyan's death was caused by acute liver failure and hepatic encephalopathy developed as a consequence of the fulminant (fulminant and malignant) viral hepatitis B. The experts noted that the possibility of contracting a contagious disease, including hepatitis B, in course of practical medical measures could not be excluded. Usually hepatitis B is transmitted parenterally (by blood) and sexually. In this case, it is impossible to state when A.

Antonyan might have contracted the disease, as it can date back to around 1.5 to 6 months, i.e. the latent period of the disease. While the treatment by A. Baghdasaryan did not call for a blood test, it would be advisable to assign a blood test to detect hepatitis B and to determine the functional state of the liver before prescribing relevant remedies, especially those with hepatotoxic effect, such as the antibiotic Rifampicin (*see* criminal case, volume 3, pp. 42-47).

On January 10, 2012, the preliminary investigative agency sent a copy of the forensic reexamination expert opinion above to S. Antonyan (*see* criminal case, volume 3, p. 49).

13. On February 24, 2011, the preliminary investigative agency sent a letter to the RA Ministry of Health which read as follows: "(...) To ensure the impartiality and completeness of the criminal proceedings, we hereby request to assign the competent staff to check and make available as soon as possible whether there are any cases of fulminant hepatitis B registered in the RA within the past 3 years, and if yes, make available the biographical data of such patients and the medical facilities that treated each of them.

If possible, also make available the data on the patients died from this disease and the relevant medical facilities.

Please, also clarify the procedure for storing and keeping medical records at the medical facilities of the Republic of Armenia and whether the attending doctor is competent to hand over the medical record to the patient upon completing his/her treatment course rather than to store it in the archive of the facility, and if yes, please specify such cases" (*see* criminal case, volume 2, p. 131).

The reply to the above-mentioned letter of the preliminary investigative agency is missing from the case materials.

14. On February 20, 2012, the preliminary investigative agency submitted another similar letter to the Ministry of Health (*see* criminal case, volume 3, p. 126).

On March 12, 2012, the Chief of Staff of the Ministry of Health stated in his reply to the letter above: "(...) The Sexopathologic Rehabilitation City Center LLC provides medical care and services (...) under the license K-XX-000837. The company functions in compliance with its own charter.

We also state hereby that only general cases of viral hepatitis B are reported to the Ministry of Health through administrative statistical reports, while cases of fulminant viral hepatitis B are not reported separately.

Therefore, complete information on the issue above calls for some extra data to be collected.

We will further inform you on the findings" (*see* criminal case, volume 3, p. 136).

15. On February 22, 2012, S. Antonyan applied to the criminal preliminary investigative agency to recognize her as the legal successor to the aggrieved party under the investigation into the death of her son (*see* criminal case, volume 3, p. 124).

On March 5, 2012, the preliminary investigative agency sent a letter to S. Antonyan that read as follows: "In response to your application of February 22, 2012, we hereby state that (...) the investigation into the criminal case No. 13130610 at the Kentron Investigation Division has not established the evidence of crime, i.e. that the death of A. Antonyan was caused due to an act prohibited by the Criminal Code, and therefore, you cannot be recognized as his legal successor, since a close relative can be recognized as a legal successor to the person if the latter died or lost his/her ability to express his/her own will only in consequence of a crime" (*see* criminal case, volume 3, p. 134).

16. On March 15, 2012, the head of the Kentron Investigation Division of Yerevan City Investigation Department of RA Police General Investigation Department gave a written assignment to investigator A. Poghosyan "to recognize Susanna Antonyan, the mother of late Arman Antonyan, as the legal successor to the aggrieved party under the criminal case No. 13130610 and clarify her rights and duties as prescribed under Article 59 of the RA Code of Criminal Procedure" (*see* criminal case, volume 3, p. 137).

On the same day, the preliminary investigative agency decided to recognize S. Antonyan as the legal successor to the aggrieved party. S. Antonyan became familiar with the decree on March 22, 2012 (*see* criminal case, volume 3, p. 138).

3. Grounds, rationale and claim of the cassation appeal

The cassation appeal is considered on the grounds and rationale below.

17. According to the plaintiff, the Court of Appeal violated the requirements under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 17, Article 41 and Article 278 of the RA Criminal Procedure Code.

