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

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ECHR 268 (2016)
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Premature baby deprived of vital emergency care because of structural deficiencies in İzmir public hospitals

In today's **Chamber** judgment[1] in the case of **Aydoğdu v. Turkey** (application no. 40448/06) the European Court of Human Rights held:

unanimously, that there had been **a violation of Article 2 (right to life)** of the European Convention on Human Rights under its substantive head; and

by six votes to one, that there had been **a violation of Article 2 (right to life)**, under its procedural head.

The case concerned the allegation by Mr and Mrs Aydoğdu that the death of their daughter – who had been born prematurely and suffered from a respiratory disorder – had been caused by professional negligence on the part of the staff of the hospital where she had been treated. As the hospital where Mr and Mrs Aydoğdu's daughter was born did not have a neonatal unit, she had been transferred to another hospital to receive vital emergency care, but owing to the lack of available space and equipment she had died two days after being born.

The Court found in particular that the baby had been the victim of a lack of coordination between health-care professionals, coupled with structural deficiencies in the İzmir hospital system, and that she had been denied access to appropriate emergency treatment, in breach of her right to protection of her life.

The Court also found that the criminal proceedings had lacked the requisite effectiveness and that the response of the Turkish justice system to the baby's death had not afforded the safeguards inherent in the right to life, noting that as a result of inadequate expert opinions the authorities had been unable to provide a coherent and scientifically grounded response to the problems arising and to establish any liability.

On the basis of **Article 46 (binding force and execution of judgments)**, the Court called upon the respondent State to take measures to require independent and impartial administrative and disciplinary investigations to be carried out within its legal system, affording victims an effective opportunity to take part; to ensure that bodies and/or specialists that could be called upon to produce expert opinions had qualifications and skills corresponding fully to the particularities of each case; and to require forensic medical experts to give proper reasons in support of their scientific opinions.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The applicants, Songül Aydoğdu and Ercan Aydoğdu, are Turkish nationals whose daughter was born prematurely and died two days later at the hospital to which she had been transferred for emergency treatment.

On 6 March 2005 Mrs Aydoğdu gave birth prematurely to a baby girl. The doctor diagnosed respiratory distress syndrome requiring emergency treatment and special technical facilities which were not available at the hospital in question. The baby was taken immediately to another hospital. As there was no space available in the intensive-care unit, which was equipped with incubators and mechanical ventilators, the baby was admitted to the neonatal department. On arriving at the hospital, Mr Aydoğdu was informed by three doctors that the neonatal department was not able to provide the necessary treatment and that he would have to find another hospital with the requisite facilities to which the baby could be transferred. The doctors jointly signed a report, of which they gave a copy to the parents, indicating that the newborn child had been transferred to their hospital despite their warning that they did not have any incubators or mechanical ventilators; they also noted that the baby's life was in danger. On 7 March 2005, while the family were looking for an appropriate hospital, the girl's condition worsened. The next day she was transferred to intensive care, where she was placed on mechanical ventilation, but she died on 8 March 2005.

In March and April 2005 Mr and Mrs Aydoğdu each filed a criminal complaint accusing the doctors and administrators from the two hospitals of homicide and holding them responsible for their daughter's death on grounds of professional negligence. Two reports issued by the İzmir and Istanbul forensic medical institutes concluded that the child had died from respiratory distress syndrome, but that there was no certainty that treatment in an incubator could have saved her life. In January 2006 a chief inspector was appointed by the Ministry of Health to carry out an administrative and, if appropriate, disciplinary investigation. In February 2006 the inspector concluded that the medical staff had provided appropriate treatment and that no fault or negligence could be attributed to them. He took the view, however, that the three doctors from Behçet Uz Hospital should be reprimanded for giving Mr and Mrs Aydoğdu a copy of the report about the incidents between the two hospitals. The inspector also noted that structural reforms were needed to address the shortcomings noted in his report. Further to the inspector's findings, the district governor refused to institute criminal proceedings against the doctors. An appeal by Mr and Mrs Aydoğdu against that decision was dismissed, as the Administrative Court found that there was not enough evidence for a charge of professional negligence to be made out.

Complaints, procedure and composition of the Court

Without relying on any specific Article of the Convention, Mr and Mrs Aydoğdu alleged that the errors committed by the medical staff and the shortcomings in the organisation of the hospital system had led to the death of their daughter. They also complained that the criminal proceedings had been unfair. The Court considered that Mr and Mrs Aydoğdu's complaints came under the substantive and procedural heads of the first sentence of Article 2 § 1 of the Convention.

