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

FIFTH SECTION

DECISION

Application no. 7001/06
Gennadiy Dmitriyevich BABIY
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 21 June 2016 as a Committee composed of:

André Potocki, *President,*
Ganna Yudkivska,
Síofra O'Leary, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 26 January 2006,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

The applicant, Mr Gennadiy Dmitriyevich Babiy, was a Ukrainian national, who was born in 1963 and lived in Odessa. He died in the course of the proceedings before the Court.

The Ukrainian Government ("the Government") were represented, most recently, by their Acting Agent, Ms O. Davydchuk, of the Ministry of Justice.

On 31 October 2005 the applicant was detained on suspicion of participation in a criminal gang. Subsequently, a number of other criminal charges were brought against him.

During his detention the applicant had several health-related concerns, mainly on account of his high blood pressure and a spine disease (osteochondrosis).

On 3 September 2007 the applicant was released under an undertaking not to abscond.

On 4 October 2007 he died. The case file contains no information on the circumstances of his death.

By a letter of 23 March 2011 the applicant's daughter, Ms Irina First, informed the Court of the applicant's death and expressed her wish to maintain his application.

On 7 January 2013 the application was communicated to the Government under Articles 3 and 5 of the Convention.

On 7 June 2013 the Government submitted their observations on the admissibility and merits of the case. They stated that they did not object to the *locus standi* of the applicant's daughter to maintain the application.

On 17 June and 16 August 2013 the Registry informed Ms First of the requirement to be legally represented at that stage of the proceedings before the Court.

In the absence of any reply, on 20 December 2013 the Registry sent another letter to Ms First, this time by registered post, drawing her attention to Article 37 § 1 (a) of the Convention, which provides that the Court may strike a case out of its list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue the application.

On 27 February 2014 Ms First replied that she had not received the Registry's letters of 17 June and 16 August 2013. She also submitted that she intended to apply for legal aid.

On 18 July 2014 the Registry sent her the legal-aid information pack by a simple letter.

There has been no further correspondence from Ms First.

COMPLAINTS

The applicant complained under Article 3 of the Convention that he had not been provided with adequate medical care in detention in respect of his hypertension disease and osteochondrosis. He also complained under Article 5 of the Convention that his detention had been unlawful and excessively long.

THE LAW

The Court must first address the question of Ms First's right to pursue the application originally lodged by the applicant, who died on 4 October 2007.

Although the Ukrainian Government explicitly stated that they did not object to Ms First's *locus standi*, the Court is not obliged to subscribe to that view. It reiterates that, since the scope of the Court's jurisdiction is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case, the mere absence of a plea of incompatibility cannot extend that jurisdiction. To hold the contrary would

mean that where a respondent State waived its right to plead or omitted to plead incompatibility, the Court would have to rule on the merits of a complaint against that State concerning a right not guaranteed by the Convention or on a Convention right not yet binding on it, for example by virtue of a valid reservation clause (incompatibility *ratione materiae*) or because it has not yet ratified an additional Protocol (incompatibility *ratione personae*) (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III).

Where the applicant has died after the application was lodged, the Court has accepted that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see, for example, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014, with further references).

In this connection the Court has considered whether or not the persons wishing to pursue the proceedings were the applicant's close relatives (see, among many other authorities, *Scherer v. Switzerland*, 25 March 1994, §§ 31 and 32, Series A no. 287, and *Thévenon v. France* (dec.), no. 2476/02, ECHR 2006-III).

As a second criterion, the Court has examined whether the rights concerned were transferable. On the one hand, the Court has continued the examination of cases involving pecuniary claims that were transferable to the deceased applicant's heirs. On the other hand, the Court has found that certain other rights, such as those guaranteed by Articles 2, 3, 5, 8, 9 and 14 were of an eminently personal and non-transferable nature (see, for example, *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI).

However, the transferability of the applicant's claim is not always decisive. It is not only material interests which the successor of a deceased applicant may pursue by his or her wish to maintain the application. Human rights cases before the Court generally also have a moral dimension and persons near to an applicant may thus have a legitimate interest in seeing to it that justice is done even after the applicant's death (see, among many other authorities, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and *Zverevy v. Russia* (dec.), no. 55098/10, 5 January 2016). This consideration is particularly pertinent for cases concerning the application of the most fundamental provisions in the Convention system (see *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 73, ECHR 2012 (extracts)).

The Court has also considered whether the case concerned involved an important question of general interest transcending the person and the interests of the applicant (see *Karner v. Austria*, no. 40016/98, §§ 22-28, ECHR 2003-IX).

Turning to the present case, the Court observes that Ms First sought to pursue the case concerning the alleged violation of the rights of her father, the original applicant. Thus, the first condition of close kinship is met.

