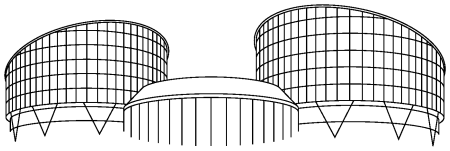

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ASİYE GENÇ v. TURKEY

(Application no. 24109/07)

JUDGMENT

STRASBOURG

27 January 2015

FINAL

27/04/2015

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

In the case of Asiye Genç v. Turkey,

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

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Helen Keller,
Paul Lemmens,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 24109/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Asiye Genç ("the applicant"), on 28 May 2007.

2. The applicant was represented by Mr A. Çay, of the Ankara Bar. The Turkish Government ("the Government") were represented by their Agent.

3. On 16 January 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The death of the child Tolga Genç

4. The applicant, Ms Asiye Genç, was born in 1976 and lives in Burdur.

5. On 30 March 2005 the applicant, who was pregnant and in pain, was taken by her husband, Mr Bülent Genç, to the Gümüşhane public hospital.

6. At about 11 p.m. on 31 March 2005 the applicant gave birth by Caesarean section to a boy (Tolga Genç), who – at 36 weeks' gestation[1] – was premature and weighed 2.5 kg.

1. A birth is considered to occur "at term" when the pregnancy lasts 41.5 weeks.

7. Shortly after his birth, Tolga began showing signs of respiratory distress.

8. As there was no suitable neonatal unit in the Gümüşhane public hospital, the doctors decided to transfer the baby to the Karadeniz Teknik Üniversitesi Farabi public hospital ("KTÜ Farabi"), located in Trabzon, 110 km away.

9. On 1 April 2005 at around 1.15 a.m. the KTÜ Farabi public hospital refused to admit Tolga on the grounds that there were no places available in the neonatal intensive care unit.

10. Around 2 a.m. Tolga was transferred to the Trabzon Medico-Surgical and Obstetrics Centre ("TMOC"). There, the duty doctor explained to Mr Genç that there were no incubators available and advised him to return to the KTÜ Farabi public hospital, which the father had no choice but to do.

11. On their arrival, the doctors at the KTÜ Farabi public hospital again argued that they were unable to admit the premature baby, owing to a lack of available places in the neonatal unit.

12. A fresh attempt was then made to drive Tolga to the TMOC.

13. Towards 3.30 a.m., he died in the ambulance, which he had apparently never left throughout this sequence of events.

B. The family's complaint and the preliminary investigation

14. On 6 April 2005 Mr and Ms Genç filed a complaint.

15. In particular, they called for the conviction of doctors K.M. and T.Ö. from the KTÜ Farabi public hospital.

16. Two investigations, one criminal and the other administrative, were opened.

17. In the context of these investigations, several witness statements were taken. The relevant passages read as follows:

The deceased's relatives:

The applicant: "My pregnancy was progressing normally. The doctors preferred a birth by Caesarean section on account of the baby's position. The birth had initially been scheduled for 25 April 2005, but during the night of 30 March 2005 I had pains, and the baby was born by Caesarean section the next day. I don't know what happened after that. I was told that the baby had been transferred to another hospital on account of a respiratory problem, but that he had not been admitted because there were no available places, and that he died in an ambulance, in the garden of a hospital, without a doctor taking the trouble to care for him. I want those responsible for my son's death to be punished."

Mr Genç: "My son was born prematurely at the Gümüşhane public hospital. The doctors decided to transfer him to another hospital with better equipment. The KTÜ Farabi hospital did not admit him owing to a lack of places. He was also refused admission to the Trabzon Medico-Surgical and Obstetrics Centre, for the same reasons. Instead of caring for my son, the doctors wasted time with administrative

formalities. They did not even take the trouble to examine him, although it was an emergency situation. They ought to have diagnosed and treated him. We fought for four hours for my son to be seen by a doctor, but no hospital would agree to admit him. After several trips back and forth between hospitals, he died in an ambulance, in a hospital garden. Had my son been admitted to hospital in time, he would not have died. The persons responsible must be punished."

