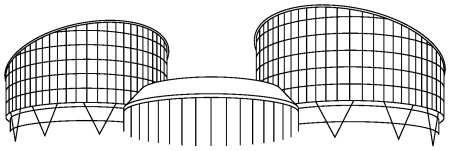

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF VASILEVA v. BULGARIA

(Application no. 23796/10)

JUDGMENT

STRASBOURG

17 March 2016

FINAL

12/09/2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Vasileva v. Bulgaria,

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

Angelika Nußberger, *President*,
Khanlar Hajiyev,
Erik Møse,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 23 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 23796/10) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Ms Maria Ivanova Vasileva ("the applicant"), on 29 March 2010.

2. The applicant was represented by Mr M. Ekimdzhiev and Ms K. Boncheva, lawyers practising in Plovdiv. The Bulgarian Government ("the Government") were represented by their Agent, Ms V. Hristova, of the Ministry of Justice.

3. The applicant alleged, in particular, that the lack in Bulgarian law of a system effectively ensuring the impartiality of medical experts in proceedings relating to medical malpractice had prevented her from obtaining compensation for damage suffered as a result of a surgery and had rendered the proceedings in which she had attempted to do so unfair.

4. On 6 February 2014 the Court decided to give priority to the application under Rule 41 of its Rules, to give the Government notice of the complaints concerning the two above-mentioned matters, and to declare the remainder of the application inadmissible under Rule 54 § 3 of its Rules.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Plovdiv.

A. The applicant's illness and the surgery she underwent in 2003

6. In January 2000 the applicant, who had been diagnosed with invasive ductal carcinoma, underwent mastectomy of her left breast.

7. In the beginning of 2002 the applicant began to experience pain in the left side of her chest, for which in February 2002 she underwent a bone scintigraphy. The scintigraphy found a pathological uptake of radioactive tracer in her sixth left rib. Another bone scintigraphy in May 2002 confirmed that finding. However, a computerised axial tomography scan carried out later in May 2002 showed a suspected metastasis in the area of the eighth and ninth left ribs rather than the sixth one. The doctor who performed the scan recommended a further bone scintigraphy. Two such scintigraphies, in August 2002 and in January 2003, showed the same findings as the previous two. A radiography in February 2003 showed a suspected pathological lesion in the sixth left rib. But a second computerised axial tomography scan later in February 2003 found again that the suspected metastasis was in the area of the eighth and ninth left ribs.

8. On 26 February 2003 a panel of five medical doctors decided that the suspected metastasis was to be surgically removed.

9. Worried that the exact location of the suspected metastasis had not been fully established, the applicant asked the surgeon who was to operate on her, Dr K.M., whether further tests were required before the operation. According to the applicant, he told her that the available imaging results were sufficient and that he would be able to identify the metastasis once he had opened up her thorax. The applicant then approached the medical doctor who had performed the mastectomy in January 2000 (see paragraph 6 above). He told her that the suspected metastasis was very small, could not be localised visually, and had to be precisely localised before any surgery. The applicant shared her misgivings in that respect with Dr K.M. and reiterated her request for further tests before the operation. However, he reassured her that the available imaging results were sufficient.

10. Having assented to the operation by signing an informed consent form, the applicant underwent surgery on 13 March 2003. In the course of that surgery Dr K.M. removed fragments of her fourth and fifth left ribs, rather than her sixth, eighth or ninth left ribs. However, the operation report erroneously said that he had removed fragments of the eighth and ninth ribs. When talking to the applicant the next day, Dr K.M. likewise told her that he had removed fragments of those ribs, and that he had inspected her lungs.

11. The removed rib fragments were sent for histological testing, the results of which were ready on 25 March 2003 and showed that they did not contain cancerous tissue.

12. When seeing her hospitalisation report upon her discharge from hospital on 24 March 2003, the applicant was surprised to find that her sixth left rib had been left in place and that, instead, fragments of her fourth and

fifth left ribs, where no lesions had been detected by the scans and where no cancerous tissue was present according to the histological tests, had been removed. She approached Dr K.M., who denied having made a mistake but agreed to prescribe a further bone scintigraphy, which was carried out in September 2003 and found an increased uptake of radioactive tracer in the sixth left rib and also in the fourth and fifth left ribs. A computerised axial tomography scan carried out the same month found that parts of the fourth and fifth left ribs had been removed and that the sixth left rib was fractured.

13. The applicant asked Dr K.M. to explain all that, and he apparently again denied having made any mistake.

14. For years after the operation, the applicant was undergoing radiotherapy and hormonal therapy.

B. The complaints to the Ministry of Health and the hospital

15. In late 2003 the applicant complained about the operation to the Ministry of Health. The Ministry ordered the Plovdiv Regional Health Inspectorate to carry out an inquiry and, based on its findings, on 23 January 2004 informed the applicant that in view of the inconclusive results of the medical imaging tests, the operating team had chosen to make a wide opening in the thorax, enabling them to inspect the left side of the thoracic wall from the fourth to the ninth ribs. They had decided to remove parts of the fourth and fifth ribs because they had observed macroscopic changes on them; they had not found pathological changes in the sixth rib. The reference to the eighth and ninth ribs in the operation report had been a clerical mistake.

16. The results of the inquiry, coupled with a complaint filed by the applicant with the hospital, prompted the hospital's ethical commission to review the case. It did not find any misconduct on the part of Dr K.M.

