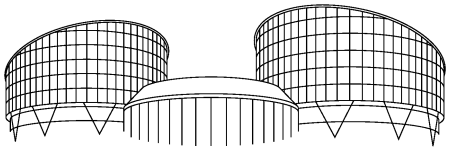

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GRAY v. GERMANY

(Application no. 49278/09)

JUDGMENT

STRASBOURG

22 May 2014

FINAL

13/10/2014

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

In the case of Gray v. Germany,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 8 April 2014,

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

PROCEDURE

1. The case originated in an application (no. 49278/09) against the United Kingdom and the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr Stuart Gray and Mr Rory Gray, on 10 September 2009.

2. The applicants were represented by Mr T. Hall, a lawyer practising with Anthony Collins Solicitors LLP, Birmingham. The German Government ("the Government") were represented by their Agent, Mr H.-J. Behrens, *Ministerialrat,* of the Federal Ministry of Justice.

3. The applicants, relying on the Member State's general duty under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in its Section I, complained, *inter alia,* under the substantive aspect of Article 2 that shortcomings in the British health system in connection with the recruitment of locum doctors and supervision of out-of-hours locum services had led to their father's death as a consequence of medical malpractice by German locum doctor U. They further complained that the investigations into their father's death conducted both in the United Kingdom and in Germany had not complied with the procedural requirements inherent in Article 2 of the Convention. In each case they alternatively invoked a breach of Articles 8, 13 and 14 of the Convention.

4. On 18 December 2012 the application was declared partly inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention as being manifestly ill-founded as regards the complaints against the United Kingdom and the complaints under Article 14 of the Convention. At the same time the complaint concerning the German authorities' failure to

discharge the procedural guarantees inherent in Article 2 was communicated to the German Government (see *Gray v. Germany and the United Kingdom* (dec.), no. 49278/09, 18 December 2012).

5. The applicants and the Government each filed observations on the admissibility and merits of the application. The Government of the United Kingdom, who had been informed of their right to intervene under Article 36 of the Convention, did not make use of this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicants are brothers. Mr Stuart Gray (the "first applicant") lives in Blakedown, United Kingdom, whereas Mr Rory Gray (the "second applicant") lives in Darmstadt, Germany.

7. The applicants are the sons of the late David Gray (hereinafter referred to as "Mr Gray" or "the deceased") who died in the evening of 16 February 2008 at the age of 71 at his home in Cambridgeshire, United Kingdom.

8. Mr Gray suffered from kidney stones and from 2004 on he had regularly been attended at home by his doctor, a General Practitioner ("GP") working for the United Kingdom's National Health Service ("NHS") which is represented at local level by NHS Primary Care Trusts ("PCTs"), in the instant case by Cambridgeshire NHS Primary Care Trust ("Cambridgeshire PCT"). The GP had routinely administered injections of opiates, in particular pethidine at a dosage of 100mg, for pain relief. On several occasions between 2006 and 2008 Mr Gray had recourse to out-of-hours medical services by "Take Care Now" ("TCN"), a private agency that recruits locum doctors within the United Kingdom or from abroad to supply out-of-hours medical care for several PCTs, including the Cambridgeshire PCT. Out-of-hours services concern the periods outside business hours of GP surgeries on weekdays as well as weekends and bank holidays.

9. Since TCN clinicians do not routinely carry pethidine, the deceased had on some of these occasions been injected with 10mg doses of the opiate diamorphine, contained in a sealed palliative care box TCN doctors were provided with for the purpose of home visits at that time. Such palliative care boxes were stocked with 10mg and 30mg vials of diamorphine for acute pain relief together with a much larger ampoule of 100mg intended for patients receiving palliative care. Attached to each box was a list of the

drugs contained as well as a form with instructions for doctors, and inside a document that listed the relative potencies of the drugs.

10. On Saturday 16 February 2008 Mr Gray developed a severe renal colic. In the afternoon his partner contacted the TCN call centre to arrange for an urgent home visit by a doctor. She explained Mr Gray's medical history to the TCN clinician who carried out the first telephone triage consultation and specified what medication Mr Gray had received on the occasion of previous home visits. The case was then assigned to doctor U., a German national, who had recently been recruited by TCN through an agency on a self-employed basis to provide out-of-hours care. U., at the time aged 65, had qualified as a doctor in Germany in 1972 where he was practising as an aesthetic surgeon but where he was also formally qualified as a GP. For the purpose of working as a locum doctor in the United Kingdom he had obtained registration with the British General Medical Council (GMC) in 2006 and had applied to be admitted to one of the Medical Performers Lists maintained by each of the local PCTs. Once a GP is admitted to a PCT's Performers List he may work in the area of any other PCT in England. U. had withdrawn a first application to join Leeds Performers List after being notified that he had not reached a sufficient score in the required English language test. However, the Cornwall and Isles of Scilly PCT authorities, unaware that U. had already tried to register with another PCT, approved a subsequent application and admitted him to their Performers List in July 2007 without verifying his English language skills.

11. U. arrived in the United Kingdom on Friday, 15 February 2008 for his first shift as a locum doctor scheduled for the coming weekend. According to an induction report established by a TCN doctor on 15 February 2008 there had not been sufficient time to assess U.'s professional competence prior to his first assignment the next day.

12. U. attended Mr Gray at his home in the late afternoon of 16 February 2008. He was told by Mr Gray and his partner that in similar situations in the past he had either received injections of 100mg of pethidine for acute pain relief or, where the out-of-hours services did not carry pethidine, had been treated with diamorphine. U. administered 100mg of diamorphine from the respective ampoule included in the palliative care box by intra-muscular injection. Some two hours after U. had left, Mr Gray's partner realised that he was no longer breathing and called an ambulance. The attending emergency services confirmed that Mr Gray had died. The police was informed and attended on-site.

13. On Sunday 17 February 2008 TCN suspended U. from duty, terminated his engagement with immediate effect and advised him to return to Germany where he arrived the following day. Subsequently, two other incidents were reported where U. on the occasion of home visits on 16 February 2008 had failed to administer the appropriate medical treatment.

14. On 29 February 2008 U. returned to London to attend a hearing before the GMC in connection with the incidents on 16 February 2008. By an order of the same date, the GMC suspended the applicant from the British medical register on an interim basis.

15. On 4 March 2008 U. informed the competent public health authorities at the Arnsberg District Government (*Bezirksregierung*), Germany, and by letter of 11 March 2008 his German professional indemnity insurance company of the incident. He explained that when treating the deceased he had committed a grave mistake with fatal outcome that had resulted from the confusion between the drugs pethidine and diamorphine, the latter being a drug not used by on-call services in Germany and with which he had been unfamiliar. On the day of the incident he had further been overtired following his journey from Germany to the United Kingdom and had found himself in a tremendous stress situation.