Particularly, the plaintiff mentioned that in accordance with the obligation to carry out an effective investigation under the right to life as enshrined in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the state is obliged to provide a convincing explanation for the circumstances that caused the death of a person who enters a medical facility and subsequently contracts a deadly disease (infection) he/she had never suffered before.

The plaintiff argued that the treatment at the Sexopathologic Rehabilitation City Center LLC led to rapid deterioration of A. Antonyan's health and ultimately to his death. Meanwhile, the preliminary investigation did not reject the hypothesis that A. Antonyan might have contracted the disease that caused his death in the course of his treatment at the company mentioned. Furthermore, the preliminary investigation failed to question the witnesses who might provide information on matters of intrinsic importance for the resolution of the case, as well as to provide face-to-face confrontations and take measures to clarify a number of issues. Considering this, the investigation into the death of A. Antonyan cannot be viewed as effective.

18. The plaintiff also noted that the Court of Appeal ignored the fact that the preliminary investigative agency had violated the requirements of Article 19 of the RA Constitution and Article 80 of the RA Code of Criminal Procedure.

According to the plaintiff, the investigation into the death of A. Antonyan was not available to his family. In this regard, the plaintiff noted that back in 2011, an application was submitted to the Prosecutor's Office to recognize S. Antonyan as a legal successor. On September 19 2011, the senior Public Prosecutor of the Prosecutor's Office of Kentron and Nork-Marash administrative districts dismissed the said application. On February 22, 2012, a similar application was filed with the preliminary investigative agency and was rejected, too. Consequently, S. Antonyan was unable to be involved in the preliminary investigation, make motions, attend examinations and ask questions to experts. S. Antonyan was recognized as a legal successor to the aggrieved party a few days before closing the criminal proceedings.

19. In view of the aforesaid, the plaintiff asked to reverse the ruling of the Court of Appeal of August 31, 2012 and send the case for a reinvestigation.

4. Reasoning and conclusion of the Court of Cassation

20. The Court of Cassation states that revising the disputed judicial act aims to exercise the constitutional function of ensuring the uniform application of the law. The Court of Cassation finds that there is a problem in terms of ensuring the uniform application of the law with respect to involving the aggrieved party (the legal successor to the aggrieved party) in criminal proceedings and the duties of the investigative agency to conduct an effective official examination of the suspicious death circumstances. Therefore, the Court deems it necessary to express legal positions that might become guidelines for the right development of the judicial practice regarding such cases.

I. Access to the case investigation for the family of the aggrieved party

21. The first legal question before the Court of Cassation consists in whether the family of the aggrieved party had access to the investigation into the death of A. Antonyan.

22. According to Article 3 of the RA Constitution, "the human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value.

The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law.

The state shall be limited by fundamental human and civil rights as a directly applicable right”.

According to Article 18 of the RA Constitution, "everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.

Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law (...)."

According to Article 19 of the RA Constitution, everyone shall have a right to restore his/her violated rights “(...) in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice”.

Under Article 2(1)(1) of the Criminal Procedure Code of the RA, criminal proceedings aim "to provide protection of individuals, the society and the state from crime".

Under Article 58 of the Code,

“1. The person shall be recognized as the aggrieved party if he/she directly suffers a moral, physical or property damage through a deed prohibited by the Criminal Code (...).

2. The decision to recognize a person as the aggrieved party is made by the investigative agency, investigator, public prosecutor or the court at his/her request.”

Under Article 80 of the Code,

“1. The successor of the aggrieved party shall be recognized one of his/her close relatives who has expressed a wish to perform during the criminal proceedings the duties of the aggrieved party who has lost his/her ability to express consciously his/her will.

2. The decision to recognize a close relative of the aggrieved party as his/her successor shall be made by the investigative authority, investigator, public prosecutor or the court at the request of the relative (...).

4. The successor to the aggrieved party shall be involved in criminal proceedings on behalf of the aggrieved party and have his/her rights and obligations (...).”

The above provisions defining the restoration of the violated rights of crime victims as a positive obligation of the state are hinged on the requirements set out in a number of international legal instruments.

23. One of the international legal instruments referred to in the previous paragraph is the Council of Europe Committee of Ministers Recommendation N R(85)11 of 1985 on The Position of the Victim in the Framework of Criminal Law and Procedure. The preamble of the Recommendation clearly specifies that it was adopted considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender, and consequently the operation of this system has sometimes tended to add rather than to diminish the problems of the victim, whereas a fundamental function of criminal justice shall be to meet the needs and to safeguard the interests of the victim.