C. The proceedings for damages against the surgeon and the hospital

1. The proceedings before the Plovdiv Regional Court

17. On 27 January 2004 the applicant brought a claim for damages against Dr K.M. and the hospital in which he was employed, a State-owned limited liability company. She alleged that he had (a) erroneously removed parts of two healthy ribs, the fourth and the fifth on the left, without having obtained her consent; (b) inspected her lungs, which had been unnecessary and unjustified; (c) fractured her sixth left rib; and (d) failed to remove the metastasis, which had been the very purpose of the operation.

18. On 14 April 2004 the Plovdiv Regional Court admitted a number of medical documents, including the consent form signed by the applicant before the operation. At the request of the applicant, the court ordered an

expert report, to be drawn up by an oncologist, nominated by the applicant, a thoracic surgeon, nominated by Dr K.M., and a radiologist, nominated by the court, on a number of points raised by counsel for the applicant. At the request of Dr K.M., the court ordered a second expert report, to be drawn up by another thoracic surgeon.

19. On 2 July 2004 the court appointed a new oncologist because the one initially chosen had declined the task, ordered the applicant to present herself for examination by the experts, admitted her medical files, and heard as witnesses a surgeon who had taken part in the operation alongside Dr K.M. and another surgeon who had monitored the applicant in the hospital after the operation.

20. The two expert reports were filed in October 2004.

21. The report drawn up by the three experts described the different methods for detecting bone metastases, including bone scintigraphy, emphasising that their results had to be assessed cumulatively; said that when operating on cancer patients it was mandatory to inspect adjoining organs by palpation; described the extent, in their view limited, to which the removal of parts of the fourth and fifth left ribs had affected the applicant's body movements; said that rib fractures were almost inevitable and very frequent in thoracotomies; said that the main principle when operating on cancer patients was that all decisions were to be made by the entire team; and opined that it would be possible to operate on the applicant again, should the need arise.

22. The thoracic surgeon's report said that the operating team had not erred from a medical point of view when carrying out the operation, and that the applicant's prognosis and quality of life would have been much worse had the operation not taken place.

23. On 20 October 2004 the court heard the four experts, including their answers to questions put by counsel for the applicant. The experts stood by their conclusions. The court then reserved judgment. However, on 5 January 2005 the court, finding that the applicant had not specified whether her preferred defendant was Dr K.M. or the hospital, reopened the proceedings and instructed her to do so.

24. On 23 March 2005 the court asked the thoracic surgeon to deal with additional questions. He filed his supplementary report in June 2006.

25. On 17 June 2005 the court admitted further written evidence and heard two witnesses called by the applicant. At the request of counsel for the applicant, it disqualified the thoracic surgeon on the basis that he was employed by the defendant hospital (see paragraph 51 below). The court then appointed a new expert.

26. In his report the new expert, a thoracic surgeon from Sofia, said that the operating team had not breached good medical practice by removing parts of the applicant's fourth and fifth left ribs based on their visual and tactile inspection in the course of the operation, bearing in mind that

histological testing of bone tissue required time and therefore no histological conclusion could be obtained during the operation; that they had correctly inspected the applicant's lungs by palpation; that rib fractures in the course of such operations were almost inevitable; that the removal of the rib fragments had not unduly affected the applicant because they had later partly regenerated; and that it could not be categorically said that the applicant had a metastasis in her sixth rib, especially bearing in mind that no further metastases had been detected for many years after the operation.

27. On 26 October 2005 the court heard the new expert, including his answers to questions put by counsel for the applicant. He explained in detail why he stood by his conclusions. Counsel for the applicant requested a further expert report on the need for the operation. The court turned down the request on the basis that it went beyond the scope of the case.

28. In a judgment of 11 January 2006, the Plovdiv Regional Court dismissed the applicant's claim. It referred to the conclusions of the experts but said that it would not take into account the reports drawn up by the expert who had been disqualified (see paragraphs 22, 24 and 25 above). Based on those conclusions, the court found that the precise location of the suspected metastasis had not been fully established before the operation. It went on to say that the allegation that Dr K.M. had removed parts of the applicant's fourth and fifth left ribs without her consent was baseless, since the written consent form that she had signed before the operation, following an explanation on the proposed procedure, had not specified the rib to be operated upon. The court further held, with reference to the expert opinions, that Dr K.M. had not erred by removing parts of the fourth and fifth left ribs, as he had observed on them tissue which he had suspected to be cancerous. The fact that the histological test had later showed otherwise had not retrospectively rendered his assessment flawed. Nor had he erred by inspecting the applicant's lungs by palpation – that was standard practice in that type of operation. Furthermore, the evidence did not categorically prove that the applicant still had a metastasis in her sixth left rib, especially bearing in mind the lack of other metastases after the operation. In particular, the experts were agreed that the medical imaging results submitted by the applicant could not be conclusive on that point in the absence of a fresh histological test. Lastly, the court found that it had not been proved that the applicant's sixth rib had been fractured in the course of the operation and that, in any event, such a fracture was a habitual risk in that sort of operation.

2. The proceedings before the Plovdiv Court of Appeal

29. The applicant appealed to the Plovdiv Court of Appeal.

30. On 10 April 2006, at the request of counsel for the applicant, the court instructed the replacement thoracic surgeon who had acted as expert in the proceedings before the lower court (see paragraph 26 above) to draw up

a supplementary report in which to address several points raised in the appeal. Counsel for the applicant also requested a fresh expert report, to be drawn up by three thoracic surgical oncologists. They asked that one of those be Dr V.T. Counsel for Dr K.M. opposed the request, arguing that Dr V.T. would be biased in favour of the applicant because he had known her for years. The court did not order the report.

