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

FOURTH SECTION

CASE OF K.H. AND OTHERS v. SLOVAKIA

(Application no. 32881/04)

JUDGMENT

STRASBOURG

28 April 2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of K.H. and Others v. Slovakia,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 7 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 32881/04) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight Slovak nationals, K.H., J.H., A.Č., J.Čo., J.Če., V.D., H.M. and V.Ž., on 30 August 2004. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms V. Durbáková, a lawyer practising in Košice and Ms B. Bukovská from the Centre for Civil and Human Rights in Košice. The Slovak Government ("the Government") were represented by their Agent, Mrs M. Pirošíková.

3. The applicants alleged, in particular, that their rights under Articles 6 § 1, 8 and 13 of the Convention had been infringed as a result of the failure by the domestic authorities to make photocopies of their medical records available to them.

4. By a decision of 9 October 2007 the Court declared the application partly admissible.

5. The Government filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the applicants replied in writing to the Government's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are eight female Slovakian nationals of Roma ethnic origin.

A. Background to the case

7. The applicants were treated at gynaecological and obstetrics departments in two hospitals in eastern Slovakia during their pregnancies and deliveries. Despite continuing to attempt to conceive, none of the applicants has become pregnant since their last stay in hospital, when they delivered via caesarean section. The applicants suspected that the reason for their infertility might be that a sterilisation procedure was performed on them during their caesarean delivery by medical personnel in the hospitals concerned. Several applicants had been asked to sign documents prior to their delivery or on discharge from the hospital but they were not sure of the content of those documents.

8. The applicants, together with several other Roma women, granted powers of attorney to lawyers from the Centre for Civil and Human Rights, a non-governmental organisation based in Košice. The lawyers were authorised to review and photocopy the women's medical records in order to obtain a medical analysis of the reasons for their infertility and possible treatment. The applicants also authorised the lawyers to make photocopies of their complete medical records as potential evidence in future civil proceedings for damages, and to ensure that such documents and evidence were not destroyed or lost. The photocopies were to be made by the lawyers with a portable photocopier at the expense of the Centre for Civil and Human Rights.

9. The applicants attempted to obtain access to their medical records in the respective hospitals through their authorised representative in August and September 2002. The lawyer unsuccessfully asked the management of the hospitals to allow her to consult and photocopy the medical records of the persons who had authorised her to do so.

10. On 11 October 2002 representatives of the Ministry of Health expressed the view that section 16(6) of the Health Care Act 1994 did not permit a patient to authorise another person to consult his or her medical records. The above provision was to be interpreted in a restrictive manner and the term "legal representative" concerned exclusively the parents of an underage child or a guardian appointed to represent a person who had been deprived of legal capacity or whose legal capacity had been restricted.

B. Civil proceedings

11. The applicants sued the hospitals concerned. They claimed that the defendants should be ordered to release their medical records to their authorised legal representative and to allow them to obtain a photocopy of the documents included in the records.

1. Action against the J. A. Reiman University Hospital in Prešov

12. Six applicants brought an action against the J.A. Reiman University Hospital (*Fakultná nemocnica J. A. Reimana*) in Prešov ("the Prešov Hospital") on 13 January 2003.

13. On 18 June 2003 the Prešov District Court delivered a judgment ordering the hospital to permit the plaintiffs and their authorised representative to consult their medical records and to make handwritten excerpts thereof. The relevant part of the judgment became final on 15 August 2003 and enforceable on 19 August 2003.

14. With reference to section 16(6) of the Health Care Act 1994 the District Court dismissed the request to photocopy the medical documents. The court noted that the records were owned by the medical institutions concerned and that such a restriction was justified with a view to preventing their abuse. It was not contrary to the plaintiffs' rights and freedoms guaranteed by the Convention. The applicants appealed against that part of the judgment.

15. On 17 February 2004 the Regional Court in Prešov upheld the first-instance decision, according to which the applicants were not entitled to make photocopies of their medical files. There was no indication that the applicants' right to have any future claim for damages determined in accordance with the requirements of Article 6 § 1 of the Convention had been jeopardised. In particular, under the relevant law the medical institutions were obliged to submit the required information to, *inter alia*, the courts, for example in the context of civil proceedings concerning a patient's claim for damages.

