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Nissen, Aleydis

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A Right to Access to Emergency Health Care:
The European Court of Human Rights Pushes the Envelope

by Aleydis Nisen *

ABSTRACT

This article argues that the European Court of Human Rights (ECtHR) seems to have recently acknowledged that there is a right to access to emergency health care in the member states of the Council of Europe. The Chamber of the ECtHR found that a state's failure to design a regulatory framework that guarantees access to health care in emergency situations violates the substantial limb of Article 2 European Convention on Human Rights (ECHR) that protects the right to life. It is argued that the newly established requirements seem to be reasonable but that there seem to be no sufficient safeguards to ensure that the ECtHR does not substitute its own assessment for that of medical professionals.

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Keywords: Access to Emergency Health Care, Access to Urgent Health Care, Article 2 ECHR, European Court of Human Rights, Positive Obligations, Right to Life

1 INTRODUCTION

The ECtHR seems to have taken a stance on access to emergency health care following two recent complaints in which persons died during their treatment in Turkish maternity hospitals. The cases of *Mehmet Şentürk and Bekir Şentürk v. Turkey* (2013) and *Asiye Genc v. Turkey* (2015) are set to become leading Strasbourg authorities.[1] This commentary shall describe the facts and reasoning in the cases before analyzing the judgments. This analysis argues that this jurisdictional evolution bolsters the right to emergency health care in the contracting states in a reasonable and

* PhD researcher, Cardiff University.

1. *Mehmet Şentürk and Bekir Şentürk v Turkey* (Application no 13423/09) (2013) 60 EHRR 4; *Asiye Genc v Turquie* (Application no 24109/07), Judgment of 27 January 2015.

non-discriminatory way, while warning that the ECtHR should be careful not to substitute its own assessment for that of medical professionals.

2 FACTS

In the first case, Mehmet Şentürk had driven his pregnant wife to four hospitals before a doctor specialising in gynaecology examined her. Upon arrival in the fourth hospital, a team of gynaecologists noticed that the unborn baby had died after 8 and a half months in the womb. They also stressed that immediate surgery was necessary to save the wife. According to the first claimant and a domestic investigation conducted by the Turkish Ministry of Health and the Turkish General Medical Council, this hospital asked for a deposit to cover the costs of hospital admission and surgery. The claimant stressed that this was why his wife had signed a paper declining treatment in this hospital. Turkey denied this. Subsequently, an emergency doctor arranged for the wife to be transferred to a fifth hospital in a private ambulance in which no medical staff was present. She died in the ambulance.

In the second case, the baby of Asiye Genc was prematurely born in a first hospital which did not have a unit to treat the baby's respiratory distress. During the domestic investigation procedure, the staff of this hospital alleged that they had ensured that the baby's condition was stabilised before they decided to transfer the baby to a second hospital with a suitable neonatal unit. The baby was transported in an ambulance with an incubator over a distance of 110 km, accompanied by an anaesthetist and a nurse from the first hospital. On arrival at the second hospital, the baby was refused admission because all of the incubators were occupied. The doctor responsible at the second hospital claimed to domestic investigators that she had examined the baby but the accompanying medical staff of the first hospital denied this. The baby was also refused admission by a third hospital, again due to a lack of available incubators. According to his testimony to the domestic investigators, the responsible doctor of the third hospital considered that it was better to leave the baby in the ambulance's incubator to avoid hypothermia. The baby died on the return journey to the second hospital.

3 REASONING

By way of a preliminary remark, it should be pointed out that the ECtHR applied its established case law to explain that it could only assert jurisdiction over persons who have been born, given the absence of a European consensus on the point at which life begins.[2] The state parties to the ECHR have a wide margin of appreciation in this controversial matter.[3] Therefore, only the right to life of the mother was judged in the *Şentürk* case. The right to life of the born baby was judged in the *Genc* case.

In both these cases the ECtHR referred to the *Powell v. United Kingdom* (2000) and *Calvelli and Ciglio v. Italy* (2002) cases for two reasons. First, the ECtHR did this to explain that the right to health could entail positive obligations under article 2

2. ibid paras [107–109].

