

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

SECOND SECTION

DECISION

Application no. 48915/09
Ayşe Çiğdem BESEN
against Turkey

The European Court of Human Rights (Second Section), sitting on 19 June 2012 as a Chamber composed of:

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 8 September 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Ayşe Çiğdem Besen, is a Turkish national who was born in 1960 and lives in İstanbul. She was represented before the Court by Mr İ. D. Gökkılıç, a lawyer practising in İstanbul.

2. The facts of the case, as submitted by the applicant and appearing from the case file, may be summarised as follows.

3. On 17 June 2003 the applicant's mother had an endoscopy done in the American Hospital (a private hospital in Istanbul). It was discovered that she had a cancerous tumour in her stomach. She was referred to a doctor in

the same hospital in order to have the cancerous tumour removed from her stomach.

4. On 29 July 2003 the applicant signed the first consent form (of four), which reads as follows:

> "I, the undersigned, hereby give consent to the surgical treatment to be administered for stomach cancer.
>
> I am aware that the below mentioned procedure is being planned and I am giving my free consent and authorisation for a "total gastrectomy".
>
> I have been given by my doctor understandable information on my health condition, the surgery to be carried out, the risks and benefits connected therewith, the possible complications, the alternatives and the risks of not undergoing treatment.
>
> I know that the result cannot be guaranteed.
>
> In the event that an additional or other operation is needed other than those already planned, I am giving consent to those operations as well..."

5. On 30 July 2003 she was operated on ("gastrectomy", "esophagojejunostomy" and "jejunostomy" were applied).

6. On the third day after the surgery, an "anastomotic leakage" was detected. On 16 August 2003 another surgery was performed by another doctor from outside the hospital for fistulas. The "omega esophagojejunostomy" was converted into a "Roux-en Y" type reconstruction. Following this surgery a gastrointestinal haemorrhage occurred.

7. On 18 August 2003 another operation ("laparotomy") was carried out to stop the bleeding, drain the blood and fix the leakage.

8. On 24 August 2003 when a leakage of intestinal contents started in the patient's abdominal wound, another surgery was done ("laparotomy" and "drainage").

9. On 11 September 2003 a "percutaneous tracheostomy" was performed.

10. On 4 October 2003 the last operation was carried out for duodenal fistula and complications associated with laparotomy.

11. On 11 October 2003 the patient developed "pneumothorax".

12. On 11 or 12 October 2003 the applicant's mother died of cardiac arrest resulting from multiple organ dysfunction. All attempts at resuscitation failed.

13. On 8 April 2004 the applicant and her daughter instituted compensation proceedings against the Vehbi Koç Foundation American Hospital and nine doctors for having caused their mother and grand mother's death by negligence. On the same day, they also lodged a complaint with the public prosecutor of Şişli.

14. The public prosecutor started an investigation into the death of the applicant's mother. As far as understood from the case file, the applicant, the doctor who had performed the first surgery, some other medical staff involved in the treatment of the applicant's mother, including the doctor who had carried out the operation on 16 August 2003, gave statements. An expert opinion dated 27 September 2006 was obtained from the Forensic Medicine Institute (3rd committee). Relying on the applicant's mother's medical history and witness evidence, it was concluded in the expert opinion that the treatment administered following the diagnosis of stomach cancer had been adequate and that the anastomotic leakage, which led to the death of the applicant's mother, had been a typical complication in this kind of surgery.

15. On 27 October 2006 the public prosecutor gave a decision of non-prosecution based on the expert opinion, witness statements and the deceased's medical records. The objection filed against this decision was also dismissed on 6 December 2006.