2. Action against the Health Care Centre in Krompachy

16. H.M. and V.Ž., the two remaining applicants, brought an identical action against the Health Care Centre (*Nemocnica s poliklinikou*) in Krompachy ("the Krompachy Hospital") on 13 January 2003.

17. On 16 July 2003 the District Court in Spišská Nová Ves ordered the defendant to allow the applicants' representative to consult their medical records and to make excerpts thereof. It dismissed the claim concerning the photocopying of the medical documents. The court referred to section 16(6) of the Health Care Act 1994 and noted that even courts or other authorities were not entitled to receive photocopies of medical records. Such a

restriction was necessary in order to prevent abuse of personal data contained therein.

18. The applicants appealed against the decision concerning the photocopying of the documents. They relied on Articles 6 and 8 of the Convention and argued that, unlike public authorities and the medical institutions concerned, they had only limited access to their medical records, which meant that they were restricted in assessing the position in their cases and in bringing an appropriate action for damages.

19. On 24 March 2004 the Regional Court in Košice upheld the first-instance decision to reject the claim concerning the photocopying of the medical records.

C. Constitutional proceedings

1. Complaint of 24 May 2004

20. On 24 May 2004 the six applicants who had sued the Prešov Hospital lodged a complaint under Article 127 of the Constitution. They alleged that the Prešov Hospital, the District Court and the Regional Court in Prešov had violated, *inter alia*, their rights under Articles 6 § 1 and 8 of the Convention.

21. As regards Article 6 § 1 the applicants argued that, in practice, handwritten excerpts from medical records could be abused just as photocopies of the relevant documents could. However, preventing the applicants from making photocopies of those documents put them at a disadvantage *vis-à-vis* the State, to which the medical institutions concerned were subordinated and which would act as defendant in proceedings concerning any future claim for damages. Furthermore, the principle of equality of arms required that the applicants should have at their disposal all the documentation in the form of photocopies. This would enable an independent expert, possibly abroad, to examine them, and also provide a safeguard in the event of the possible destruction of the originals.

22. Under Article 8 of the Convention the applicants complained that they had been denied full access to documents pertinent to their private and family lives in that they had been refused the right to make photocopies of them.

23. On 8 December 2004 the Constitutional Court (Third Chamber) rejected the complaint. It found no appearance of a violation of Article 6 § 1 of the Convention in the proceedings leading to the Regional Court's judgment of 17 February 2004. As to the alleged violation of Article 8 of the Convention, the Constitutional Court held that the Regional Court had correctly applied section 16(6) of the Health Care Act of 1994 and that a fair balance had been struck between the conflicting interests. Reference was made to the explanatory report to that Act. Furthermore, Article 8 of the

Convention did not encompass a right to make photocopies of medical documents.

2. Complaint of 25 June 2004

24. On 25 June 2004 the remaining two applicants lodged a similar complaint under Article 127 of the Constitution alleging a violation of, *inter alia*, Articles 6 § 1 and 8 of the Convention as a result of the conduct of the representatives of the Krompachy Hospital and in the proceedings leading to the Košice Regional Court's judgment of 24 March 2004.

25. On 27 October 2004 the Constitutional Court (Second Chamber) rejected the complaint as being premature. The decision stated that the plaintiffs had lodged an appeal on points of law against the part of the Regional Court's judgment by which the first-instance decision to grant their claim for access to medical records had been overturned.

D. Subsequent developments

26. Subsequently seven applicants were able to access their files and to make photocopies thereof under the newly introduced Health Care Act 2004 (see paragraph 35 below) in circumstances which are set out in the decision on the admissibility of the present application.

27. As regards the eighth applicant, Ms J. H., the Prešov Hospital only provided her with a simple record of a surgical procedure indicating that surgery had been performed on her and that she had been sterilised during the procedure. On 22 May 2006 the Director of the Prešov Hospital informed the applicant that her complete medical file had not been located and that it was considered lost. On 31 May 2007 the Ministry of Health admitted that the Prešov Hospital had violated the Health Care Act 2004 in that it had failed to ensure the proper keeping of the medical file of Ms J. H.

II. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure

28. Article 3 guarantees to everyone the right to seek judicial protection of a right which has been placed in jeopardy or violated.

29. Under Article 6, courts shall proceed with a case in cooperation with the parties in a manner permitting the speedy and efficient protection of persons' rights.

