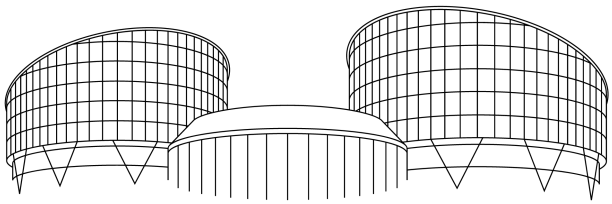

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF OYAL v. TURKEY

(Application no. 4864/05)

JUDGMENT

STRASBOURG

23 March 2010

FINAL

23/06/2010

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

In the case of Oyal v. Turkey,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş, *judges,*

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 2 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 4864/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Mr Yiğit Turhan Oyal, Ms Neşe Oyal and Mr Nazif Oyal ("the applicants"), on 13 November 2004.

2. The applicants, who had been granted legal aid, were represented by Mr M.E. Keleş and Ms M. Keleş, lawyers practising in Izmir. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged that the infection of the first applicant, a new-born baby at the relevant time, with the HIV virus during blood transfusions at a State hospital, had given rise to a violation of Articles 2, 6 and 13 of the Convention.

4. On 6 March 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1996, 1973 and 1961, respectively, and live in Izmir.

A. Infection of the first applicant with the HIV virus

6. The first applicant was born prematurely on 6 May 1996 at the Dr Behçet Uz Children's Hospital in Izmir.

7. On 7 May 1996 he was diagnosed with an "inguinal and umbilical hernia" by doctors working in the same hospital.

8. On an unspecified date in May or June 1996, the third applicant, who is the first applicant's father, purchased a unit of red blood cells and a unit of plasma from the Izmir Directorate of the Kızılay (the Turkish Red Cross, hereinafter "the Kızılay"). A number of blood and plasma transfusions were carried out on 19 May 1996, 24 May 1996, 26 May 1996, 29 May 1996 and 6 and 7 June 1996. The first applicant was discharged from the hospital on 17 June 1996.

9. Approximately four months after the blood transfusion, the second and third applicants learned that the first applicant had been infected with the HIV virus which could develop into the more severe Acquired Immune Deficiency Syndrome (AIDS).

10. According to the information given by the Government, on 31 October 1996 a donor (no. 1294, code MUALAB-43) donated blood to the Kızılay. Subsequent to screening and tests carried out on the donated blood (serial no. 210619), HIV was found and the blood in question was destroyed. Following two more tests, it became certain that donor no. 1294 had been infected with HIV. The authorities conducted an investigation with a view to determining whether donor no. 1294 had donated blood previously. It appeared that the unit of plasma (serial no. 202367) used for the first applicant's treatment had been given by donor no. 1294. The first applicant was admitted to the Hacettepe University Hospital for treatment. The costs of treatment were paid by the Izmir Social Solidarity and Mutual-Aid Foundation.

B. Criminal Proceedings

1. Proceedings against the Kızılay

11. On 7 May 1997 the applicants filed a complaint with the Public Prosecutor's office in Izmir. They claimed that the Kızılay had provided contaminated blood and the Ministry of Health had been negligent in conducting the requisite screening and testing in accordance with the relevant domestic legislation. They requested that criminal proceedings be initiated against the doctors and laboratory personnel involved in the transfusion process, as well as against the Director of the Izmir Health Department (*İzmir İl Sağlık Müdürü*) and the Director of the Kızılay Izmir Branch.

12. On 2 October 1997 the Audit Department of the Ministry of Health prepared a report in which it stated that the unit of plasma used for the first applicant's treatment had been screened and tested for the HIV virus. However at that stage the HIV antibodies had not yet been produced in the unit of plasma donated by donor no. 1294. The report further noted that all around the world the HIV infection had been screened by Anti-HIV (ELISA) tests on the recommendation of the World Health Organisation. Therefore, it had been scientifically impossible to diagnose the HIV contained in the unit of plasma in question by the routine tests. Thus, relying on the statements given by health personnel and expert reports, the report concluded that there was no negligence attributable to the health personnel involved in the incident or to any other authority.

13. Notwithstanding, the Audit Department advised that (1) a circular be issued to relevant departments; (2) the health personnel be reminded to ensure that questionnaires were properly filled in by blood donors; (3) questions be asked about the sexual history of the donors and (4) donations be refused in doubtful cases. The Audit Department added that health personnel's attention should be drawn to the need to wait for a sufficient period of time before delivering blood in case antibodies had not yet been produced. In this connection, on 3 January 1998 circular no. 141 and its attachments were communicated to all blood centres and stations in order to prevent infections resulting from blood transfusions.

14. On 2 July 1998 the Izmir Administrative Council decided that no investigation could be conducted into the doctors who had been involved in the blood transfusion process on the ground that the children's hospital where the transfusions had taken place was not equipped with facilities for the ELISA test. Therefore the doctors had not been at fault in the incident.

2. Proceedings against the Ministry of Health

15. On 7 May 1997 the applicants filed a complaint with the Public Prosecutor's office in Izmir, this time against the Minister of Health and the Director General of the Kızılay.

16. On 23 May 1997 the Public Prosecutor issued a decision of non-prosecution. He reasoned that an investigation into the actions of a minister could only be conducted in accordance with Article 100 of the Turkish Constitution, which requires a motion to be brought in parliament. Therefore the Public Prosecutor concluded that he lacked jurisdiction *ratione materiae* and *ratione personae* in this matter. As regards the Director General of the Kızılay, the Public Prosecutor noted that he was in Ankara whereas the incident had taken place in Izmir and that there was no fault directly attributable to him, bearing in mind particularly that he had not been involved in selling the infected blood.

17. On 8 September 1997 the applicants filed an objection with the Kırıkkale Assize Court against the Public Prosecutor's decision.

18. On 14 October 1997 the Kırıkkale Assize Court dismissed the applicants' objection for non-compliance with the fifteen-day statutory time-limit to lodge their objection.

C. Civil proceedings

19. On 19 December 1997 the applicants initiated compensation proceedings against the Kızılay and the Ministry of Health. They requested non-pecuniary damage for the infection of the first applicant with HIV as a result of medical negligence on the part of the defendants.