Ö.B.: "Mr Genç is a friend. I accompanied him on the evening of the incident. We followed behind the ambulance in a car. At the KTÜ Farabi hospital, the duty paediatrician, Ms T.Ö., was annoyed that the transfer had been carried out without any prior checks that there was indeed a place available at the hospital. She paid no attention to the baby. She was busy with the administrative side of things and asked for documents proving that there were in fact no places in the other hospitals. She first called the Trabzon Medico-Surgical and Obstetrics Centre, then the Giresun public hospital, to check. She told us that there were indeed places at the Trabzon Medico-Surgical and Obstetrics Centre, but that the duty doctor had simply not wished to be disturbed. She advised us to request an official signed document stating that there were no places available in the hospital. She added that if the doctors at the Trabzon Medico-Surgical and Obstetrics Centre were confronted with such a request, they would certainly change their attitude, find a place and agree to admit the child. When we went to the Trabzon Medico-Surgical and Obstetrics Centre, doctor K.B. told us that there were no places available and that they could not take the child into their care. Instead of looking after the child, who needed urgent medical assistance, he preferred to spend time drawing up a document stating that there were no places in the hospital. 45 minutes were lost in this way. After numerous back-and-forth trips between hospitals, the child ended up having a heart attack. Treatment by the emergency doctor was not enough to save him. Nobody wanted to take charge of the child. No emergency doctor examined him. They all refused to admit him and tried at any cost to transfer him to another hospital. This indifference towards a child who required emergency medical killed him."

The medical staff:

O.Ü.: "I work as a gynaecologist and obstetrician at the Gümüşhane public hospital. Ms Genç's Caesarean section proceeded normally. We handed over the child to the paediatrician after the birth. He was crying. I don't know what happened after that, since I continued with the operation."

E.K.: "I work as a midwife in the Gümüşhane public hospital. Ms Genç gave birth to a boy. The child was showing no anomalies when I took him in my arms. Suddenly, for a reason I don't understand, he had difficulty breathing. Doctor N.A. stepped in right away. The child was intubated. He was transferred to another hospital by ambulance."

N.A.: "I work as a paediatrician at the Gümüşhane public hospital. I saw the child about five minutes after his birth. I intervened as a matter of urgency, since he was not breathing correctly and his pulse was weak. Once his condition had stabilised, we organised his transfer to a better equipped hospital. I had been told that there was a place available at the KTÜ Farabi hospital. The child was transferred by ambulance and he was intubated during the transfer."

N.S.: "I work as an anaesthetist at the Gümüşhane public hospital. Ms Genç gave birth by Caesarean section to a 36-week-old premature baby. Shortly afterwards, the midwife told us that the child had breathing difficulties. The paediatrician intervened immediately to provide the necessary treatment. It was decided to transfer him to another hospital, since there was no appropriate medical unit on site. I was in the

ambulance with E.İ. The child was intubated. The transfer was carried out in an incubator. At the KTÜ Farabi hospital, the duty paediatrician, Ms T.Ö., did not examine the child. She simply said that we should go to the Trabzon Medico-Surgical and Obstetrics Centre. Once there, doctor K.B. also refused to admit the child on the grounds that there were no available places. He took this decision without even examining the child. We went back and forth between hospitals, but no one would accept him. He died in the ambulance outside the Trabzon Medico-Surgical and Obstetrics Centre."

E.İ.: "I work as a nurse at the Gümüşhane public hospital. I was on duty on the day of the incident. The child had been brought to us in an incubator so that we would take him to the KTÜ Farabi hospital. Once there, doctor K.M. told us that it was impossible to take charge of the child and that he ought to be looked after by a specialised paediatrician. He told us to go and see doctor T.Ö. That is what we did. Ms T.Ö., without even examining the child, told us that there were no places in the hospital and that he should be transferred to the Trabzon Medico-Surgical and Obstetrics Centre. We went there immediately. Doctor K.B. did not examine the child. He simply told us that there were no places in the hospital. We insisted for about half an hour that he take the child in for treatment. He refused. We then set off again for the KTÜ Farabi hospital. Doctor T.Ö. again refused to admit the child and insisted that he be transferred to the Giresun public hospital. The child's father and I protested strongly against this decision. Doctor T.Ö. then asked us to provide her with an official document stating that there were no places at the Trabzon Medico-Surgical and Obstetrics Centre. As no one had thought to give us such a document, we were unable to give it to her. She then asked us to return once more to the Trabzon Medico-Surgical and Obstetrics Centre. Faced with her categorical refusal, we set off once again for the Trabzon Medico-Surgical and Obstetrics Centre. Once there, the doctors again refused to admit the child. The child died in the ambulance at about 3.30 a.m."

K.M.: "On the evening of the incident, I was on duty at the adult emergency department at the KTÜ Farabi hospital. I spoke to the father on the telephone. I told him that paediatrics was not my field, but that I could help him with the transfer to the emergency paediatrics department."