16. By a letter of 17 April 2008 in reply to a complaint lodged by the first applicant following his father's death, TCN confirmed that U. had satisfied the requirements generally expected from locum doctors working for the TCN and had completed the compulsory induction process all clinicians had to undergo before they could be assigned to clinical shifts.

17. A post mortem report issued on 25 June 2008 by a forensic pathologist in the United Kingdom established as the cause of Mr Gray's death diamorphine poisoning in association with alcohol intoxication as well as hypertensive heart disease and myocardial fibrosis. The report further stated that the diamorphine injection had more than minimally contributed to the death and that in view of the large dose administered there was no need to necessarily invoke the additional effect of alcohol in causing death.

18. By a letter of 10 July 2008 to the deceased's partner and the first applicant, U. apologised for the medical malpractice in connection with the deceased's treatment and again explained that he had confused the opiates and referred to the stress situation he was subject to when making the mistake.

19. On 8 August 2008 the applicant attended a further hearing before the GMC in London where his suspension from the medical register was confirmed.

B. The criminal proceedings instituted against U. in the United Kingdom and Germany

20. Following Mr Gray's death the Cambridgeshire police commenced criminal investigations against U. for manslaughter by gross negligence.

21. On 5 March 2008 Cambridgeshire Constabulary, through Interpol London, made an application for assistance to the German Federal Office of Criminal Investigation (*Bundeskriminalamt*) requesting in particular the

supply of data with respect to U.'s personal record and past professional career. The request was forwarded to the competent Bochum police department which provided the Cambridgeshire police with the requested information and documentation by mid-March 2008.

22. On 21 April 2008 the English Crown Prosecution Service (CPS) sent a formal letter of request to the Ministry of Justice of the *Land* North Rhine-Westphalia, Germany, in accordance with the European Convention on Mutual Assistance in Criminal Matters 1959, requesting assistance in obtaining information with respect to U.'s medical qualifications and the authenticity of the related certificates submitted by him to the British authorities when applying to be admitted as a locum doctor. The letter gave a short summary of the circumstances of Mr Gray's death and specified that while no criminal proceedings had yet been instigated in the United Kingdom, the offence investigated constituted manslaughter, i.e. the unlawful killing of a human being, an offence contrary to Common Law and punishable on conviction by a term of life imprisonment. The CPS asked the German authorities to carry out the respective investigations and to arrange for hearings of the relevant witnesses in Germany in the presence of representatives of Cambridgeshire Constabulary.

23. The request was forwarded by the North Rhine-Westphalia Ministry of Justice to the Hamm General Prosecution Authorities (*Generalstaatsanwaltschaft*) as well as to the locally competent Bochum prosecution authorities. By a decision of the Bochum Chief Public Prosecutor (*Oberstaatsanwalt*) of 6 June 2008 the request for assistance was granted and by letter of the same date the Bochum police department was informed accordingly and invited to provide the requested assistance and to coordinate any future investigation measures with Cambridgeshire police.

24. Simultaneously, the Bochum Chief Public Prosecutor *ex officio* initiated preliminary criminal proceedings (*Ermittlungsverfahren*) against U. in Germany under file no. 49 Js 174/08 on suspicion of having negligently caused the death of Mr Gray pursuant to Article 152 § 2 of the German Code of Criminal Procedure in conjunction with Articles 222 and 7 § 2 no. 1 of the German Criminal Code (see Relevant domestic and international law and practice below). In a letter of the same date the Chief Public Prosecutor instructed the Bochum police to conduct the necessary investigations also in respect of the domestic preliminary proceedings, in particular to interview the suspect U., who was represented by counsel. He further explicitly invited Bochum police to permit the presence of English police officers also on the occasion of such interview.

25. In accordance with the letter of request dated 21 April 2008, Cambridgeshire police officers visited Germany on several occasions in the period from July until September 2008 and were provided with assistance by the German police in their investigations against U. The investigations focussed on the authenticity of the certificates U. had submitted to the

English health authorities as evidence of his medical qualifications as well as on the question whether U.'s treatment of the deceased had amounted to medical malpractice. At the request and in the presence of officers of Cambridgeshire police, German police officers heard, *inter alia*, representatives of U.'s professional indemnity insurance company, of the public health authorities at the Arnsberg District Government and the Westphalia-Lippe Medical Association (*Ärztekammer*) as witnesses. The originals of the protocols of the witness hearings conducted as well as the material obtained in the course of the investigations were handed over to Cambridgeshire police. On 10 July 2008 German and British police officers visited U. at his surgery in Witten, Germany, and informed him that criminal investigations were pending against him in Germany and the United Kingdom. U. availed himself of his right not to testify. He also declined a subsequent request by the Cambridgeshire police to be interviewed in the United Kingdom.

26. Furthermore, at the request of the Cambridgeshire Constabulary a forensic expert opinion was obtained from a professor of Essen university hospital on the question whether the treatment of the deceased by U. had complied with medical standards. The expert established his report on the basis of the information contained in the Cambridgeshire police's investigation files. He presented his preliminary findings to representatives of Cambridgeshire Constabulary on the occasion of one of their visits to Germany in September 2008. In his final report issued on 18 September 2008 the expert confirmed that the cause of Mr Gray's death had been an overdose of diamorphine. He pointed out that notwithstanding the fact that the therapeutical use of diamorphine was in general not permitted in Germany and therefore doctors in Germany were as a rule not trained in its use, U. had not sufficiently investigated the cause of Mr Gray's acute pain and had not verified whether the medication administered and its dosage had been an appropriate therapy under the circumstances. The expert concluded that U.'s treatment of the deceased had thus been inadequate and had violated basic principles of medical care.

27. According to a file note by a Bochum police officer of 23 September 2008, the Cambridgeshire police, for their part, had provided their German counterparts upon request with certain documents for use in the preliminary proceedings conducted against U. in Germany, namely with the post mortem report of 25 June 2008 as well as protocols of statements made by Mr Gray's partner following the latter's death.

28. By a letter of 1 October 2008 counsel for the second applicant practising in Germany informed the Bochum prosecution authorities that his client was the son of a patient who had possibly been killed by U. on 16 February 2008 through medical malpractice. Counsel asked for information whether preliminary criminal proceedings were pending against U. and, should this be the case, requested access to the relevant

investigation files. By a letter of 23 October 2008 counsel for the second applicant reiterated his request for information whether preliminary proceedings had been instituted against U. Pursuant to a file note by the Bochum public prosecution authorities dated 30 October 2008 counsel was informed about the pending preliminary proceedings and forwarded copies of excerpts of the investigation file such as the forensic expert opinion of 18 September 2008 and the letter of March 2008 by which U. had notified the incident to his professional indemnity insurance company.