20. On 13 July 1998 the Ankara Civil Court of First Instance issued a decision of non-jurisdiction in respect of the case brought against the Ministry of Health. It stated that these complaints must be brought before the competent administrative tribunal.

21. As regards the case instituted against the Kızılay, the court held that it was strictly liable for the incident as it had been established through a witness statement that the test which gave clear results on the presence of the HIV virus could not be carried out due to its high costs and that the health questionnaire system had not been in full practice at the time of the incident (see paragraph 13 above). It thus awarded the applicants 30,000,000,000 Turkish lira (TRL) plus interest at the statutory rate running from 17 June 1996, the date of the incident. The court held, in particular:

> "...As briefly mentioned above, Yiğit Turhan Oyal suffers from AIDS after receiving HIV virus infected blood supplied by the Izmir the Kızılay District Office. The Kızılay District Office is at fault for the infection of the child. This appeared from the sworn statements given on 8 June 1998 by Prof. Dr. Hakkı Bahar, who works at the Dokuz Eylül University School of Medicine, Department of Biology and Clinical Microbiology. Hakkı Bahar, who is a specialist on this subject, is the only witness of the Red Crescent Directorate General and holds an academic title of "professor". In his statements, he submitted that AIDS was a disease which could be detected with certainty by a special test but that, because it was very expensive, it was not employed. Bearing in mind that it was possible to detect HIV with sufficient certainty and that the Kızılay did not employ the test in question, because it was costly, then it should be held responsible for the infection of [the child]. The Kızılay has to bear the consequences of this [negligence]. It cannot escape this [responsibility]. Either it has to employ the test which determines with certainty AIDS, or it fails to do the test and assumes responsibility for providing blood which was infected with AIDS.
>
> Moreover, the Kızılay is at fault for the following reason: As is clear from the statements of the doctors indicated by the Red Crescent and, following the contamination of the plaintiffs' child, the Ministry of Health issued a circular on 3 January 1997 and required the questioning of donors. It thus follows that this circular had to be issued because no such questioning took place at all previously or was not done properly.
>
> Even assuming for a moment that the the Kızılay was not at fault in this incident, it still has strict liability (*kusursuz sorumluluk*). This is the very requirement of justice.

Yiğit Turhan Oyal was infected with HIV at a very young age because of the blood given by the the Kızılay. He caught AIDS, which is, together with cancer, one of the most dangerous diseases of our age. It is unnecessary to explain how evil and fatal this disease is. It is highly unlikely that little Yiğit will survive this disease; most probably he will lose his life. Even if he survives, he will live with this disease throughout his lifetime and everybody will avoid him. Strictly speaking, by having been infected with this disease, Yiğit has become a social outcast. He should not have sexual intercourse and should not get married during his lifetime. It is impossible for a living person to endure this. Furthermore, Yiğit should be taken care of very well. It is impossible to put into words how father Nazif Oyal and mother Neşe Oyal suffer from sorrow because of Yiğit's infection with this disease. In view of the foregoing, the court considers that the award of TRL 10,000,000,000 for each plaintiff in respect of non-pecuniary damages appears to be low. In fact, the sorrow and pain suffered by the plaintiffs cannot be compensated even if quadrillions were awarded. As noted above, the amount of compensation awarded is an insignificant one and merely aims at lessening their pain to some extent. Having regard to the fact that today compensation of three to five billion Turkish liras is awarded in a defamation case and that the amount in question would not even suffice to buy a car by the current prices of the day, it is obvious that the increase of awards is inevitable. It is considered that today is the time to increase compensation to a satisfactory level. For this reason, the determination of the amount in this case, albeit insignificant, was in line with this view.

Notwithstanding the above, I should like to stress the following: the fact that an aid organisation like the Kızılay ... chose to pursue all avenues with full strength in order to avoid compensating Yiğit, instead of redressing his suffering, is thought provoking..."

22. On 9 February 1999 the Court of Cassation upheld the judgment and stated the following:

"... The case concerns the payment of damages incurred as a result of the tortious act of the defendant. In order to hold the defendant liable for the alleged act, it should be established that the defendant was at fault, that the plaintiff incurred damage as a result of the tortious act and that there was a causal link between the act and the damage suffered. There is no dispute between the parties that the damage in question occurred as a result of the blood used by [Yiğit] and that such an act is unlawful. Again, it is also undisputed that the plaintiffs purchased the blood, which was used for the treatment of Yiğit, from the the Kızılay Izmir District office and that the blood was infected HIV positive.

The focal point of the dispute is whether the Kızılay Directorate General is at fault... It is a known fact that a foundation such as the Kızılay has a noteworthy prominence in meeting the need for blood and is worthy of credence on account of this vocation. In other words, there is an assumption that the blood obtained from the defendant meets expectations. However, it appeared that the blood obtained and used [in the present case] was unclean and so malignant that there was no possibility of purifying it. The fact that the [donor] was the bearer of the known virus cannot absolve the defendant from liability. The defendant should have subjected such an important and vital substance to all necessary tests and screening using the necessary technology in accordance with the purpose of its use and the importance of that substance. Nevertheless it appears that the blood in question was not subjected to the requisite tests available in today's technology. Furthermore, bearing in mind the particular

circumstances of the case, witness statements have no bearing on the establishment of the lack of fault on the part of the defendant. In other words, it cannot be concluded by witness statements that the defendant was not at fault. In the instant case, it was not alleged that the defendant acted deliberately. Nor was it implied. The defendant did not wish such an outcome in the present case. However, the defendant did not display due attention and diligence in order to avoid the impugned result.

Turning to the defendant's contention that the amount awarded in respect of non-pecuniary damage was excessive, ... [I]t should be noted that the present and future life of the child, his mother and father have become dramatically insufferable. All segments of society will now avoid having any kind of social or physical contact with these people. Thus, it is apparent that the physical, social and personal values of all the plaintiffs, especially those of the child, shall be under attack during their lives. Having regard to the foregoing and particularly to the rule under Article 49 of the Code of Obligations which stipulates '...parties' social and economic conditions should also be taken into account...', as well as to the current purchase value of money, the court concludes that the amount awarded in respect of non-pecuniary damage was not excessive. In this connection, when determining an amount for non-pecuniary damage, the amount in question should be satisfactory for the suffering party and should have a dissuasive effect for the harming party. Therefore, the defendant's objections on this part of the case must be dismissed..."