T.Ö.: "I was on duty at the paediatrics department in the KTÜ Farabi hospital on the evening of the incident. The Gümüşhane public hospital did not contact us to find out whether or not there were free beds. The child was transferred directly to our hospital. I immediately addressed myself to his care. Other than the presence of meconium on his body, the child was fine. His vital functions were normal. I tested his oxygen saturation level, and it was between 95 and 100%. As there was a risk that the child would inhale meconium, I preferred to keep him [at the hospital] in order to ensure closer monitoring. However, I discovered that there were no beds in the department. The child's father told me that doctor K.M. had stated that there were places available in the hospital. I then called doctor K.M., who was in the adult emergency department. He told me that he had thought that there were still places in the neonatal unit, but that he had not thought it necessary to call and check. I then expressed my displeasure to him. The child's father, who was accompanied by a friend, protested strongly against my decision to refuse to admit [the child] for lack of a bed. But I had only followed the procedure. The head of department had expressly asked us not to accept patients if there were no places available and to organise for their immediate transfer. That is what I attempted to do. Someone from the Trabzon Medico-Surgical and Obstetrics Centre told me on the telephone that there was one place available. After completing the administrative formalities, I ordered an ambulance journey. However, the ambulance came back to our hospital about two hours later, since the

Trabzon Medico-Surgical and Obstetrics Centre had refused to admit him. As there was no official document to that effect, I again transferred the patient to the same hospital. As it was impossible to take the child into our care, I did not go ahead with his administrative registration or open a treatment file."

Doctor A.A.: "I saw doctor T.Ö. looking after the child. He was doing well and was not intubated. The oxygen saturation level was about 95%."

Nurse A.A.: "I do not recall having seen any intubated child in the paediatric unit of the KTÜ Farabi hospital on the evening of the incident."

İ.E.: **"**I am a doctor at the KTÜ Farabi hospital. The child was taken care of by doctor T.Ö. From what I saw, his general state was entirely satisfactory. The oxygen saturation level was 95%."

Y.A.: "I am the head of the paediatric department at KTÜ Farabi hospital. My assistant, doctor T.Ö., was right to refuse to admit the child, because we cannot admit patients when the department is full. On the other hand, she ought to have opened an administrative file."

K.B.: "I was on duty at the Trabzon Medico-Surgical and Obstetrics Centre. At about 2 a.m. on 1 April 2005, an ambulance carrying an intubated newborn baby arrived at our hospital. I did not want to take the child out of the incubator, since there is a risk of hypothermia with premature babies. I called doctor M.K. to ask for his advice, since the child needed to be put on a respirator, but there were no available places in the department. I called the other hospitals to try to find a place, but without success. I then told them to return to the KTÜ Farabi hospital. Around one hour later, they came back asking for an official document stating that there were no available places in our hospital. I did not give them a document of this sort, but I told them they could visit the department if they didn't believe me. While I was in the middle of explaining all this, I was suddenly informed that the child had had a heart attack. I immediately went into the ambulance to carry out resuscitation, but in spite of all my efforts I was unable to save the child. I do not think that I was negligent. If we had admitted the child, we would have had to care for him in an ordinary bed. We would have been unable to control his temperature and guarantee artificial ventilation in those conditions, which in fact would probably have caused an even quicker death."

M.K.: "K.B. called me to ask for advice. As we had no places, I told him to organise a transfer to the nearest university hospital. The patient was in an incubator in the ambulance. Yet we didn't even have an incubator available in the hospital. We would have lost the patient much more quickly had we admitted him. We couldn't really do anything else. Furthermore, according to what I've been told, Gümüşhane public hospital would not have wanted to lend us the ambulance incubator."

18. With regard to the available places in the neonatal units on the evening of the incident, the criminal investigation revealed that there had been only one incubator at the Gümüşhane public hospital and that it was out of order.

19. At the KTÜ Farabi public hospital, there were five children in the maternity unit and nineteen in the neonatal unit, where capacity was limited to fourteen children.

20. There were four incubators at the CMOT: three were occupied and the fourth was out of order. Furthermore, they were not equipped with assisted ventilation systems.

21. With regard to the two other establishments located in the region, it was noted that, out of nine incubators at the Fatih public hospital, two were available at 3 p.m. on 31 March 2005, but that they did not have assisted ventilation systems.

22. The Giresun Medico-Surgical and Obstetrics Centre had no neonatal unit at all.

23. A full autopsy was carried out on Tolga's body. It revealed, in particular, that the child's lungs showed signs of "asphyxial haemorrhage".

C. The criminal investigation in respect of the medical staff

1. In respect of doctors K.M. and T.Ö., from the KTÜ Farabi public hospital

24. On 12 May 2005 the Gümüşhane public prosecutor held that he did not have jurisdiction and relinquished the investigation to the Trabzon prosecutor's office.

25. On 1 June 2005 the Trabzon public prosecutor sent the file to the Karadeniz University Rector's Office, to which the KTÜ Farabi public hospital was attached.