29. By a letter dated 6 November 2008, Cambridgeshire Constabulary, referring to a telephone conversation of the previous day, requested the German public prosecution authorities to assure that no criminal proceedings would be instituted against U. in Germany prior to finalisation of the investigations in the United Kingdom and that none of the information gathered in the course of the investigations carried out jointly by German and British police officers on the occasion of their visits to Germany would be disclosed to U., Mr Gray's relatives or their respective counsel. According to a file note by the Bochum public prosecution authorities of 5 November 2008, the German prosecution authorities had informed Cambridgeshire Constabulary in reply to a similar request made over the phone that day that they had been obliged by operation of law to institute preliminary criminal proceedings against U. in Germany and that they were also obliged under German criminal procedure to grant counsel for the accused as well as counsel for the victim's relatives acting as joint plaintiffs to the prosecution (*Nebenkläger*) the right to inspect the files in such preliminary proceedings.

30. On 6 November 2008, German counsel for the second applicant, referring to the preliminary proceedings conducted under file no. 49 Js 174/08 against U., transmitted the latter's apology letter of 10 July 2008 to the deceased's partner and the first applicant as well as the TCN's letter to the first applicant dated 17 April 2008 to the Bochum prosecution authorities for inclusion in the investigation file.

31. On 27 February 2009 an arrest warrant was issued against U. by the Huntingdon Magistrates' Court, Cambridgeshire. On 12 March 2009 the Colchester Magistrates' Court issued a European Arrest Warrant ("EAW") against U. for allegedly having caused the death of Mr Gray with an overdose of morphine.

32. On the same day, 12 March 2009, the Bochum Chief Public Prosecutor ordered that the preliminary criminal proceedings against U. be terminated and applied to the Witten District Court for a penal order (*Strafbefehl*) to be issued against U. convicting him of having caused Mr Gray's death through negligence pursuant to Article 222 of the Criminal Code and imposing a suspended prison sentence of 9 months as well as a payment of 5,000 euros (EUR) to the treasury. A draft of the penal order was attached to the application. Following previous discussions with the

public prosecution authorities, U., represented by counsel, had declared that he would accept the envisaged sentence.

33. The Chief Public Prosecutor's assessment of the facts of the case and U.'s guilt set out in the draft penal order relied on the circumstances of the case as reflected in the deceased partner's statements following the incident, the post mortem report of 25 June 2008, the forensic expert opinion of 18 September 2008, the explanatory letter by TCN to the first applicant of 17 April 2008, U.'s notification to his professional indemnity insurance company dated 11 March 2008 as well as his apology letter to the deceased's family of 10 July 2008. The Chief Prosecutor found that while the fact that U. did not have a criminal record, had made a full confession and had apologised to the victim's relatives had to be considered in his favour and notwithstanding the fact that an ampoule with a fatal dose of morphine had been included in the care box, U. had nevertheless committed a grave error in the deceased's treatment and had thus violated basic principles of the medical profession.

34. On 13 March 2009 the EAW was forwarded by the British authorities to the German Federal Office of Criminal Investigation.

35. By email of 17 March 2009 the Cambridgeshire police asked the Bochum public prosecution authorities for information about the procedure to be followed by the German authorities after transmission of the EAW. In their reply of the same day the Bochum public prosecution authorities specified that the Hamm General Prosecutor (*Generalstaatsanwalt*) was the competent authority to deal with questions regarding U.'s extradition and pointed out that extradition might be hindered on the ground that criminal proceedings were also pending against U. in Germany. On the occasion of a phone call later the same day Cambridgeshire police was informed by the Hamm General Prosecution authorities that execution of the EAW was halted in view of the criminal proceedings pending against U. in Germany in accordance with section 83b (1) of the Act on International Cooperation in Criminal Matters (see Relevant domestic and international law and practice below).

36. On 20 March 2009 the Witten District Court issued the penal order (file no. 49 Js 174/08) against U. as applied for by the prosecution authorities. By a decision of the same day, the District Court determined that the probation period for U. was two years starting from the date the penal order became final.

37. By a letter dated 23 March 2009 the CPS asked the Ministry of Justice of the *Land* of North Rhine-Westphalia for information why the EAW had not yet been executed and for clarification whether any criminal or other proceedings were conducted, pending or envisaged against U. in Germany as well as for copies of related court decisions.

38. By fax dated 14 April 2009 newly appointed counsel for the second applicant practising in Germany asked the Bochum prosecution authorities

for information whether the preliminary proceedings against U. had meanwhile been terminated and whether a bill of indictment had been issued. Counsel further asked for information whether a possible trial was to be conducted in Germany or in the United Kingdom. He finally requested to be granted access to the files in the proceedings under file no. 49 Js 174/08. It follows from a subsequent letter by counsel dated 19 May 2009 that his request for inspection of the files was granted. However, it is not clear on what date between 14 April and 19 May 2009 counsel actually obtained access to the file.

39. On 15 April 2009, no appeal having been lodged by U., the penal order of 20 March 2009 became final in accordance with Article 410 of the German Code of Criminal Procedure (see Relevant domestic and international law and practice below).

40. By written submissions dated 6 May 2009 the Hamm General Prosecution Authorities (*Generalstaatsanwaltschaft*) requested the Hamm Higher Regional Court (*Oberlandesgericht*) to declare U.'s extradition to the United Kingdom inadmissible since U. had been convicted by final decision of a German court for the offence underlying the extradition request and the sentence imposed upon him was currently in the process of being executed. His extradition would therefore be contrary to the ban on double jeopardy as reflected in section 9 (1) no. 1 of the Act on Cooperation in Criminal Matters as well as Article 3 no. 2 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JI) (see Relevant domestic and international law and practice below).

41. By a decision of 14 May 2009 the Hamm Higher Regional Court, endorsing the reasoning of the Hamm General Prosecution Authorities, declared U.'s extradition inadmissible.

42. By a letter of 27 May 2009 the Hamm Chief Prosecutor communicated the Higher Regional Court's decision to the Colchester Magistrates' Court in Chelmsford, United Kingdom.

43. By a letter of the same day the Bochum Chief Public Prosecutor, in reply to the CPS's information request of 23 March 2009, explained that he had been obliged by operation of domestic law to instigate criminal investigations against U. after having learned of the circumstances of Mr Gray's death through the CPS's request for assistance dated 21 April 2008. He specified that the domestic proceedings had meanwhile been terminated and that U. had been convicted by a final decision of the Witten District Court for having negligently caused Mr. Gray's death. A copy of the related penal order of 20 March 2009 was attached to the letter.

44. On 1 July 2009 a meeting between the representatives of the Bochum prosecution authorities, the CPS and Cambridgeshire police took place at Eurojust in The Hague with a view to providing explanations on the

conduct of the criminal investigations and proceedings in Germany. The content of these discussions is confidential.

45. In August 2009 and April 2010 counsel for the second applicant was again granted access to the files in the terminated criminal proceedings against U. under file no. 49 Js 174/08.