23. On 24 February 1999 the Kızılay paid a total amount of TRL 54,930,703,000 to the applicants, to cover the non-pecuniary damage awarded by the court and the statutory interest applied to that sum.

D. Administrative proceedings

24. On 13 October 1998 the applicants initiated proceedings against the Ministry of Health, requesting non-pecuniary damage.

25. On 20 November 1998 the Izmir Administrative Court rejected the case on the ground that the judgment of the Izmir First Instance Court which had issued a non-jurisdiction decision in respect of the proceedings concerning the Ministry of Health had been pending before the Court of Cassation. On 8 February 1999 the applicants appealed against this decision.

26. On 7 May 2001 the Supreme Administrative Court quashed the decision and remitted the case to the Izmir Administrative Court for examination on the ground that the proceedings concerning the Ministry of Health must have been considered to have become final, given that the Ministry of Health had not appealed against the Izmir First Instance Court's judgment.

27. On 14 July 2003 the Izmir Administrative Court refused the applicants' compensation claims. Referring to the Izmir First Instance Court's judgment, the Izmir Administrative Court reiterated that the Kızılay and the Ministry of Health were both liable for the first applicant's HIV infection. The court added, however, that the purpose of awarding non-pecuniary damage was not to provide full restitution and the award of

non-pecuniary damage twice for the same incident would have resulted in unjust enrichment.

28. On 3 October 2003 the applicants appealed.

29. On 31 March 2006 the Supreme Administrative Court quashed the judgment of 14 July 2003, holding that there was no provision in domestic law which could have prevented the administration from being held liable jointly with other real or corporate bodies.

30. On 13 March 2007 the Supreme Administrative Court dismissed the Ministry of Health's rectification request against the above decision.

31. In a judgment dated 7 June 2007, the Izmir Administrative Court held that the Ministry of Health personnel had been negligent in the performance of their duties. The court thus awarded the applicants TRL 30,000 plus interest at the statutory rate running from the date on which the proceedings had been initiated, namely 19 December 1997. Both the applicants and the Ministry of Health appealed against the judgment. The applicants challenged the failure of the court to order the defendant to pay the legal fees, whereas the Ministry of Health challenged the outcome of the case.

32. On 26 December 2007 the Supreme Administrative Court dismissed the Ministry of Interior's appeal but partly quashed the judgment insofar as it concerned the fees. The parties did not inform the Court about the outcome of these proceedings.

33. On 30 April 2008 the Ministry of Health paid 159,369.49 New Turkish Liras to the applicants.

E. Award of a scholarship

34. On 16 February 2005 the newly appointed Administrative Board of the Kızılay presented their apologies to the applicants and decided to give a scholarship to the first applicant in order to contribute towards his educational costs. A delegation of board members visited the applicants and told them that the medical expenses of the first applicant would also be paid by the Kızılay.

F. Current condition of the first applicant and his family

35. According to the information given by the applicants, the Kızılay rejected the applicants' claim for treatment and medical costs which amounted to TRL 3,000 (approximately EUR 1,340) and EUR 5,469, respectively, per month. The Ministry of Health also rejected their request for payment of these expenses.

36. The green card[1] issued by the Governorship of Izmir was cancelled right after the announcement of the judgments ordering the administration to pay compensation to the applicants.

37. The compensation awarded by the civil and administrative courts covered only one year's medical treatment expenses and did not suffice to pay the costs of medication used by the first applicant.

38. The first applicant was not admitted to any school because of his condition and reactions from families of other pupils. He thus started his education at a hospital. Following public pressure and negotiations with the National Education Directorate, he was ultimately admitted to a public school. Yet he has no close friends and suffers from stammering. Every week he sees a psychologist. Upon the latter's advice, he attends drama and painting courses.

39. The third applicant's (the father) health has been severely affected as a result of reactions from parents of other children and the school administration's refusal to admit his son to school. Currently he is unable to work and provide any income for the family.

40. The family is in serious economic difficulty and is trying to pay the first applicant's medical expenses with the help of family friends. Meanwhile, although some health associations offered help, they wanted to test some medications on the first applicant, which the family refused.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41 Article 4 of the Law on Blood and Blood Products (Law no. 2857 dated 25 June 1983) provides:

> "The powers and duties of the Ministry of Health and Social Welfare ... are as follows:
>
> ...
>
> (c) Inspection and supervision of real and corporate entities which deal with blood and blood products..."

42. Article 23 of the Regulation on the Blood and Blood Products (dated 25 November 1983) reads:

> "The following blood screening tests shall be conducted; blood type, Rh, compatibility and cross-match, VDRL tests, Hepatitis B, malaria parasite..."

43. Common provisions in the Law on Blood and Blood Productions and the Regulation on Blood and Blood Products are as follows:

---

1. The Ministry of Health provides a special card to people with a minimum level of income which gives free access to health care at the State and some university hospitals, and covers the cost of medicines for in-patients.

Article 7 and Article 38 respectively

> "All entities which deal with blood and blood products shall be inspected by the Ministry of Health and Social Welfare at least twice a year. Defects found during inspections shall immediately be remedied by the relevant entities. In the event the same defects are found to exist during the following inspection, the respondent individuals shall be subject to administrative and criminal proceedings."

44. On 18 August 1983 the Ministry of Health sent a letter to all governors, for distribution to hospitals, blood centres and public institutions, informing them about AIDS and the measures to be taken to prevent the spread of this disease. The Ministry stressed that particular vigilance must be shown when choosing blood donors. In particular, it required that blood donors be subjected to a medical examination prior to giving blood and that their blood be refused in case any symptoms of HIV AIDS were detected.

45. By a letter dated 21 November 1985, the Ministry of Health informed the governors that all HIV AIDS cases must be reported to the health authorities. It noted that persons suspected of having HIV AIDS must be medically examined, and their blood, bodily fluids and all other relevant substances subjected to the requisite tests.