26. On 20 October 2005 a committee of investigation, composed of doctors, issued a report concluding that the doctors in question had not committed any fault and that, accordingly, there were no grounds to grant authorisation for bringing proceedings against them.

27. On 19 January 2006 the Supreme Administrative Council upheld that decision.

2. In respect of doctor N.A., at the Gümüşhane public hospital

28. On 2 May 2005 the Gümüşhane Governor refused to open a criminal investigation against doctor N.A., considering that he had committed no breach of his professional duties.

29. On 9 May 2005 the Gümüşhane public prosecutor filed an objection to that decision, on the grounds that doctor N.A. ought not to have ordered the child's transfer to a hospital that had no places available.

30. On 18 May 2005 the Trabzon Regional Administrative Court rejected the prosecutor's objection.

31. On 31 May 2005, taking note of that judgment, which was *ipso jure* final, the prosecutor issued a decision that there was no case to answer.

32. In the absence of an appeal before the Assize Court, this decision became final on 23 June 2005.

3. In respect of doctors K.B. and M.K., from the CMOT

33. On 3 May 2005 the Trabzon Governor refused to open proceedings against doctors K.B. and M.K., taking the view that they could not be criticised for any negligence in performing their duties.

34. The Trabzon public prosecutor lodged an objection to that decision, considering that the accused had indeed committed an offence and that they ought to be referred to the courts for negligence in the performance of their duties.

35. On 8 June 2005 the Trabzon Regional Administrative Court rejected the prosecutor's objection.

36. On 21 June 2005 the prosecutor, who was obliged to comply with that final judgment, issued a decision that there was no case to answer.

37. In the absence of an appeal before the Assize Court, this decision became final on 22 July 2005.

D. The administrative investigation carried out by the Ministry of Health

38. An investigation committee within the Ministry of Health's Trabzon branch decided of its own motion to carry out administrative investigations.

39. On completion of these investigations, on 26 April 2005 Trabzon Governor refused to authorise the opening of an additional investigation in respect of doctors K.B. and M.K.

40. By contrast, in respect of doctor T.Ö., the Governor accepted the conclusions of the investigation committee and decided to open a criminal investigation for professional negligence.

41. To that end, on 17 May 2005 the Trabzon public prosecutor, to whom the case had been referred back, transferred the file to the Rector's Office of Karadeniz University, to which T.Ö. was subordinate.

42. The Rector's Office immediately opened an administrative inquiry.

43. This confirmed the preliminary conclusions reached by the ministerial investigation committee.

44. On 25 August 2006 the Rector's Office authorised the opening of a criminal investigation in respect of T.Ö. The relevant passages of that decision read as follows:

> "Health Inspector S.M. considered in his report of 26 April 2005 that doctor T.Ö. had been negligent and that she should be held liable.
>
> In his report of 26 June 2006, Health Inspector G.Ç. found that doctor T.Ö. ought to have carried out administrative registration of the patient and opened a treatment file.
>
> The information in the file reveals that there were no places available in the KTÜ Farabi hospital.
>
> The patient's transfer to this hospital was due to a failure in communication and co-ordination.

> At the KTÜ Farabi hospital, no adequate treatment was given, although the patient's state was very serious and his condition was life-threatening.
>
> Furthermore, apart from the witness statements by medical staff from the KTÜ Farabi hospital, there is no evidence showing that the patient was examined by a doctor.
>
> In addition, there is no administrative file or treatment file in the patient's name.
>
> Doctor T.Ö.'s explanation that "if [she] did not open an administrative file, it was because we could not admit the patient to the hospital" is unacceptable conduct.
>
> In this incident, it must be concluded that there was negligence and fault on the part of doctor T.Ö."

45. On 14 September 2006 T.Ö. applied to have that decision set aside.

46. On 25 July 2007 the Supreme Administrative Council set aside the decision of 25 August 2006 (see paragraph 44 above) on the grounds that, in the absence of new evidence capable of justifying revision, its previous judgment of 19 January 2006 (see paragraph 27 above) remained final.

II. RELEVANT DOMESTIC LAW AND PRACTICE

47. The relevant domestic law is described in the case of *Sevim Güngör v. Turkey* ((dec.), no. 75173/01, 14 April 2009).

THE LAW

I. SUBJECT-MATTER OF THE DISPUTE

48. The applicant's complaints are as follows.

49. Relying on Article 2 of the Convention, she complained about the alleged deficiencies in the investigation into her son's death conducted under the domestic law.

50. Relying on Article 3 of the Convention, she complained, in particular, about the circumstances in which Tolga died.

51. Furthermore, relying on Article 13 of the Convention, she submitted that she had no effective remedy in domestic law by which to have established the facts and responsibilities which had led to the death.