3. ibid paras [107–108] referring to *Vo v France* (Application no 53924/00) (2004) 40 EHRR 12 paras [82 and 85] and A, B and C v Ireland (Application no 25579/05 (2010) 53 EHRR 13 para [237].

ECHR.[4] Second, the ECtHR did this to reiterate that matters such as error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be sufficient to engage the responsibility of the state as long as the contracting state has made adequate provision to secure high professional standards among health professionals and to protect the lives of patients.[5] On this issue, the ECtHR found that the insufficient coordination between the involved departments in the hospital where it was diagnosed that Ms. Sentürk's life was in danger was not sufficient to engage Turkey's responsibility.[6] Correspondingly, the insufficient coordination between the involved hospitals in the *Genc* case alone was found to be not sufficient to engage Turkey's responsibility.[7] In so doing, the ECtHR explained that Turkey's responsibility could not have been engaged if the baby's death would have been exclusively caused by a failure to effectively coordinate his hospitalisation.

The ECtHR further attempted to present its material interpretations in both new cases as applications of the material interpretation under Article 2 ECHR that was set out in *Nitecki v. Poland* (2002).[8] In the *Nitecki* case the ECtHR set out that an issue may arise in relation to a material aspect of the right to health under Article 2 ECHR where it is shown that the authorities of a contracting state deliberately put an individual's life at risk through the denial of health care which they have undertaken to make available the population generally.[9] In this particular case, the Court found that the applicant was not entitled to a full refund for the drug used to treat ALS, because Poland had not undertaken to offer a standard of health care this high to the public.[10] There is, however, a clear difference between the new case law and the *Nitecki* case. In particular, in the *Nitecki* case the ECtHR held that an issue may arise under the material aspect of article 2 ECHR if it is shown that the authorities of a contracting state fail to honour their commitments. However, nowhere in the ECtHR's material analysis in the *Şentürk* case and the *Genc* case is there any reference to a provision in which the Turkish government commits to provide access to health care in emergency situations to its population in general. Rather, the ECtHR adopted a new interpretation in these cases. The ECtHR expressed that the material aspect of article 2 ECHR can also be violated if a contracting state did not enact a sufficient regulatory framework for guaranteeing that the lives of patients are protected in medical

4. European Convention on Human Rights, ETS no 5 (1950), art 2; *Mehmet Şentürk and Bekir Şentürk v Turkey*, para [79] referring to *Powell v United Kingdom* (Application no 45305/99), 30 EHRR 30 and *Calvelli and Ciglio v Italy* (Application no 32967/96), Judgment of 17 January 2002, para [48]; *Asiye Genc v Turquie,* paras [65–66] referring to *Powell v United Kingdom* and *Calvelli and Ciglio v Italy,* para [48]. The *Calvelli and Ciglio v Italy* case (2002) concerned the procedural aspect of the right to life under art 2 ECHR, which covers the right of an effective investigation.

5. *Mehmet Şentürk and Bekir Şentürk v Turkey*, para [80] referring to *Powell v United Kingdom* and *Calvelli and Ciglio v Italy*, para [48]; *Asiye Genc v Turkey,* para [67] referring to *Powell v United Kingdom* and *Calvelli and Ciglio v Italy,* para [49].

6. *Mehmet Şentürk and Bekir Şentürk v Turkey*, para [80].

7. *Asiye Genc v Turkey,* para [67].

8. *Mehmet Şentürk and Bekir Şentürk v Turkey*, para [88] referring to *Nitecki v Poland* (Application no 65653/ 01), Admissibility decision of 21 March 2002; *Asiye Genc v Turquie,* para [73] referring to *Nitecki v Poland.*

9. *Nitecki v Poland,* para [1].

10. ibid.

emergencies. The ECtHR therefore did not require that the contracting state undertakes to make health care available to its population but expressed that this positive obligation only exists in emergency situations.