Based on the above and the fact that it is necessary to strengthen the victim's confidence in the criminal justice system, the Committee of Ministers of the Council of Europe recommended the governments of member states to review their legislation and practice in order to increase the role of the victim in a number of aspects of the criminal justice system.

The obligation of the states to take measures to meet the needs and safeguard the interests of victims within the criminal justice system is also prescribed in the United Nations Resolution N 40/34 on Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Accordingly, Para 4 lays down that victims of crime are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Under Para 6 of the Resolution, the responsiveness of judicial and administrative processes to the needs of victims should be facilitated, inter alia, by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected;
- (c) Providing proper assistance to victims throughout the legal process (...);
- (...)
- (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

The European Convention on the Compensation of Victims of Violent Crimes also highlights the issue of restoring the rights of crime victims.

24. The European Court of Human Rights has also touched upon the obligation of the state to ensure protection of the victim's rights. In particular, according to the ruling on *Jankovic v. Croatia*, the physical and moral integrity of an individual is covered by the concept of private life. Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the states undertake to protect the physical and moral integrity of a

person from any interference from others. To this end they should approve and apply adequate legal protection mechanism against interferences of private persons.

While the Croatian legislation on criminal procedure provides for a number of mechanisms to protect the victim's rights, including the right to act as a subsidiary prosecutor, the European Court of Human Rights found that the state failed to comply with its positive obligation since, inter alia, the victim was not given a real chance to start criminal proceedings against the person who infringed upon his/her rights (*see Jankovic v. Croatia*, Judgment of 5 March 2009, Application No. 38478/05, Paras 25, 45, 57).

25. Guided by the legal provisions and approaches in Paras. 22-24 of the above ruling, the Court of Cassation states that criminal procedure aims not only to reveal the crime and bring the guilty person to criminal responsibility, but also to ensure protection of the rights and legal interests of crime victims. In other words, protection of the rights and legal interests of victims ranges among the most critical issues of criminal procedure.

The concept of "victim" as a legal category, has both legal and procedural features. As a legal concept, it reflects the objective fact of causing immediate damage to a natural or legal person. In its procedural sense, it defines the procedure and conditions for the crime victim to become a party to criminal proceedings by acquiring certain procedural rights and obligations. The criminal procedural law also provides for the institute of victim's legal successor as an independent form to protect the rights and interests of the victim if the latter died or lost his/her ability to express his/her own will. To establish legal succession, a close relative of the victim must express his/her wish to protect his/her rights and assume his/her responsibilities.

26. The Court of Cassation states that redressing harm, full disclosure and accurate legal assessment of the circumstances of the action inflicting damages, conviction and imposing a fair sentence on the offender fall within the victim's legitimate interests. Therefore, the participation of the victim/aggrieved party (legal successor to the aggrieved party) in criminal proceedings is both an essential prerequisite to ensure the protection of the rights and legitimate interests of the latter, and contributes to the thorough, comprehensive and impartial examination of the factual background of the case. It is impossible to exercise procedural rights and obligations in criminal proceedings without being a participant to the trial, and the effective participation crime victim can be ensured only after the investigative agency decides to identify him/her as an aggrieved party.

The comparative analysis of the procedure for recognizing a person as the aggrieved party under criminal proceedings suggests that the legislative authority considered a necessary condition for passing such a procedural act the established evidence or allegation that the person in question suffered moral, physical or property damages in consequence of a crime. However, this cannot have the interpretation below: for a person to be recognized as a victim/aggrieved party, it is necessary to prove all elements of crime or collect exhaustive evidence on damages.

27. Thus, Article 182(1) of the RA Criminal Procedure Code stipulates that under available reasons and grounds for criminal proceedings, the public prosecutor, investigator and the investigative agency shall decide to initiate criminal proceedings. For the purposes of this Article, grounds for criminal proceedings cover the data in support of the elements of crime. In other words, to start criminal proceedings, the competent official must consider the collected data sufficient to deem the fact of a crime (objective aspect of criminal element and object) established. And if the victim of the alleged crime comes up at the stage of instigating criminal proceedings, the investigating agency is obliged to recognize the latter as the aggrieved party and involve him/her in the investigation. Likewise, at this stage, the investigating agency must recognize as a legal successor a close relative (if they express such a wish) of the victim who died or lost his/her ability to express his/her will.