52. The Government disputed those arguments and allegations.

53. The Court, being master of the characterisation to be given in law to the facts of the case, considers that the applicant's complaints call for examination solely under Article 2 of the Convention, the relevant part of which is worded as follows:

> "1. Everyone's right to life shall be protected by law..."

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

A. Admissibility

54. The Government objected that the applicant had not exhausted domestic remedies. They criticised the applicant, firstly, for failing to lodge an objection to the decisions of 31 May and 21 June 2005 that there was no case to answer (see paragraphs 32 and 37 above).

Secondly, they considered that the applicant should, as a preliminary step, have brought proceedings for compensation before the civil or administrative courts.

The Government also raised an objection that the applicant had not complied with the six-month time-limit.

55. With regard to the possible remedy of lodging an objection to the decisions finding that there was no criminal case to answer, the Court notes that in the present case the decisions in question were issued by the prosecutor in the light of final judgments from the administrative court upholding the legality of the refusal to bring proceedings against the accused doctors (see paragraphs 31 and 36 above), judgments which completely restricted his discretion. In those circumstances, the Court does not see in what manner an objection by Ms Genç could have changed the outcome of the proceedings. Furthermore, the Government have submitted no decisions demonstrating the adequacy and effectiveness, in similar cases, of such an appeal to the assize court.

It follows that this first branch of the Government's preliminary objection must be dismissed.

56. With regard to the objection alleging that the application was out of time, the Court notes that the procedure brought against doctor Ms T.Ö. was ended by the Supreme Administrative Council's judgment of 25 July 2007, which set aside the decision by the Rector's Office of 25 August 2006 authorising the opening of criminal proceedings against her (see paragraph 46 above).

As the applicant lodged her application with the Court on 28 May 2007, the six-month rule was thus not breached.

57. With regard to the objection based on the existence of various forms of claims for compensation, the Court considers, firstly, that, contrary to what the Government have argued (see paragraph 54 above), the breach of the right to life of the applicant's son could not be rectified though civil or administrative proceedings; especially given that no culpable conduct – criminal, administrative or disciplinary – was ultimately established by the domestic authorities. The Court finds it difficult to see how the applicant could reasonably have hoped to win her case before the civil or administrative courts, since in either of these proceedings she would have been required at least to prove the existence of a fault (see paragraphs 26, 27

and 46 above). Moreover, it is in this respect that the present case differs from that of *Karakoca v. Turkey* (dec.), no. 46156/11, 21 May 2013. In the present case, there had been previous administrative investigations, at the close of which it was found that there was no fault or negligence by the relevant authorities, and these were confirmed by the Supreme Administrative Council. It follows that the Government's preliminary objection in this respect – without, however, submitting examples from the case-law capable of supporting its assertions – cannot be accepted.

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

B. Merits

1. The parties' submissions

59. The applicant considered that the authorities had failed in their positive obligation to protect her son's right to life, in breach of the State's general duty to provide the necessary medical care, since it managed and/or controlled the entirety of the health protection system. It seemed to her entirely abnormal that a newborn baby requiring emergency medical care could not be treated by the hospitals as a result of a lack of resources. She concluded therefore that the authorities were responsible for Tolga's death, in that they had not provided him with the urgent treatment required by his condition.

60. The applicant further alleged that the investigations carried out in the present case did not meet the requirements of Article 2 of the Convention.

61. She argued that the Governor's refusal to authorise the opening of criminal proceedings against the doctors concerned had prevented the true circumstances of the death from being established, and the punishment of those responsible.

62. While continuing to emphasise the supposed failure to exhaust the domestic remedies, the Government also submitted that the events complained of and the responsibilities of all the persons involved had been examined at all levels by the relevant bodies, which met the requirements of independence, on the basis of multiple scientific reports. In consequence, no question arose with regard to the effectiveness of those investigations.

63. In the Government's view, those investigations had clearly shown that the hospitals were functioning in a manner that complied with the circulars from the Ministry of Health and that there had simply not been places available in the hospitals on the day of the incident; in those circumstances, they considered that the conclusion that there had been no negligence on the part of the medical staff was correct.

64. In any event, the Government submitted that the Convention did not guarantee the right to institute criminal proceedings against third parties and that the national courts were best placed to evaluate the evidence and to interpret and apply the substantive and procedural law.

2. The Court's assessment

(a) General principles

65. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

66. These principles apply also to the area of public health (see, *inter alia*, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Calvelli and Ciglio* [GC], no. 32967/96, § 48, ECHR 2002-I), as the acts and omissions of the authorities in the context of public health policies may, in certain circumstances, engage their responsibility under the substantive limb of Article 2 (see *Powell*, cited above).