31. The thoracic surgeon's supplementary report said that the applicant had correctly been subjected to surgery; that the operating team had not erred by acting on the basis of the visual and tactile findings made in the course of the operation, especially bearing in mind the uncertain results of the prior medical imaging tests; that there was no universally reliable method to establish the presence of bone metastases; that it had been impossible to mark the precise spot of the suspected metastasis before the operation; and that Dr K.M. had had the requisite qualifications to operate on the applicant.

32. On 29 May 2006 the court admitted the report and heard the thoracic surgeon. The applicant submitted a private expert opinion which said that the removal of parts of her fourth and fifth left ribs had been needless and erroneous. This opinion could not be admitted because it had not been drawn up by court-appointed experts. The applicant however reiterated her earlier request for a fresh expert report (see paragraph 30 above), and the court acceded to it, appointing as experts two thoracic surgeons, one of whom was Dr V.T., and a thoracic surgical oncologist, all from Sofia.

33. The experts were divided. Dr V.T., who filed a minority report, was of the view that the operation had not been necessary and had been carelessly carried out, with the removal of parts of two healthy ribs. The other two experts expressed the same views as those set out in the thoracic surgeon's supplementary report (see paragraph 31 above), and came to the conclusion that the operation had been required and that the operating team had not acted out of line with good medical practice.

34. On 18 September 2006 the court admitted the reports and heard the three experts, who each stood by the views expressed in their respective reports. On 2 October 2006 it admitted further written evidence and heard the parties' oral argument.

35. On an unknown later date in 2006 the Plovdiv Court of Appeal upheld the lower court's judgment. It said that it credited all expert opinions save that of the expert disqualified in the proceedings before the lower court (see paragraphs 22, 24 and 25 above) and that of Dr V.T. (see paragraph 33 above), which went against the remainder of the evidence. It went on to hold, by reference to the other experts' conclusions, that the operation had been necessary, and that by removing parts of the applicant's fourth and fifth left ribs on the basis of a visual and tactile examination Dr K.M. had acted in line with established medical practice, even though it had later transpired that they did not contain cancerous tissue. The court came to the

same conclusions as the lower court with respect to the inspection of the applicant's lungs by palpation, the alleged fracture of her sixth rib, and the question whether it had been proved that she had cancer after the operation (see paragraph 28 above). On that basis, the court held that the medical team which had operated on the applicant had not acted negligently and that it had not been categorically established that the applicant had suffered damage as a result of their actions.

3. The proceedings before the Supreme Court of Cassation

36. The applicant appealed on points of law.

37. In a judgment of 29 July 2008 (реш. № 393 от 29.07.2008 г. по гр. д. № 2227/2008 г., ВКС, I г. о.), the Supreme Court of Cassation quashed the lower court's judgment and remitted the case. It held that that court had failed duly to elucidate the facts and in particular to take on an active role in the formulation of the questions to the experts. It had thus not fully clarified whether it had been necessary to operate on the applicant, whether her sixth left rib had been fractured in the course of the operation, and why it had been necessary to remove parts of her fourth and fifth left ribs. It had likewise failed to explain fully why it had disregarded Dr V.T.'s opinion; simply saying that it went against the rest of the evidence was not enough. On remittal, the lower court had to re-visit these points by taking into account the history of the applicant's medical condition, and inquire into the need for the operation, the presence of metastases in her ribs, and the alleged worsening of her health after the operation. In so doing, it had to obtain a fresh medical expert report and enable the parties to take part in the formulation of the questions to the experts.

4. The remittal proceedings before the Plovdiv Court of Appeal

38. On remittal, the Plovdiv Court of Appeal ordered a fresh expert report, to be drawn up by two thoracic surgeons from Sofia and a medical imaging specialist from Plovdiv.

39. The report said that it had been imperative to carry out the operation; that the fracture of the sixth rib had been there before the operation and had been due to the rib's heightened fragility resulting from previous anti-cancer treatment; that the removal of parts of the fourth and fifth ribs had not been an error in view of the inconclusive prior medical imaging data, which had its limitations, and the visual observation of tissue that could at the time have been suspected to be cancerous; that there was no categorical medical data proving the presence of a metastasis in the sixth rib before or after the operation – the bone scintigraphies had only showed an increased uptake of radioactive tracer there – in spite of the medical treatment undergone by the applicant after the operation; that the applicant could be operated upon again, should the need arise; and that the applicant's medical condition

would have been much worse had she indeed had an untreated metastasis in her sixth, eighth or ninth rib for years after the operation.

40. On 26 November 2008 the court admitted the report and heard the three experts, including their replies to questions posed by counsel for the applicant. The experts stood by their conclusions. The court also admitted other evidence submitted by the applicant.