46. As a consequence of the German authorities' decision not to extradite U., the criminal investigations in the United Kingdom were discontinued.

C. Subsequent investigations and proceedings against U. in Germany

1. The proceedings regarding U.'s fitness to practice medicine before the Arnsberg District Government

47. After U. had informed the Arnsberg District Government of Mr Gray's death in March 2008, the competent District health authorities commenced investigations regarding U.'s fitness to practice as a doctor (*approbationsrechtliches Verfahren*). Within the scope of their investigations the health authorities, *inter alia*, conducted interviews with U. on two occasions in March 2009 and November 2010 with a view to clarifying the circumstances of the incidents of 16 February 2008 and with a view to examining U.'s fitness to practice in general. Furthermore, at the applicants' request a meeting was arranged between them and representatives of the Arnsberg District Government on 27 September 2010 on the occasion of which they provided further information on the circumstances of the case.

48. Following completion of their investigations by the end of 2010 the health authorities, considering U.'s professional conduct over the last 30 years in Germany, the fact that he had committed himself to refrain from practising medicine abroad in the future and taking into account the particular circumstances under which U.'s medical malpractice had occurred, found that there was nothing to establish that U. would commit a similar error of treatment in Germany or that he lacked the necessary qualifications for practising medicine. Consequently, the health authorities held that there was no need to suspend or revoke U.'s licence to practice medicine in Germany and discontinued the proceedings regarding U.'s fitness to practice.

2. The disciplinary proceedings before the Münster Administrative Court

49. By written submissions of 15 April 2010 the Westphalia-Lippe Medical Association applied for the opening of disciplinary proceedings against U. for breach of his professional duties in connection with the incidents in the United Kingdom on 16 February 2008.

50. By a decision dated 27 April 2011 of the competent Münster Administrative Court sitting in a special formation as disciplinary jurisdiction for the healthcare professions (*Berufsgericht für Heilberufe*) U. was reprimanded for having disregarded the standards of the medical profession on the occasions of three patient consultations on 16 February 2008 in the United Kingdom, in particular for having committed a grave error in the treatment of Mr Gray, and fined him 7,000 EUR. The decision became final on 4 June 2011.

D. Subsequent investigations and proceedings against U. in the United Kingdom

51. A number of further investigations and proceedings were instituted in the United Kingdom following Mr. Gray's death. An Inquest into the circumstances of the incident was held by the Cambridgeshire Coroner from 14 January to 4 February 2010. The latter not only returned the verdict that the deceased had been unlawfully killed as a consequence of the inadequate treatment administered by U. but also pointed explicitly to the deficiencies in the recruitment, training and supervision of foreign locum doctors in the United Kingdom. These deficiencies were at the origin of a subsequent report by the Coroner to the Secretary of Health and resulted in investigations by the House of Commons Health Committee as well as in an independent inquiry by the Care Quality Commission, a public body overseen by the Department of Health, which came to similar conclusions as the Inquest and identified related shortcomings in the British health system. Moreover, on the occasion of proceedings conducted by the General Medical Council regarding U.'s fitness to practice in the period from 2 to 18 June 2010, the circumstances of Mr Gray's death were further investigated and additional evidence from expert witnesses and the deceased's next of kin was considered. The GMC Fitness to Practice Panel considered that U. had breached several of the basic principles of good medical practice and decided to formally strike U.'s name from the medical register in the United Kingdom. In addition, in 2009 the applicants brought civil claims for damages for unlawful killing arising out of negligence with the High Court against U., TCN as well as Cambridgeshire PCT in the United Kingdom. The applicants' compensation claims were settled with respect to all three defendants by consent orders of December 2009, January and August 2010.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant German law in connection with the criminal proceedings instituted against U.

52. Pursuant to Article 222 of the German Criminal Code (*Strafgesetzbuch*) a person causing the death of another person through negligence shall be liable to imprisonment of not more than five years or a fine. Article 12 stipulates that unlawful acts punishable by a minimum sentence of less than one year's imprisonment or by a fine shall be qualified as misdemeanours. Article 56 §§ 1 and 2 of the Criminal Code provides that prison sentences which do not exceed two years may be suspended and probation be granted under the conditions specified in that provision.

53. Articles 5 to 7 of the Criminal Code deal with the jurisdiction of Germany for offences committed abroad. The relevant part of Article 7 stipulates that German criminal law shall apply to offences committed abroad if the act constitutes a criminal offence at the place where it was committed and if the offender was a German national at the time he committed the offence.

54. In accordance with Article 152 of the German Code of Criminal Procedure (*Strafprozessordnung*) the public prosecution authorities shall, as a rule, be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications that an offence was committed. Article 160 stipulates that as soon as the public prosecution authorities obtain knowledge of a suspected criminal offence either through a criminal complaint or by other means it shall investigate the facts to decide whether a bill of indictment is to be issued.

55. The rules concerning a conviction of an offender by penal order are to be found in Articles 407 to 412 of the Code of Criminal Procedure. Article 407, as far as relevant, provides that in proceedings before the criminal court judge a sentence for an offence that qualifies as a misdemeanour may be imposed by a written penal order without a main hearing upon written application by the public prosecution office. The public prosecution authorities shall file such application, if they do not consider a main hearing to be necessary given the outcome of the investigations. The application shall refer to specific legal consequences. It shall constitute the formal bill of indictment. Only certain sentences may be imposed for an offence by penal order, such as, *inter alia*, a fine or - where the accused is represented by counsel - imprisonment not exceeding one year, provided its execution is suspended on probation. In the case of suspension on probation, it is possible to impose in addition the payment of a certain sum of money for the benefit of a non-profit organisation or the treasury (Article 56b § 2 of the Criminal Code). Article 408 § 3 stipulates

that the judge shall comply with the public prosecutor's application if he has no reservations about issuing the penal order. He shall set down a date for the main hearing if he has reservations about deciding the case on the basis of a written procedure, if he wishes to deviate from the public prosecutor's legal assessment in the application to issue the penal order, or if he wishes to impose a legal consequence other than the one applied for by the public prosecutor and the latter disagrees. In accordance with Article 409 of the Code of Criminal Procedure the penal order shall contain information as regards, *inter alia*, personal data of the defendant and of any other persons involved, the offence the defendant is charged with, the time and place of its commission, the evidence on which the statement of facts and legal assessment are based as well as the legal consequences imposed. It should further advise on the possibility of filing an objection against the penal order and that the latter shall become effective and executable if no such objection is lodged within the time-limit of two weeks following its service in accordance with Article 410 of the Code of Criminal Procedure. Where no objection is lodged the penal order shall be equivalent to a final judgment.