67. In this area, the positive obligations imposed on the State by Article 2 imply, above all, that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected.

However, where a Contracting State has made adequate provision to ensure that those requirements are met, the Court cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations within the meaning of Article 2 of the Convention to protect life (see, in particular, *Calvelli and Ciglio*, cited above, § 49, and *Powell*, cited above).

68. Article 2 also implies the obligation to put in place an efficient and independent judicial system allowing the facts of a case to be exposed to public scrutiny, by which the cause of death of any individual under the responsibility of health professionals can be established, whether they are operating in the public sector or employed in private structures, and, as the case may be, to ensure their accountability for their actions (see, in particular, *Calvelli and Ciglio*, cited above, § 49; concerning more specifically the protection of the life and health of those deprived of their liberty, see *Powell*, cited above; *Anguelova v. Bulgaria*, no. 38361/97, § 130, ECHR 2002-IV; *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004; *Taïs v. France*, no. 39922/03, §§ 96 and 98, 1 June 2006; *Huylu v. Turkey*, no. 52955/99, §§ 57-58, 16 November 2006; and *Dzieciak v. Poland*, no. 77766/01, § 91, 9 December 2008).

69. In particular, where there are plausible grounds for believing that the death is suspicious, Article 2 requires that the authorities launch promptly, and of their own motion, an official, independent, impartial and effective investigation in order to establish the underlying circumstances (see, *mutatis mutandis*, *Tararieva v. Russia*, no. 4353/03, §§ 74, 75 and 103, ECHR 2006-XV (extracts); *Kats and Others v. Ukraine*, no. 29971/04, §§ 116 and 120, 18 December 2008; *Gagiu v. Romania*, no. 63258/00, § 68, 24 February 2009; *Makharadze and Sikharulidze v. Georgia*, no. 35254/07, § 87, 22 November 2011; and *Gülay Çetin v. Turkey*, no. 44084/10, § 87, 5 March 2013).

70. A requirement of promptness and reasonable expedition is implicit within this context. Rapid examination of cases of this type is important for the safety of users of all health services (see *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006).

The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice, and that requires a prompt examination of the case without unnecessary delays (see *Šilih v. Slovenia* [GC], no. 71463/01, § 195, 9 April 2009).

In addition, the official investigation to be conducted in this context – whatever its nature – must not only be complete, in that it must include all the crucial aspects needed to shed light on the circumstances of the death in question (see, for example, *Tararieva*, cited above, § 92), but must also be such as to enable the medical staff and the institutions concerned to remedy any potential deficiencies (see, *inter alia* and *mutatis mutandis*, *Makharadze and Sikharulidze*, cited above, § 89, and *Byrzykowski*, cited above, ibid.).

71. However, it should be reiterated that the above-mentioned obligation to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. Thus, in the specific sphere of medical negligence (see paragraph 67 above) the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress to be obtained (see *Calvelli and Ciglio*, cited above, § 51; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; and *Trocellier v. France* (dec.), no. 75725/01, 5 October 2006; with more specific regard to the cases involving Turkey, see *Karakoca*, cited above; *Sevim Güngör*, cited above; *Aliye Pak and Habip Pak v. Turkey* (dec.), no. 39855/02, 22 January 2008; and *Serap Alhan v. Turkey* (dec.), no. 8163/07, 14 September 2010).

72. Nonetheless, even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has stated on many occasions that the effective judicial system required by

Article 2 may, and under certain circumstances must, include recourse to the criminal law (see *Calvelli and Ciglio*, cited above § 51).

73. In general, where it is established that the negligence attributable to State officials or bodies goes beyond an error of judgment or negligence, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may entail a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 93, ECHR 2004-XII).

This approach also applies to the area of public health, if and in so far as it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general (see *Cyprus v. Turkey* [GC], no. 25781/94, § 219, ECHR 2001-IV; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; and, more recently, *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, § 105, 9 April 2013).

(b) Application of those principles to the present case

74. In the present case, it should be pointed out as a preliminary remark that the applicant does not accuse any of the persons concerned of having intentionally caused the newborn's death. Nor does her complaint under Article 13 taken together with Article 2 of the Convention concern the issue of a lack of compensation (see, *mutatis mutandis*, *Öneryıldız*, cited above, §§ 145-149).

The applicant submits, however, that the events for which the medical staff in question were criticised went well beyond mere negligence or an error of judgment, and that the death of her baby is directly attributable to the refusal by the relevant doctors to provide him with treatment.

75. In this context, the Court is required to ascertain whether the national authorities did what could have reasonably been expected of them and, in particular, whether they satisfied, in principle, their obligation to take appropriate measures to ensure the protection of the young Tolga's life.