30. Article 78 § 1 provides that, prior to starting proceedings on the merits, courts can secure evidence on the proposal of the person concerned where it is feared that it will be impossible to take such evidence later.

31. Article 79 § 2 obliges a plaintiff to submit the documentary evidence relied upon in an action, with the exception of evidence which the plaintiff is unable to submit for external reasons.

32. Pursuant to Article 120 § 1, parties are obliged to produce evidence in support of their arguments. The decision as to which evidence will be taken lies with the court. Exceptionally, courts can take other evidence than that proposed by the parties where it is necessary for the determination of the point in issue.

B. Health Care Act 1994

33. Until 31 December 2004, the following provisions of Health Care Act 277/1994 (*Zákon o zdravotnej starostlivosti* – "the Health Care Act 1994") were in force:

"Section 16 – Medical records

1. The keeping of medical records shall form an inseparable part of health care.

2. All medical institutions ... shall be obliged to keep medical records in written form ... The documents are to be dated, signed by the person who established them, stamped and numbered on each page ...

3. Medical records shall be archived for a period of 50 years after the patient's death. ...

5. A medical institution shall be obliged to provide medical records on a specific written request and free of charge, to a public prosecutor, investigator, police authority or court in the form of excerpts, to the extent that they are relevant in the context of criminal or civil proceedings. The medical records as a whole cannot be put at the disposal of the above authorities.

6. A patient, his or her legal representative ... shall have the right to consult medical records and to make excerpts thereof at the place [where the records are kept] ...

8. A medical institution shall provide an expert appointed by a court with information from medical records to the extent that it is necessary for preparing an expert opinion ...

11. An excerpt from a person's medical record ... shall contain exact and true data and give an overview of the development of the health of the person concerned up to the date when the excerpt is established. It shall be established in writing on numbered pages."

34. The relevant part of the Explanatory Report to the Health Care Act 1994 reads as follows:

"Medical records remain the property of the medical institution concerned. They contain data about the patient and often also about the members of his or her family or other persons. That information being of a strictly confidential and intimate nature, the obligation of non-disclosure extends to them in their entirety. It is therefore necessary

to define as precisely as possible cases where a patient or other persons may acquaint themselves with such information."

C. Health Care Act 2004

35. The Health Care, Health Care Services and Amendment Act 576/2004 (*Zákon o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov* – "the Health Care Act 2004") came into force on 1 November 2004 and became operative on 1 January 2005. It repealed, *inter alia*, section 16 of the Health Care Act 1994. Its relevant provisions read as follows:

"Section 25 – Access to data included in medical records

1. Data included in medical records shall be made available by means of consultation of the medical records to:

(a) the person concerned or his or her legal representative, without any restriction; ...

(c) any person authorised in writing by the person mentioned in point (a) ... subject to the signature of the latter being certified in accordance with a special law ... to the extent that it is specified in the authorisation; ...

(g) an expert appointed by a court or an authority in charge of a criminal case or whom one of the parties has asked for an opinion ...; the extent of data necessary for preparing the opinion shall be determined by the expert ...

2. The persons entitled to consult medical records shall have the right to make excerpts or copies of them at the place where the records are kept to the extent indicated in paragraph 1."

III. RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE No. R (97) 5 ON THE PROTECTION OF MEDICAL DATA

36. Point 8 of the Recommendation adopted on 13 February 1997 deals with the rights of persons whose medical data have been collected. The relevant part provides:

"*Rights of access and of rectification*

8.1. Every person shall be enabled to have access to his/her medical data, either directly or through a health-care professional or, if permitted by domestic law, a person appointed by him/her. The information must be accessible in understandable form.

8.2 Access to medical data may be refused, limited or delayed only if the law provides for this and if:

a. this constitutes a necessary measure in a democratic society in the interests of protecting state security, public safety, or the suppression of criminal offences; ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicants complained that they had been unable to obtain photocopies of their medical records under the Health Care Act 1994. They relied on Article 8 of the Convention, which in its relevant part provides:

“1. Everyone has the right to respect for his private and family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments of the parties

1. The applicants

38. The applicants maintained that the mere possibility of consulting the files and making handwritten excerpts thereof did not provide them with effective access to the relevant documents concerning their health. In particular, medical records contained charts, graphs, drawings and other data which could not be properly reproduced through handwritten notes. They were voluminous as a rule and their transcript by hand was not only insufficient but also time consuming and burdensome.