41. On 11 May 2009 the Plovdiv Court of Appeal again upheld the lower court's judgment. It held, by reference to the reports of the three experts that it had appointed, the three experts appointed in the proceedings before the lower court, and three of the experts appointed in the first appeal proceedings (see paragraphs 21, 31, 33 and 39 above), that the operation had been required. It said that it could not follow the opinion of Dr V.T. on this point (see paragraph 33 above) because, even though the question whether it had been advisable to operate in such circumstances could be debated theoretically, the medical team treating the applicant had been faced with an exigently practical situation: the medical imaging tests had showed the presence of a suspected isolated tumour whose exact location was uncertain, and there had been for this reason only one course of action: localise the tumour using the methods of surgical diagnostics and immediately remove it. The court agreed with the experts' conclusions that the operating team had not erred by removing parts of the applicant's fourth and fifth ribs on the basis of their suspicion that they contained cancerous tissue, even though that had turned out not to be the case. The mention of the eighth and ninth ribs in the operation report had been a clerical mistake without incidence for the applicant's health. Again by reference to the experts' conclusions, the court fully agreed with the lower court's findings with respect to the inspection of the applicant's lungs by palpation, and held that it had not been proved that her sixth rib had been fractured in the course of the operation, or that a metastasis in that rib had erroneously not been removed. On that basis, it concluded that Dr K.M. had not acted negligently.

5. The second proceedings before the Supreme Court of Cassation

42. The applicant again attempted to appeal on points of law.

43. In a decision of 10 November 2009 (опр. № 1537 от 10.11.2009 г. по гр. д. № 1275/2009 г., ВКС, IV г. о.), the Supreme Court of Cassation refused to admit the appeal for examination, holding that there was no divergent case-law on the points of law decided by the lower court and that the appeal in effect concerned that court's findings of fact.

II. RELEVANT DOMESTIC LAW

A. Damages for medical malpractice

44. In Bulgarian law, compensation for damage suffered as a result of medical malpractice can be obtained by bringing a claim for damages against the medical practitioner concerned or his employer. State-owned hospitals do not bear liability under the special provisions governing the no-fault liability of public authorities (see реш. № 219 от 01.07.1998 г. по гр. д. № 26/1998 г., ВКС, петчл. с-в).

45. A report published in 2010 (*Безлов, Т., Илкова, Р., Чинарска, Д., Георгиев, Г.*, Ефективност на съдебната система при решаване на дела свързани с лекарски грешки Доклад. Международен институт по здравеопазване и здравно осигуряване. София, 2010 г. – *Bezlov, T., Ilkova, R., Chinarska, D., Georgiev, G.*, Effectiveness of the judicial system in the examination of cases relating to medical errors. Report, International Healthcare and Health Insurance Institute, Sofia, 2010, p. 36) said that until 2000 there had been very few if any such claims. Although, according to a sociological survey carried out in 2009 and set out in the same report, during the previous five years only 2.2% of those who had become victim of a "medical mistake" had sought to vindicate their rights (it was unclear how many had done so through judicial channels) (ibid., pp. 10 and 30), in later years there have been a number of such cases. While in many instances the courts have dismissed the claims, there also have been cases in which they have awarded damages in relation to medical malpractice (examples include реш. № 1228 от 18.12.2008 г. по гр. д. № 4894/2007 г., ВКС, V г. о.; реш. № 565 от 19.06.2009 г. по гр. д. № 94/2008 г., ВКС, III г. о.; реш. № 1206 от 17.08.2009 г. по гр. д. № 402/2009 г., САС, ГК; реш. № 130 от 01.03.2010 г. по гр. д. № 640/2009 г., ВКС, III г. о.; реш. № 134 от 01.03.2010 г. по гр. д. № 529/2009 г., ВКС, г. о.; реш. № 508 от 18.06.2010 г. по гр. д. № 1411/2009 г., ВКС, III г. о.; реш. № 457 от 01.07.2010 г. на по гр. д. № 1264/2009 г., ВКС, III г. о.; реш. от 09.07.2010 г. по гр. д. № 8365/2009 г., СГС, appeal on points of law not admitted by опр. № 706 от 13.06.2012 г. по гр. д. № 1562/2011 г., ВКС, IV г. о.; реш. № 473 от 13.09.2010 г. по гр. д. № 1329/2009 г., ВКС, III г. о., which formed the basis for this Court's decision in *Daskalovi v. Bulgaria* (dec.), no. 27915/06, 29 January 2013; реш. № 738 от 05.11.2010 г. по в. гр. д. № 901/2010 г., ПАС, ГК, appeal on points of law not admitted by опр. № 25 от 10.01.2012 г. по гр. д. № 233/2011 г., ВКС, IV г. о.; реш. № 628 от 19.11.2010 г. по гр. д. № 1711/2009 г., ВКС, III г. о.; реш. № 250 от 21.11.2012 г. по гр. д. № 1504/2011 г., ВКС, III г. о.; реш. № 120 от 12.06.2013 г. по гр. д. № 1330/2012 г., ВКС, III г. о.; реш. № 271 от 15.10.2013 г. по гр. д. № 1403/2012 г., ВКС, IV г. о.; реш. № 177 от 31.01.2014 г. по в. гр. д. № 2677/2013 г., САС,

ГК; and реш. № 17 от 06.03.2015 г. по гр. д. № 3174/2014 г., ВКС, IV г. о.).

B. Experts in civil proceedings

46. By Article 157 § 1 of the Code of Civil Procedure 1952, the court had to appoint an expert if the elucidation of a point required special knowledge that the court did not have. Article 157 § 2 provided that if the subject matter was more complex the court could appoint three experts, with each of the two parties nominating one and the court determining the third one. It also provided that if the parties contested the conclusion of the initial experts, whether one of three, the court could appoint new experts.

47. The former Supreme Court has held that a court could only rely on an expert report that was duly reasoned (see реш. № 620 от 13.11.1991 г. по гр. д. № 722/1991 г., ВС, III г. о.).