The Court further notes that the case concerns issues falling under Articles 3 and 5 of the Convention, which are so closely linked to the person of the original applicant that they cannot be regarded as transferable (see, for example, *Stankevich v. Ukraine* (dec.), no. 48814/07, 26 May 2009; *M.P. and Others v. Bulgaria*, no. 22457/08, §§ 97 and 99, 15 November 2011, with further references; and *Brūzītis, v. Latvia* (dec.), no. 15028/04, 26 August 2014).

It remains to be seen whether Ms First can still be regarded as having sufficient legitimate interest in the case for the Court to continue its examination.

The Court notes that she informed it of the applicant's death and expressed her wish to pursue the application almost three and a half years after that death, without providing any explanation of the reasons for the delay. The Court recalls that in the case of *Sukhomlinov v. Russia* ((dec.), no. 13472/04, 5 June 2012) such a belated notification from the applicant's half-brother was a major consideration leading the Court to the conclusion that the relative of the late applicant could not claim a legitimate interest justifying the continued examination of the application. Like in the present case, in the case cited above the applicant had complained under Article 3 of the Convention about the conditions of his detention and had died during the proceedings before the Court.

The Court also attaches weight to the absence of any allegations from Ms First that she herself was in any way affected by the violations alleged by the applicant or that she suffered in that regard (see, for comparable situations, *Vääri v. Estonia* (dec.), no. 8702/04, 8 July 2008, and *Brūzītis* (dec.), cited above). Her submissions to the Court were limited to her statements of intention to pursue the application and to apply for legal aid. At no point has she made any submissions concerning the substance of her late father's complaints.

The Court also takes note of the following circumstance, which it considers to be indicative of the lack of Ms First's interest in the present application. On 27 February 2014 she wrote to the Court that she had not received the Registry's letters addressed to her of 17 June and 16 August 2013, and submitted that she would require legal aid. More than two years have elapsed since then, but Ms First has not written to the Court anymore. Even assuming that the Registry's letter of 18 July 2014 (sent by simple rather registered post) had not reached her, such prolonged absence of any correspondence from her shows that she has not been really interested in the continuation of the examination of her late father's case before the Court.

The Court must now consider whether any question of general interest affecting the observance of the obligations undertaken by the Contracting States would still justify a further examination of the application.

The Court recalls that in its judgment on the case of *Koryak v. Russia* (no. 24677/10, 13 November 2012) it had to decide on the *locus standi* of

the applicant's mother to pursue, after his death, his complaint under Article 3 of the Convention in respect of the medical care in detention. The Court held that "the standard and quality of medical assistance for a seriously ill detainee, who had suffered from two diseases plaguing Russian detention facilities, HIV and tuberculosis, coupled with an issue of exhaustion of domestic remedies under Russian law – [involved] an important question of general interest, not only for Russia but also for other States Parties to the Convention. Thus, the continued examination of [that] application would contribute to elucidating, safeguarding and developing the standards of protection under the Convention" (§ 66).

While the present application also concerns the issue of medical care afforded to the applicant in detention, the Court does not find the above considerations to be applicable to it for the following reasons. Firstly, it appears that the applicant's health-related concerns (hypertension disease and osteochondrosis) were not as serious as those in the *Koryak* case cited above. Secondly, the Court notes that it has already examined a large number of cases against Ukraine raising complaints of inadequate medical care afforded to detainees (see, among recent cases, *Barilo v. Ukraine*, no. 9607/06, §§ 66-72, 16 May 2013, *Kushnir v. Ukraine*, no. 42184/09, §§ 134-150, 11 December 2014, and *Temchenko v. Ukraine*, no. 30579/10, §§ 84-93, 16 July 2015). Likewise, the Court has had many occasions to examine complaints under Article 5 §§ 1 and 3 of the Convention similar to those raised in the present case (see, for example, *Kharchenko v. Ukraine*, no. 40107/02, §§ 64-81, 98 and 99, 10 February 2011, *Gerashchenko v. Ukraine*, no. 20602/05, §§ 93-104, 7 November 2013, and *Orlovskiy v. Ukraine*, no. 12222/09, §§ 70-82, 2 April 2015).

Therefore, the Court considers that respect for human rights does not require it to continue the examination of the present case.

In the light of all the foregoing, the Court concludes that Ms First has not shown a sufficient interest in the present case and that no general interest can be detected to continue its examination. Consequently, in accordance with Article 37 § 1 (c) of the Convention, the Court considers that it is no longer justified to continue examination of the application.

For these reasons, the Court, unanimously,

Decides to strike the application out of its list of cases.

Done in English and notified in writing on 12 July 2016.

Milan Blaško
Deputy Registrar

André Potocki
President