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

SECOND SECTION

DECISION

Application no. 53480/11
Yusuf and Gulten KAYAR
against Turkey

The European Court of Human Rights (Second Section), sitting on 11 October 2016 as a Committee composed of:

Paul Lemmens, *President,*
Ksenija Turković,
Jon Fridrik Kjølbro, *judges,*

and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 14 July 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Yusuf Kayar and Ms Gülten Kayar, are Turkish nationals, who were born in 1963 and live in Istanbul. They were represented before the Court by Mr F. Aydınkaya, a lawyer practising in Istanbul.

2. On 30 March 2002 after the applicants' son had been involved in a fight with some of his friends at school, he was brought to Bakırköy Education and Research Hospital.

3. The applicants then brought him to Haseki Education and Research Hospital. Based on a cerebral tomography, the applicant's son was discharged from hospital.

4. On 2 April 2002, since the condition of the applicants' son worsened, he was taken to Bakırköy Education and Research Hospital. He received treatment in the form of an injection and was sent home.

5. On the same day at around 11 p.m. his condition worsened once again. He was admitted to Haseki Education and Research Hospital.

6. His condition, however, had deteriorated by 2 a.m. and he was placed in the intensive care unit.

7. On 3 April 2002 at 3.30 a.m. the applicants' son died of respiratory and circulatory failure at the age of 12.

8. The applicants lodged a criminal complaint against the healthcare professionals concerned for having caused death by negligence.

9. On 18 February 2004 the Governorship of Fatih District decided not to grant permission for prosecution.

10. Following an objection by the applicants, the Istanbul Regional Administrative Court annulled this administrative decision. Criminal proceedings were accordingly initiated and the applicants joined as civil parties.

11. The Forensic Medicine Institute, which the case had been referred to for expert evidence, held that the doctors should have noticed the child's condition (namely, sepsis) was deteriorating and that the Ministry of Health had been at fault in the provision of services (*hizmet kusuru*). It considered that it was not possible to ascertain the extent to which the doctors had been at fault since they had not kept any record, other than those related to the battery, which would have allowed the estimation of the stage of sepsis at which the child had been admitted to the hospital.

12. On 25 May 2009 the Fatih Criminal Court of General Jurisdiction acquitted the healthcare professionals of the charges. The applicants appealed.

13. Although an appeal was still pending before the Court of Cassation when the application was lodged with the Court, the criminal proceedings became time-barred as acknowledged by the applicants and noted in the opinion of the Public Prosecutor of the Court of Cassation.

14. At the request of the Registry, the applicants submitted further information in their letter dated 16 June 2013, according to which, on 3 April 2003 they initiated proceedings seeking compensation. They claimed 10,000 Turkish Liras (TRY) for their pecuniary loss and TRY 50,000 for their moral suffering.

15. On 11 March 2008, the Istanbul Administrative Court awarded the applicants TRY 50,000 in respect of non-pecuniary damage, TRY 1,780 in respect of pecuniary damage, together with accrued interest thereon as well as TRY 2,500 and TRY 5,242 in costs and expenses.

16. On appeal, lodged by the Ministry of Health, the Supreme Administrative Court upheld the decision of the first-instance court.

COMPLAINTS

17. The applicants complained under Articles 1, 2, 8 and 6 of the Convention that their son, who had been healthy, had died because of the medical negligence of the State Party's healthcare officials. They alleged that due to the statutory time-limit they had been denied an effective remedy in respect of their son's death, which had warranted the application of Article 85 of the Code of Criminal Procedure, among others.

18. According to them, as established by the expert evidence obtained from the Forensic Medicine Institute, the Ministry of Health was also responsible for the death of their son, since it did not make adequate provision for securing high professional standards among health professionals and the protection of the lives of patients.

19. The applicants also complained of the excessive length of criminal proceedings and argued that the delays should be attributed to the justice system. They further complained that the criminal courts had not examined crucial evidence when ruling on their case.

THE LAW

20. The Court, being the master of the characterisation to be given in law to the facts of the case, considers that the applicants' complaints fall to be examined under Article 2 of the Convention in its substantive and procedural aspects.

21. In this connection, the Court reiterates that in the specific sphere of medical negligence, 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. The obligation may, for instance, also be satisfied if the legal system affords victims a remedy in the civil/administrative courts and/or disciplinary measures, 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 to be obtained (see, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I).

22. The Court reiterates that the acts and omissions of the authorities in the field of health care policy 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 in themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see *Powell v. United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006).

23. Although, the Court's case-law does not exclude the provision of a criminal-law remedy in the context of medical negligence, the Court considers that, the appropriate legal remedy to be used by the applicants in the Turkish legal system would be to complain about medical negligence in the civil and/or administrative court proceedings (see, *Karakoca v. Turkey* (dec.), no. 46156/11, ECHR, 21 May 2013).

24. In the present case, the applicants' complaints concern exclusively the criminal proceedings which were conducted against the healthcare professionals who involved in the treatment of their son. Those proceedings were time-barred due to the statutory time-limit.

25. The Court notes that while the criminal proceedings were pending, the administrative continued to examine the applicants claims and found the Ministry of Health liable on the grounds that the doctors involved had failed to diagnose the deceased's respiratory and circulatory failure and to provide the required treatment. As a result, the applicants were awarded damages, the amount of which was not contested by the applicants before the Court.

26. Therefore, the Court considers that the application must be rejected, pursuant to 35 §§ 3 and 4 of the Convention, for being manifestly ill-founded.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 17 November 2016.

Hasan Bakırcı
Deputy Registrar

Paul Lemmens
President