To determine whether access to health care was denied in an emergency situation, the ECtHR analysed the sequence of events leading to the death of the patients in both cases. In the *Şentürk* case, the ECtHR firstly argued that the treatment was subordinated to a prior financial obligation while the medical staff was aware of the urgency of the wife's situation.[11] In addition, relying on evidence from the internal investigators, the ECtHR found that it was sufficiently proven that the wife's decision to be transported to a fifth hospital was not made in an informed manner or in such a way that national bodies could be exonerated from their responsibilities.[12] The ECtHR concluded that the domestic law of Turkey did not have provisions capable of preventing the failure to provide medical treatment in emergency situations when the corresponding fees were not paid.[13] This seems to this author to be accurate. According to a number of circulars from the Turkish Ministry of Health, the reported payment practices in Turkish hospitals in emergency situations persisted over a prolonged period of time, between 2004 and 2011, after Ms. Sentürk's death.[14]

In the *Genc* case, the ECtHR held that there could not have been an error of judgment by the medical staff as the baby died before any examination had taken place. The ECtHR considered that Turkey had not enacted a sufficient regulatory framework for guaranteeing an efficient public hospital service and health protection system in which there was a place for a baby that needed urgent medical treatment.[15] The ECtHR found that there was a total absence of urgent medical treatment. The ECtHR concluded that the baby had been denied access to appropriate emergency treatment, in breach of his right to protection of his life, due to a lack of coordination between health care professionals coupled with structural deficiencies in the regional hospital system.[16]

Judges Lemmens, Spano and Kjølbro wrote a Separate Opinion in the *Genc* case.They affirmed that a right of access to emergency health care exists in the legal order of the Council of Europe.[17] They also found a material breach of article 2 ECHR on the right to life.[18] They did not, however, agree with the majority of the judges that the ECtHR has the authority to require a domestic regulatory framework that guarantees access to emergency health care. The three judges argued that the material infringement of the right to emergency health care hinged entirely on the lack of coordination between the medical staff in the hospitals.[19] They considered that the observed actions and omissions went 'far beyond a simple error of judgment on the part of a health professional or negligent coordination among health professionals in

11. *Mehmet Şentürk and Bekir Şentürk v Turkey*, paras [90–96].

12. ibid para [95].

13. ibid para [96].

14. *Sayan v Turkey* (Application no 81277/12), Judgment of 11 October 2016, paras [67–73] referring to Turkish Ministry of Health, *Circular no 2004/47* (30 March 2004) and to Turkish Ministry of Health, *Circular no 2011/62* (15 December 2011).

15. *Asiye Genc v Turkey*, paras [80 and 82].

16. ibid paras [77–82].

17. *Asiye Genc v Turkey*, Opinion concordante Lemmens, Spano, and Kjølbro, para [2].

18. ibid.

19. ibid paras [2 and 4].

the treatment of a particular patient'.[20] The three judges also found that the majority of the judges had overstepped its authority by criticising the functioning of the Turkish health system, including the limited number of places for patients and the limited number or quality of incubators.[21] They explained that the majority of the judges could not require a 'certain standard, level or quality' of treatment and equipment in hospitals.[22] According to this Separate Opinion, such a positive obligation would have a too far-reaching impact on the way in which governments of contracting parties allocate their resources.[23]

Judge Kjølbro repeated this separate point of view in a Separate Opinion that he submitted alone in the recent *Aydoğdu v. Turkey* case (2016).[24] The facts and judgment of this case were similar to those of the *Genc* case. A prematurely born baby in need died after a caesarean section as there were no units to treat the baby's respiratory disease in three nearby hospitals in the region. The majority of the judges concluded in this case that there had been a material violation of article 2 ECHR because there had been no sufficient coordination amongst the medical staff in the involved hospitals in combination with the lack of a regulatory framework that could guarantee the possibility of access to appropriate emergency care in Turkey.[25]

4 ANALYSIS

4.1 A Right to Access to Emergency Health Care

The recognition of a right to access to emergency health care under the ECHR proved to be non-controversial. As indicated above, there was an agreement amongst all Chamber judges that such a right exists under article 2 ECHR in the discussed cases.[26] However, requiring contracting states to take positive steps to guarantee access to emergency health care was deemed contentious by judges Lemmens, Spano, and Kjølbro in the *Genc* case. They found that the material infringement of the right to emergency health care hinged entirely on the lack of coordination between the medical staff in the involved hospitals.[27] This section argues that the minority of the judges appears to have overlooked two important points.