76. The Court observes at the outset that the facts of the present case differ considerably from those examined by it in the cases set out in paragraph 66 above, which concerned solely instances of medical negligence. In these circumstances, the Court considers that the criteria and principles emerging from this case-law cannot be transposed as such, although they may partially guide it in assessing the circumstances of the case.

77. Referring to the factual elements of the case and the evidence in the case file, the Court thus notes that in the present case neither the gravity of the state of health of the applicant's son, who was born prematurely and suffered from respiratory distress, nor the necessity of urgent medical intervention, were disputed. In addition to the question of the

appropriateness of carrying out a Caesarean section in a hospital that was not equipped for dealing with neonatal complications (see paragraph 8 above), it is sufficient to study the findings set out in report by the Ministry of Health dated 25 August 2006 (see paragraph 44 above), to understand that the life of the applicant's son was put at risk by a set of circumstances featuring, according to the authorities, three distinct aspects:

– a lack of effective coordination between the hospitals, accompanied by a carelessness that was characterised by bureaucratic concerns;

– a shortage of equipment in the neonatal units of the hospitals in question, compounded by the fact that some incubators were out of order;

– a total lack of urgent medical examinations.

78. The Gümüşhane public hospital could not therefore have been unaware of the risk for young Tolga's life in the event of a refusal to admit him to another hospital. While it is inappropriate to speculate as to the baby's chances of survival had he received immediate treatment, the Court notes that, in spite of the above risk, the staff members in question did not take the necessary measures to ensure that the patient would be properly cared for at the KTÜ Farabi public hospital before deciding to transfer him there (see paragraphs 8 and 9 above).

79. This lack of coordination between hospitals continued throughout the subsequent episodes, characterised by unsuccessful attempts to transfer the baby between KTÜ Farabi public hospital and the Trabzon Medico-Surgical and Obstetrics Centre (see paragraphs 10-13 above), these establishments having refused to admit the baby on the grounds that they did not have the resources.

80. In this connection the Government submitted that such a situation could not engage the responsibility of the medical staff, as the lack of places in the hospitals amounted, in their view, to an objective obstacle that could not be imputed to the doctors. In the light of the case file, the Court considers that in the present case the shortcoming in coordination between the hospitals and the failure of any of the doctors called upon to provide treatment to the new-born baby could not be justified by the mere absence of places. It is sufficient for the Court to observe that on the evening of the incident, the only incubator in Gümüşhane public hospital, where the child Tolga was born, was out of order. Nor could the quantity and condition of the equipment in the other hospitals in the region be considered satisfactory (see paragraphs 17-22 above). This shows that the State had not taken sufficient care to ensure the smooth organisation and correct functioning of the public hospital service, and more generally of its system for health protection, and that the lack of places was not linked solely to an unforeseeable shortage of places arising from the rapid arrival of patients.

81. As a result of those shortcomings, a premature baby with a life-threatening condition made several futile return trips in an ambulance pending any appropriate treatment or an examination, even if only to

compare the urgency of his case against the clinical picture of the other babies hospitalised *in situ*. In consequence, he ended up dying in that same ambulance.

82. It follows that the applicant's son must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate emergency care. In other words, the child died not as a result of negligence or an error of judgment in the treatment administered to him (see paragraph 66 above), but because he was simply not offered any form of treatment at all – it being understood that such a situation was analogous to a denial of medical care such as to put a person's life in danger (see *Mehmet Şentürk and Bekir Şentürk*, cited above, §§ 97 and 105).

83. In this case, on account of the refusal by the administrative authorities to grant authorisation, the fact that no criminal charges or proceedings were brought against the staff who refused to provide medical treatment to baby Tolga raises an issue under Article 2 of the Convention (see also *Mehmet Şentürk and Bekir Şentürk*, cited above, § 105), especially since the conduct of certain of the accused medical staff had indeed been considered by the prosecutor as capable of amounting to a criminal offence (see paragraphs 29, 34 and 40 above; see also *Huylu*, cited above, § 74, and *Prado Bugalla v. Spain* (dec.), no. 21218/09, 18 October 2011).

84. Nevertheless, over and above the question of whether or not the accused doctors were guilty, it is important to assess the response by the respondent State's courts to the allegations concerning the implementation of its health-care services.

It was legitimate to expect that the national bodies to which the case was referred would respond by verifying if and to what extent the failings identified in this incident remained compatible with the imperatives of the public health service and the hospital regulations and that they would, if necessary, establish liability on that basis.

However, no attempt was made to ascertain how the protocols applicable to the admission of newborns to the emergency services or to coordination between the neonatal units had been implemented, or to establish the reasons for the lack of basic facilities in those units – and, in particular, for the number of incubators that were out of order.

