

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

THIRD SECTION

CASE OF AKSENOV v. RUSSIA

(Application no. 13706/08)

JUDGMENT

STRASBOURG

29 March 2022

This judgment is final but it may be subject to editorial revision.



In the case of Aksenov v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Georgios A. Serghides, *President,*
Anja Seibert-Fohr,
Frédéric Krenc, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 13706/08) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Valeriy Alekseyevich Aksenov ("the applicant"), on 1 March 2008;

the decision to give notice to the Russian Government ("the Government") of the applicant's complaint concerning effectiveness of the investigation into the alleged medical negligence;

the parties' observations;

Having deliberated in private on 8 March 2022,

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

INTRODUCTION

1. The case concerns the applicant's allegation of ineffective investigation into medical negligence which, according to him, resulted in the death of his son.

THE FACTS

2. The applicant was born in 1950 and lives in Orenburg. The applicant was represented by Mr B. Bowring, Mr P. Leach, Ms J. Evans, Ms T. Chernikova, Ms A. Razhikova and Mr F. Tishayev, at the time lawyers with the Memorial Human Rights Centre in Moscow and the European Human Rights Advocacy Centre in London.

3. The Russian Government ("the Government") were represented initially by Mr G. Matyushkin, former Representative of the Russian Federation to the European Court of Human Rights, and later by his successor in that office, Mr M. Vinogradov.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. ASSAULT ON THE APPLICANT'S SON, HIS MEDICAL TREATMENT AND DEATH IN A HOSPITAL

5. At about 10 p.m. on 9 September 2006 Mr T. assaulted the applicant's son (Mr K.) and inflicted him a brain injury.

6. Mr K.'s friends immediately took him to Orenburg hospital no. 1 ("Hospital no. 1"), where he underwent a skull X-ray examination and examination by the hospital's neurologist and ophthalmologist, who sent him to the neurosurgical department of the Pirogov Hospital in Orenburg ("Pirogov Hospital") for further treatment.

7. Mr K. arrived at the Pirogov Hospital at about midnight. He was not fully conscious and behaved in a non-cooperative manner. Doctors on duty diagnosed him with brain concussion and head contusions.

8. At about 10 p.m. on 10 September 2006 Mr K. complained of headache and then lost consciousness. He was immediately submitted to a computer tomography which revealed a basal skull fracture, subdural haematoma, subarachnoid haemorrhaging, cerebral oedema and dislocation.

9. Shortly thereafter, at the night between 10 and 11 September 2006 a surgeon trepanned Mr. K. and removed the brain haematoma. The surgery was repeated on 16 September 2006. On 17 September 2006 Mr K. died.

II. CRIMINAL CONVICTION OF Mr T. FOR THE ASSAULT

10. On 26 December 2006 the Leninskiy District Court of Orenburg convicted Mr T. of intentional infliction of grave bodily injuries resulting in the victim's death and sentenced him to nine years' imprisonment.

III. PRE-INVESTIGATION INQUIRY INTO MEDICAL NEGLIGENCE

11. On 20 September 2006 the Leninskiy District prosecutor's office of Orenburg opened pre-investigation inquiry into alleged medical negligence resulting in the death of Mr K. and transmitted it to the Dzerzhinskiy District prosecutor's office of Orenburg ("Prosecutor's office") which subsequently transmitted it to the Investigative Committee in the Dzerzhinskiy District of Orenburg.

12. In the context of that inquiry which lasted with interruptions until 18 July 2011, the investigators questioned Mr K.'s parents and a partner, three doctors from Hospital no. 1, three doctors from the Pirogov Hospital, an x-Ray medical specialist from that hospital, a patient who had been present at the hospital at the time and her relative, as well a relative of another patient from that hospital.

13. Mr K.'s parents and a partner submitted that the doctors had examined their son in a perfunctory manner and had not provided him with adequate treatment. The doctors argued that Mr K. had received necessary medical assistance and that the early diagnostic of his brain condition had been hampered by his uncooperative behaviour. Other witnesses had not been aware of the particularities of Mr K.'s treatment.

14. At the investigators' requests the Orenburg Bureau of Forensic Medical Examinations issued three forensic reports on

the quality of medical care given to Mr K. The first report was prepared on 13 December 2006. It stated that doctors of the Pirogov Hospital had failed to diagnose the patient's medical condition in a correct and timely manner because of initial medical examination had been perfunctory and because the follow-up supervision had not been duly carried out. As a result of those shortcomings Mr K. underwent surgery belatedly. However, even timely performed surgery would most probably result in his death given the gravity of his injury. The two subsequent reports dated 24 July and 28 November 2008 respectively stated that there had been no direct causal link between the doctors' conduct and Mr K.'s death.