39. The originals of the records contained information which the applicants considered important from the point of view of their moral and physical integrity. In particular, the applicants feared that they had been subjected to an intervention affecting their reproductive status. The records would convey not only information about any such intervention, but also whether the applicants had given consent to it and in what circumstances. A typed or handwritten transcript of the records could not faithfully represent the particular features of the original records bearing, in some cases, the applicants’ signatures. With photocopies of the records the applicants would

not only be able to establish a basis for civil litigation but also to demonstrate to their families and communities, where appropriate, that their infertility was not a result of any deliberate action on their part.

40. Finally, the applicants saw no justification for the Government's argument according to which submitting transcripts of the relevant parts of the medical documents to prosecuting authorities or courts protected their privacy to a greater extent than making copies of the relevant files available.

2. The Government

41. The Government argued that the refusal to allow the applicants to make photocopies of their medical files had been in accordance with the relevant provisions of the Health Care Act 1994. It had been compatible with the applicants' right to respect for their private and family life in the circumstances. In particular, the applicants had been allowed to study all the records and to make handwritten excerpts thereof.

42. The refusal to allow the applicants to photocopy their medical records had been justified, at the relevant time, by the State's obligation to protect the relevant information from abuse. The State enjoyed a margin of appreciation in regulating similar issues. It had not been overstepped in the case of the applicants, who had not been prevented from obtaining all relevant information related to their health. The Contracting States' positive obligations under Article 8 did not extend to an obligation to allow persons to make photocopies of their medical records.

43. Under the relevant law health institutions were obliged, upon a written request, to provide relevant information contained in the medical records of the person making the request, in the form of written excerpts, to police investigators, prosecutors or a court. That procedure provided the advantage that, unlike a copy of the medical file, it gave access to the relevant parts of the files without disclosing other information which was not related to the subject-matter of the proceedings.

B. The Court's assessment

44. The complaint in issue concerns the exercise by the applicants of their right of effective access to information concerning their health and reproductive status. As such it is linked to their private and family lives within the meaning of Article 8 (see, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 155, ECHR 2005-X, with further reference).

45. The Court reiterates that, in addition to the primarily negative undertakings in Article 8 of the Convention, there may be positive obligations inherent in effective respect for one's private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest

of the community and the competing interests of the individual concerned, the aims in the second paragraph of Article 8 being of a certain relevance (see, for example, *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160).

46. The existence of such a positive obligation was established by the Court, among other circumstances, where applicants sought access to information about risks to one's health and well-being resulting from environmental pollution (*Guerra and Others v. Italy*, 19 February 1998, § 60, *Reports* 1998-I), information which would permit them to assess any risk resulting from their participation in nuclear tests (*McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III) or tests involving exposure to toxic chemicals (*Roche v. the United Kingdom* [GC], referred to above). The Court held, in particular, that a positive obligation arose to provide an "effective and accessible procedure" enabling the applicants to have access to "all relevant and appropriate information" (see, for example, *Roche v. the United Kingdom* [GC] cited above, § 162, with further references).

Similarly, such a positive obligation was found to exist where applicants sought access to information to social service records containing information about their childhood and personal history (see *Gaskin v. the United Kingdom*, cited above and *M.G. v. the United Kingdom*, no. 39393/98, § 31, 24 September 2002).

47. Bearing in mind that the exercise of the right under Article 8 to respect for one's private and family life must be practical and effective (see, for example, *Phinikaridou v. Cyprus*, no. 23890/02, § 64, ECHR 2007-... (extracts), with further reference), the Court takes the view that such positive obligations should extend, in particular in cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files.

48. It can be accepted that it is for the file holder to determine the arrangements for copying personal data files and whether the cost thereof should be borne by the data subject. However, the Court does not consider that data subjects should be obliged to specifically justify a request to be provided with a copy of their personal data files. It is rather for the authorities to show that there are compelling reasons for refusing this facility.

49. The applicants in the present case obtained judicial orders permitting them to consult their medical records in their entirety, but they were not allowed to make copies of them under the Health Care Act 1994. The point to be determined by the Court is whether in that respect the authorities of the respondent State complied with their positive obligation and, in particular, whether the reasons invoked for such a refusal were sufficiently compelling to outweigh the Article 8 right of the applicants to obtain copies of their medical records.