48. Article 161 of the Code provided that in case of divergences of opinion, each group of experts had to set out its own conclusions, and that if the court was unable to weigh up those divergences, it had to ask the experts to make additional inquiries or to appoint new experts. Regulation 18(4) of Regulations no. 23 of 18 May 1994 on medical expert reports, superseded by regulation 17(4) of Regulations no. 2 of 26 October 2011 on medical expert reports, which is identically worded, provided that medical expert reports had to explain in detail their conclusions.

49. By Article 157 § 3, the court was not bound to accept the experts' conclusions but rather had to analyse them alongside the other evidence in the case. The former Supreme Court and the Supreme Court of Cassation have consistently emphasised this requirement, noting that it applied even if the parties had not contested the experts' conclusions (see реш. № 932 от 25.09.1991 г. по гр. д. № 699/1991 г., ВС, I г. о.; реш. № 1261 от 11.01.1995 г. по гр. д. № 2070/1994 г., ВС, IV г. о.; реш. № 622 от 04.08.2006 г. по гр. д. № 298/2005 г., ВКС, IV г. о.; реш. № 837 от 04.01.2008 г. по т. д. № 519/2007 г., ВКС, I т. о.; реш. № 1012 от 13.02.2008 г. по т. д. № 600/2007 г., ВКС, II т. о.; реш. № 1327 от 26.11.2008 г. по гр. д. № 5729/2007 г., ВКС, II г. о.; реш. № 823 от 11.01.2010 г. по гр. д. № 1763/2008 г., ВКС, IV г. о.; реш. № 393 от 01.10.2010 г. по гр. д. № 4703/2008 г., ВКС, II г. о.; реш. № 108 от 16.05.2011 г. по гр. д. № 1814/2009 г., ВКС, IV г. о.; and реш. № 762 от 20.07.2011 г. по гр. д. № 1371/2009 г., ВКС, I г. о.). However, the court had to explain why it did not adhere to an expert opinion or why it chose to follow one expert opinion over another or none of the opinions (see реш. № 3152 от 26.12.1969 г. по гр. д. № 2365/1969 г., ВС, II г. о.; реш. № 385 от 11.03.2003 г. по гр. д. № 1926/2001 г., ВКС, IV о.; and реш. № 1318 от 16.04.2009 г. по гр. д. № 5641/2007 г., ВКС, II г. о.). In one case, the former Supreme Court held that an opinion's being supported

by more experts than another was not in itself a good reason for the court to follow it; the court had to rather have regard to the experts' qualifications (see реш. № 511 от 02.06.1993 г. по гр. д. № 83/1993 г., ВС, I г. о.).

50. In two recent cases, the Supreme Court of Cassation applied Article 157 § 3 to quash the lower courts' findings of no fault on the part of surgeons and re-examine the cases itself, ruling in favour of the claimants (see реш. № 508 от 18.06.2010 г. по гр. д. № 1411/2009 г., ВКС, III г. о., and реш. № 457 от 01.07.2010 г. по гр. д. № 1264/2009 г., ВКС, III г. о.).

51. By Article 158 § 1, persons who were spouses, descendants or ascendants of a party, or related to a party by blood up to the fourth degree or by marriage up to the first degree, or who had a personal interest in the case, could not act as experts. Article 158 § 2 provided that a party could request the disqualification of an expert on any of these grounds. On the basis of this provision, the former Supreme Court has held that an employee cannot act as an expert in a case brought against his employer (see реш. № 640 от 05.10.1987 г. по гр. д. № 506/1987 г., ВС, IV г. о.).

52. By Article 160 § 1, before hearing the experts, the court had to remind them of the criminal liability for giving a false or biased opinion. (This liability is set out in Article 291 of the Criminal Code 1968, which makes it an offence wilfully or negligently to give a false expert opinion before a court of law, orally or in writing.) By Article 160 § 2, the experts had to promise that they would give their opinion without bias.

53. In March 2008 these provisions were superseded by Articles 195 to 203 of the Code of Civil Procedure 2007, which are for the most part similarly worded. However, Article 196 § 1 of the 2007 Code expands the grounds for the disqualification of an expert, saying that they are the same as those for the recusal of a judge.

C. Informed consent

54. By section 25(3) of the People's Health Act 1973, medical treatment, unless mandatory, could only be carried out with the patient's consent. By section 31(1), medical practitioners had to explain to the patient, in an appropriate manner, the nature of the illness and the purpose of the medical treatment carried out. Section 32 provided that surgical operations could, except in life-threatening circumstances in which consent could not be obtained in time, only be carried out with the patient's consent.

55. By section 87(1) of the Health Act 2005, medical procedures may as a rule only be carried out with the patient's informed consent. By section 88(1), to obtain such consent medical practitioners must inform the patient of the diagnose and the character of the illness; the aims and nature of the envisaged treatment, the reasonable alternatives, and the prognosis; the risks, including side effects, pain or other inconveniences; and the likelihood of a positive effect of the envisaged treatment and the risk to the

patient's health if alternative methods are used or if treatment is declined. Section 88(2) provides that the information must be provided in a form and volume and at a time that enable the patient freely to choose his treatment. By section 89(1), in cases of surgery the information must be provided in writing.

56. The Supreme Court of Cassation has noted the difference between claims for damages relating to mistakes by medical practitioners and claims for damages based on lack of informed consent (see опр. № 1174 от 22.11.2013 г. по гр. д. № 4416/2013 г., ВКС, III г. о.).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicant complained under Articles 3, 8 and 13 of the Convention of the lack of an effective mechanism enabling her to obtain compensation for the damage suffered as a result of the 2003 surgery.