56. Pursuant to Article 201 of the Code of Criminal Procedure the presiding judge shall communicate the bill of indictment to the persons entitled to join the prosecution as joint plaintiffs (*Nebenklagebefugte*) if they so request. Article 395 provides that a person whose children, parents, siblings, spouse or civil partner were killed through an unlawful act and thus qualify as aggrieved persons of such act may join the public prosecutor as joint plaintiffs to the prosecution (*Nebenkläger*). Pursuant to Article 396 § 1 a declaration to join in penal order proceedings shall only take effect when the judge decides to schedule a date for the main hearing. Article 400 provides that joint plaintiffs to the prosecution may not contest a judgment with the objective of another legal consequence of the offence being imposed.

57. Articles 406d to 406h grant aggrieved persons, including those whose children, parents, siblings, spouse or civil partner were killed through an unlawful act, certain participation rights in criminal proceedings conducted in respect of the underlying offence. Article 406d § 1 stipulates that aggrieved persons shall, upon request, be notified of the termination of the proceedings and the outcome of court proceedings to the extent they are concerned by them. According to Article 406f aggrieved persons may avail themselves of the assistance of an attorney or be represented by such attorney. Pursuant to Article 406e § 1 counsel for the aggrieved person may inspect the files that are available to the court or the files that would be required to be submitted to the latter if public charges were preferred, as well as the officially impounded pieces of evidence, if he can demonstrate a legitimate interest in this regard. In the event the aggrieved persons are the children, parents, siblings, spouse or civil partner of the victim as referred to

in Article 395 (see § 56 above), there shall be no requirement to demonstrate such legitimate interest. Article 406h § 1, in the version in force at the relevant time, stipulated that aggrieved persons should be informed of their rights following from Sections 406d to 406g and of their right to join the public prosecution as plaintiffs under Article 395.

B. Relevant German and international law in connection with the extradition proceedings instituted against U.

58. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) provides in its Article 1 that Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. Article 4 specifies that the judicial authority of a Member State may refuse to execute a European arrest warrant against a person where the latter is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based. Pursuant to Article 3 the executing judicial authorities of a Member State shall refuse to execute a European arrest warrant if it has come to their knowledge that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

59. Pursuant to section 1 of the German Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)*) its provisions shall govern the relations between Germany and foreign States regarding legal assistance in criminal matters. It further specifies that provisions of international treaties shall take precedence over the provisions of the Act to the extent that they have become directly applicable in the domestic legal order. Pursuant to section 80 (1) of the Act the extradition of a German citizen to a Member State of the European Union for the purpose of prosecution shall not be admissible unless measures are in place to ensure that the requesting Member State after a final conviction to a sentence of imprisonment or other sanction will offer to return the person sought, if he so wishes, to Germany for the purpose of enforcement and unless the offence has a substantial link to the requesting Member State. The competent Higher Regional Court in Germany, acting upon application of the relevant public prosecutor, decides on the admissibility of an extradition request (see section 29 of the Act). In accordance with section 83 b (1) of the Act, extradition may be refused if criminal proceedings are pending against the person sought in Germany for the same offence as the one on which the extradition request is based. Furthermore, section 9 stipulates that extradition shall not be granted in the

event the offence at issue is also subject to German jurisdiction and a domestic court or other domestic authority has rendered a final decision against the prosecuted person in this respect.

THE LAW

ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

60. The applicants complained under Article 2 of the Convention, read in conjunction with the State's general duty under its Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", that Germany did not provide for an adequate or effective official investigation into their father's death. They further complained that the German authorities had refused to allow U.'s extradition to face trial in the United Kingdom. They relied in this respect on the procedural obligations inherent in Article 2 § 1 which provides in its first sentence:

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

and, alternatively, on Article 8 of the Convention which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

61. The applicants maintained in particular that the summary criminal proceedings instituted against U. in Germany had not involved a proper investigation or scrutiny of the facts of the case or the related evidence. Moreover, the German authorities had failed to inform them of the proceedings and had thus deprived the deceased's next of kin of any possibility to get involved and participate in the latter.

62. The Government contested that argument.

63. The applicants further complained that U.'s conviction by the Witten District Court could no longer be challenged since it had become final. They relied on Article 13 in this respect, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

64. The Court finds that the entirety of the applicants' complaints relate in substance to an alleged failure by the German authorities to discharge their procedural obligations under Article 2 § 1 of the Convention and

therefore falls to be examined under that provision with no separate issue arising under its Articles 8 and 13 (with respect to Article 13 see also *Gray v. Germany and the United Kingdom*, cited above, § 76).

A. Admissibility

65. The Government argued that as regards part of the complaints the application was inadmissible since the applicants had failed to exhaust domestic remedies. They contended, in the alternative, that there had been no breach of Article 2 § 1 of the Convention and that the application should be rejected as being manifestly ill-founded.

66. The Government conceded that the applicants did not have available an effective remedy under German law in the meaning of Article 35 § 1 of the Convention as regards their complaint that the criminal proceedings in Germany had not involved a proper investigation into their father's death. They specified in this respect that German law did not provide for a right to request particular measures of investigation by the prosecution in criminal proceedings against third parties or to challenge the investigative authorities' measures in such proceedings. German criminal procedure did also not grant the next of kin of a crime victim the right to challenge the decision of the prosecution authorities and the domestic courts to prosecute and convict the perpetrator of an offence which, as in the instant case, qualified as a misdemeanour in summary proceedings without a main hearing.

67. The Government submitted that, by contrast, the applicants would have had the possibility to complain about the German prosecution authorities' alleged failure to inform them about the proceedings against U. in their capacity as next of kin of the deceased in accordance with Article 406d et seq. of the Code of Criminal Procedure. The Government maintained, however, that such a complaint would not have had a prospect of success since the domestic authorities had fully complied with the applicants' related information requests throughout the proceedings and had thus respected their related rights.

68. The applicants argued that the Government appeared to concede that they had not had available an effective domestic remedy in respect of their complaints.

69. The Court reiterates that the obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see among other references, *Sejdovic v. Italy* [GC], no. 56581/00, §§ 45 and 46,

ECHR 2006-II). The Court notes that in the instant case the Government themselves indicated that in respect of part of the applicants' complaints domestic law did not provide for an effective domestic remedy whereas the available remedy in respect of the remainder of the complaints would not have had any prospect of success.

70. Having regard to the above considerations the Court dismisses the Government's objection of non-exhaustion of domestic remedies. Neither does the Court find the complaints manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It accordingly declares the application admissible.

B. Merits

1. The parties' submissions

(a) The applicants

71. The applicants maintained that given the gravity of the offence committed by U., the summary written penal order proceedings conducted against him in Germany and the sentence imposed by the Witten District Court were not sufficient to discharge the procedural guarantees enshrined in Article 2 § 1. The criminal proceedings in Germany had not involved a proper investigation or scrutiny of the facts of the case or the related evidence. In this respect the applicants, whilst accepting that U. had confessed in writing that his medical malpractice had been at the origin of their father's death, pointed to the fact that he had never been formally interviewed by the German prosecution authorities or trial court.