The first point relates to the observation that the three judges did not appear to acknowledge that heath care professionals are entitled to a working environment which facilitates their professional responsibilities in medical emergencies. In so doing, the minority of the judges in the *Genc* case failed to follow General Comment no. 14 on the Right to the Highest Attainable Standards of Health of the United Nations

20. ibid para [2].

21. ibid.

22. ibid para [4].

23. ibid.

24. *Aydoğdu v Turkey* (Application no 40448/06), Judgment of 30 August 2016, Opinion en Partie Concordante et en Partie Dissidente Kjølbro, paras [5–6].

25. *Aydoğdu v Turkey* (Application no 40448/06), Judgment of 30 August 2016, para [103].

26. *Mehmet Şentürk and Bekir Şentürk v Turkey*, para [88]; *Asiye Genc v Turkey*, paras [77–82]; *Asiye Genc v Turkey*, Opinion concordante Lemmens, Spano, and Kjølbro, para [2].

27. *Asiye Genc v Turkey*, Opinion concordante Lemmens, Spano, and Kjølbro, paras [2 and 4].

Committee on Economic, Social and Cultural Rights (UN CESCR).[28] Paragraph 42 of this General Comment states that:

> While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities.

It is unfortunate that the three minority judges did not follow this General Comment in the *Genc* case. The ECtHR has even said on various occasions that it tries to insert itself into the work of the United Nations and that relevant rules of international law should be taken into account when interpreting the ECHR.[29]

The second point relates to the minority's assertion in the *Genc* case that the majority of the judges was seeking to rearrange the contracting state's budgetary priorities. Such an argument seems to be symptomatic of a longstanding criticism that positive obligations relating to socio-economic rights under the ECHR would undermine fundamental political rights.[30] Yet, this argument can be challenged when it comes to a right to access to emergency health care.

The careful considerations made by the South African Constitutional Court in the *Minister of Health v Treatment Action Campaign* (2002) elucidate the point of criticism that will be put forward here.[31] In this case, the South African Ministry of Health failed to distribute the medicine Nevirapine that the claimant provided and that could prevent the spread of HIV/AIDS from pregnant women to their foetuses and babies. After establishing that the prevention of infection with HIV is a situation of emergency health care, the South African Constitutional Court challenged the government's resource allocation policies. The Court argued that the government failed to design an effective programme that was national in scope for those with this urgent need to prevent the spread of this deadly disease.[32] The relevant part of the judgment deserves to be quoted here at length:

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28. UN CESCR, 'General Comment 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4.

29. Eg *Golder v the United Kingdom* (Application no 4451/70) (1975) 1 EHRR 524, para [29]; *Neulinger v Switzerland* (Application no 41615/07) (2010) 54 EHRR 31, para [131]. See M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010) 258.

30. L Clements and A Simmons, 'European Court of Human Rights. Sympathetic Unease' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 410.

31. *Minister of Health v Treatment Action Campaign* (2002) (5) SA 703 (CC); JC Mubangizi and BC Mubangizi, 'Poverty, Human Rights Law and Socio-Economic Realities in South Africa' (2005) 22(2) Development Southern Africa 284–85; JA Singh, M Govender and N Reddy, 'South Africa a Decade after Apartheid: Realizing Health through Human Rights' (2005) XII/3 The Georgetown Journal on Poverty Law & Policy 365–66.

32. *Minister of Health v Treatment Action Campaign*, paras [23–26] referring to *Government of the Republic of South Africa v Grootboom* (2001) AS 46 (CC), paras [24, 25 and 38]; J Woods, 'Emerging Paradigms of Protection for "Second-Generation" Human Rights' (2004–05) 6 Loyale Journal of Public Interest Law 117.

> The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.[33]

The South African Constitutional Court added that the alternative ~~to~~ to the applied reasonableness standard would mean that those people with financial issues would be excluded from emergency health care when their life is in danger.