46. On 4 February 1987 the Ministry of Health issued a circular to all governors (circular no. 1141), for distribution to public and private hospitals and clinics as well as to the Kızılay, for prevention of the spread of the HIV AIDS disease. The Ministry noted in this circular that HIV AIDS could only be transmitted through sexual intercourse, blood transfusion or multiple use of a syringe. In this connection, the Ministry stated that the *anti titre* test was the most effective way of diagnosing HIV AIDS. This could only be done by the ELISA method. It stressed that, prior to blood transfusions, the requisite ELISA tests must be carried out. To that end, all hospitals should be equipped with facilities for carrying out ELISA tests on blood given by donors. The hospitals which did not have such facilities should send blood samples to the hospitals which had blood centres.

47. By a circular dated 1 April 1992, the Ministry of Health required all blood centres and stations to conduct VDRL, HBsAg, AIDS and malaria tests on all blood and blood products. It stressed that no blood transfusions should be carried out if the aforementioned tests had not been conducted.

III. COUNCIL OF EUROPE

48. Between 1980 and 1988, the Committee of Ministers of the Council of Europe adopted a number of recommendations aimed at ensuring the adoption of common rules in the health field. In the below-mentioned Recommendations, the Committee of Ministers drew Member States' attention to the growing importance of a new and severe health hazard, namely AIDS, which was caused by an infectious agent transmissible by blood and blood products, and invited them to adopt a number of measures

to prevent the spread of this infectious disease. These Recommendations were as follows:

– Recommendation No. R (80) 5, dated 30 April 1980, on blood products for the treatment of haemophiliacs;

– Recommendation No. R (81) 14, dated 11 September 1981, on preventing the transmission of infectious diseases in the international transfer of blood, its components and derivatives;

– Recommendation No. R (84) 6 on the prevention of the transmission of malaria by blood transfusion;

– Recommendation No. R (83) on preventing the possible transmission of AIDS from affected blood donors to patients receiving blood and blood products;

– Recommendation 985 (1984) on the supply and utilisation of human blood and blood products; and

– Recommendation No. R (85) 12 on the screening of blood donors for the presence of AIDS Markers.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

49. The applicants complained that the State authorities had failed in their positive obligation to protect the right to life of the first applicant as a result of his infection with the HIV virus by blood supplied by the Kızılay, and that no effective investigation had been conducted into their criminal complaints. They invoked Article 2 of the Convention, which reads as follows:

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

50. The Government contested that argument.

A. Admissibility

51. The Government submitted that Article 2 of the Convention did not apply in the circumstances of the present case. They maintained that the applicants were no longer victims of a violation of the aforementioned provision following the redress provided by the authorities, within the meaning of Article 34 of the Convention. They further noted that in the case of *D. v. the United Kingdom* (application no. 30240/96, 2 May 1997, *Reports of Judgments and Decisions* 1997-III), which concerned the attempted expulsion of an AIDS sufferer to St. Kitts where he would have

been deprived of the medical treatment he was receiving in the United Kingdom, the Court had examined the complaints of the applicant under Article 3 of the Convention rather than Article 2.

52. The applicants claimed that Article 2 of the Convention covered not only incidents which resulted in the death of the victim, but also cases where the victim suffered life-threatening, serious injury. Bearing in mind that the first applicant's disease was not curable, the State was responsible for violation of the right to life of the first applicant. They thus claimed that Article 2 of the Convention applied in the present case.

53. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of unjustified force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 54, ECHR 2002-II).

54. Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up 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 authorities, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

55. Furthermore, on a number of occasions the Court has examined complaints raised under Article 2 of the Convention where the victims had suffered serious injuries as a result of illegal acts perpetrated against them and has accepted that the aforementioned provision could apply in exceptional circumstances even if the victims had not died (see *Osman v. the United Kingdom*, 28 October 1998, *Reports* 1998-VIII; *Yaşa v. Turkey*, 2 September 1998, *Reports* 1998-VI; *Makaratzis v. Greece* [GC], no. 50385/99, § 51, ECHR 2004-XI; and *G.N. and Others v. Italy*, no. 43134/05, § 69, 1 December 2009).

56. Likewise, in the above-cited *L.C.B.* case, where the applicant had suffered from leukaemia diminishing her chances of survival, and in the case of *Karchen and Others v. France* ((dec.), no. 5722/04, 4 March 2008), where the first applicant had been infected with the HIV virus which put his life in danger, the Court held that Article 2 of the Convention was applicable.

57. In view of the foregoing, the Court sees no reason to depart from its established case-law and considers that Article 2 of the Convention applies in the circumstances of the present case.

58. As regards the Government's reference to the case of *D. v. the United Kingdom* (cited above), where the applicant's complaints under Article 2 had been examined under Article 3 of the Convention, the Court notes that the circumstances of that case are fundamentally different from the present case. In the case of *D.* the Court examined the respondent Government's responsibility stemming from the attempted expulsion of the applicant to a third country, where he would be deprived of the medical treatment he had been receiving in the United Kingdom, from the standpoint of Article 3 of the Convention in accordance with its established practice in expulsion cases (see, among many others, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 56-78, ECHR 2005-I). In the instant case, however, the applicants' complaints must be examined under Article 2 of the Convention since they pertain to the alleged failure of the State authorities to fulfil their positive obligation to protect life by not taking preventive measures against the spread of HIV through blood transfusions and by not conducting an effective investigation against those responsible for the infection of the first applicant.

59. Turning to the Government's submission concerning the victim status of the applicants, the Court notes that this question is inextricably linked to the merits of the case, as it needs to be ascertained whether the national authorities responded to the applicants' grievances in accordance with their positive obligation under Article 2. Accordingly, the Court joins this question to the merits and will examine it under Article 2 of the Convention (see *Codarcea v. Romania*, no. 31675/04, § 100, 2 June 2009).

60. Finally, the Court notes that the Government implicitly recognised the *locus standi* of the second and third applicants in accordance with the rulings of the national courts which accepted their standing under Turkish law as parents of the first applicant and delivered judgments favourable to them (see, *a contrario*, *Karchen and Others*, cited above).

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

B. Merits

1. The parties' submissions

(a) The applicants

62. The applicants alleged that the national authorities had not protected the right to life of the first applicant as a result of their failure to give sufficient training to the health personnel concerned and to supervise and

inspect their work. In this connection, they noted that the health personnel at the Kızılay had shown gross negligence by not requiring the blood donors to fill out questionnaires and by not screening their blood with sufficient care. The health personnel at the hospital, where the blood transfusion had been conducted, also failed to do the necessary tests on the blood given to the first applicant, considering that the test in question was very expensive.