16. Subsequently, the Şişli Civil Court of General Jurisdiction appointed three professors from the Ankara University School of Medicine for another expert opinion. In this expert report, the experts observed the following:

> "It was the leakage after the first surgery that started the chain of events that led to the applicant's mother's death; the method to be used to close a surgical wound, namely stitching or stapling, is to be chosen by the surgeon depending on the circumstances. In view of the deceased's age, manual suturing could be considered as convenient. By the same token, in a total gastrectomy, it is for the surgeon to decide on the method to be applied in gastric reconstruction, either "Omega" or "Roux-en Y" type. That the leakage was noticed on the third day after the first operation showed that the follow-up of the patient had been duly carried out. An anastomotic leak is the major post-operative complication of a total gastrectomy, the incidence of which has been reported to be between 5 and 7.5 %. In the deceased's case, the anastomotic leakage began at an early stage in the post-operative period. Although this suggests technical incompetence, there is no evidence to that effect; the treatment to be administered for an anastomotic leakage is still debated. Treatment options range from conservative management to aggressive surgery. The course of treatment followed in the deceased's case seems to be appropriate and in line with the medical practice. Unfortunately, after all these complications, the development of multiple organ dysfunction could have been expected. There is no finding which might substantiate that the hospital and/or doctors involved in the treatment were at fault."

17. On 25 November 2007 the applicant challenged the findings of the three professors and demanded that a new expert report should be obtained.

18. Relying on the expert reports drawn up by the Forensic Medicine Institute and the three professors appointed from the Ankara University, the witness evidence, the medical records of the deceased and the investigation file of the Public Prosecutor, the first-instance court rejected the applicant's action on 25 December 2007 on the grounds that they had been duly informed of the procedure followed and that there was no fault attributable to the hospital or doctors.

19. On 16 September 2008 the Court of Cassation upheld the judgment of the first instance court after having held a hearing. The applicant requested rectification. The Court of Cassation dismissed the request on 17 February 2009. The final decision was served on 10 March 2009.

COMPLAINTS

A. Concerning Article 2 of the Convention

20. The applicant complained that the State Party had not set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession could be determined and those responsible made accountable.

21. According to the applicant, she was deprived of an effective remedy since there had been no investigation into the death of her mother. She pointed out that no autopsy had been carried out, that the complainants had not been summoned to give statements to the public prosecutor, and that the expert opinion had been drawn up by doctors who had no expertise in the field. She alleged that the civil proceedings had also failed partly because of these shortcomings.

22. She claimed that she had been misled by the doctors who had understated the seriousness of the operation and that they had not been duly informed of the health risks. According to her, their consent had, therefore, been invalid. In particular, the applicant submitted that they had not given consent to the particular techniques used in the stitches as well as in the surgical connection between the gullet and the intestine and that other techniques would have been more convenient and safer considering her mother's age and specific health conditions. The applicant argued that the unreasonable lack of skill in the first surgical operation had caused her mother's death. She also alleged that her mother should not have been operated on since it had turned out that she had been suffering from a chronic pulmonary disease. She further contended that their argument about informed consent had not been dealt with by the domestic courts.

23. The applicant complained that the adjudicating judges sitting on the civil court had not been independent and impartial. In this connection, she alleged that she had not been afforded the opportunity to put questions to some witnesses and that some witness statements had not been taken into consideration.

24. Relying *mutatis mutandis* on the Court's findings in *Mantovanelli v. France* (18 March 1997, *Reports of Judgments and Decisions* 1997-II), the applicant argued under Article 2 that she had not been able to comment

effectively on the main piece of evidence, namely the expert reports, and that she should have been associated to the process of producing the reports.

B. Concerning Article 3 of the Convention

25. According to the applicant, the intensity and duration of the physical and psychological suffering they had to go through after her mother's first operation attained the level of severity of inhuman treatment. The applicant emphasized that the deceased had stayed in the hospital for 74 days, most of it in the intensive care unit, and had been operated on six times.

26. Referring to the case of *X. v. Denmark* ((dec.), no. 9974/82, 2 March 1983), the applicant submitted that a medical treatment without the patient's informed consent fell to be examined under Article 3.

C. Concerning Article 6 of the Convention

27. The applicant alleged that her right to a fair trial had been violated. In this regard, she repeated her submissions made under Article 2 concerning the examination of witnesses, and the principles of adversarial proceedings and equality of arms.