Mutatis mutandis, the ECtHR's progressive requirement to provide a sufficient legal framework which guarantees that there is access to health care for every person in mortal danger, can have a budgetary impact. But this impact seems to this author to be reasonable, as it is an essential safeguard against excluding financially disadvantaged people from the protection of their right to life in the most immediate peril circumstances. It was indicated above, in the context of the *Şentürk* case, that financial requirements may effectively exclude the poorest in society from access to emergency health care when their life is in danger.

It should be acknowledged here that the *Treatment Action Campaign* judgment was delivered in a very different context. In contrast to the ECHR, the Constitution of South Africa refers explicitly to socio-economic rights.[34] In particular, article 27(3) of the South African Constitution—which was proclaimed in the post-Apartheid era (1996)—stresses that 'no one may be refused emergency medical treatment'.

However, the majority of the judges of the ECtHR could protect the same right under the ECHR in the *Genc* case by employing the Court's well-established 'living instrument' doctrine.[35] According to this doctrine, the ECHR should be interpreted according to present-day conditions. Article 14 ECHR read in conjunction with article 2 ECHR could protect against the described discrimination which excludes the poorest in society from health care when their life is in danger.

Closely connected to this observation is paragraph 3 in the UN CESCR's General Comment no 3 on the Nature of States Parties' Obligations which indicates that a sound legislative foundation may be an indispensable element in health care in order to combat discrimination effectively in fields such as health and the protection of children and mothers.[36] It is unfortunate that the three minority judges did not follow this General Comment in the *Genc* case.

In summary, this sub-section has demonstrated that the Chamber had a watertight case when requiring member states to undertake positive steps to guarantee access to emergency health care, contrary to the suggestion that was made by the three minority of the judges in the *Genc* case. The budgetary impact of the applied standard is reasonable.

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33. *Minister of Health v Treatment Action Campaign*, para [38]; M Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: a Comparative Perspective' (2003) 6(137) Chapman Law Review 145.

34. Constitution 1996 (Republic of South Africa).

35. *Tyrer v United Kingdom*, (Application no 5856/72) (1978) 2 EHRR 1, para [31].

36. UN CESCR, 'General Comment 3 on the Nature of States Parties Obligations' (1 January 1991) UN Doc E/1991/23, para [3].

By requiring a sufficient regulatory framework to protect the right to life of everyone in emergency situations, the ECtHR effectively guarantees that medical staff are supported in their job and that the poorest in society are not excluded from emergency health care.

The Court seems to have confirmed the two presented findings in the recent *Aydoğdu* case. First, the majority of the judges commented that the medical staff did not have the choice not to conduct a caesarean section because they worked in a public hospital which is obliged to help all patients without distinguishing between them, regardless of a structural lack of capacity.[37] It was stressed that it was the task of the Turkish state to facilitate the medical staff's responsibilities by providing sufficient capacity.[38] Second, the majority of the judges commented that the Turkish government did not demonstrate how providing a legislative framework would have been an excessive burden in terms of the choices that the government had to make regarding its priorities and the allocation of its resources.[39]

4.2 Speculation on Urgent Nature of Medical Situations?

Notwithstanding this conclusion, there seems to be another issue in which the ECtHR seems to have overstepped its authority. The finding that there was a material breach of the right to life by both the majority and minority of the judges in the *Genc* case relied heavily on a subjective selection and interpretation of inconclusive testimonies in the (insufficient) internal proceedings. The ECtHR alleged that no examinations of the patient had taken place despite the fact that the doctors of all hospitals asserted that they conducted the required examinations in the domestic proceedings.[40]

The ECtHR had held on various occasions that it is impossible to speculate about the facts and the death of respective claimants.[41] The judges of the ECtHR can indeed not replace the conclusions of medical staff or medical experts in domestic proceedings.[42]

The ECtHR also confirmed these principles in the context of access to urgent health care in the *Affaire Sayan v Turkey* case (2015).[43] In this case, the ECtHR explicitly stressed that it was not possible to speculate about the urgent character of the facts and the death of the claimant. Yet, it is worth dwelling for a moment on the *Sayan* case because the ECtHR did not actually follow this approach. The facts of the *Sayan* case are similar to those in the *Şentürk* case. The 9-month pregnant partner of Mr Sayan went to the first hospital because she suffered from respiratory problems. The hospital and Turkey allege that necessary treatment was provided but that costs were requested for further treatment. The claimant then took his partner to a second hospital. According to an internal investigation by the Ministry of Health, a midwife of the

