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

FOURTH SECTION

DECISION

Application no. 52920/13
Oana NAN
against Romania

The European Court of Human Rights (Fourth Section), sitting on 24 January 2017 as a Committee composed of:

Paulo Pinto de Albuquerque, *President,*
Iulia Motoc,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 8 August 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Oana Nan, is a Romanian national who was born in 1970 and lives in Constanţa. She was represented before the Court by Mr C. Haiduc, a lawyer practising in Constanţa.

2. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

A. The circumstances of the case

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

4. On 7 October 2011, the applicant lodged a claim for damages against the dental practice of Dr A.M. with Constanţa District Court. She contended that Dr A.M. had been negligent in providing her with dental care and sought compensation amounting to 8,000 euros (EUR) in respect of

pecuniary and non-pecuniary damage arising from the suffering and health problems that the treatment in question had caused her. She submitted that in 2001 Dr A.M. had fixed bridges onto her maxilla and her mandible. As the bridges later became detached, in 2008 she asked the same dentist to repair them. The treatment was completed in 2009 and she paid EUR 3,000 for it. However, shortly after the bridges had been permanently fixed, they became detached again. Moreover, she suffered great pain when eating and her face had become asymmetrical because of the change in alignment of her upper jaw.

5. The applicant also claimed that because of the deficiencies in the dental work carried out by Dr A.M. she had had to leave her job on a cruise ship and come back to Romania. Accordingly, she had lost a significant amount of money as she had had to terminate her employment contract before the contractually stipulated end-date.

6. The court asked the Constanţa Forensic Institute to prepare a medical expert report. The report dated 8 March 2011 stated that the treatment chosen by Dr A.M. for the applicant's mandible had been inadequate given the number of the applicant's teeth (only four), their disposition in her mouth, and the diagnosis of periodontitis. It also stated that the dental bridgework executed on the upper jawbone had not been correctly adapted to the cervical and axial margins and had led to functional disorders (masticatory, phonetic and physiognomic).

7. The report was sent for confirmation to the Mina Minovici National Forensic Institute.

8. On 27 April 2011 the National Forensic Institute confirmed the report in part. It stated that the dental prosthesis fixed on the mandible had not been the best choice of treatment as it had minimal chances of functional and esthetical integration. It stated that the right choice of treatment would have been a removable prosthesis. It added that the failure of the mandibular prosthesis had been hastened because the bridges had remained in place provisionally for a prolonged period of time. However, it concluded that there had been no medical errors in the treatment provided to the applicant and that Dr A.M. had complied with ethical and deontological norms.

9. On 9 May 2012 the court heard evidence from P.C., a nurse employed by the dental practice of Dr A.M. She stated that she had heard Dr A.M. suggesting a removable mandibular prosthesis to the applicant and the applicant refusing the suggestion. The applicant challenged her statements, claiming that the dentist had advised her to have a fixed prosthesis, given her age and circumstances.

10. The court also heard evidence from C.G., a dental technician. She stated that the applicant appeared to be satisfied with the dental work carried out by Dr A.M.

11. Both the applicant and Dr A.M. gave evidence before the district court. In her statement, as well as in her written observations submitted at

the end of the oral hearing, Dr A.M. stated that she had proposed a removable prosthesis to the applicant but the latter had refused and insisted on having a fixed prosthesis on her mandible.

12. Dr A.M. submitted a set of questions to be put to the applicant. To the questions "Do you admit that I proposed a removable prosthesis as the best solution for your situation?" and "Do you admit that you categorically refused a removable prosthesis?" the applicant replied "No, the doctor proposed a fixed prosthesis. She also suggested a removable prosthesis but she told me that a fixed prosthesis was more suitable for my age."

13. In a judgment delivered on 6 June 2012 the Constanţa District Court dismissed the applicant's action on the ground that no medical negligence had been committed. It held that the applicant had not proved that Dr A.M. had committed any medical error. The court noted that according to P.C.'s statement, Dr A.M. had proposed a removable prosthesis to the applicant and had explained the risks of a fixed prosthesis on her mandible but the applicant had refused treatment with a removable prosthesis, which in the National Forensic Institute's opinion represented the more suitable treatment for her situation.

As regards the reliability of the statements made by P.C., an employee in the medical practice of Dr A.M., the court noted as follows:

> "Although the applicant suggested that P.C.'s statements should not be taken into account because they were subjective, given her position as an employee of the defendant, the court will take her statements into account. The fact that the witness is the defendant's employee does not prove a lack of sincerity."

14. Based on P.C.'s statements and the applicant's replies to the questions submitted by Dr A.M., the court concluded that the applicant had refused a removable prosthesis even though she had been informed of the risks of a fixed prosthesis and had given her consent to the chosen treatment. The court also noted that the prostheses had been fitted only provisionally between January 2009 and March 2009 because of the applicant's failure to pay the dentist the total cost of the executed work. The dentist could therefore not be held responsible for the subsequent detachment of the bridges.

15. The court also noted that the applicant gave back to Dr A.M. the dental prosthesis fitted onto her lower jaw and had been reimbursed EUR 1,700. As regards the work on the upper jaw, however, the court noted that the applicant had kept the prosthesis and her request for reimbursement of EUR 1,300 was therefore unjustified.