THE LAW

A. Concerning Article 2 of the Convention

28. The applicant complained that her mother had died as a result of medical negligence and that the subsequent proceedings which she had instituted had not made it possible to establish responsibility for her death.

29. The Court reiterates that the acts and omissions of the authorities in the field of health care may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as errors of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

30. The positive obligations require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an

effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among other authorities, *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006).

31. In this connection, the Court also reiterates that, if the infringement of the right to life is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling the liability of the doctors concerned to be established and appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 51 and 54, ECHR 2002-I).

32. In the instant case, the Court observes that the applicant's mother, a woman aged 67 with a history of pulmonary problems, was diagnosed with stomach cancer when she was admitted to hospital. She died on 12 October 2003 from cardiac arrest as a result of multiple organ dysfunction. The applicant did not allege or imply that her mother was intentionally killed by the doctors responsible for her care and treatment at the material time. However, she alleged that these doctors had failed to use reasonable skill and care to properly treat her mother, thereby causing her death, and that due to a number of procedural shortcomings it had not been possible to establish their liability.

33. The Court considers that it is not its function under Article 2 of the Convention to gainsay the doctors' assessment of the applicant's mother's condition or their decisions regarding the treatment to be administered. These assessments and decisions were made against the background of the deceased's condition at the material time and the doctors' perception as to what steps needed to be taken for her treatment. However, the events leading to the death of the applicant's mother and the alleged responsibility of the health professionals involved are matters which must be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events (see, among other authorities, *Sevim Güngör v. Turkey* (dec.), no. 75173/01, 14 April 2009).

34. In this connection, the Court observes that the applicant did attempt to initiate criminal proceedings by way of lodging a complaint with the public prosecutor against the hospital and doctors supposedly responsible. The public prosecutor requested an expert opinion from the Forensic Medicine Institute. It is understood from the case file that statements were taken from the applicant, the accused doctor and some other medical staff

involved in the treatment of the applicant's mother. Moreover, the Forensic Medicine Institute examined the deceased's medical records. In the end, it concluded that no fault could be attributed to the hospital or doctors for the death of the applicant's mother. The public prosecutor gave a decision of non-prosecution based on the said expert opinion, witness statements and the deceased's medical records. The objection filed against this decision was dismissed.

35. The Court observes that this investigation was conducted with reasonable expedition in the circumstances of the present case. It notes that the doctors who had been involved in the applicant's mother treatment were interviewed in the course of the investigation and the applicant was able to take part in the proceedings to the extent necessary to safeguard her legitimate interests. The Court further notes that the expert opinion of the Forensic Medicine Institute could not be held to be inadequate or flawed. The Court accepts that the applicant is critical of the outcome of this investigation. However, from the standpoint of exposing to public scrutiny both the course of events at the hospital and the decisions taken by the doctors, it does not find any serious defects in the authorities' conduct in the circumstances of the present case. Even assuming that an issue might arise regarding the applicant's effective participation in the investigation, despite the subsequent judicial control exercised by the civil courts, the Court reiterates once again that, if the infringement of the right to life is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case.

36. The Court observes that the applicant also brought civil proceedings against the hospital and doctors for negligence.

37. As regards the allegation concerning independence and impartiality of the judges, the Court finds that there is no indication which might suggest that they lacked independence and impartiality.

38. On the issue of whether the Şişli Civil Court of General Jurisdiction should have obtained another expert report and heard that particular witness of the applicant, the Court reiterates that the domestic courts are in principle better placed for assessing the relevance of evidence to the issues in the case and for interpreting and applying rules of substantive and procedural law (see *Gurepka v. Ukraine*, no. 61406/00, § 45, 6 September 2005). In this connection, the Court points out that unlike the situation examined in *Mantovanelli,* cited above, the Şişli Civil Court of General Jurisdiction did seek and obtain fresh expert evidence, other than the expert opinion issued by the Forensic Medicine Institute. It based its decision, among others, on two different expert reports, the findings of which had not been contradictory. The Court does not find any element in the case file which might allow it to depart from or call into question those expert reports (*Klaas v. Germany*, 22 September 1993, § 30, Series A no. 269). The Court