63. The applicants maintained that no meaningful investigation had been carried out into their complaints, that the proceedings before the administrative courts had lasted more than twelve years and that the compensation awarded by the civil and administrative courts had not even covered the costs of medication of the first applicant. They emphasised that the family was in serious economic difficulty and unable to cover all the expenses for medication and treatment of the first applicant.

(b) The Government

64. The Government submitted that the legal remedies at the domestic level had afforded appropriate redress for the applicants' complaints under Article 2 of the Convention. They further asserted that the national authorities had conducted an effective investigation into the applicants' complaints. In their opinion, both the civil and administrative courts had taken a protective approach towards the applicants when establishing their victim status and granting them redress for their grievances. The courts had awarded the applicants sufficient compensation and these judgments had been executed by the authorities. They added that, following the impugned incident, the Kızılay had decided to give the first applicant a scholarship in order to support his education.

65. As regards the applicants' allegations that the criminal investigation was ineffective, the Government contended that the Ankara Chief Public Prosecutor's decision of non-prosecution in relation to the President of the Kızılay and the Minister of Health was compatible with the principle that the criminal liability should be personal.

2. The Court's assessment

(a) Applicable principles

66. The Court reiterates that, even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), 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 positive 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. 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 liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages. Disciplinary measures may also be envisaged (see *Calvelli and Ciglio*, cited above, § 51; *Lazarini and Giacci v. Italy (*dec.), no. 53749/00, 7 November 2002; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; and *G.N. and Others*, cited above, § 82).

(b) Application of the above principles in the present case

67. The Court notes that the criminal investigation into the applicants' complaints concerning negligence on the part of the health personnel concerned, the Director General of the Kızılay and the Minister of Health was terminated on the ground that there was no fault directly attributable to these persons (see paragraphs 14 and 16 above).

68. In view of the above-cited principles indicating that Article 2 of the Convention does not necessarily require a criminal-law remedy in cases of unintentional infringement of the right to life or to personal integrity, such as the present case involving medical negligence, the Court must ascertain whether the Turkish legal system afforded the applicants sufficient and appropriate civil redress in order to satisfy the positive obligation under the aforementioned provision.

69. In this context, the Court notes that both the civil and administrative courts ruled that the Kızılay was at fault for supplying HIV-infected blood to the first applicant and that the Ministry of Health was also responsible as a result of the negligence of its personnel in the performance of their duties. Both institutions had therefore been held liable for the damage caused to the applicants (see paragraphs 21, 22 and 31 above). Furthermore, the Ankara Civil Court of First Instance established that the HIV infected blood given to the first applicant had not been detected by the health personnel because they had not done the requisite test on the blood in question, considering that it would be too costly. The court found moreover that, prior to the impugned incident, there was no regulation requiring blood donors to give information about their sexual history which could help determine their eligibility to give blood. On account of these deficiencies, and the defendants' failure to comply with the already existing regulations, the civil and administrative courts awarded the applicants TRL 54,930,703,000 and 159,369.49 New Turkish Liras, respectively, to cover non-pecuniary damages and the statutory interest applied to those sums.

70. It thus appears that the applicants had access to the civil and administrative courts which enabled the establishment of the liability of those responsible for the infection of the first applicant with the HIV virus and the award of civil redress, in an order for damages. However, as it

appears from the parties' submissions, a crucial question in the instant case is whether the redress in question was appropriate and sufficient.

71. In this connection, the Court notes that the non-pecuniary damage awards received by the applicants only covered one year's treatment and medication for the first applicant (see paragraph 37 above). Thus the family was left in debt and poverty and unable to meet the high costs of the continued treatment and medication amounting to a monthly cost of almost EUR 6,800, which was not contested by the Government (see paragraphs 35, 39 and 40 above). Despite the promises made by the authorities to pay the medical expenses of the first applicant, the applicants' requests to that effect were rejected by the Kızılay and the Ministry of Health (Ibid.). It is striking that the green card given to the applicants was withdrawn immediately after the announcement of the judgments ordering the defendants to pay compensation to the applicants (see paragraph 36 above). It follows that the applicants were left on their own to pay the high costs of treatment and medication for the first applicant.

72. In view of the above, while the Court acknowledges the sensitive and positive approach adopted by the national courts in determining the responsibility of the Kızılay and the Ministry of Health and in ordering them to pay damages to the applicants, it considers that the most appropriate remedy in the circumstances would have been to have ordered the defendants, in addition to the payment of non-pecuniary damages, to pay for the treatment and medication expenses of the first applicant during his lifetime. The Court concludes therefore that the redress offered to the applicants was far from satisfactory for the purposes of the positive obligation under Article 2 of the Convention.

73. Accordingly, the Court considers that the applicants can still claim to be victims of a violation of their rights under Article 2 within the meaning of Article 34 of the Convention. It follows that the Government's objection on this point must be dismissed (see paragraph 59 above).

74. As regards the complaint pertaining to the length of the proceedings before the administrative courts, the Court recalls that the requirements of Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory. It must also operate effectively in practice, which requires a prompt examination of the case without unnecessary delay (see *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; and *G.N. and Others*, cited above, § 97).

75. On that basis, the Court observes that, despite the due diligence shown by the civil courts in the handling of the applicants' compensation claims within a very short time (approximately one year and two months), the administrative court proceedings aimed at determining the liability of the Ministry of Health lasted nine years, four months and seventeen days

(see paragraphs 24-32 above). Having regard to the latter delay, it cannot be said that the administrative courts complied with the requirements of promptness and reasonable expedition implicit in this context.

76. In that connection, the Court recalls that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning medical negligence in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care is essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services (see *Šilih v. Slovenia* [GC], no. 71463/01, § 196, 9 April 2009).

77. In view of the foregoing considerations, the Court concludes that there has been a violation of Article 2 of the Convention.

78. Finally, the Court is of the view that it is appropriate to further examine the "reasonableness" of the length of the administrative proceedings in question from the standpoint of Article 6 § 1 of the Convention below.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND 13 OF THE CONVENTION

79. The applicants complained that the length of the administrative court proceedings had contravened the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention. They also alleged under Article 13 of the Convention that there were no effective remedies in domestic law to accelerate the proceedings.