The application was lodged with the European Court of Human Rights on 22 September 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Julia **Laffranque** (Estonia), *President*,
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Valeriu **Griţco** (the Republic of Moldova),
Ksenija **Turković** (Croatia),
Jon Fridrik **Kjølbro** (Denmark),
Georges **Ravarani** (Luxembourg),

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 2 (right to life)

In his report, the inspector M.O. had noted recurrent problems in the management of neonatal care in İzmir, pointing out in particular that Atatürk Hospital, which performed approximately 3,500 deliveries per year, did not have a neonatal unit, meaning that the duties of the 14 in-house paediatricians were limited to outpatient appointments; as a result, the hospital had to transfer more than 300 premature babies every year, notably to Behçet Uz Hospital; the transfers were poorly organised and regulated; and the 170 incubators in the province of İzmir were not put to efficient use, owing to the lack of coordination between hospitals and the lack of a central facility for monitoring the availability of places with a view to arranging transfers.

The Court observed that while the baby's life had been endangered by a combination of circumstances, the decisive factor had been that the doctors at Atatürk Hospital had been obliged on medical grounds to perform a Caesarean section on a woman who was 30 weeks pregnant, in a department not equipped to handle neonatal complications. They must nevertheless have been aware of the potential risk to the baby's life in the event that a transfer was necessary and admission to another hospital was refused. The Court thus found that before deciding to transfer the baby, the staff at Atatürk Hospital had not taken any steps to ensure that she would receive the treatment that her clinical picture required. This was a case of negligence, marked by a lack of coordination and attributable to the staff in question; that in itself raised an issue under Article 2 of the Convention.

The Court observed that Behçet Uz Hospital specialised in perinatal and neonatal care and was suitably equipped for that purpose; it belonged to the category of public hospitals that were supposed to admit all patients indiscriminately, and yet it faced a serious and recurrent overcrowding problem. There was therefore no cause to criticise the hospital's procedures and professionals from a structural or medical perspective, given the number of spaces, incubators and mechanical ventilators it had available. The real problem, in the Court's view, resulted from the ill-considered and poorly organised transfers to Behçet Uz Hospital of premature babies born at other facilities, including Atatürk Hospital, and from the position of other university hospitals in the region, which "did not accept transfers of this kind".

The Court noted that Atatürk Hospital had neither an appropriate unit for premature babies nor the technical facilities to treat them. This chronic state of affairs, which was common knowledge, showed that the authorities responsible for health care must have been aware at the time of the events that there was a real risk to the lives of multiple patients, including this particular baby, and that they had not taken the steps that could reasonably have been expected to avert that risk. In addition, the Court noted that the Government had not explained why taking such steps would have constituted an impossible or disproportionate burden for them, bearing in mind the operational choices needing to be made in terms of priorities and resources.

The Court concluded that Turkey had not taken sufficient care to ensure the proper organisation and functioning of the public hospital service in this region of the country, in particular because of the lack of a regulatory framework laying down rules for hospitals to ensure protection of the lives of premature babies. It further noted that besides the negligence attributable to the medical staff, a causal link had been established between the baby's death and the above-mentioned structural problems. Accordingly, it considered that the baby had been the victim of negligence and structural deficiencies that had effectively precluded her from receiving appropriate emergency treatment, amounting to a life-endangering denial of medical care.

Article 2 (right to life) – investigation

With regard to the criminal proceedings, the accused medical staff and the institutions that employed them were governed by public law, specifically Law no. 4483, by which the prosecution of public officials was subject to prior authorisation by the appropriate administrative authority. This procedure had systematically prompted criticisms and findings of violations by the Court on account of the lack of independence of the investigative bodies, the inability of complainants to participate effectively in investigations and the inadequate judicial scrutiny of the decisions of the bodies concerned. The Court held that there was no cause to depart from those conclusions in the present case and found that there had been a breach of the procedural aspect of Article 2. On the basis of the investigation report drawn up by the inspector M.O., the district governor had refused to open a criminal investigation in respect of the seven doctors, holding that "no negligence, omission, fault or reckless conduct" was attributable to them.

The Court also noted that the report by the inspector M.O. had been based on an expert opinion which he had commissioned from a paediatrician (M.He.) and a gynaecologist and obstetrician (M.Sa.); their opinion had itself been based on a report by expert committee no. 1 of the Istanbul Forensic Medicine Institute. In that connection, the Court had difficulty understanding how the nine specialists of expert committee no. 1 had been able to conclude bluntly that "it was not certain that the child could have survived even if she had been treated in an incubator", or how the specialists M.He. and M.Sa., who had simply endorsed that conclusion, had been able to maintain that in fact, even the immediate admission of the child to the intensive-care unit and her placement on mechanical ventilation would scarcely have improved her chances of survival. The experts had confined themselves to describing the medical procedures carried out up to that stage, without looking into the treatment protocols that could or should have been applied, and had concluded that all the doctors concerned had acted in compliance with the standards of modern medicine and with accepted practice, without ever setting out the standards or practice in question or giving any reasons for making that assertion. Nor had they sought to shed light on the contradiction concerning the child's Apgar scores, or to substantiate their serious prognosis that her chances of survival were virtually zero.

