

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

FIFTH SECTION

CASE OF TRETYAKOVA v. UKRAINE

(Application no. 63126/13)

JUDGMENT

STRASBOURG

4 November 2021

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



In the case of Tretyakova v. Ukraine,

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

Arnfinn Bårdsen, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 63126/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Valentina Davydovna Tretyakova ("the applicant"), on 21 September 2013;

the decision to give notice to the Ukrainian Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 7 October 2021,

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

INTRODUCTION

1. The case concerns the effectiveness of domestic proceedings on the applicant's allegations under Article 2 of the Convention that her mother had died as a result of medical negligence.

THE FACTS

2. The applicant was born in 1940 and lives in Kerch. The applicant was represented by Mr Y.L. Boychenko, a lawyer practising in Strasbourg.

3. The Government were represented by their Agent, Mr I. Lishchyna.

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

I. MEDICAL TREATMENT AND DEATH OF THE APPLICANT'S MOTHER

5. The applicant's mother suffered from chronic multiple organs diseases. On 5 May 2003 doctor K. diagnosed the applicant's mother with diabetes, stenocardia, hypertension, chronic bronchitis and other illnesses. K. gave the applicant's mother injections following which the condition of the latter deteriorated.

6. On 22 May 2003 K. examined the applicant's mother at home and gave her another injection, following which the patient's condition seriously deteriorated. The applicant's mother was admitted to hospital where she was

provided with intensive care treatment. On 25 May 2003 her mother was discharged from hospital. On 26 May 2003 she died. No autopsy was performed before the body was buried.

II. CRIMINAL INVESTIGATIONS

7. Between July 2003 and December 2008, following the applicant's complaints, the local prosecutor's office conducted several pre-investigation inquiries resulting in decisions that there had been no grounds to open criminal proceedings for the alleged medical negligence. Those decisions were quashed as unfounded by the supervising authorities and further inquiries were ordered.

8. On 24 December 2008 a full-scale investigation was opened. On 1 November 2012 the investigator terminated criminal proceedings because of the absence of the constituent elements of a criminal offence. The investigator, relying on three forensic medical reports and other evidence, found that the decision by K. to administer injections had been wrong but it could not be established whether there had been a direct causal link between the injections and the death of the patient. Notably, it had been too late to exhume the body to examine the question of a causal link.

9. The applicant challenged this decision before the domestic court, arguing that there had been sufficient proof of medical error, that no autopsy had been carried out to establish the cause of death and that medical records regarding the treatment of her mother had been forged.

10. On 19 February 2013 the Kerch Town Court of the territory of Crimea rejected the applicant's complaint stating that, in the absence of an autopsy, there had been no evidence to substantiate the causal link between the medical error and the death and that it had been too late to carry out an exhumation. The town court specified in its decision that the applicant could appeal against the decision by submitting an appeal through them within a seven-day period. Subsequently, the town court refused to accept the applicant's appeal, noting that she should have sent the appeal directly to the court of appeal.

11. On 5 March 2013 the court of appeal rejected the applicant's appeal as being out of time, finding that the applicant had missed the deadline for no valid reason. On 31 May 2013 the Higher Specialised Court on Civil and Criminal Matters dismissed the applicant's cassation appeal against the appellate court's decision of 5 March 2013.

III. DISCIPLINARY INQUIRIES

12. The applicant complained about medical negligence to the chief doctor of the hospital. In June 2003 the chief doctor, having conducted a

disciplinary inquiry, reprimanded doctor K. for the inappropriate medical treatment of the applicant's mother.

13. In July 2003 the local healthcare authorities informed the applicant that they had established an *ad hoc* commission which had conducted an inquiry into the incident with the applicant's mother. The commission made a report finding that doctor K. had examined and treated the applicant's mother properly.

RELEVANT LEGAL FRAMEWORK

14. The relevant provisions of the domestic law can be found in *Muravskaya v. Ukraine* (no. 249/03, §§ 35-36, 13 November 2008).

THE LAW

I. PRELIMINARY REMARKS

15. The Government submitted that they did not have access to the relevant domestic case file as it was located on the territory of Crimea which was not controlled by Ukraine. Their comments on the case were therefore based on the material provided by the Court.