50. Although it was not for the applicants to justify the requests for copies of their own medical files (see paragraph 48 above), the Court would nevertheless underline that the applicants considered that the possibility of obtaining exclusively handwritten excerpts of the medical files did not provide them with effective access to the relevant documents concerning their health. The original records, which could not be reproduced manually, contained information which the applicants considered important from the point of view of their moral and physical integrity as they suspected that they had been subjected to an intervention affecting their reproductive status.

51. The Court also observes that the applicants considered it necessary to have all the documentation in the form of photocopies so that an independent expert, possibly abroad, could examine them, and also in order to safeguard against the possible inadvertent destruction of the originals are of relevance. As to the latter point, it cannot be overlooked that the medical file of one of the applicants had actually been lost (see paragraph 27 above).

52. The national courts mainly justified the prohibition on making copies of medical records by the need to protect the relevant information from abuse. The Government relied on the Contracting States' margin of appreciation in similar matters and considered that the Slovak authorities had complied with their obligations under Article 8 by allowing the applicants or their representatives to study all the records and to make handwritten excerpts thereof.

53. The arguments put forward by the domestic courts and the Government are not sufficiently compelling, with due regard to the aims set out in the second paragraph of Article 8, to outweigh the applicants' right to obtain copies of their medical records.

54. In particular, the Court does not see how the applicants, who had in any event been given access to the entirety of their medical files, could abuse information concerning their own persons by making photocopies of the relevant documents.

55. As to the argument relating to possible abuse of the information by third persons, the Court has previously found that protection of medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention and that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention (see *I. v. Finland*, no. 20511/03, § 38, 17 July 2008).

56. However, the risk of such abuse could have been prevented by means other than denying copies of the files to the applicants. For example, communication or disclosure of personal health data that may be inconsistent with the guarantees in Article 8 of the Convention can be prevented by means such as incorporation in domestic law of appropriate safeguards with a view to strictly limiting the circumstances under which

such data can be disclosed and the scope of persons entitled to accede to the files (see also *Z v. Finland*, judgment of 25 February 1997, *Reports* 1997-I, §§ 95-96).

57. The fact that the Health Care Act 2004 repealed the relevant provision of the Health Care Act 1994 and explicitly provides for the possibility for patients or persons authorised by them to make copies of medical records is in line with the above conclusion. That legislative change, although welcomed, cannot affect the position in the case under consideration.

58. There has therefore been a failure to fulfil the positive obligation to ensure effective respect for the applicants' private and family lives in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

59. The applicants complained that their right of access to a court had been violated as a result of the refusal to provide them with copies of their medical records. They relied on Article 6 § 1 of the Convention, which in its relevant part provides:

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

60. The applicants argued that they had been barred from having effective access to their medical records and from securing the evidence included in those records by means of photocopies. Having copies of the files was important for later civil litigation concerning any possible claims for damages on their part and for compliance with the burden of proof, which would be incumbent on the applicants as plaintiffs.

61. Obtaining copies of the medical records was essential for an assessment, with the assistance of independent medical experts of the applicants' choice, of the position in their cases and of the prospects of success of any future civil actions. The latter element was important because the applicants, who were living on social benefits, would be ordered to reimburse the other party's costs if the courts dismissed their action.

62. The applicants considered that they could not obtain redress by means of asking a court under Article 78 of the Code of Civil Procedure to secure the files as evidence in the proceedings. They relied on section 16(5) of the Health Care Act 1994, which allowed courts to receive information from medical records exclusively in the form of excerpts but not the records as such or their copies. The domestic courts were thus unable to directly check any inconsistency in the applicants' medical records.

63. The Government referred to the conclusions reached by the Constitutional Court on 8 December 2004. Consulting and making excerpts from the medical documents had provided the applicants with a sufficient

opportunity to assess the position in their cases and initiate civil proceedings if appropriate. The relevant provisions of the Code of Civil Procedure included guarantees for the applicants to be able effectively to seek redress before the courts in respect of any infringement of their rights which they might establish during the consultation of their medical records. The use of excerpts of the files had the advantage of protecting confidential information and personal data which had no bearing on the litigation in issue.