58. The Court finds that this complaint is to be examined solely under Article 8 of the Convention (see, *mutatis mutandis*, *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I). This Article provides, in so far as relevant:

> "1. Everyone has the right to respect for his private ... life ..."

A. The parties' submissions

59. The Government submitted that the proceedings brought by the applicant had fully complied with the requirements of Article 8 of the Convention. The courts had thoroughly and actively examined the case, admitting a number of expert reports and other evidence, but finding no medical malpractice. They had dealt with all relevant points, including whether the operation had been necessary, what was the proper approach by the operating team if the medical imaging tests were inconclusive, and whether the applicant had given informed consent to the operation and more generally whether she had been properly advised.

60. The applicant submitted that the authorities had failed to put in place a mechanism enabling victims of medical malpractice to obtain objective opinions by independent experts and have such cases duly investigated. She referred to a report by Open Society Justice Initiative which said, *inter alia*, that although medical experts bore criminal liability for giving false evidence, they had a tendency to exculpate their colleagues out of professional solidarity. She also referred to scholarly articles and a seminar in which that issue had been discussed.

61. The applicant went on to describe in detail the expert reports drawn up in her case, saying that they had arrived at mutually exclusive conclusions: that she did not have metastases but that it had at the same time been necessary to operate her; that bone metastases could not be visually detected but that the surgeon had acted in line with good medical practice when removing parts of her fourth and fifth ribs – but not of her sixth rib, where the suspected metastasis was located – on the basis of a visual and tactile inspection; that the applicant was in good health but had for years after the operation been prescribed expensive medicines with serious side-effects. These points could not be properly explored without expert knowledge, but it had been open to the courts not to follow the expert opinions which had not elucidated them in a satisfactory way. However, if the courts had opted not to follow those opinions, they would have likewise had to dismiss the claim because under Bulgarian law, claimants in tort cases bore the burden of proof. The mechanism for establishing medical malpractice provided by the general law of tort was therefore deficient. It failed to achieve a fair balance between the applicant's right to respect for her integrity and any hypothetical countervailing public interest. Such balance could only be struck by putting in place a special mechanism for dealing with medical malpractice that would resolve the problem with the lack of impartiality on the part of medical experts.

B. The Court's assessment

1. Admissibility

62. This complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

63. It is now well established that although the right to health is not as such among the rights guaranteed under the Convention or its Protocols (see *Fiorenza v. Italy* (dec.), no. 44393/98, 28 November 2000; *Pastorino and Others v. Italy* (dec.), no. 17640/02, 11 July 2006; and *Dossi and Others v. Italy* (dec.), no. 26053/07, 12 October 2010), the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation

for damage (see *Trocellier v. France* (dec.), no. 75725/01, ECHR 2006-XIV; *Benderskiy v. Ukraine*, no. 22750/02, §§ 61-62, 15 November 2007; *Codarcea v. Romania*, no. 31675/04, §§ 102-03, 2 June 2009; *Yardımcı v. Turkey*, no. 25266/05, §§ 55-57, 5 January 2010; *Spyra and Kranczkowski v. Poland*, no. 19764/07, §§ 82 and 86-87, 25 September 2012; *Csoma v. Romania*, no. 8759/05, §§ 41 and 43, 15 January 2013; and *S.B. v. Romania*, no. 24453/04, §§ 65-66, 23 September 2014).

64. For this obligation to be satisfied, such proceedings must not only exist in theory but also operate effectively in practice (see *Gecekuşu v. Turkey* (dec.), no. 28870/05, 25 May 2010, and *Spyra and Kranczkowski*, cited above, § 88).

65. This entails, *inter alia*, that the proceedings be completed within a reasonable time (see, for an example where this was not the case, *Codarcea*, cited above, § 106, and, for an example where this was the case, *Spyra and Kranczkowski*, cited above, § 91).

66. It also entails, like in the case of the parallel positive obligation under Article 2 of the Convention, the possibility to obtain effective medical expert examination of the relevant issues. For instance, the authorities must take sufficient care to ensure the independence, both formal and *de facto*, of the experts involved in the proceedings and the objectivity of their findings, since these are likely to carry crucial weight in the ensuing legal assessment of the highly complex issues of medical negligence (see *Bajić v. Croatia*, no. 41108/10, § 95, 13 November 2012, and *Karpisiewicz v. Poland* (dec.), no. 14730/09, § 59, 11 December 2012, as well as the earlier case of *Skraskowski v. Poland* (dec.), no. 36420/97, 6 April 2000, in which the same requirement was laid down in less explicit terms). A further requirement is that the experts examine carefully all relevant points and set out in enough detail the reasons for their conclusions (see *Baldovin v. Romania*, no. 11385/05, § 23, 7 June 2011, and *Altuğ and Others v. Turkey*, no. 32086/07, §§ 78-81, 30 June 2015), and that the courts or other authorities dealing with the case then scrutinise properly those conclusions (see *Csoma*, § 56, and *Altuğ and Others*, § 82, both cited above). A system in which an opinion given by a specialised institution is automatically regarded as conclusive evidence which precludes further expert examination of the relevant issues falls afoul of this requirement (see *Eugenia Lazăr v. Romania*, no. 32146/05, §§ 76-80, 16 February 2010; *Baldovin*, cited above, § 24; and *Csoma*, cited above, § 61).