The aforesaid position of the Court of Cassation also derives from the strict requirement in Article 182(3) of the RA Criminal Procedure Code: “If any crime victim is identified at the time of initiating criminal proceedings, the person(s) in question shall be recognized as the aggrieved party, along with initiating the case (...)”. The Court of Cassation believes that only this interpretation and application of the criminal procedure mechanisms can provide the victim (victim’s legal successor) with the possibility to actually enjoy the rights as prescribed under Article 59 of the RA Criminal Procedure Code and effectively resolve the criminal procedure issue of ensuring the protection of the rights and legal interests of crime victims.

28. Turning to the factual background of this case, the Court of Cassation states that criminal proceedings on the death of A. Antonyan were initiated on June 23, 2010 under Article 130(2) of the RA Criminal Code, i.e. failure to implement or improper implementation of professional duties by medical and support personnel which through negligence caused the patient’s death (*see* Para. 1 of this Ruling).

The plaintiff argues that back in 2011, she applied to the prosecutor supervising the case proceedings to recognize her as the legal successor to the victim. However, on September 19, 2011, her application was rejected (*see* Para 18 above).

Criminal case materials suggest that on February 22, 2012, S. Antonyan again applied to the investigative agency to recognize her as the legal representative to the aggrieved party under the preliminary investigation of her son's death.

On March 5, 2012, the investigator dismissed her application on the grounds that the investigation into the criminal case did not establish the evidence of crime, i.e. that the death of A. Antonyan was caused due to an act prohibited by the Criminal Code, and therefore, S. Antonyan could not be recognized as a victim's legal successor (*see* Para 15 above).

It was only upon the written assignment of the Head of the Investigation Department of 15 March 2012 that the preliminary investigative agency decided to recognize S. Antonyan as a legal successor to the victim. S. Antonyan became familiar with the decree on March 22, 2012 (*see* Para 16 above).

On March 30, 2012, the criminal case was dismissed due to the absence of elements of crime (*see* Para 2 above).

29. Upon assessing the factual background quoted in the Para. above in view of the analysis in Paras 25-27 of this Ruling, the Court of Cassation states hereby that by not recognizing S. Antonyan as the legal successor to the aggrieved party under the criminal proceedings on her son's death, the preliminary investigative agency disproportionately restricted her rights and legal interests. S. Antonyan was deprived of the possibility to actually enjoy her procedural rights.

As for the decree of the preliminary investigative agency of March 15, 2012 to recognize S. Antonyan as the legal successor to the aggrieved party, the Court of Cassation finds that it was essentially quite formal, since A. Antonyan became familiar with the decree on March 22, 2012 when the investigation into the case was actually completed, and a few days later, on March 30, 2012 the criminal case was closed.

Based on the aforementioned, the Court of Cassation states that A. Antonyan's family had no access to the investigation into his death.

II. Efficiency of investigation into A. Antonyan's death

30. The next legal question under this case raised before the Court of Cassation is whether an efficient criminal and procedural investigation into the death of A. Antonyan was conducted.

31. According to Article 15 of the Constitution, "Everyone shall have a right to life (...)."

Under Article 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "Everyone's right to life shall be protected by law (...)."

According to the case law of the European Court of Human Rights, various Articles of the European Convention for Protection of Human Rights and Fundamental Freedoms set out procedural obligations to make sure that the rights enshrined in the Convention are practical and effective, rather than theoretical and abstract (see *B. v. the United Kingdom* judgment of July 8, 1987, No. 9840/82, Para 63; *M.C. v. Bulgaria* judgment of December 4, 2003, Application No. 39272/98, Paras 148-153 and *Cyprus v. Turkey* judgment of May 10, 2001, Application No 25781/94, Para 147).

Considering the fundamental nature of these rights, the European Court of Human Rights interpreted Article 2 and Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms as legal regulations prescribing a procedural obligation to carry out an effective investigation into the alleged violations of the substantive norms of such provisions (see *McCann and Others v. United Kingdom* judgment of September 27, 1995, Application No 18984/91, Para. 157-164; *Ergi v. Turkey* judgment of July 28, 1998, Application No 23818/94, Para 82 and *Assenov and Others v. Bulgaria* judgment of October 28, 1998, Application No 24760/94, Para. 101-106).