64. The Court reiterates that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6. It secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93).

65. The Court accepts the applicants' argument that they had been in a state of uncertainty as regards their health and reproductive status following their treatment in the two hospitals concerned and that obtaining the relevant evidence, in particular in the form of photocopies, was essential for an assessment of the position in their cases from the perspective of effectively seeking redress before the courts in respect of any shortcomings in their medical treatment.

66. The protection of a person's rights under Article 6 requires, in the Court's view, that the guarantees of that provision should extend to a situation where, like the applicants in the present case, a person has, in principle, a civil claim but considers that the evidential situation resulting from the legal provisions in force prevents him or her from effectively seeking redress before a court or renders the seeking of such judicial protection difficult without appropriate justification.

67. It is true that the statutory bar at the material time on the making available of copies of the records did not entirely bar the applicants from bringing a civil action on the basis of information obtained in the course of the consultation of their files. However, the Court considers that section 16(6) of the Health Care Act 1994 imposed a disproportionate limitation on their ability to present their cases to a court in an effective manner. It is relevant in this respect that the applicants considered the original form of the records, which could not be reproduced manually and which, in accordance with the above-cited provision, could not be made available to either the applicants or the courts (compare and contrast in this connection the *McGinley and Egan* case (cited above, § 90)), decisive for the determination of their cases.

68. When examining the facts of the case under Article 8 of the Convention the Court has found no sufficiently strong justification for preventing the applicants from obtaining copies of their medical records. For similar reasons, that restriction cannot be considered compatible with an effective exercise by the applicants of their right of access to a court.

69. There has therefore been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

70. The applicants complained that they had no effective remedy at their disposal in respect of their above complaints under Article 8 and Article 6 § 1 of the Convention. They alleged a violation of Article 13 of the Convention, which 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."

71. The Government argued that the applicants had at their disposal an effective remedy, namely a complaint under Article 127 of the Constitution.

A. Alleged violation of Article 13 in conjunction with Article 8

72. The Court recalls that Article 13 does not guarantee a remedy whereby a law as such can be challenged before a domestic organ (see *M.A. and 34 Others v. Finland* (dec.), no. 7793/95, 10 June 2003). It follows from the terms of the applicants' submissions that it is basically the legislation as such which they attack. However, as stated above, Article 13 does not guarantee a remedy for such complaints.

In these circumstances, the Court concludes that there has been no violation of Article 13 taken together with Article 8 of the Convention.

B. Alleged violation of Article 13 in conjunction with Article 6 § 1

73. In view of its conclusion in relation to Article 6 § 1 (see paragraph 69 above), the Court does not consider it necessary to examine separately the complaint in relation to Article 13, the requirements of which are less strict than and absorbed by those of Article 6 § 1 in this case (see also *McGinley and Egan v. the United Kingdom* referred to above, § 106).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The eight applicants claimed 15,000 euros (EUR) each in respect of non-pecuniary damage. They submitted that they had been unable to obtain photocopies of their medical records for three years, as a result of which they had experienced anxiety about the state of their health and reproductive abilities. Their personal lives had been thereby affected.

76. The Government considered that claim to be excessive.

77. The Court accepts that the applicants suffered non-pecuniary damage which cannot be remedied by the mere finding of a violation. Making its assessment on an equitable basis, the Court therefore awards each of the eight applicants EUR 3,500 in respect of non-pecuniary damage.

B. Costs and expenses

78. The applicants claimed EUR 6,042 for their representation in the domestic proceedings by Mrs V. Durbáková and the Centre for Civil and Human Rights in Košice. They claimed a total of EUR 11,600 in respect of the proceedings before the Court. Finally, the applicants claimed EUR 812 in respect of the administrative costs of their legal representatives (preparation of legal documents, photocopying, telephone calls, sending of faxes and postage) and EUR 1,127.50 for translation of documents and expenses incurred in correspondence with the Court.

79. The Government considered that the claims relating to the applicants' representation and the administrative costs were overstated. They had no objection to the sums claimed in respect of translation costs and international postage.

80. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see Rule 60 and, among other authorities, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI; *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).

81. Having regard to the documents submitted, the number of applicants, the scope of the proceedings at both national level and before the Court and the fact that the applicants were only partly successful in the Convention proceedings, the Court awards the applicants a total of EUR 8,000 in respect of costs and expenses, together with any tax that may be chargeable to the applicants.