Article 6 § 1 reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

Article 13 provides:

> "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."

80. The Government contested that argument.

81. The period to be taken into consideration began on 13 October 1998 and ended on 30 April 2008. It thus lasted approximately nine years, four months and seventeen days for two levels of jurisdiction.

A. Admissibility

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

B. Merits

83. The applicants alleged that the length of the proceedings before the administrative courts was excessive. They further noted that the Izmir Administrative Court's judgment had not been executed within a reasonable time, although they had informed the authorities that the compensation in question would be used for the treatment and medication of the first applicant.

84. The Government submitted that the alleged delay had been caused by the difficulties pertaining to the jurisdictional questions, the nature of the dispute and the applicants' appeal against the First Instance Court's judgment in relation to the legal fees.

85. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII; *X v. France*, 31 March 1992, § 32, Series A no. 234-C; *Vallée v. France*, 26 April 1994, § 34, Series A no. 289-A; *Karakaya v. France*, 26 August 1994, § 30, Series A no. 289-B; *Pailot v. France*, 22 April 1998, § 61, *Reports* 1998-II; *Richard v. France*, 22 April 1998, § 57, *Reports* 1998-II; *Leterme v. France*, 29 April 1998, § 64, *Reports* 1998-III; and *Henra v. France*, 29 April 1998, § 61, *Reports* 1998-II).

86. The Court considers that the case was not at all complex as the negligence and responsibility of the authorities in the infection of the first applicant had already been established by the Ankara Civil Court of First Instance and the Court of Cassation by judgments dated 13 July 1998 and 9 February 1999, respectively.

87. As regards the conduct of the applicants, the Court observes that there is no indication in the case file that the applicants noticeably contributed to the length of the proceedings. The fact that they exercised their right to lodge an appeal against the First Instance Court's judgment in relation to the legal fees cannot be taken as a factor which caused significant delay in the proceedings.

88. As to the conduct of the authorities, the Court notes that several periods appear to have been abnormally long. In this connection, it observes

that the administrative courts took almost two and a half years to resolve the jurisdictional question (see paragraphs 25 and 26 above). The Izmir Administrative Court delivered its first judgment more than two years after the case had been remitted to it for examination (see paragraphs 26 and 27 above). Finally, it took the Supreme Administrative Court two and a half years to examine the appeal lodged by the applicants against the First Instance Court's judgment of 14 July 2003 (see paragraphs 27-29 above).

89. Notwithstanding the above findings, the Court observes that the main issue in the present case was not whether there had been unreasonable delays imputable to the administrative courts hearing the applicants' case, but whether those courts had acted with "exceptional diligence" in view of the first applicant's condition and the gravity of the overall situation. Furthermore, what was at stake in the proceedings complained of was of crucial importance to the applicants in view of the disease from which the first applicant is suffering (see *X v. France*, *Vallée*, *Karakaya*, *Pailot*, *Richard*, *Leterme* and *Henra* judgments cited above, § 47, § 47, § 43, § 68, § 64, § 68, and § 68 respectively).

90. Having regard to the foregoing, the Court considers that in the instant case the length of the proceedings before the administrative courts was excessive and failed to meet the "reasonable time" requirement.

91. The applicants further complained of a lack of an effective domestic remedy to accelerate the proceedings. The Government disputed this complaint.

92. The Court recalls its earlier finding that the Turkish legal system did not provide an effective remedy whereby the length of the proceedings could be successfully challenged (see *Tendik and Others v. Turkey*, no. 23188/02, §§ 34-39, 22 December 2005). It finds no reason to reach a different conclusion in the instant case.

93. There has accordingly been a breach of Articles 6 § 1 and 13 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

94. Lastly, relying on Article 6 § 1 of the Convention the applicants complained that they had been denied a fair hearing by an independent and impartial tribunal. Under Article 13 of the Convention they maintained that they had not had an effective remedy in respect of their complaints under Article 2.

95. Having examined the material submitted to it, the Court considers that there is no appearance of a violation of these provisions.

96. It follows that this part of the application is manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

98. The applicants claimed TRL 1,913,248 (approximately EUR 852,128) in respect of pecuniary damage. The applicants explained that this amount consisted of the following items:

– EUR 328,140 for medication costs which had already been incurred by the applicants up until September 2008;

– TRL 480,000 for the costs that had already been incurred and will be incurred for forty years for the treatment of the first applicant. This amount includes the travel and accommodation expenses of the applicants who have to travel to Ankara every month for the treatment;

– TRL 213,560 for the deprivation of future income of the first applicant;

– TRL 259,874 for the costs of employing a house keeper as the second applicant has to work and is unable to do the household work;

– TRL 142,999 for the deprivation of income of the second applicant (mother);

– TRL 262,361 for the deprivation of future income of the third applicant (father) who is currently unable to work.

99. The applicants submitted a detailed report about the medication consumed by the first applicant and the price of each medicine. They also furnished the Court with an expert report in support of the remaining claims.

100. The Government submitted that the applicants had failed to substantiate their claims in respect of the pecuniary damage. In this connection they emphasised that the domestic courts had already awarded the applicants sufficient compensation for the damage incurred by them. They thus asked the Court not to make any award under this head.

101. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In view of its above conclusion, it finds that there is a direct causal link between the violation found under Article 2 of the Convention and the damage incurred by the applicants. Having regard to the documents in its possession and to the fact that the authorities refused to pay the costs

of treatment and medication for the first applicant, the Court considers it reasonable to award the applicants, jointly, EUR 300,000 in respect of past pecuniary damage, plus any tax that may be chargeable on that amount.

102. The Court considers that, in addition to the award made above, the Government must provide free and full medical cover for the first applicant during his lifetime.

2. Non-pecuniary damage

103. The applicants claimed EUR 2,000,000 in respect of non-pecuniary damage. They noted that this amount consisted of the following: EUR 1,000,000 for the first applicant and EUR 500,000 for each of the second and third applicants.

104. The Government submitted that the amount claimed was excessive and unjustified. They further contended that any award to be made for non-pecuniary damage should not be a source of enrichment.

105. The Court has found a violation of Articles 2, 6 and 13 of the Convention on account of the authorities' failure to fulfil their positive obligation to protect the right to life of the first applicant and of the excessive length of the administrative court proceedings as well as lack of an effective remedy to accelerate the proceedings. Bearing in mind the emotional distress and anguish they endured, the Court accepts that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations.