15. Throughout the proceedings the investigators more than thirty five times refused to open a criminal case into the incident on the grounds that there had been no appearance of a criminal offence or elements of crime (the refusals were issued on 30 September, 12 and 22 October, and 3 November 2006; 25 January, 23 March, 2 April, 3 and 17 May, 6, 17 and 28 October, 8 November, 21 and 28 December 2007; 12 April, 14 May, 15 June, 16 July, 8 August and 28 November 2008; 26 January, 13 February, 6 and 20 April, 4 and 22 May, 17 June, 20 July, 3 and 21 August, 9 September, 19 October, and 12 November 2009; 2 February, 12 April, 4 June 2010 and 18 July 2011). Each of them (except the most recent) was overruled by the supervising investigating authority on various dates for being premature and manifestly ill-founded

16. On 3 May 2009 the Deputy Chief of the Investigative Committee in the Dzerzhinskiy District of Orenburg examined the effectiveness of the investigation. He pointed out that the investigators had demonstrated professional negligence and that they had failed to rectify the shortcomings identified by the domestic courts on 10 July 2007 and 30 October 2008 (see paragraphs 17 and 19 below). He repeated that criticism on 22 May and 17 June, 20 July, 3 and 20 August, 8 September, 16 October and 11 November 2009, 28 January and 29 March 2010.

IV. JUDICIAL COMPLAINTS ABOUT THE REFUSALS TO INSTITUTE CRIMINAL PROCEEDINGS

17. On an unspecified date the applicant lodged a claim with the Dzerzhinskiy District Court of Orenburg ("District Court"). He challenged the investigators' refusal to open a criminal case on 17 May 2007. The court granted the challenge on 10 July 2007. It noted that the investigators had failed (i) to question people who had been in contact with Mr K. during his stay in the Pirogov Hospital, including his friends and other patients, (ii) to assess the conclusion of forensic experts that Mr K.'s initial medical examination had been perfunctory or (iii) to establish why Mr K. had developed complication of brain injury resulting in his death. The Orenburg Regional Court upheld that judgment on appeal on 7 August 2007.

18. On 7 November 2007 the applicant lodged another claim with the District Court challenging the investigators' decision not to open a criminal case on 7 October 2007. The court dismissed the claim on 15 November 2007 on the grounds that the impugned decision had already been overruled on 29 October 2007.

19. On unspecified dates later the applicant challenged before the District Court the decisions not to open a criminal case of 8 November and 28 December 2007 and 8 August 2008. The court quashed the impugned decisions on 29 November 2007, 1 February and 30 October 2008 respectively. In the first judgments it noted that the investigators had failed to rectify the shortcomings identified by the District Court on 10 July 2007. The full text of the judgment of 30 October 2008 was not submitted to the Court.

RELEVANT LEGAL FRAMEWORK

20. For a summary of the relevant domestic provisions governing pre-investigation inquiries see *Belenko v. Russia* (no. 25435/06, §§ 56-60, 18 December 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

21. The applicant complained under Articles 2, 6 and 13 of the Convention that the domestic authorities had failed to carry out an effective investigation into his son's death, in particular, that they had failed to rectify the shortcomings which were identified by the District Court on 10 July 2007. Bearing in mind that it is master of the characterisation to be given to the facts of the case (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 145, ECHR 2017, and *Elena Cojocaru v. Romania*, no. 74114/12, § 74, 22 March 2016), the Court considers that the complaints at hand should be examined from the standpoint of Article 2 of the Convention alone, which reads:

> "1. Everyone's right to life shall be protected by law..."

A. Admissibility

22. The Government stated that the applicant's complaint was inadmissible, because the inquiry had met the requirements of Article 2 of the Convention.

23. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

24. The applicant submitted that the investigators had issued forty-two refusals in opening of criminal proceedings into Mr K.'s death. Forty-one of those refusals had been overruled for being premature and manifestly ill-founded. The applicant noted a number of shortcomings in the inquiry and the investigators' repeated failures to comply with the binding decisions given by the domestic courts or orders issued by the supervising authorities. He also submitted that the investigators had not allowed him to participate in the criminal inquiry.

25. The Government submitted that the investigating authorities had complied with their procedural obligations under Article 2 of the Convention. They had identified the person who had inflicted lethal injury to Mr K., established the specific reason of Mr K.'s death and the surrounding circumstances.

2. The Court's assessment

26. The Court has interpreted the procedural obligation of Article 2 in the context of health care as requiring States to set up an effective and independent judicial system 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, *Šilih v. Slovenia* [GC], no. 71463/01, §§ 192-96, 9 April 2009, and *Lopes de Sousa Fernandes*, cited above, §§ 214-21).

27. The procedural obligation under Article 2 in the context of health care requires, *inter alia*, that the proceedings be completed within a reasonable time. In that connection the Court emphasises that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning medical negligence in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care is essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of all users of health-care services (see ibid.; and *Oyal v. Turkey*, no. 4864/05, § 76, 23 March 2010).