37. *Aydoğdu v Turkey*, paras [85–87].
38. ibid para [87].
39. ibid para [103].
40. *Asiye Genc c Turkey*, para [17].
41. ibid para [77].
42. *Glass v United Kingdom* (Application No 61827/00) (2004) 39 EHRR 15, para [87]; *Tysiac v Poland* (Application No 5410/03) (2007) 45 EHRR 42, para [119].
43. *Sayan v Turkey*, para [110]. See *Lopes de Sousa Fernades v Portugal* (Application No 56080/13), Judgment of 15 December 2015, para [109].

second hospital declared that she was unable to hear the heartbeat of the unborn child and that she called a specialist doctor. She added that formal procedures were not followed as her colleague midwife informed her that the partner had been sent back to the first hospital. Back in the first hospital, the claimant was required to sign a paper in which she guaranteed that the hospital costs would be paid. The partner and the unborn baby died during treatment. On the day of these tragic events, the head claimant filed domestic civil and criminal complaints. In these complaints, he alleged that his partner had to wait for health care when she returned to the first hospital because he could not pay the hospital costs.

In its conclusion on the merits, the ECtHR said that the life of the partner of Mr Sayan was not thought to be in danger and that therefore there was no breach of the right of access to emergency health care. This conclusion ignored the testimony of the midwife and its own factual conclusion that there was some delay due to a prior financial obligation that required the claimant to sign a paper in which he guaranteed that the hospital costs would be paid.[44] The corresponding statements of specialised doctors were also not taken into account by the ECtHR.[45] A doctor of the first hospital alleged that there were difficulties due to medical costs and a doctor of the second hospital testified that his employer had neither the team nor the means to provide patients health care in two separate investigations.

There are serious risks associated with subjective interpretations of a selection of testimonies, as seems to have happened in the *Genc* and the *Sayan* cases. The ECtHR can find a violation under the material limb of article 2 ECHR if no access to health care is provided while there is no emergency (and while the contracting state has not undertaken to make the contested health care available to its population in general). Otherwise, an error of judgment on the part of a health professional might lead to a violation of the ECHR. Such interpretations would have far-reaching and undesirable consequences. A certain level of medical services with a severe budgetary impact or a requirement that no errors of judgment at all take place might be imposed. The ECtHR firmly—and rightly—rejected such extensive and positive obligations with considerable budgetary and undesirable consequences under article 2 in the *Nitecki* case.[46]

5 CONCLUSION

This article has argued that the Chamber of the ECtHR seems to have recognised that there exists a material right to emergency health care under article 2 ECHR on the right to life in a reasonable and non-discriminatory way, while warning that the ECtHR should be careful not to substitute its own assessment for that of medical professionals when determining the emergency character of a medical situation. Two findings have thus been presented. First, it was explained that the ECtHR's acknowledgment of positive obligations regarding access to emergency health care is reasonable. Safeguarding an environment that facilitates the responsibilities of health professionals is an essential safeguard to protect poor people who face obstacles in

44. *Sayan v Turkey*, paras [109–112] referring to para [92].

45. ibid paras [29 and 37].

46. *Nitecki* v *Poland*, para [1].

their quest for equality. Such obligations do not create an individual entitlement to health care but do require domestic governments to grant access to health care to everyone, including the most vulnerable people in society in emergency situations. Such a requirement might have some impact on the budgets of the domestic governments but this impact does not seem to be unreasonable. Second, it was argued that the ECtHR should, however, be careful not to substitute its own assessment for that of medical staff when determining the emergency character of the case or the testimonies in the internal proceedings. It was argued that the ECtHR seems to have overstepped its authority in the *Genc* case by relying heavily on inconclusive testimonies from domestic investigation proceedings. Subjective assessment of the facts can impose a general level of quality of medical services with severe implications on the budgets of domestic governments, which are beyond the ECtHR's judicial authority.