

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

FOURTH SECTION

DECISION

Application no. 27915/06
Dobromir Borisov DASKALOV and others
against Bulgaria

The European Court of Human Rights (Fourth Section), sitting on 29 January 2013 as a Chamber composed of:

Ineta Ziemele, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Krzysztof Wojtyczek, judges,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 28 June 2006,

Having regard to the partial decision of 23 November 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants.

THE FACTS

1. The applicants, Mr Dobromir Borisov Daskalov, born in 1938, and his two sons, Mr Galin Dobromirov Daskalov, born in 1975 and Mr Borilsav Dobromirov Daskalov, born in 1970, are Bulgarian nationals who live in Varna. They were represented before the Court by Ms M. Ilieva, a lawyer practising in Sofia.

2. The Government were represented by their Agent, Mrs R. Nikolova, of the Ministry of Justice.

A. The circumstances of the case

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

1. The events of 19 January 2005

4. Mrs Koina Daskalova, the first applicant's wife and the mother of the second and third applicants, died on 19 January 2005 at the age of 67 following complications resulting from hepatitis C.

5. Her hepatitis was diagnosed in 2001. Later she developed cirrhosis of the liver and oesophageal varices which resulted in haemorrhages.

6. She survived four major haemorrhages, the last in April 2003. On each of these occasions she was treated in St Anne's Hospital in Varna without the use of a Blakemore tube, as she had refused that treatment, fearing unbearable pain. A Blakemore tube is a medical device inserted through the nose or mouth allowing for balloons to be inflated inside the stomach and oesophagus, applying pressure to reduce blood flow from varices. St Anne's Hospital is owned by the State and several municipalities and is managed by them.

7. At 3.15 a.m. on 19 January 2005 Mrs Daskalova regurgitated blood and was transported by ambulance from her home to the emergency unit of St Anne's Hospital, accompanied by the first applicant.

8. On her arrival, the doctors on duty proposed the use of a Blakemore tube, but she refused and signed a written refusal.

9. At about 4.30 a.m. Mrs Daskalova was admitted to the surgery unit of the same hospital and treated with medicines and transfusions. She was advised again to accept treatment with a Blakemore tube but refused, signing under the following text: "In full awareness I refuse the use of a Blakemore tube, having received explanations on the subject."

10. At about 7.30 p.m. Mrs Daskalova had another haemorrhage. At that point Dr Y., the doctor on duty, told her and the first applicant that in spite of her wishes it was imperative to use a Blakemore tube. The first applicant was rushed out of the room and the medical staff administered treatment using a Blakemore tube. The first applicant, who was waiting outside, heard his wife screaming.

11. The doctors' efforts were to no avail and the first applicant's wife died at about 8.40 p.m.

2. Administrative investigation and criminal proceedings

12. In March 2005 the second applicant complained to the Ministry of Public Health, alleging, *inter alia*, that his mother had been unlawfully treated with a Blakemore tube against her will and that she had not been treated properly.

13. On 13 June 2005 the Ministry replied, stating, *inter alia*:

> "Under section 90(1) of the Health Act patients or their relatives may at any time refuse medical assistance offered or the continuation of medical treatment. The emergency and surgical unit doctors [of St Anne's Hospital] initially respected [Mrs Daskalova's] wish. However, where a patient's condition becomes life-threatening (in this case, haemorrhagic shock), section 90(4) provides that the doctor (the head of the institution) may decide to administer life-saving treatment."

14. On an unspecified date in 2005 the applicants complained to the local prosecutor in Varna, alleging that there had been medical negligence which had contributed to their close relative's death and that the doctors had not complied with her explicit refusal to be treated with a Blakemore tube.

15. The prosecutor opened criminal proceedings. The investigator heard evidence from several individuals, including the first applicant, and the medical staff involved. He commissioned a medical expert report and collected other evidence.

16. Dr Y., the doctor on duty on the evening of 19 January 2005, stated, *inter alia*, that he had known about Mrs Daskalova's refusal to be treated with a Blakemore tube, but had decided to use it anyway because of the acute bleeding.