Article 2(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms obliges the States not only to refrain from intentional and illegal infringement of the right to life, but also to take relevant measures to secure the right to life to everyone within their jurisdiction (*inter alia* see *Osman v. the United Kingdom* judgment of October 28, 1998, Application № 87/1997/871/1083, Para. 115).

Securing the right to life under Article 2(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms indirectly requires that the state to carries out an official

impartial investigation into the death of a person. Such obligation arises in all cases, i.e. murder or suspicious circumstances of death, no matter whether the offenders are individuals, governmental agencies or unidentified persons (see *Nachova and Others v. Bulgaria*, judgment of July 6, 2005, applications № 43577/98 and № 43579/98, Para. 110).

To be considered effective, the investigation shall make it possible to compare the evidence obtained throughout the investigation and to bring offenders to responsibility. To detect the crime, the authorities must take reasonable measures available, i.e. questioning the witness, forensic examination and autopsy that will make it possible to reveal the real and complete picture of injuries and ultimately the cause of death (see *Tanrikulu v. Turkey* judgment of July 8, 1999, Application No. 23763/94, Para. 109 and *Giil v. Turkey* judgment of December 14, 2000, Application No. 22676/93, Para. 89). The expert opinion of the investigation shall be based on the comprehensive, objective and impartial analysis of the factual background of the case. The measures to be taken during the investigation shall not provide an absolute right to accuse or convict a person, and failure to detect the person who committed any breach or offence in course of the investigation is deemed as a violation of the requirement to secure efficiency (see *Esat Bayram v. Turkey*, judgment of May 26, 2009, Application No. 75535/01, Para. 47 and *Ramsahai and Others v. the Netherlands*, judgment of May 15, 2007; Application No. 52391/99, Para. 321).

The investigation is considered effective if conducted by agencies impartial and independent both by law and in practice. Accordingly, such agencies must be independent both in their hierarchy and practical operation (see *Ramsahai and Others v. the Netherlands*, judgment of May 15, 2007, Para. 325, 333-346; *Scavuzzo-Hager and Others v. Switzerland* judgment of February 7, 2006, Application № 41773/98, Para. 78, 80-86). The responsible agencies must also provide the members of the society with relevant information on the investigation and its findings, ensure public confidence in the rule of law and exclude any tolerant attitudes to criminal acts or criminal acts or associations. At any rate, crime victims must be involved in the investigation to secure their legal interests (see *Gulec v. Turkey*, judgment of July 27, 1998, Application № 54/1997/838/1044, Para 82).

32. As for the factual background of this case, the Court of Cassation hereby states that in November 2009, A. Antonyan applied with infertility complaints to sexual pathologist A. Baghdasaryan and underwent relevant medical examinations at the Sexology Rehabilitation Center LLC. Starting from mid-January 2010, A. Antonyan received a course of treatment prescribed by Dr. A. Baghdasaryan after which his state deteriorated rapidly in late March 2010

and he was admitted to Vanadzor Hospital Complex № 1, then transferred to Vanadzor Infection Hospital where he was diagnosed with viral hepatitis B. On April 1, 2010, A. Antonyan, unconscious and in coma, was transferred to 'Nork' Infection Hospital in Yerevan, where he died without regaining consciousness on April 5, 2010.

A. Antonyan's mother, S. Antonyan, reiterated at the agencies responsible for the preliminary criminal investigation and its legal supervision that her son had contracted the disease causing his death in course of his examination and treatment by Dr. A. Baghdasaryan (*see* Para 6 above). This statement by the legal successor to the aggrieved party is not explicitly baseless and suggests that in order to assess the efficiency of the investigation into the death of A. Antonyan, it is necessary first of all to find out whether the agency responsible for pre-trial proceedings had denied the plaintiff's statement based on a comprehensive, objective and impartial analysis of the factual data of the case.