72. The applicants conceded that, in the generality of cases, and so as not to overburden the judicial system, a Member State could legitimately allocate a proportion of its criminal caseload to written proceedings. The instant case was however atypical due to its international dimension resulting from the fact that investigations had been simultaneously pending in the United Kingdom and that the British police authorities had informed their German counterparts of their continued intention to take action against U. In this context the applicants also pointed to the fact that in 2007 two incidents had been reported where locum doctors having previously trained and practised in Germany had treated patients in the United Kingdom and had administered overdoses of diamorphine from palliative care boxes to patients on two separate occasions. The applicants took the view that in an unusual and sensitive case like the present one the prosecution authorities' decision to apply for a conviction by penal order in summary proceedings was open to question.

73. The applicants further submitted that the Bochum prosecution authorities had not informed them of their various procedural rights in their capacity as next of kin of the deceased in accordance with Article 406h of

the Code of Criminal Procedure (see Relevant domestic and international law and practice above) which, as a consequence, had not been effective in practice. Moreover, they had not been able to exercise their right to join the public prosecutor as plaintiffs in the proceedings against U. since the prosecution authorities had omitted to notify counsel for the second applicant mandated in Germany of the termination of the investigations and of their decision to charge U. by means of an application for a penal order. Insofar as German criminal procedure did not impose an express obligation on the prosecution authorities to keep potential joint plaintiffs to the prosecution informed on the state of progress of pending (preliminary) criminal proceedings, the applicants argued that domestic law failed to give full effect to the procedural guarantees inherent in Article 2 § 1. They contended in this connection that the German authorities had concealed their intention to prosecute and convict U. in Germany with a view to preventing his extradition to the United Kingdom where he would have expected a heavier sentence for having caused their father's death through negligence.

(b) The Government

74. The Government argued that German legal order provided for an effective and independent judicial system with a view to establishing the cause of deaths resulting from medical malpractice and with a view to making those responsible for the death of patients accountable, in accordance with the procedural guarantees enshrined in Article 2 § 1 as specified in the Court's case-law (citing *Šilih v. Slovenia* [GC], no. 71463/01, §§ 192 and 195, 9 April 2009, and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I). Within the framework of such judicial system, the background and circumstances of Mr Gray's death had been promptly and thoroughly investigated and assessed.

75. The Government maintained that, contrary to the applicants' submissions, the fact that U. had been tried in summary criminal proceedings without a main hearing had had no impact on the scope and quality of the investigations underlying his conviction. Preliminary criminal proceedings leading to a suspect's conviction by penal order did not differ from those that were followed by a main hearing.

76. The Government explained that pursuant to Article 407 of the Code of Criminal Procedure (see Relevant domestic and international law and practice above) the public prosecution authorities were under an obligation to apply for an accused's conviction by means of a penal order if in the course of the criminal investigations in respect of a misdemeanour sufficient material had been gathered to allow a complete assessment of the case by the criminal court and a main hearing could not be expected to lead to any deviation from the investigation results. The Government contended that these requirements had been clearly met in the instant case. They further took the view that the conduct of a main hearing had also not been

necessary for special or general preventive purposes (*aus Gründen der Spezial- oder Generalprävention)*. They specified in this context that, having regard to the particular circumstances under which the medical malpractice leading to Mr. Gray's death had occurred and the fact that U. did not have a criminal record in Germany, there had been nothing to establish that he would commit a similar error of treatment in Germany.

77. Accordingly, the prosecution authorities' decision to apply for U.'s conviction by penal order had been justified and the applicants' right to join the prosecution as plaintiff had not become effective pursuant to Article 396 § 1 of the Code of Criminal Procedure since no main hearing had been scheduled by the trial court (see Relevant domestic and international law and practice above). In this connection the Government pointed to the fact that potential joint plaintiffs to the prosecution did not have available a legal remedy to challenge the domestic authorities' decision to convict an accused in summary proceedings without a main hearing. For this reason, German criminal procedure did also not impose an obligation on the prosecution authorities to inform potential joint plaintiffs to the prosecution of their decision to apply for a penal order.

78. The Government further argued that the applicants' rights in their capacity as the deceased's next of kin had been fully respected in the course of the criminal proceedings against U. They had been granted effective access to the investigative proceedings and had been involved in the procedure to the extent necessary to safeguard their legitimate interests in line with the requirements set out in the Court's case-law. The Government maintained in this context that the applicants had been involved in the proceedings from the beginning through the intermediary of the second applicant's lawyer mandated in Germany and had been informed about the proceedings instituted against U. according to their respective requests submitted to the prosecution authorities.

79. The Government concluded that the proceedings at issue had fully complied with the procedural requirements of Article 2 of the Convention.

2. The Court's assessment

80. The Court reiterates that the procedural obligation of Article 2 requires the States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among other authorities, *Šilih v. Slovenia*, cited above, § 192; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Calvelli and Ciglio*, cited above, § 49).

81. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law.

However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII). In the specific sphere of medical negligence 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 responsibility of the medical practitioners concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (*Calvelli and Ciglio*, cited above, § 51; and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII).

82. 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,* cited above, § 195; *Calvelli and Ciglio*, cited above, § 53; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006).

83. The Court observes that in the case at hand the applicants did not in any way suggest that their father's death was intentional. They also do not seem to contest that the German legal order does in principle provide for an effective independent judicial system with a view to determining the cause of death of patients in the care of the medical profession and making those responsible for an unlawful killing arising out of negligence accountable. The Government submitted in this context that in the event of a patient's death as a result of medical malpractice his or her next of kin may lodge a criminal complaint against those allegedly responsible should the prosecution authorities not already have started investigations *ex officio*. Moreover, next of kin may bring claims in negligence against those responsible for the victim's death before the civil courts with a view to obtaining compensation. In addition, depending on the circumstances of the case, professional or administrative disciplinary measures may be imposed on those answerable for the unlawful killing.

84. Turning to the circumstances of the instant case, the Court notes that the German prosecution authorities started criminal investigations into the circumstances of Mr Gray's death on their own initiative in June 2008 after they had been informed about the incident in the context of a request for legal assistance made by their British counterparts. Within the scope of the ensuing preliminary criminal proceedings in Germany the cause of death and U.'s involvement in the underlying events were conclusively established in due course by the German investigative authorities. In cooperation with their British counterparts, German police officers heard,

inter alia, representatives of U.'s professional indemnity insurance company, of the public health authorities at the Arnsberg District Government and the Westphalia-Lippe Medical Association as witnesses with a view to assessing U.'s medical qualifications and to establishing whether U.'s treatment of the deceased had amounted to medical malpractice. Further written evidence was provided by the Cambridegshire police, such as the post mortem report of 25 June 2008 as well as depositions made by Mr Gray's partner following the latter's death. The prosecution authorities also had regard to an expert opinion from a professor of Essen university hospital on the question whether the treatment of the deceased by U. had complied with medical standards and which opinion had been established having regard to the information contained in the Cambridgeshire police's investigation files. The German prosecution authorities also made an attempt to interview U., who, however, availed himself of his right not to testify. The Court observes in this connection that U. had confessed in writing from the outset that his medical malpractice had been at the origin of Mr Gray's death. The description of the incident given in his apology letter of 10 July 2008 to the deceased's partner and the first applicant as well as in his letter of 11 March 2008 to his professional indemnity insurance company had been consistent with the testimonies obtained from the further witnesses and experts examined during the investigations.