106. As regards the Government's contention that the award to be made under this head should not be a source of enrichment, the Court recalls the considerations of the Ankara Civil Court of First Instance that the sorrow and pain suffered by the [applicants] cannot be compensated even if huge amounts were awarded (see paragraph 21 above).

107. In view of the above, ruling on an equitable basis, the Court awards the applicants, jointly, a total sum of EUR 78,000, plus any tax that may be chargeable thereon.

B. Costs and expenses

108. The applicants did not specify a sum in respect of the costs and expenses that which have incurred. However, they submitted a schedule of legal work carried out by their representative before the domestic courts and for the presentation of their case to the European Court.

109. The Government asked the Court to dismiss the applicants' claims for costs and expenses.

110. The Court has consistently held that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see,

for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

111. In the present case, although the applicants did not claim a specific sum, they submitted a time schedule indicating the time spent for the preparation and submission of their application and asked the Court to make an award under this head. Considering that the applicants must have incurred costs and expenses for the presentation of their case which involves complex issues of fact and legal questions, the Court finds it reasonable to award EUR 3,000 to them, jointly, under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the complaints concerning the alleged violation of the right to life, the excessive length of the administrative court proceedings and lack of effective remedies in domestic law to accelerate the proceedings, and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention;

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

4. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

5. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 300,000 (three hundred thousand euros) plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 78,000 (seventy-eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 3,000 (three thousand euros), plus any tax that may chargeable to the applicants, for costs and expenses;

(b) that the respondent Government must provide free and full medical cover for the first applicant during his lifetime;

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

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé	Françoise Tulkens
Registrar	President

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

F.T.
S.D.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

Little Yiğit's fate is heartbreaking: as a newborn baby, he was infected with the HIV virus because of the gross negligence of the authorities. The consequences unfold as if in a Greek tragedy. His fate puts our humanity to the test. This Court is a human rights court, with special humanitarian responsibilities. It has to be human, it has to serve rights, and it has to operate as a court. In the present case I would have opted for a different balance among these three considerations, and would have opted for more judicial "formalism", which – to my mind – would have been equally able to reflect human sensibility and rights protection (in line with the established case-law and the Convention).

On 19 December 1997 the applicants initiated compensation proceedings against the Kızılay (Turkish Red Crescent) and the Ministry of Health. They requested *non-pecuniary damages* for the infection of the first applicant, Yiğit. On 24 February 1999 the Kızılay paid a total amount of TRL 54,930,703,000 to the applicants, to cover the non-pecuniary damage awarded by the court and the statutory interest applied to that sum.

On 13 October 1998 the applicants initiated proceedings against the Ministry of Health, requesting *non-pecuniary damages*. Having been found negligent, on 30 April 2008 the Ministry of Health paid 159,369.49 new Turkish Liras to the applicants.

According to the jurisprudence of the Court, the present facts (the continuous threat to life) fall under Article 2 of the Convention. With regard to the second proceedings it cannot be said that the administrative courts complied with the requirements of promptness and reasonable expedition that are required in the context of the protection of life. The judgment is not specific in this regard but this is clearly a procedural violation (see *G.N. and Others v. Italy*, no. 43134/05, § 102, 1 December 2009).

Contrary to *G.N. v. Italy*, the present judgment goes into an evaluation of the redress provided. It finds that the non-pecuniary damage awards received by the applicants covered only one year's treatment and medication for the first applicant (see paragraph 71): "Thus the family was left in debt and poverty and unable to meet the high costs of the continued treatment and medication amounting to a monthly cost of almost EUR 6,800, which was not contested by the Government" and therefore concludes that the redress offered to the applicants was far from satisfactory for the purposes of the positive obligation[1] under Article 2 of the Convention (see

1. I am not sure that the case as decided is only about positive obligations. Where the State *causes* the loss of life or a permanent life-threatening situation, the issue is not one of positive obligation: in fact the State contributes to death, even if life is not deprived "intentionally". By failing to provide the free treatment after 2007, the character of the violation changes.

paragraph 72). It would appear that, according to the judgment, this lack of redress amounts to a substantive violation of Article 2 of the Convention, given the conclusion that there is a "general" violation of Article 2 (see paragraph 77). Here, with all due respect, I have to disagree.

I admit that such a substantive violation might have occurred had the State failed to provide any of the necessary treatment for a life-threatening medical condition caused by its entities, as the applicants alleged. But in that case the issue would not have been the adequacy of the redress for material damage; moreover, *allegations* do at least have to be substantiated.

While the judgment finds a substantive violation of Article 2 for the non-payment of compensation for material damage, the claim made in the guise of just satisfaction, that is, after the original complaint, and referring to new developments, is a new one. The original application, as communicated to the Government by the Court, concerned the remedies offered in the different domestic proceedings. It did not concern the alleged pecuniary damage caused by lack of treatment, an event that might have occurred from a non-specified date after June 2007.

In response to the Government's observations, the applicant, represented by a lawyer, stated in his just-satisfaction claim of 3 October 2008 that the compensation for moral damages was too low to cover material damages and that the Government and Kızılay did not provide free treatment to the infected child because the Green Card[2] was cancelled after the pronouncement of the judgment awarding compensation. They did not produce evidence that the card had been cancelled and we are not provided with the reasons for cancelling it. Instead, the applicants claimed that the judgment awarding compensation (which duly dealt with their claim for non-pecuniary damages) covered only one year of treatment. They claimed that the necessary medication cost them EUR 5,469 plus TRL 3,000 per *month* (however, in the final summary of their demand they sought only TRL 328,140 for *lifelong treatment*[3]). In order to prove their claim they

2. The Ministry of Health provides a special card to people with a low level of income which gives free access to health care at the State and some university hospitals, and covers the cost of medicines for in-patients.