33. Based on the analysis of the investigative actions and factual data collected thereby under this case, the Court of Cassation states as follows:

a) The investigating agency failed to take immediate investigative actions, particularly it failed to seize from the Sexopathologic Rehabilitation City Center LLC documents on A. Antonyan and other items of essential significance for the case (medical records, research findings, medical instruments, etc.). Instead, the preliminary investigative agency applied to the administration of the Sexopathologic Rehabilitation City Center LLC to provide the investigation with all available documents on A. Antonyan. In response to the letter, the company's administration stated that the medical history was handed over to the patient (*see* Para 8 above). This being so, in course of the following stages of investigation, A. Antonyan's medical records were never found.

b) The pre-trial investigative agency failed to detect the scope and diagnoses of the persons treated at the Sexopathologic Rehabilitation City Center LLC at the same time as A. Antonyan.

c) While the preliminary investigative agency had some information that nurse S. Shahsuvaryan personally controlled the treatment prescribed by Dr. A. Baghdasaryan (*see* Para 9 above), the agency had never questioned her.

The Court of Cassation hereby finds that if the investigative agency took actions under the (a), (b) and (c) subparagraphs above, it would be able to find out whether A. Antonyan had

contracted the disease that caused his death before or during his medical examination and treatment at the Sexopathologic Rehabilitation City Center LLC.

34. The Court of Cassation concludes that the investigative agencies, in violation of the legal and procedural requirements, did not allow the ~~third~~-interested third party, S. Antonyan, to be involved in the forensic examination to reveal the causes of her son's death. The preliminary investigative agency sent to S. Antonyan only the established evidence, i.e. ex post facto findings on the cause of the death (*see* Paras 11-12 above). The fact that the plaintiff was not involved in the above-mentioned investigative actions critical for the investigation and resolution of the case hindered the exercise of her rights and limited the possibility for her involvement in the investigation and thereby cast doubt on the findings of the investigative actions.

However, none of the forensic expert opinions within this case excludes the plaintiff's statement to the effect that her son contracted hepatitis B during his medical examination and treatment at the Sexopathologic Rehabilitation City Center LLC. Accordingly, the death of A. Antonyan was caused by acute liver failure and hepatic encephalopathy developed as a consequence of the fulminant (fulminant and malignant) viral hepatitis B. Hepatitis B is transmitted parenterally (by blood) and sexually.

The experts did not exclude the possibility of contracting a contagious disease, including hepatitis B, in course of practical medical measures and stressed that A. Antonyan might have contracted the disease from about 1.5 to 6 months before the first manifestation of the disease; this also coincides with the period when A. Antonyan underwent medical examination and subsequently received treatment at the Sexopathologic Rehabilitation City Center LLC. The experts also pointed out that while the treatment by A. Baghdasaryan did not call for a blood test, it would be advisable to assign a blood test to detect hepatitis B and to determine the functional state of the liver before prescribing relevant remedies, especially those with hepatotoxic effect, such as the antibiotic Rifampicin (*see* Para 11-12).

35. The Court of Cassation also states that Dr. A Baghdasaryan had testified that before turning to him, A. Antonyan received treatment for infertility in other medical institutions many times. A Baghdasaryan also did not exclude the possibility that A. Antonyan might have been involved in extramarital relationships (*see* Para 9 above). Meanwhile, the victim's mother and wife testified that A. Antonyan had not received any treatment in any other medical institution. A. Antonyan's wife, G. Nikolayeva testified that since they had no child and received treatment, the doctors

advised them to refrain from sex till they were completely cured. The laboratory blood test showed that G. Nikolayeva suffered no viral hepatitis (see Para 10 above).

The investigative agency took a number of measures to find out whether A. Antonyan had been involved in extramarital relationships or abused drugs or received treatment (including for infertility) at any other medical institution. All such measures provided negative answers, and the investigation revealed no factual data that might suggest that A. Antonyan had contracted hepatitis B either through sex, or abusing drugs or in course of treatment at any other medical institution (*see* Para 10 above).

36. The Court of Cassation as well states that back on February 24, 2011, the preliminary investigative agency submitted a letter to the RA Ministry of Health requesting information on whether there were any cases of fulminant hepatitis B registered in the RA within the past 3 years, and if yes, asked to make available the biographical data of such patients and the medical facilities that treated each of them. The Ministry was also required to clarify the procedure for storing and keeping medical records at the medical facilities of the Republic of Armenia and whether the attending doctor was competent to hand over the medical record to the patient upon completing his/her treatment course rather than to store it in the archive of the facility (*see* Para 10 above).