C. Default interest

82. 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. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* by a majority that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 13 in conjunction with Article 8 of the Convention;

4. *Holds* unanimously that a separate examination of the complaint under Article 13 in conjunction with Article 6 § 1 of the Convention is not called for;

5. *Holds* unanimously
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,500 (three thousand five hundred euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,000 (eight thousand euros) jointly to all applicants, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) 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 28 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

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

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE ŠIKUTA

To my regret, I cannot agree with the majority's conclusion that there has been a violation of Article 6 of the Convention, for the following reasons.

Since the Chamber was unanimous in finding the violation of Article 8 of the Convention, which was the real substance of the case, I was of the opinion that there was no need to examine the complaint under Article 6 of the Convention.

The national courts at two levels of jurisdiction, in two different sets of civil proceedings, granted the applicants' claim and ordered the J.A. Reiman University Hospital in Prešov and the Health Care Centre in Krompachy to permit all the applicants and their representatives to consult their medical records and to make handwritten excerpts thereof. As regards access to medical records, that was the maximum that was allowed and permitted according to the relevant national legislation in force at the material time. Accordingly, the courts dismissed their request to make a photocopy of the medical documents.

The fact that the Court has found a violation of Article 8 of the Convention because the applicants had no possibility of making copies of their medical records does not mean that they had no access to a court.

I do agree that in such a situation the applicants had only a limited amount of evidence and information in their hands since they were not allowed to make copies of medical records.

I do not agree that this amount of information in their possession was not sufficient to assess the position in their cases and that that amount of information was not sufficient to initiate civil proceedings if appropriate. I do not agree that the unavailability of copies of the records barred the applicants from starting a lawsuit on the basis of the information obtained in the course of the consultation of their files.

Firstly:

If additional information to that in the possession of the applicants were needed in the course of civil proceedings, a national court, according to the standard practice, would appoint an expert, whose role would be to study originals of the medical records, to examine the state of health of the applicants and to reply to qualified medical questions put forward by the court dealing with the case. This procedure would come into play regardless of whether the applicants had available copies of all medical records, and regardless of whether the applicants also attached to the lawsuit a private expert opinion prepared by another expert upon their request. The national court would be obliged, after the commencement of the proceedings, to appoint of its own motion another independent expert from the List of Court Experts, who would **have access to all originals of medical records** in line

with Section 16 of the Health Care Act 1994 (*Zákon o zdravotnej starostlivosti č. 277/1994 Z.z.).*

Secondly:

The applicants **did not even try to bring** such civil proceedings. Therefore the arguments of the applicants to the effect, that the lack of copies was very important for potential civil litigation concerning any possible claims for damages, for discharge of the burden of proof and for the assessment of the prospects of success of any future civil actions are of a hypothetical and speculative nature. Here I fully agree with the Constitutional Court's conclusions. In addition, if the applicants were unable to support their lawsuit sufficiently with more evidence because of statutory restrictions, the courts would not reject such lawsuit and would not disadvantage the applicants as regards their burden of proof, but would order both health institutions – the University Hospital in Prešov and the Health Care Centre in Krompachy, **to disclose all originals or relevant excerpts** of the applicants' medical records.

Thirdly:

Such broad and wide interpretation of the right of access to a court goes far beyond the Court's established case-law. In the case of *McGinley and Egan v. The United Kingdom (judgment of 9 June 1998)*, which is to a certain extent the most similar to this case, the Court **did not find a violation** of Article 6 § 1 of the Convention, on the basis that a procedure was provided for the disclosure of documents which the applicants failed to utilise, and under such circumstances it could not be said that the State denied the applicants effective access to the PAT (Pension Appeal Tribunal). We now have the same situation in the instant case; the applicants could initiate civil proceedings, in the course of which all relevant medical records of the applicants would be disclosed according to Section 16 of the 1994 Health Care Act. The applicants did not bring any such proceedings and they therefore **failed to utilise an existing available procedure**.

In conclusion, I am of the opinion, that the applicants in the instant case did have a limited amount of information in their hands since they were not allowed to make copies of all medical records, but they were not limited to such an extent and in such a manner, as would bar their effective access to a court and would violate Article 6 § 1 of the Convention.