17. The medical experts stated in their report that everything possible had been done to save Mrs Daskalova's life and that she had been treated correctly. The essential treatment in cases such as hers was the use of a Blakemore tube.

18. By an order of 6 December 2005 the regional prosecutor terminated the proceedings. He found clear evidence that everything possible had been done in the circumstances. Appropriate treatment had been administered promptly, given Mrs Daskalova's refusal to be treated with a Blakemore tube, which was the essential and potentially life-saving treatment for her condition. The prosecutor did not find any evidence of medical negligence. He did not comment on the applicants' complaint that it had been unlawful to administer treatment which Mrs Daskalova had refused.

19. The applicants appealed, drawing attention in particular to the fact that no answer had been given to their complaint about forced medical treatment. They submitted that section 90(4) of the Health Act, referred to in the Ministry's letter, did not provide a legal basis for the forced treatment, since that provision concerned situations where a parent or guardian had refused treatment on behalf of the patient. Furthermore, that provision vested the right to overrule the refusal in the director of the hospital, not in the doctor treating the patient.

20. On 9 January 2006 the Varna Regional Court upheld the prosecutor's decree. It found no evidence of medical negligence which could have contributed to the death of Mrs Daskalova. The court further stated:

> "As regards the complaint concerning the use by Dr Y. of a Blakemore tube when Mrs Daskalova experienced her last [haemorrhagic] crisis, the court finds it ill-founded, given that the doctor treating her decided what treatment was appropriate in the particular case and administered it, the patient not having objected to its use on that occasion."

3. Civil proceedings concerning the events of 19 January 2005

21. In July 2005 the first applicant brought a compensation claim against the Ministry of Health. He submitted that his wife had died as a result of medical negligence because (i) he had been sent by the hospital staff to buy life-saving medicines although they had been available in the hospital, which delayed his wife's treatment; (ii) the doctors on duty had not given her the last dose bought by him; and (iii) his wife had been treated with a Blakemore tube despite her explicit and repeated refusal, which caused her serious pain. He submitted that the treatment he and his wife had been subjected to had caused him grief, which had caused his own health to deteriorate. He relied on the Bulgarian Constitution and the Health Act.

22. The first applicant was not legally represented in the proceedings. He was invited to clarify his claims and amended them several times, changing the legal grounds cited and the defendant. Eventually, he abandoned the claim against the Ministry and sought damages from St Anne's Hospital.

23. The court admitted documentary evidence and a medical expert report and examined witnesses.

24. In a judgment of 3 May 2007 the Varna District Court rejected the claims. It found that there was no causal link between the actions of the hospital staff and Mrs Daskalova's death. There was no evidence of negligence. Addressing the claim that damages were also due on grounds of forced treatment administered against Mrs Daskalova's will, the court noted that the first applicant had not argued that the treatment in question had caused the fatal outcome, but had referred only to the lack of consent and lack of authorisation by the head of the hospital. However, these facts were irrelevant in the circumstances. They would have been relevant only in the assessment of the amount of compensation had it been established that the medical treatment had been inappropriate in view of the patient's condition.

25. The Varna District Court judgment of 3 May 2007 was upheld on appeal by the Varna Regional Court on 30 April 2009. In the proceedings before it the Regional Court commissioned another medical expert report and admitted other evidence. It found that there was no evidence of any negligence, the doctors having administered treatment that was appropriate in the circumstances. With regard to the use of a Blakemore tube against the patient's will, the Regional Court stated that there was no evidence that it had contributed to the fatal outcome.

26. The first applicant submitted an appeal on points of law.

27. On 9 November 2009 the Supreme Court of Cassation declared the appeal admissible. It noted that the issues raised by the case concerned not only the adequacy of Ms Daskalova's medical treatment but also the lawfulness of the hospital staff's conduct in that they had required the first applicant to buy medicines which had been available in the hospital and had not respected Mrs Daskalova's express wish not to be treated with a Blakemore tube. Those issues were relevant for the outcome of the proceedings and concerned an area in which the domestic jurisprudence was contradictory, which required interpretation of the provisions of the Health Act in the light of the Convention on Human Rights and Biomedicine.