67. At the same time, the High Contracting Parties have a margin of appreciation in choosing how to comply with their positive obligations under the Convention (see, as a recent authority, *Lambert and Others v. France* [GC], no. 46043/14, § 144, ECHR 2015 (extracts)), and enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems meet its requirements (see, albeit in different contexts, *König v. Germany*, 28 June 1978, § 100, Series A no. 27; *Taxquet*

v. Belgium [GC], no. 926/05, §§ 83 and 84, 16 November 2010; and *Finger v. Bulgaria*, no. 37346/05, § 120, 10 May 2011).

68. Also, the mere fact that proceedings concerning medical negligence have ended unfavourably for the person concerned does not in itself mean that the respondent State has failed in its positive obligation under Article 8 of the Convention (see, in the context of Article 2 of the Convention, *Besen v. Turkey* (dec.), no. 48915/09, § 38 *in fine*, 19 June 2012).

69. Lastly, it is well established that the High Contracting Parties also have a positive obligation under Article 8 of the Convention to have in place regulations ensuring that medical practitioners consider the foreseeable consequences of planned medical procedures on their patients' physical integrity and inform patients of these beforehand in such a way that they are able to give informed consent (see *Trocellier*; *Codarcea*, § 105; *Gecekuşu*; and *Csoma*, § 42, all cited above).

(b) Application of these principles

70. In Bulgaria, as in many other High Contracting Parties (see, for instance, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; *Iversen v. Denmark*, no. 5989/03, § 54, 28 September 2006; *Colak and Tsakiridis v. Germany*, nos. 77144/01 and 35493/05, §§ 19-20, 5 March 2009; and *Šilih v. Slovenia* [GC], no. 71463/01, § 95, 9 April 2009), compensation for medical malpractice can be claimed under the law of tort or contract (see paragraph 44 above). In other High Contracting Parties, such claims, if directed against public hospitals, are examined under rules governing the liability of public authorities for damage (see *Draon v. France* [GC], no. 1513/03, § 37 and 47-48, 6 October 2005, and *Byrzykowski v. Poland*, no. 11562/05, § 77, 27 June 2006). Some High Contracting Parties also operate no-fault compensation schemes (see, for instance, *Lopez v. France* (dec.), no. 45325/06, 2 February 2010). In view of the broad margin of appreciation enjoyed by the High Contracting Parties in laying down their health care-policy (see *Pentiacova and Others*, cited above; *Shelley v. the United Kingdom* (dec.), no. 23800/06, 4 January 2008; and *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 119, ECHR 2012 (extracts)), and in choosing how to comply with their positive obligations and organise their judicial systems (see paragraph 67 above), there is no basis on which to hold that the Convention requires a special mechanism which facilitates the bringing of medical malpractice claims or a reversal of the burden of proof in such cases, as suggested by the applicant. It should further be borne in mind that in discharging their positive obligations towards the alleged victims of medical malpractice, the authorities must also have regard to counter-considerations, such as the risk of unjustifiably exposing medical practitioners to liability, which can compromise their professional morale and induce them to practise, often to

the detriment of their patients, what has come to be known as "defensive medicine".

71. It cannot be said that seeking compensation for medical malpractice in Bulgaria by way of a claim for damages is a possibility that only exists in theory. While apparently difficult to make out, medical malpractice has been established and has led to awards of damages in a number of cases (see paragraph 45 above).

72. The Court is furthermore unable to accept that the objectivity of the expert opinions in such cases can automatically be called into doubt by the fact that the experts are medical practitioners who are under an ethical duty not to criticise their colleagues. In *Csősz v. Hungary* (no. 34418/04, §§ 31 and 35, 29 January 2008), in the face of an almost identical submission, the Court held that it was normal for the expert opinions in such cases to be given by medical practitioners. While those practitioners do have an ethical duty not to unduly criticise their colleagues, when acting as court-appointed experts they also bear criminal liability – of which they must be advised before they give evidence – for giving a false opinion (see paragraph 52 above). This must be regarded as a serious deterrent even if prosecutions for such offences are, in view of the complexity of the subject matter, difficult to mount in practice. There is no basis on which to hold that the Convention requires that medical expert evidence be drawn from specialised institutions. On the contrary, examples in the Court's case-law show that conferring such institutions a key role in medical malpractice cases can in some instances prevent persons who have become victims of such malpractice from effectively vindicating their rights (see *Eugenia Lazăr*, §§ 78-80, and *S.B. v. Romania*, §§ 70-74, both cited above).

73. Furthermore, Bulgarian law lays down several safeguards designed to ensure the reliability of expert evidence. Experts whose impartiality is in doubt may be disqualified (see paragraphs 51 above), and experts must give cogent reasons for their conclusions, so as to enable the courts to weigh up any divergences of opinion (see paragraphs 46-48 above). The courts, for their part, can appoint new experts if one of the parties contests an expert report (see paragraph 46 above), and are not bound uncritically to accept expert evidence – on the contrary, they must scrutinise it carefully (see paragraphs 49 and 50 above). Indeed, they have done so in medical malpractice cases (see paragraph 50 above).