16. Having regard to the nature of the complaints, which are the subject of well-established case-law, and the applicant's submissions, the Court considers it possible to proceed with the case file as it stands (see, to similar effect, *Litvinyuk v. Ukraine* [Committee], no. 55109/08, §§ 16 et seq., 1 March 2018 and *Talalikhina v. Ukraine* [Committee], no. 13919/12, §§ 15-17, 22 October 2020).

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

17. The applicant complained that her mother had died as a result of medical negligence and that there had been no effective investigation in that regard.

18. The Court decided to examine the case under Article 2 of the Convention which reads, in so far as relevant, as follows:

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

A. Admissibility

19. The Government submitted that the applicant had not exhausted domestic remedies in respect of her complaint of medical negligence. In particular, the applicant failed to appeal against the court ruling of 19 February 2013.

20. The applicant submitted that she had tried to appeal against the ruling of 19 February 2013 following the procedure as explained by the Kerch Town Court in its decision. In those circumstances, the fact that her appeal was later dismissed as time-barred could not be attributed to her.

21. The Court considers that the Government's objection is closely linked to the substance of the applicant's complaint under Article 2 of the Convention. It must therefore be joined to the merits.

22. The Court further notes that the application 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

23. The applicant maintained that the criminal investigations were the only remedy that could comprehensively address the applicant's complaint. However, those investigations had not been thorough and prompt.

24. The Government contended that the domestic proceedings in response to the applicant's complaints had been effective and appropriate.

2. The Court's assessment

(a) General principles

25. The general principles concerning the State's procedural obligations under Article 2 in the context of health care are described in *Lopes de Sousa Fernandes v. Portugal* ([GC], no. 56080/13, §§ 214-221, 19 December 2017).

26. The Court reiterates that if the infringement of the right to life or to physical integrity 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 any liability of the doctors concerned to be established and any 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 (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII).

27. Unlike in cases concerning the lethal use of force by State agents, where the competent authorities must of their own motion initiate investigations, in cases concerning medical negligence where the death is caused unintentionally, the States' procedural obligations may come into

play upon the institution of proceedings by the deceased's relatives (see, *Lopes de Sousa Fernandes,* cited above, § 220).

28. Article 2 of the Convention will not be satisfied if the protection afforded by domestic law only exists in theory: above all, it must also operate effectively in practice. Therefore the Court is called to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In other words, rather than assessing the legal regime *in abstracto*, the Court must examine whether the legal system as a whole adequately dealt with the case at hand (see *Valeriy Fuklev v. Ukraine*, no. 6318/03, § 67, 16 January 2014, with further references).

(b) Application of these principles to the present case

29. In the present case the applicant could make use of the criminal, disciplinary and civil remedies in respect of her allegations of medical negligence. The Court will examine whether those remedies were made available and effective in practice.

(i) Criminal proceedings

30. The Court observes that the applicant consistently pursued her allegations within the framework of domestic criminal procedure. There is nothing to indicate that the death of the applicant's mother was caused intentionally, and the circumstances in which it occurred were not such as to raise suspicions in that regard. Therefore, Article 2 did not necessarily require a criminal-law remedy. However, given that the domestic rules on criminal procedure afforded the possibility of a joint examination of criminal responsibility and civil liability arising from the same culpable actions, the Court does not consider that the applicant acted inappropriately when choosing to pursue the case under the Code of Criminal Procedure which, moreover, offered procedural advantages as regards the burden of proof and the legal costs (see *Arskaya v. Ukraine*, no. 45076/05, § 78, 5 December 2013 and *Valeriy Fuklev v. Ukraine,* cited above, § 80).

31. In assessing the effectiveness of the criminal procedures, the Court notes that for about five and a half years the incident was investigated by means of pre-investigation inquiries. However, the Court has held that such inquiries do not comply with the principles of an effective remedy, because the inquiry officer can only take a limited number of steps and the victims have no formal status, meaning that they are excluded from effective participation in the procedure (see, *mutatis mutandis, Strogan v. Ukraine*, no 30198/11, § 53, 6 October 2016, with further references). Moreover, in the present case the findings of the pre-investigative inquiries

were repeatedly quashed by the supervising authorities as unfounded (see paragraph 7 above) which pointed to a structural deficiency (see *Zubkova v. Ukraine*, no. 36660/08, § 40, 17 October 2013).