28. This is why the Court has held that, in Article 2 cases, particularly in those concerning proceedings instituted to elucidate the circumstances of an individual's death in a hospital setting, the lengthiness of proceedings is a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and

plausible reasons to justify the length of the proceedings (see *Lopes de Sousa Fernandes*, cited above, § 219, and *Bilbija and Blažević v. Croatia*, no. 62870/13, § 107, 12 January 2016).

29. In the instant case, the applicant's allegation of inadequate medical treatment received by his son were confirmed by witness statements and, to some extent, by the expert report of 13 December 2006 (see paragraph 14 above). The applicant therefore had a prima facie case of medical negligence. Since the domestic legal framework allowed for criminal prosecution in such cases (see the decisions of the domestic courts criticising the investigators' refusals to have a criminal case opened in paragraphs 17 and 19 above), the investigative authorities had a duty to carry out investigation into the applicant's allegation. Accordingly, the applicant cannot be reproached for waiting for the outcome of the investigation before seeking other means of redress (for example, a civil claim).

30. Turning to the manner in which the investigation was conducted, the Court observes that it lasted for almost five years from 20 September 2006 to 18 July 2011. The authorities failed to ascertain the exact circumstances of Mr K.'s death or to indicate whether or not medical negligence had taken place. During that period the supervising investigating authorities and the courts repeatedly noted that the pre-investigation inquiry had been deficient and criticised the investigators' failure to question witnesses, to assess the conclusion of the forensic experts and to establish the reasons for the complication of brain injury resulting in K.'s death (see paragraphs 15, 16, 17 and 19 above). Moreover, the material in the Court's possession does not suggest that the length of the proceedings could be justified by the complexity of the case or by the applicant's behaviour.

31. Although Article 2 of the Convention does not necessarily require a criminal-law remedy in cases of medical negligence, if deemed effective, criminal proceedings would by themselves be capable of satisfying the procedural obligation of that Article (see *Lopes de Sousa Fernandes*, cited above, § 232). Since in the applicant's case the criminal investigation was made available to the applicant under domestic law (see the domestic court's decisions of 10 July 2007 and 30 October 2008, paragraphs 17 and 19 above), it had to satisfy the requirement of effectiveness (compare *Aftanache v. Romania*, no. 999/19, §§ 67 and 69, 26 May 2020). However, the shortcomings identified by the District Court on 10 July 2007, to which the Court has subscribed in paragraph 30 above, do not allow the Court to conclude that the State authorities conducted in the present case a proper investigation consonant with the State's procedural obligations under Article 2 of the Convention.

32. It follows that there has been a violation of that Article under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed compensation for non-pecuniary damage in an amount to be determined by the Court.

35. The Government submitted that the finding of a violation constitutes in itself sufficient just satisfaction.

36. The Court awards the applicant 10,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable on him.

B. Costs and expenses

37. The applicant claimed 7,087.51 pounds sterling (EUR 8,228.85) and 30,000 Russian roubles (RUB) (EUR 713.85) for the proceedings before domestic authorities and the Court. He requested that those amounts be paid in pounds sterling into the representatives' bank account. The applicant submitted a receipt from the Orenburg Regional Bar, bills for translation services, telephone calls, various expenses and legal work.

38. The Government stated that the claim was unsubstantiated.

39. An applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 61, ECHR 2015). However, it has not been shown that the applicant's representatives performed any legal work in relation to the domestic proceedings, or that the applicant was under a legal obligation to pay any fee to them, because no legal-services contracts with the representatives was submitted to the Court. The latter is therefore unable to conclude that the applicant had a legally enforceable obligation to pay for the services of his representatives, or that he had in fact paid them. Regard being had to these considerations and its case-law, the Court rejects the applicant's claim for costs and expenses (see *Novikova and Others v. Russia*, nos. 25501/07 and 4 others, § 235, 26 April 2016).

C. Request for an investigation

40. The applicant also requested that an effective criminal investigation be conducted into his allegation of medical negligence.

41. The Court notes that in numerous cases in comparable circumstances (see, among others, *Medova v. Russia*, no. 25385/04, §§ 142-43, ECHR 2009 (extracts), and *Magnitskiy and Others v. Russia*, nos. 32631/09 and 53799/12, §§ 294-97, 27 August 2019), it has decided that it was most appropriate to leave it to the respondent State to choose the means to be used in the domestic legal order in order to discharge its legal obligation under Article 46 of the Convention. The Court does not discern any exceptional circumstances which would lead it to reach a different conclusion in the present case.

D. Default interest

42. The Court considers it appropriate that the default interest rate 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention under its procedural limb;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Deputy Registrar	Georgios A. Serghides President