85. In this connection, it is telling that the case file contains no trace or criticism or disapproval, whether on the part of the Governor's services, the prosecutor's offices or the administrative courts, with regard to all those factors, which certainly contributed to, or were even decisive in, the endangering of the young Tolga's life. Account being had to the public interest at stake, however, critical scrutiny was crucial. Elucidation of the circumstances in which treatment was or was not provided, as well as of possible failings that could have influenced the course of the events, is essential to rectify possible shortcomings in the health services, so that

comparable errors are not repeated with impunity, at patients' expense (see, *mutatis mutandis*, *Byrzykowski*, cited above, § 117, 27 June 2006, and *Makharadze and Sikharulidze*, cited above, § 89).

86. Thus, the Turkish judicial system's response to the tragedy in question was not appropriate for the purpose of shedding light on the decisive circumstances surrounding the death of the baby Tolga. In particular, the investigation was not complete, since none of the crucial factors set out above with regard to shortcomings in the management of the health system was the subject of any investigation.

87. In conclusion, the Court concludes that, in the light, firstly, of the circumstances leading to the failure to provide essential emergency care and, secondly, of the insufficient nature of the domestic investigations carried out in that connection, the State must be regarded as having failed to meet its obligations under Article 2 of the Convention in respect of the child Tolga Genç.

There has therefore been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage, but made no claim in respect of pecuniary damage or of costs and expenses.

89. The Government considered that amount excessive and invited the Court to reject the applicant's claim.

90. Ruling on an equitable basis, the Court considers that the applicant should be awarded EUR 65,000 in respect of the non-pecuniary damage sustained as a result of the violation found.

91. The Court further considers it appropriate that the default interest rate 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 2 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, EUR 65,000, to be converted into the currency of the respondent State at the rate applicable at the date of

settlement, plus any tax that may be chargeable, in respect of pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 French, and notified in writing on 27 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of judges Lemmens, Spano and Kjølbro is annexed to this judgment.

G.R.
S.H.N.

JOINT CONCURRING OPINION OF JUDGES LEMMENS, SPANO AND KJØLBRO

1. We voted for finding a violation of Article 2 of the Convention, but we write separately as we only concur partly with the reasoning of the judgment.

2. We fully concur that there has been a violation of the substantive limb of Article 2 of the Convention. Thus, we agree that the combined effect of sending the applicants' new born child in need of urgent medical treatment from one hospital to another back and forth for four and a half hour without any prior communication or coordination between the hospitals in question and without providing the child with any examination and medical assistance did put the life of the child at risk. The authorities knew or ought to have known, that the life of the child was put at risk by the acts and omissions of the health care personnel involved. In the specific circumstances of the case, the acts and omissions go beyond mere error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient (see, inter alia, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Eugenia Lazăr v. Romania*, no. 32146/05, § 68, 16 February 2010). The Court should, in our view, have limited its finding of a violation of Article 2 of the Convention to this aspect alone.

3. This case is not about a structural problem in the Turkish health care system revealing a dysfunctional system, but a tragic incident resulting from acts and omissions in the treatment of the applicants' child (see paragraphs 80, 82 and 85).

4. Nor do we find basis for criticising the limited number of places for patients, the number or quality of incubators or the failure to compare the urgency of the situation of the applicant's child with that of other children hospitalised (see paragraphs 80 and 81). In general, Article 2 of the Convention cannot be interpreted as requiring a certain standard, level or quality of treatment and equipment in public hospitals. The capacity to provide treatment as well as the level of treatment and the quality of equipment is an area where States have to make difficult decisions taking into account a number of factors, including prioritisation of needs as well as the reality of limited financial resources.

5. Nor do we find sufficient basis for saying, that it raises a problem under Article 2 that the domestic authorities in the specific circumstances of the case did not find basis for pressing criminal charges and instituting criminal proceedings against individuals (see paragraph 83). Compliance with the procedural requirements under Article 2 is not a matter of result, but means.

6. Finally, we do not find basis for criticizing the scope of the investigation performed. The applicants lodged a criminal complaint against

individuals alleging that they were responsible for the death of their child. As a consequence, a criminal as well as an administrative investigation was performed. On the basis of the domestic investigation the Court has been able to assess the facts of the case finding a violation of the substantive limb of Article 2 of the Convention. In our view, there is not sufficient basis for finding that the investigation was incomplete and insufficient, as it did not assessed the functioning of relevant rules on reception of patients or coordination between hospitals or the reasons for shortage of equipment or number of incubators (see paragraphs 84-87). These elements fall outside the scope and the purpose of the domestic investigation.