further notes that the Şişli Civil Court of General Jurisdiction itself held several hearings during which a number of witnesses including those of the applicant as well as the health personnel involved in her mother's treatment were heard in person in the presence of the applicant and her lawyer. Nothing in the case file suggests that the applicant was not given a reasonable opportunity to put questions to the witnesses, challenge their statements or have access to documents relevant for her case. The Court also observes that the applicant did not substantiate her allegation that the particular witness concerned would have had any information capable of changing the outcome of the proceedings.

Therefore, it cannot be said in the present case that the applicant was not able to comment effectively on the expert reports and present her case. The applicant participated effectively in the proceedings and availed herself of her procedural rights. The unfavourable outcome for the applicant does not suffice to find the respondent State liable under its positive obligations arising from Article 2 of the Convention.

39. In the light of the above, the Court observes that it was established that there was not any negligence on the part of the medical staff concerned. Having regard to the circumstances of the present case, the Court also considers that the relevant regulatory framework did not disclose any shortcoming which can lay the basis of an arguable claim of a breach of the domestic authorities' obligation to protect the right to life of the applicant's mother.

40. It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

B. Concerning Articles 3 and 8 of the Convention

41. There is no doubt that the circumstances that had led to the applicant's mother death caused her particular suffering. However, the Court considers that it has not been established that there were special factors which would justify finding a separate violation of Article 3 of the Convention in the present case.

42. It, therefore, concludes that this complaint must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

43. As regards the applicant's complaint concerning their consent to medical treatment, the Court points out that individuals' physical and psychological integrity, their involvement in the choice of medical care provided to them and their consent in that respect and access of information enabling them to assess the health risks to which they are exposed fall within the scope of Article 8 of the Convention (*Trocellier v. France* (dec.),

no. 75725/01, ECHR 2006-XIV). The Court considers that this provision applies to the circumstances complained of by the applicant.

44. There can be no doubt that an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it, except for exceptional circumstances. In order to enable patients to make an educated decision, information on the treatment proposed and associated risks should be provided.

45. It appears from the case file that the applicant's consent was sought four times before the main surgeries (see paragraph 4). Taking into account the consent forms signed by the applicant's mother, the domestic courts concluded that she had been duly informed of the risks. Although the applicant alleged that they had been misled by the doctors, there is no evidence that might substantiate such an allegation.

46. The applicant's main argument consists in the affirmation that the doctor concerned did not disclose any information about the particular surgical methods to be used in her mother's operation. The Court considers that the disagreement lies in the amount and kind of information that must be disclosed in obtaining an informed consent and that the content of the information to be given may vary according to the specific circumstances of each case.

47. In the present case, the domestic courts held that the particular method to be used in the stitches as well as in the surgical gastric reconstruction was a technical matter for the surgeon to decide and that either method could have been used depending on the surgeon's assessment. In the Court's opinion, it should be enough for the patient to be informed of all the risks associated with the treatment proposed and the duty of information cannot be interpreted as extending to every technical detail. In this respect, the Court also notes that whether this is even feasible and useful in practice remains debatable. Accordingly, the Court observes that there is no element in the case file which might necessitate a departure from the domestic courts' establishment of the facts.

48. Considering that the applicant has not substantiated her argument that the duty of disclosure in the process of informed consent should require specific information to be given as to the stitching method and the method of gastric reconstruction, the Court holds that this part of the application must be rejected, pursuant to 35 §§ 3 and 4 of the Convention, for being manifestly ill-founded.

C. Concerning Article 6 of the Convention

49. Referring to its above findings under the procedural limb of Article 2, the Court considers that there is no element in the case file which might lead it to a different conclusion in respect of Article 6.

50. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Stanley Naismith
Registrar

Françoise Tulkens
President