32. During the full-scale investigation which was opened in 2008 and terminated in 2012 (see paragraph 8 above), the authorities admitted that the treatment of the applicant's mother had not been correct, however they discontinued these proceedings as it had been no longer possible to prove the causal link between the medical error and the death of the patient. The absence of an autopsy was apparently one of the essential reasons for the discontinuation of the case. In these circumstances, it follows that the manner in which the criminal inquiries and investigations were conducted undermined the principle of a thorough examination of the basic facts of the case.

33. The Court further notes that when the first-instance court adopted its decision on 19 February 2013 upholding the decision to close the investigation (see paragraph 10 above), the overall length of proceedings had exceeded nine years and eight months and, given the above considerations, by that time those proceedings had proved to be ineffective.

34. In such circumstances the applicant was not obliged under Article 35 § 1 of the Convention to challenge the decision of 19 February 2013 and her unsuccessful attempt to make use of such an appeal cannot be placed against her (see *Savitskyy v. Ukraine*, no. 38773/05, § 120, 26 July 2012). The Government objection concerning the non-exhaustion of domestic remedies is therefore dismissed.

(ii) Disciplinary measures

35. The Court notes that a month after the incident took place, the chief doctor of the hospital reprimanded the doctor of the applicant's mother (see paragraph 12 above). However, this disciplinary procedure does not suggest that the hospital established all the relevant facts or examined the causal link between the doctor's conduct and the death of the patient. Indeed, shortly after that decision the *ad hoc* commission made the opposite conclusion in their report that the applicant's mother was provided with appropriate treatment (see paragraph 13 above). However, the thoroughness of the commission's report is equally doubtful given that the same issue was examined within the criminal proceedings which involved repeated forensic medical examinations and which resulted in the authorities' conclusion that the medical treatment of the applicant's mother had not been correct (see paragraph 8 above).

36. In these circumstances the Court considers that the inquiries held by the hospital and the healthcare authorities did not meet the procedural requirements of Article 2 (see, *mutatis mutandis*, *Arskaya, cited above,* §§ 67-71, and *Valeriy Fuklev, cited above,* §§ 68-71).

(iii) Civil action

37. The applicant did not lodge a civil claim for damages after the termination of the criminal proceedings. However, as noted above, the applicant had reasonably pursued criminal proceedings where her civil claims could be examined together with criminal charges. The Court considers that having pursued the criminal investigations for such a long period of time, it would have been onerous to expect the applicant to subsequently institute civil proceedings (see *Arskaya, cited above,* §§ 75-81 and *Valeriy Fuklev*, cited above, §§ 77-83).

(iv) Overall conclusion as to the availability of legal remedies in practice

38. In the light of the foregoing, the Court finds that the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's mother, failed to provide an effective response consonant with the State's obligation under Article 2.

39. There has therefore been a violation of the procedural aspect of Article 2 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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."

41. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

42. The Government maintained that the applicant's claim was unfounded.

43. The Court considers that the applicant must have suffered distress and anxiety on account of the violation it has found. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 6,000 in respect of non-pecuniary damage.

44. The applicant further claimed EUR 1,200 in respect of costs and expenses.

45. The Government contended that the claim was unsubstantiated.

46. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 1,000 for costs and expenses, plus any tax that may be chargeable on the applicant. At the request of the applicant, the amount awarded under this head should be paid directly into the bank account of Mr Y.L. Boychenko (see, for example, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 288, 15 December 2016).

47. 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. *Joins to the merits* the Government's objection concerning the non-exhaustion of domestic remedies and rejects this objection after an examination of the merits;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of a procedural aspect of Article 2 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, this amount to be paid into the bank account of Mr Y.L. Boychenko in France;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Arnfinn Bårdsen
Deputy Registrar	President