85. In view of these circumstances, the Court is satisfied that the criminal proceedings conducted in Germany enabled the investigative authorities to determine the cause of Mr Gray's death and to establish U.'s responsibility in this respect. Having regard to the available body of evidence taken together, the Court accepts the Government's finding that the prosecution authorities' decision to apply for U.'s conviction in summary proceedings without a main hearing had been justified and that the Witten District Court had available sufficient means of evidence to proceed to a thorough assessment of the circumstances of the case and U.'s guilt. It further notes that there is nothing to suggest that the penal order proceedings were not conducted in accordance with domestic law or that the evidentiary conclusions reached by the prosecution authorities or the trial court had been unfounded. The Court also notes the Government's argument that in view of the fact that there was nothing to establish that U. would commit a similar error of treatment when practicing as a medical doctor in Germany, there had been no grounds to exceptionally hold a main hearing with a view to enabling an enhanced public scrutiny for preventive purposes in the instant case.

86. Turning to the applicants' allegations that they had not been sufficiently involved in the criminal proceedings conducted in Germany against U., the Court observes that the German prosecution authorities did not inform the applicants on their own initiative about the initiation of the

criminal investigations at issue. Neither did they inform them of their decision of 12 March 2009 to apply for U.'s conviction by means of a penal order nor did they – being approached by the second applicant's lawyer – comprehensively inform the applicants themselves of all their rights. It appears that the applicants only learned about the fact that a penal order had been issued by the Witten District Court against U. on 20 March 2009 after the order had become final on 15 April 2009.

87. The Court recognises that, as submitted by the Government, pursuant to German criminal procedure the prosecution authorities were not obliged to inform the applicants on their own initiative about the initiation and progress of the proceedings against U. The Court is of the opinion that in the instant case such obligation does not follow from the procedural requirements inherent in Article 2 § 1 of the Convention. The Court reiterates in this context that it has previously held that in situations where the responsibility of State agents in connection with a victim's death had been at stake, Article 2 § 1 required that within the scope of the investigations conducted by the authorities into the underlying events "the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests" (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 109, ECHR 2001-III (extracts), and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 98, 4 May 2001). It notes that, by contrast, the present application does not concern a case where an involvement of State agents in the victim's death is at issue or where the circumstances surrounding the death were suspicious or unclear. The Court further recalls that in the sphere of medical negligence the procedural obligation imposed by Article 2 does not necessarily require the provision of a criminal-law remedy and that it may therefore be arguable whether and to what extent the applicants' involvement as next of kin is required in the event the prosecution authorities have recourse to such a remedy on their own initiative as in the present case. The Court notes that, even assuming similar considerations as in its above cited case-law applied in the instant case, the applicants have been involved in the criminal proceedings against U. in the following manner.

88. The Court observes, firstly, that the German prosecution authorities had initiated criminal proceedings against U. *ex officio* in June 2008 at a time when they had not yet been aware of the applicants as possible next of kin of the victim. It notes that neither German law nor the procedural requirements inherent in Article 2 § 1 as defined in the Court's case-law impose an obligation on the prosecution authorities to search on their own initiative for a victim's next of kin with a view to informing them of the institution of investigations or their procedural rights in this respect. It would be particularly burdensome for the domestic authorities to comply with such an obligation in cases like the present one where the victim was a foreigner and the events at issue occurred abroad.

89. Subsequently, by letter of 1 October 2008, counsel for the second applicant practising in Germany informed the Bochum prosecution authorities that he had been mandated by a son of the deceased. He asked for information whether preliminary criminal proceedings were pending against U. and requested access to the relevant investigation files. Having reiterated his request by letter of 23 October 2008, counsel was informed by the prosecution authorities about the pending preliminary proceedings and forwarded copies of excerpts of the investigation file. The Court further notes that within the course of the preliminary proceedings the applicants had the opportunity to contribute to the investigations. For instance, on 6 November 2008 counsel for the second applicant transmitted U.'s apology letter of 10 July 2008 as well as TCN's letter dated 17 April 2008 to the Bochum prosecution authorities for inclusion in the investigation file.

90. It follows that the applicants did in fact avail themselves of their rights as aggrieved persons in the proceedings against U. pursuant to Articles 406d to 406g of the Code of Criminal Procedure (see Relevant domestic and international law and practice above). As contended by the Government there had thus been no need for the prosecution authorities to provide further information to the applicants in this respect, in particular in view of the fact that the latter had been represented by counsel throughout the proceedings. Having regard to the fact that U. confessed from the outset that he had negligently caused Mr Gray's death through medical malpractice, it must have been evident to counsel that according to German criminal procedure U.'s conviction by means of a penal order had been an option in the instant case.

91. The Court finally observes that the German authorities' decision to convict U. in summary proceedings without previously notifying the applicants of their intention to proceed in such way did not affect the applicants' legitimate interests as aggrieved persons or potential joint plaintiffs to the prosecution. In this respect the Court refers to the Government's submissions that as a consequence of the domestic authorities' justified decision to have recourse to summary proceedings and to refrain from scheduling a main hearing (see §§ 84 and 85 above) the applicants' right to join the prosecution as plaintiff had not become effective pursuant to Article 396 § 1 of the Code of Criminal Procedure (see Relevant domestic and international law and practice above). The Court further accepts the Government's argument that, since the circumstances of the case had been sufficiently established in the course of the investigative proceedings, a participation of the applicants in a potential main hearing, even if it might have a cathartic effect for the victim's next of kin, could not have further contributed to the trial court's assessment of the case. It notes in that context that the applicants have not specified which aspect of U.'s responsibility for medical negligence causing the applicants' father's death has not been sufficiently clarified. Moreover, even in the event a hearing

had been scheduled, pursuant to Article 400 § 1 of the Code of Criminal Procedure, the applicants would not have had the right to contest the trial court's judgment with the objective of a heavier penalty being imposed on U.

92. Having regard to the above considerations, the Court considers that there is nothing to establish that the legitimate interests of the deceased's next of kin were not respected in the domestic proceedings.