28. In a judgment of 13 September 2010 the Supreme Court of Cassation quashed the lower court's judgment and ordered the hospital to pay the first applicant 6,000 Bulgarian levs (BGN, approximately 3,100 euros (EUR)) in non-pecuniary damages. It established that Mrs Daskalova had explicitly refused treatment with a Blakemore tube and that it had taken the first applicant about an hour to procure the medicine required by the hospital staff. It noted that the third dose bought by the first applicant had not been given to his wife. It further noted that when Mrs Daskalova had begun again to haemorrhage at about 7.30 p.m., the doctor on duty had decided to use a Blakemore tube anyway, and the first applicant had had to listen to his wife's screams for about half an hour. He had been informed of her death at about 8.45 p.m. but had not been allowed to see her body in the hours which followed.

29. The Supreme Court of Cassation found that the hospital staff had acted appropriately from a medical point of view and had done everything possible in the circumstances to save Mrs Daskalova's life. Nevertheless, it found that the medical professionals were also obliged to show understanding and empathy to patients and their relatives and that they could be held liable in tort even in the absence of medical malpractice. The court found that in the first applicant's case damages were due, first, because the medical staff had sent him twice within eight hours, at a critical moment when he had feared for his spouse's life, to look for a life-saving medicine, considering that the hospital did have a quantity of it available. Secondly, they had failed to respect Mrs Daskalova's clearly expressed will and had administered treatment forcibly by means of a Blakemore tube, although this treatment had only a 50-60% rate of success according to the expert heard in the proceedings and was not therefore life-saving within the meaning of section 90(4) of the Health Act, and despite the fact that the decision to proceed with this treatment had not been taken by the person in whom such power was vested, namely the head of the hospital.

30. The court further stated that the lower court had erred in that it had failed to look at the facts from the point of view of ethics and human rights.

31. The court determined the amount of the compensation on the basis of its assessment of the first applicant's suffering and its consequences, as

established by the evidence of a deterioration of his health after these events had taken place.

B. Relevant domestic law

32. The relevant provisions of the Health Act 2005, as in force at the relevant time, read as follows:

> "**Section 87**
>
> (1) Medical procedures shall be carried out after the patient has expressed his or her informed consent...
>
> **Section 90**
>
> (1) The patient or his or her parent, general or special guardian, or the person [appointed by a court] under section 162(3), may refuse at any time the medical assistance offered or the continuation of medical treatment which is already under way.
>
> (2) A refusal under the preceding paragraph shall be recorded in the medical file with the person's signature...
>
> (4) Where treatment has been refused by a parent or a general or special guardian under paragraph 1 and the patient's life is in danger, the head of the medical institution may decide to carry out life-saving treatment.
>
> **Section 91**
>
> The cases in which medical treatment may be undertaken against the patient's will shall be determined solely by Act of Parliament.
>
> **Section 220**
>
> The administering of medical treatment to another person without that person's informed consent or in breach of the requirements for obtaining the patient's informed consent shall be punishable by a fine of between BGN 500 and 1,500 or, in the event of repetition, by suspension of the licence to practice a medical profession for a period of between six months and one year."

33. There is no reported case-law of relevance to the present case concerning these provisions, nor are there any relevant provisions to be applied in conjunction with section 91.

34. Some of the above provisions were amended with effect from 2 June 2009. In particular, the words "by a parent or a general or special guardian" in section 90(4) were deleted, so that the amended paragraph reads:

> "Where treatment has been refused under paragraph 1 and the patient's life is in danger, the head of the medical institution may decide to carry out life-saving treatment."

C. Relevant international material

35. The Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (opened for signature in Oviedo on 4 April 1997 and in force in respect of Bulgaria since 1 August 2003) contains the following principles regarding consent:

> **"Chapter II – Consent**
>
> **Article 5 – General rule**
>
> An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
>
> This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.
>
> The person concerned may freely withdraw consent at any time.
>
> ...
>
> **Article 8 – Emergency situation**
>
> When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned."

COMPLAINTS

36. The applicants complained under Articles 3 and 8 of the Convention that Mrs Daskalova had been forced unlawfully and unnecessarily to undergo painful treatment which she had categorically refused and, under Article 13 that they did not have an effective remedy in this respect.