The above letter essential for the resolution of the case remained unanswered. A year later, on February 20, 2012, the preliminary investigative agency submitted another similar letter to the RA Ministry of Health and received a reply on March 14, 2012 stating that the Sexopathologic Rehabilitation City Center LLC functions in compliance with its own charter. The letter also informed that only general cases of viral hepatitis B were reported to the Ministry of Health through administrative statistical reports, while cases of fulminant viral hepatitis B were not reported. Therefore, complete information on the issue above called for some extra data to be collected, and the Ministry would further inform on the findings (*see* Para 14 above).

Afterwards, the preliminary investigative agency took no measures to clarify the above-mentioned 2 questions significant for the impartial investigation of the case. Particularly it failed to seek exhaustive answer to the question about the procedure for storing and keeping medical records at the medical facilities of the RA and failed to require and obtain data on the registered cases of viral hepatitis B - general or fulminant. On March 30, 2012, a few days after receiving the above letter of the RA Ministry of Health, the case was closed.

37. According to the family members of the aggrieved party, on March 27, 2010 as A. Antonyan's condition deteriorated rapidly, and he ran high temperature and was unable to move, they called the ambulance in Vanadzor. Upon arrival, the ambulance crew examined A. Antonyan and said that there was no need to worry as he was merely experiencing symptoms of the flu. On March 30, 2010, A. Antonyan's health deteriorated further, and the family called the ambulance again. The ambulance crew reiterated that he had the flu. On March 31, 2010, the ambulance crew saw that A. Antonyan's condition was rapidly deteriorating and took him to hospital.

The records of the emergency calls for A. Antonyan seized by the investigation from the Emergency Unit of the Vanadzor № 1 Hospital Complex CJSC also provide that the ambulance crew was called to the A. Antonyan's place, diagnosed "stenocardia attack" and rendered necessary medical aid (see Para 7 above).

The Court of Cassation confirms that the pre-trial investigative agency gave no legal assessment as to the failures within the professional duties of the ambulance crew that rendered emergency aid to A. Antonyan.

38. Along with the aforesaid, the Court of Cassation states that in its decree to close the criminal proceedings and stop the criminal prosecution upon the supplementary investigation, the investigative agency failed to specify the scope of persons who were not liable to criminal prosecution due to no element of crime in their actions. Particularly, the wording below in the decree to close the criminal proceedings and stop the criminal prosecution "not to initiate criminal prosecution against the medical personnel of the Sexopathologic Rehabilitation City Center LLC, Vanadzor Hospital Complex № 1, Vanadzor Infection Hospital and Yerevan 'Nork' Infection Hospital" (*see* Para 2 above) suggests that the investigative agency settled the issue of the criminal responsibility of the entire personnel of the 4 institutions above, in violation of the principle of personal responsibility as set forth in Article 8 of the RA Criminal Code.

39. By applying the positions of the European Court of Human Rights on the procedural component of the right to life quoted in Article 31 above in respect of the factual background quoted and analyzed in Paras. 32-38 above, the Court of Cassation finds that no effective criminal and procedural investigation was conducted into the death of A. Antonyan.

40. Based on the analysis in Paras. 21-39 above, the Court of Cassation hereby states that in course of the investigation, the lower courts, in light of the violations by the pre-trial

investigative agency as outlined under Para 29 and 39 of this Ruling, failed to assess the decree of the senior investigator A. Poghosyan dated March 30, 2012 to close the criminal proceedings and not initiate criminal prosecution. This gives grounds to the Court of Cassation to reverse the judicial acts of the lower courts and send the case to the court of first instance for reinvestigation, in compliance with Article 397, Article 398 and Article 406 of the RA Criminal Procedure Code.

Based on the aforesaid as well as Article 92 of the Constitution of the Republic of Armenia and Articles 403-406, 419 and 422-424 of the Criminal Procedure Code of the Republic of Armenia, the Court of Cassation

RULED

1. To uphold the appeal; to reverse the ruling of the First Instance Court of General Jurisdiction of Kentron and Nork-Marash administrative districts of Yerevan dated June 27, 2012 and the ruling of the RA Court of Criminal Appeals of August 31, 2012 on leaving it legally effective, and send the case to the First Instance Court of General Jurisdiction of Kentron and Nork-Marash administrative districts of Yerevan for reinvestigation;
2. The ruling shall be effective upon publication, final and not subject to further appeal.

Presiding Judge: D. Avetisyan /signature/

Judges: A. Poghosyan /signature/

H. Asatryan /signature/

S. Avetisyan /signature/

Y. Danielyan /signature/

S. Ohanyan /signature/

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