3. It is hard to determine what is covered by the EUR 300,000 pecuniary award of the Court, but in view of the claim for medical treatment it looks *ultra petitum*. The EUR 300,000 refers expressly to the refusal to pay the cost of treatment and medication (see paragraph 101). This is much more than the amount of the claim for lifelong treatment, and given that the Government are required to provide lifelong treatment in accordance with the judgment, the award must refer only to the period beginning on an unspecified date after June 2007 until perhaps the date of the submission of the claim (03.10.2008). The amount is excessive. Even if the period that was taken into consideration lasted until the judgment was rendered (a period of about 30 months), the monthly award exceeds EUR 10,000, which is way above the unsubstantiated and grossly inflated price quotes submitted by the applicants. Once again, all these damages were awarded without the applicants having spent a documented penny; they were awarded for actions and expenditure *not* taken.

produced grossly inflated internet-based prices for the prescribed medication.[4]

The Government replied that all those claims were unsubstantiated; indeed, no single *receipt* for actual treatment related to costs was submitted. No invoice whatsoever related to anything at all. Nevertheless, the judgment considers that there is actual material damage in respect of medication and treatment. To my mind, compensation for material damage is paid only where damage (loss) actually occurs. If the treatment has not taken place, there is no damage in that regard. It might be the case that the applicant suffered additional non-pecuniary damage (as he might have suffered without treatment, or his life expectancy might have been reduced, etc.) but that is a different matter. More importantly, these claims (like all the other claims which were made, such as loss of future earnings etc.) are to be recovered in domestic proceedings. The applicants admitted that such a remedy was available in the domestic system. This is a typical case of non-exhaustion of domestic remedies, both in respect of the original pecuniary damages claims related to the original infection and its consequences, and with regard to the situation arising from the lack of treatment beginning around mid-2007.

As if the alleged (never substantiated) material damage would have occurred as a result of the original infection, and as if no new facts were to intervene, the judgment awards 300,000 euros for damage incurred, "having regard to the documents in its possession and to the fact that the authorities refused to pay the cost of treatment and medication."

It seems to me that while free medical treatment was provided as long as the applicant had a Green Card, after the alleged revocation of the card, sometime after June 2007, a new situation arose. It is possible that the child was without treatment after that date, though this is not clear from the just satisfaction claim.

I find it procedurally unfair to assume that the Government should have expressly raised an objection of non-exhaustion of domestic remedies in respect of the material damages in the context of the Article 41 proceedings.[5]

---

4. For example, in the case of Tripanavir they submit an internet-based pharmacy price for 120 tablets (250mg) where the monthly prescribed dose is one per day; i.e. the suggested price applies for four months but they present it as a monthly price. The quoted prices are also inflated in the sense that e.g. Fuzeon is available for U$ 2400 (http://aids.about.com/od/hivmedicationfactsheets/a/drugcost.htm) where the applicants claim that the monthly dose costs EUR 3,609.

5. In the context of the case, the Government should have been put on notice of this of the Court's own motion. The alleged denial of treatment started "shortly" after June 2007. The resulting injury (which consists for the Court and myself primarily in the lack of treatment) as a violation of Article 2 of the Convention was brought up only in October 2008, that is, after six months. When a new complaint is raised for the first time during the proceedings before the Court, the running of the six-month period is not interrupted until this complaint

According to the Communication served on the Government, the applicants complained only that *in and through the proceedings* that they had launched in the domestic courts (which were partly pending at the time of communication) the Ministry was not held liable and hence there was a violation of the State's positive obligations under Article 2. The relevant Questions (3. and 4.) communicated to the Government concerned the promptness of the procedure.[6] In the domestic proceedings the applicants asked for non-pecuniary damages and this is what they were awarded (without adequate promptness.) A remedy was provided in the domestic system as requested, and it must be held to be an adequate one, as the judgment has nothing to say in this regard. For the Court, the substantive violation of Article 2 consists in the fact that the material damage resulting from lack of treatment was not compensated, and in this regard the Court finds that a specific amount of material damage was caused, to be compensated by EUR 300,000.

The applicants could have sought material damages in Turkey. They did not do so in the original proceedings. They argued that this would have caused additional delays in the domestic proceedings. This is pure speculation, though it might be reasonable. But to request a court order in the actual proceedings for the provision of lifelong treatment would not have caused additional delay. Even if one were to accept that it would have done, the applicants had ample opportunity to initiate separate proceedings, at least after 1999 when the responsibility of Kızılay had been definitively established, and after June 2007, with regard to the Ministry of Health. As to the new development, namely, that the child was deprived of free medical treatment, they could have appealed against the revocation of the Green Card, or have initiated proceedings against the two defendants for provision of the treatment or payment of the cost thereof. They claimed that Kızılay had promised it, which is again an allegation, and if it was a legally binding promise they could have asked for enforcement or execution. Although State liability had been clearly established, the specific remedy (of treatment) was never asked for, nor judicially recognized. Instead of making use of the available legal remedies, the applicants brought the treatment claim directly to the Court in the guise of a just-satisfaction claim.

In view of the applicants' allegations in their just satisfaction claim, the proper approach would have been a) to ask for minimum substantiation (why was the Green Card cancelled?; is the child actually without

---

is actually lodged (see *Sarl Aborcas and Borowik v. France* (dec.), no. 59423/00, 10 May 2005, and *Loyen v. France* (dec.), no. 46022/99, 27 April 2000). As a rule the Court rejects them in accordance with Article 35 §§ 1 and 4 of the Convention (*Hazırcı and Others* v. Turkey, no. 57171/00, § 54, 29 November 2007).

6. Other questions concerned victim status and the adequacy of protection of life in the specific circumstances of a blood transfer, which was not a ground for finding a violation in the end.

treatment? etc.) and b) in the affirmative, apply an interim measure of its own motion that requires the Government to proceed with the treatment until the Court decides on the matter.

What I find stunning is that the applicants made no attempt to use the available domestic legal remedies, but brought their claim in the form of a just satisfaction claim. I fully understand that the parents, being in shock, asked for support from foundations and the President of the Republic, but their lawyer should have made use of domestic judicial remedies. There is no reason to assume that the domestic courts or other authorities would not have acted in the same spirit as the Court has in the judgment.

The exhaustion of domestic remedies is not only a Convention requirement that serves reasonable goals, but is one that in the present case would have served the interests of the applicants.

As the Court could have found an equitable legal "solution" to the lack of treatment, to the extent that there is a legal solution to a human tragedy of this nature, and without disregarding its subsidiary role (exhaustion of domestic remedies), I feel compelled to partly dissent.