THE LAW

37. The applicants complained under Articles 3, 8 and 13 of the Convention that a particular method of treatment of her medical condition, namely a Blakemore tube, had been applied to Mrs Daskalova against her will, causing her great distress. Article 3 reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8 states that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The text of Article 13 is:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

38. The Government disagreed, relying on several arguments concerning the admissibility and the merits of the complaints. They submitted, *inter alia*, that the applicants could not claim to be victims of the alleged violations of the Convention, which concerned exclusively the late Mrs Daskalova, and, separately, that the applicants had obtained compensation.

39. The applicants replied, *inter alia*, that the Supreme Court of Cassation had failed to recognise Mrs Daskalova's legal right to be free from forced treatment, seeing that it had only found a breach of "ethical rules", not of a right. The court had dealt with the first applicant as the direct victim of the impugned conduct of the medical personnel. Furthermore, the second and third applicants had not been included as victims. The applicants finally alleged that the relevant domestic law was defective in the light of the relevant international standards and that the Bulgarian courts had never imposed sanctions for medical treatment without the patient's consent.

40. The Court observes that by its final judgment of 13 September 2010 the Supreme Court of Cassation awarded BGN 6,000 (approximately EUR 3,100) in non-pecuniary damages to the first applicant following its finding that the medical doctors had failed to respect Mrs Daskalova's categorical refusal to be treated with a Blakemore tube and had done so in violation of the Health Act.

41. The Court reiterates that it falls first to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII). A decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the

national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 30, § 66; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Siliadin*, cited above, § 62).

42. As to the redress which has to be afforded to an applicant in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case (see *Watkins v. the United Kingdom* (dec.), no. 35757/06, 6 October 2009, with further references).

43. In the present case the Supreme Court of Cassation acknowledged expressly that the hospital's failure to comply with Mrs Daskalova's refusal to undergo treatment with a Blakemore tube had been unjustified. This was precisely the ground on which the applicants had alleged, in their application to the Court, that there had been violations of Articles 3 and 8 of the Convention. The domestic court furthermore awarded damages in an amount that does not appear unreasonable, considering that the first applicant was not the direct victim of the impugned medical intervention (compare *R.R. v. Poland*, no. 27617/04, §§ 107-108, ECHR 2011 (extracts)).

44. The Court does not find convincing the applicants' arguments that the acknowledgment contained in the final domestic judgment was insufficient or indirect. The Supreme Court recognised expressly that the conditions set out in the Health Act for the application of urgent treatment without Mrs Daskalova's consent had not been fulfilled. For the purposes of the victim issue, the precise legal construction applied by the domestic court is of relatively minor importance, provided that it resulted – as it did in the present case – in findings which contain in substance an acknowledgement and an award of damages.

45. In these circumstances, and noting that the second and third applicants, the first applicant's sons, did not formulate individual complaints separate from all the applicants' joint complaint in relation to the last hours of the life of Mrs Daskalova, the Court considers that none of the applicants can any longer claim to be a victim, within the meaning of Article 34 of the Convention, of the alleged violations of Articles 3 and 8.

46. This conclusion is not affected by the fact that the criminal investigation against the doctor concerned ended without any acknowledgement of misconduct or irregularity. A remedy in the civil courts may be generally sufficient, for the purposes of relevant Convention complaints, in cases of medical negligence resulting in death (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I). That is even more so in cases such as the present one, which does not concern death caused by medical professionals but a medical act carried out without the patient's consent as a life-saving measure.

47. This part of the application must therefore be rejected pursuant to Article 35 §§ 3(a) and 4.

48. The Court further finds that it is not necessary to examine whether in general the Bulgarian legal system provides adequate redress in cases of medical treatment administered without the patient's consent. That is so because in the particular circumstances of the present case the complaint under Article 13 is manifestly ill-founded within the meaning of Article 35 § 3(a), the relevant domestic civil proceedings having ended with an acknowledgement and adequate redress for the alleged violations of the Convention. The remainder of the application must therefore be rejected in accordance with its Article 35 § 4.

For these reasons, the Court unanimously

Declares the remainder of the application inadmissible.

Lawrence Early Registrar	Ineta Ziemele President