93. The Court observes that, in reality, the applicants complained about the fact that U. was convicted in Germany and not in the United Kingdom where he may have faced a heavier penalty. It notes in this context that the German authorities were obliged to institute criminal proceedings against U. by operation of domestic law once they had learned of his involvement in the events surrounding Mr Gray's death and consequently had a basis for their decision not to extradite U. to the United Kingdom in accordance with the relevant domestic and international law. The Court would point out in this respect that the procedural guarantees enshrined in Article 2 do not entail a right or an obligation that a particular sentence be imposed on a prosecuted third party under the domestic law of a specific State. It reiterates in this connection that the procedural obligation under Article 2 is not an obligation of result but of means only (see *Paul and Audrey Edwards* v. the United Kingdom, no. 46477/99, § 71, ECHR 2002-II, and *Gray v. Germany and the United Kingdom*, cited above, § 95).

94. The Court further finds it relevant to note that in addition to the criminal proceedings conducted against U., investigations regarding his fitness to practice as a physician had been conducted by the competent German administrative authorities. Within the scope of the investigations regarding U.'s fitness to practice medicine, the latter had been heard by the competent health authorities on two occasions and the applicants were granted an opportunity to provide further information on the circumstances of the case. Furthermore, as a consequence of the disciplinary proceedings instituted against U. before the Münster Administrative Court on the initiative of the Westphalia-Lippe Medical Association, the latter was reprimanded for having committed a grave error in the treatment of Mr Gray and imposed a fine. The Court recalls in this connection that in the specific sphere of medical negligence disciplinary measures may also be envisaged with a view to satisfying the procedural obligation of Article 2 (see § 81 above).

95. The Court concludes that in the present case the German authorities have provided for effective remedies with a view to determining the cause of the applicants' father's death as well as U.'s related responsibility. There is further nothing to establish that the criminal investigations and proceedings instituted on the initiative of the German authorities in relation to Mr Gray's death fell short of the procedural guarantees inherent in Article 2 § 1 of the Convention.

96. There has accordingly been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 2 of the Convention.

Done in English, and notified in writing on 22 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Power-Forde is annexed to this judgment.

M.V.
C.W.

CONCURRING OPINION OF JUDGE POWER-FORDE

I voted with the majority to find no violation of Article 2 of the Convention. The case, however, raises a question which may require clarification in another forum. The judgment cites a central principle articulated in *Hugh Jordan v. the United Kingdom.*[1] In situations where the responsibility of state agents in connection with a person's death is at stake, the next of kin of the victim must be involved in any investigative procedure conducted by the authorities to the extent necessary to safeguard his or her legitimate interests. The question which the instant case raises is whether a deceased person's family has the same or an equivalent right to be involved in such criminal investigations that ensue where the responsibility of non-state agents is in issue.

The facts of the present case are extreme. The applicants' father's death was caused by the gross negligence of a doctor who administered a lethal dose of *diamorphine* in circumstances where he was not familiar with or aware of the purposes of that drug. Criminal proceedings were instituted both in Germany where he had been licenced to practise and in the United Kingdom where the death had occurred. It is in these circumstances that the judgment considers the extent to which, if at all, the family had right to be involved in such proceedings as were instituted by the German authorities.

The judgment confirms that the Court's jurisprudence does not necessarily require the provision of a criminal law remedy in every case involving medical negligence. It then considers that 'it may, therefore, be arguable whether and to what extent the applicants' involvement as next-of-kin is required in the event that the prosecution authorities have recourse to such a remedy on their own initiative' (§ 87). Having questioned whether the applicants' involvement in the criminal investigation was '*required*' as part of the state's procedural obligations under the Convention, the judgment concludes -without answering the question- that the applicants' 'involvement', such as it was in this case, was sufficient to the extent necessary to safeguard their interests (§ 92).

I would have preferred the judgment to identify, more specifically, the legitimate interests of the next-of-kin in criminal proceedings for wrongful death caused by non-state agents and, thereafter, to examine whether such interests had been safeguarded sufficiently. Clearly, the family has a legitimate interest in establishing the facts pertinent to the cause of death together with an interest in identifying the person responsible. These matters were certainly established in the investigation conducted by the authorities

[1] *Hugh Jordan v. the United Kingdom*, no. 24746/94, ECHR 2001-III (extracts).

in this case.[2] Whether the family's legitimate interests in criminal proceedings extend any further—or to put it another way, whether the state's obligation vis-à-vis the next-of-kin ends there—is a question that might, usefully, be clarified.

It is anomalous that whilst German law obliges the authorities to grant a victim's relatives the right to inspect the files in criminal proceedings taken against the perpetrator of the offence (§ 29) that same law imposes no obligation on the authorities to inform the relatives of the fact that such proceedings, *to which they are parties*, have terminated. On the 12th of March 2008 the prosecutor in this case took such a decision to terminate the criminal proceedings against Doctor U. They applied to the Witten District Court for a penal order to be issued, which, if granted, would impose a suspended sentence of nine months upon the doctor together with a fine of €5,000. German law did not entitle the applicants to challenge this request for the purposes of 'having a different legal consequence for the offence being imposed' (§ 56). Essentially, they had no right to object to this application nor, indeed, to be heard by the court that would impose such an order. In this context, victim impact evidence is, apparently, not a factor in the assessment of such applications which, if granted, have significant consequences in terms of sentencing.

I hesitate to endorse the very broad nature of the assertion that the decision not to notify the applicants about the termination of criminal proceedings '*did not affect their legitimate interests as aggrieved persons or potential joint plaintiffs in the prosecution*' (§ 91) in circumstances where those interests have not been identified, specifically. No longer being joint plaintiffs in criminal proceedings has obvious consequences for the next-of-kin. The discontinuation of proceedings without notice to a party thereto may raise an issue under Article 6 of the Convention. Whether that failure to notify affects the party's interests sufficiently so as to amount to a violation of Article 2 is questionable.

I accept that a penal order may satisfy the requirements of Article 2 insofar as it enables the authorities to identify the cause of death and the

[2]A state's general responsibility under Article 2, however, is not limited to establishing the immediate or proximate cause of death as is clear from the Court's findings in a number of cases (See *L.C.B. v. the United Kingdom* (9 June 1998, *Reports of Judgments and Decisions* 1998-III); *Öneryıldız v. Turkey (*[GC], no. 48939/99, ECHR 2004-XII); and *Opuz v. Turkey (*no. 33401/02, ECHR 2009)). In considering the state's obligations under Article 2, this Court assesses whether the state did all that could have been required of it to prevent life from being 'avoidably put at risk'. This assessment, however, does not fall within a review of any criminal proceedings taken against an individual responsible for the wrongful death.

person responsible therefor. However, where a wrongful death resulting in criminal proceedings being instituted occurs, it is, psychologically, of some value for the next-of-kin to have an opportunity to hear the authorities pronounce on such criminal responsibility. It is important for them to have a public acknowledgement of the wrong that was done to their loved one even if they are aggrieved by the apparent leniency of the penalty imposed for having caused such a wrong.