74. There is no evidence that these safeguards were not properly applied in the applicant's case or that the experts whose opinions formed the basis for the courts' rulings in the case lacked the requisite objectivity. The courts disqualified one expert because he was employed by the defendant hospital, and then said that they would not have regard to his conclusions (see paragraphs 25, 28 and 35 above, and contrast, *mutatis mutandis*, *Bajić*, cited above, §§ 98-101). They did not simply admit the written reports drawn up by the other experts, many of which were from another town (see

paragraphs 26, 32 and 38 above), but on each occasion heard them give evidence in open court, in the presence of counsel for the applicant, who were able to, and did, pose questions (see paragraphs 23, 27, 32, 34 and 40 above). The courts several times ordered supplementary reports and fresh reports by new experts, to cast further light on points which had remained unclear or had been contested (see paragraphs 24, 26 and 30-32 above, and compare with *Besen*, cited above, § 38, and *Eugenia Lazăr*, cited above, §§ 76-77).

75. With regard to the question whether the courts then duly scrutinised the expert evidence (see paragraph 66 above), it should be noted that the Plovdiv Regional Court and the Plovdiv Court of Appeal both analysed that evidence in some detail (see paragraphs 28 and 35 above), and that the Supreme Court of Cassation then remitted the case to the Plovdiv Court of Appeal for it to remedy some omissions in that regard (see paragraph 37 above). Following that remittal, the Plovdiv Court of Appeal re-examined the case not only on the basis of the earlier expert reports, but also of a fresh and expanded report (see paragraphs 38 and 39 above). While the applicant disputed the experts' conclusions on a number of points, it does not appear that, following the remittal of the case, the experts left any relevant issue without consideration (contrast *Altuğ and Others*, cited above, §§ 77-81), or that the Plovdiv Court of Appeal, whose judgment does not appear arbitrary, then failed duly to scrutinise their conclusions. In particular, that court gave reasons why it chose to follow the opinion of the majority of the experts rather than that of the only dissenting expert, Dr V.T., saying that even though the question whether it had been advisable to operate on the applicant could be debated theoretically, the medical team which had treated her had acted on the basis of their assessment of an exigently practical situation (see paragraph 41 above). It is not for this Court, which is not a court of appeal from the national courts, to gainsay that court's findings on these points (see *Yardımcı*, cited above, § 59).

76. The Court does not overlook that the available evidence tends to suggest that the surgeon did not properly inform the applicant of all the foreseeable consequences of the planned operation that he carried out on her. The experts who gave evidence in the proceedings for damages said that there was no reliable way of establishing the precise location or even the presence of a metastasis in a rib before or during the operation, because none of the medical imaging methods used before the operation could give certainty on that point and because histological testing of bone tissue required time, which meant that no histological conclusion could be obtained during the operation (see paragraphs 26, 31, 33 and 39 above) It does not appear that the applicant was fully made aware of this uncertainty and its consequences before agreeing to be operated upon. On the contrary, the surgeon appears to have repeatedly given her assurances in that respect (see paragraph 9 above), which the evidence obtained in the ensuing

proceedings proved to be untenable. However, it does not appear that the applicant specifically emphasised that aspect of the case, which was predicated on the broader and somewhat different allegation that the surgeon had acted negligently when operating on her (see paragraphs 17 and 56 above). The Bulgarian courts cannot therefore be faulted for not delving into that issue in more depth.

77. In view of all this, it cannot be said that the authorities did not provide the applicant an effective procedure enabling her to obtain compensation for the medical malpractice to which she alleged to have fallen victim.

78. There has therefore been no breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

79. The applicant complained under Article 6 § 1 of the Convention that as a result of the lack of a system effectively ensuring the impartiality of medical experts in proceedings relating to medical malpractice she had been put at a substantial disadvantage *vis-à-vis* the surgeon and the hospital in the course of the proceedings for damages against them, and had not had effective access to a court in those proceedings.

80. Article 6 § 1 of the Convention provides, in so far as relevant:

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

A. The parties' submissions

81. The Government submitted that the proceedings brought by the applicant had been fair. They had been conducted in the usual way, with the participation of medical experts to elucidate points that required special knowledge. The independence and impartiality of those experts had been open to review by the courts, at the request of the parties to the case. That manner of proceeding was fully consistent with Article 6 of the Convention.

82. The applicant submitted that medical experts, who were often highly qualified practitioners in a narrow field of study whose conclusions could not easily be challenged by a layperson, were indispensable in medical malpractice cases and usually predetermined their outcome. Defendant medical practitioners in such cases were far better placed than claimants to scrutinise the validity of their conclusions. There were no rules effectively ensuring the objectivity of their conclusions, whereas they had a tendency to exculpate their colleagues out of professional ethics. The risk of incurring criminal liability for giving false conclusions was not a sufficient deterrent because, in view of the highly specialised subject matter, the risk that such an offence would be exposed was a very slim.

B. The Court's assessment

1. Admissibility

83. This complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

84. The question whether the Bulgarian authorities took sufficient care to ensure the independence of the medical experts involved in the proceedings and the objectivity of their conclusions, which was already examined under Article 8 of the Convention (see paragraphs 72-74 above), could also be examined by reference to its Article 6 § 1 (see, *mutatis mutandis*, *Mantovanelli v. France*, 18 March 1997, §§ 33-36, *Reports of Judgments and Decisions* 1997-II; *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007; and *Placì v. Italy*, no. 48754/11, §§ 74-80, 21 January 2014). But, in view of its findings on this point under Article 8, the Court does not consider that the applicant was put at a substantial disadvantage *vis-à-vis* the surgeon or the hospital in the course of the proceedings for damages that she brought against them, or that those proceedings did not afford her effective access to a court.

85. There has therefore been no breach of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the remainder of the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 17 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President