In the Court's view, only thorough and scientifically grounded reports containing reasons for their conclusions and answering the questions raised in the present case would have been capable of inspiring public trust in the administration of justice. While the Court required that an official investigation to be carried out in the context of Article 2 should "cover all the crucial aspects for shedding light on the circumstances of the death in question", that same requirement indisputably applied to the contents of a court-ordered expert report, if and to the extent that it had constituted the principal evidence on which the investigative bodies' decision had been based. In the present case, the experts had never answered the only fundamental questions that could have allowed them to determine whether, leaving aside the coordination problems and the structural deficiencies, the baby's death had been inevitable, whether it had resulted from the abnormal and unforeseeable consequences of a medical procedure entailing unavoidable risks (thus ruling out medical negligence), or whether it had stemmed from the refusal to provide certain specific forms of treatment for premature babies with respiratory distress syndrome. The Court observed that there was no evidence before it that the experts had included a specialist in neonatology, the branch of medicine at the heart of this case, bearing in mind that expert committee no. 1 had met and reached its conclusions in the absence of the only one of its members who was a paediatrician, thus breaching Law no. 2659. Throughout the expert assessment, the only professional representing a discipline linked to childhood diseases had apparently been M.He. (a paediatrician), from Tepecik Hospital – which had a neonatal department, but no specialists in neonatology. M.He.'s contribution had gone no further than justifying the position taken by the Forensic Medicine institute, without any additional comments.

As a result of these shortcomings in the expert opinions, the Court considered that no authority had been capable of providing a coherent and scientifically grounded response to the problems arising in the present case and giving an informed assessment of any liability on the part of the doctors. In other words, the decision by the Konak district governor had been based on medical reports that had ignored the fundamental aspects of the case, and the İzmir Regional Administrative Court, not having the requisite powers, had opted to cite "lack of sufficient evidence" in rejecting the appeal by Mr and Mrs Aydoğdu without considering their arguments, which had required specific and explicit answers.

The Court thus considered that this state of affairs was incompatible with the procedural obligation under Article 2, which required the national authorities to take steps to secure the evidence likely to provide a complete and accurate record of the events and an objective analysis of the clinical findings as to the cause of the baby's death. Accordingly, the Court held that the criminal proceedings had lacked the requisite effectiveness to be able to establish and punish any breach of the right to the protection of the baby's life.

Article 46 (binding force and execution of judgments)

Finding that the questions raised in the present case were likely to arise again whenever a premature baby with a worrying short-term prognosis had to be transferred to a different hospital from the one where he or she had been born, owing to the lack of essential medical facilities for treating the child, the Court considered it necessary to make the following clarifications.

Firstly, the establishment of the circumstances in which treatment had or had not been provided, and of any failings that might have had a bearing on the course of events, was essential for remedying such shortcomings so that similar incidents would not recur and go unpunished to the detriment of users of the public health service. Since the structural deficiencies in the health system were likely to affect more than one person and often remained unknown to the public, the Court was persuaded that administrative and disciplinary investigations, to be conducted under the supervision of the highest competent authority of the public service in question, could play a central role in the search for appropriate solutions. The Court therefore considered that if the Turkish legal system were to require the prompt and automatic institution of such proceedings, which would need to be independent and impartial and to ensure the effective participation of the victims, that would constitute a measure complying with Article 2 of the Convention.

Secondly, the Court pointed out that in order to preserve the rule of law and the trust of the public and the victims in the judicial system, the procedure for forensic medical examinations had to include sufficient safeguards: among other things, the bodies and/or specialists that could be called upon to carry out such examinations should have qualifications and skills corresponding fully to the particularities of each case under review, and the credibility and effectiveness of this procedure should be preserved, in particular by requiring forensic medical experts (from the public or private sector) to give proper reasons in support of their scientific opinions. On the latter point, the Court considered that the perspective set out in paragraph 138 of the *Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States*[2] would offer sufficient guidance to the respondent State in choosing the means to put in place for the purposes of Article 46.

The Court left it to the respondent State, subject to supervision by the Committee of Ministers, to take the specific measures it considered necessary in order to achieve the intended aims.

[2] *Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States* (CEPEJ(2014)14), issued on 12 December 2014 by the European Commission for the Efficiency of Justice.

Article 41 (just satisfaction)

The Court held unanimously that Turkey was to pay Mr and Mrs Aydoğdu jointly 65,000 euros (EUR) in respect of non-pecuniary damage and EUR 486 in respect of costs and expenses.

Separate opinion

Judge Kjølbro expressed a partly concurring and partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

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