16. The applicant lodged an appeal on points of law. She submitted that the district court had drawn the wrong conclusion concerning her role in choosing the right medical treatment for her situation. As a patient she had not had the specialist knowledge needed to make a decision in this field; she had therefore sought the advice of a specialist who, according to Law no. 46/2003, had an obligation to inform her about her health status, to

propose the most appropriate treatment and to inform her about the potential risks of each proposed medical procedure. She maintained that she was mainly complaining about the treatment chosen by the doctor and not about the manner in which it had been carried out.

17. On 28 February 2013 the Constanţa County Court had dismissed the appeal, upholding the judgment of the first-instance court. It held that Dr A.M. had informed the applicant about her medical situation and had explained the risks of the chosen treatment. The county court noted the patient's consent to the proposed treatment and, basing its decision on the conclusions of the expert report of the Commission of Confirmation and Supervision attached to the Mina Minovici National Forensic Institute, it concluded that Dr A.M. had not been negligent in providing the dental treatment to the applicant.

B. Relevant domestic law

18. Article 12 of the Code of Deontology of Dental Practitioners of 25 June 2005 in force at the relevant time obliges the dental practitioner to obtain the patient's informed consent to any treatment or investigative work. For treatment involving a high risk, the patient's written consent was required.

19. This article was repealed and replaced by a new article on 15 May 2010. According to the new article (Article 11) the dental practitioner has an obligation to obtain the patient's informed consent to any medical activity or treatment plan. This article does not expressly require the patient's consent in writing.

20. Under Article 37 of Law no. 46/2003, the breach of a patient's right to be informed and consulted may entail disciplinary or criminal action against the medical practitioner, depending on the applicable law.

COMPLAINTS

21. The applicant complained under Article 8 of the Convention of the lack of an effective mechanism enabling her to obtain compensation for the damage suffered as a result of the dental treatment provided by Dr A.M.

22. Relying on Article 6 § 1 of the Convention the applicant complained of the excessive length of the proceedings she had initiated against Dr A.M.

THE LAW

A. Complaint under Article 8 of the Convention

23. Relying on Article 8, the applicant complained that Dr A.M. had failed in her obligation to inform her fully of the risks of the dental treatment, with the result that she had not been able to give her informed consent. She also complained about the ineffectiveness of the Romanian judicial system in failing to sanction a dentist who had performed her duties in an inept manner. Article 8 of the Convention, reads as follows:

> "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."

1. The parties' submissions

24. The Government raised a plea of non-exhaustion of domestic remedies, arguing that the applicant should have instituted a disciplinary action against the doctor before lodging a civil claim for compensation. They further contended that disciplinary proceedings would have been an effective remedy in the circumstances of the case, referring to the Court's findings in the case of *Stihi-Boos v. Romania* (dec.), no. 7823/06, §§ 42-43, 11 October 2011.

25. The Government submitted that the applicant's complaint under Article 8 of the Convention concerned two different issues: on the one hand the applicant complained about the dental treatment carried out without her informed consent and on the other hand she had complained about the ineffectiveness of the Romanian judicial system in failing to sanction a professional who had performed her duties in an inept manner, and had thereby interfered with the applicant's physical integrity.

26. As regards the lack of informed consent, the Government argued that the applicant had been fully aware of the treatment that was to be performed on her. According to Dr A.M., corroborated by the statements of P.C. and C.G., a removable prosthesis had been proposed to the applicant but she had refused it, asking for a fixed one. The domestic courts had examined the applicant's allegations in this respect and dismissed them, providing sufficient reasoning for their decisions.

27. Moreover, in respect of the ineffectiveness of the Romanian judicial system, the Government maintained that the applicant had had effective civil and disciplinary remedies at her disposal. Her civil claim had been

examined by the national courts, which had diligently examined all the evidence in the file. An expert report had been ordered.

28. The Government also maintained that an adequate legal framework had been devised in Romania which allowed the protection of patients' rights to be taken into account. In this respect they referred to Law no. 46/2003 and Law no. 95/2006 as well as to the Dentists' Deontological Code.

29. The applicant submitted that she had exhausted the available domestic remedies by lodging a civil action in tort, which in her opinion seemed the most appropriate remedy for obtaining compensation for medical negligence.

30. The applicant claimed that Dr A.M. had failed to inform her of the nature and the possible consequences of the proposed dental treatment and accordingly to obtain her informed consent. She also complained of the failure of the national courts to grant her civil claim.

31. She contended that under Romanian law she had the right to be provided with sufficient information to allow her to make an informed decision about the proposed treatment. However, Dr A.M. had failed in this respect. The national courts had not investigated the case in sufficient depth to establish the relevant facts and to determine whether Dr A.M. had fulfilled her professional duties.

32. She also contended that Dr A.M.'s civil liability should have been engaged, taking into consideration the findings of the expert report which stated that the bridgework on the lower dental arcade had been incorrectly and incompletely executed. Moreover, the Commission of Confirmation and Supervision of the Mina Minovici National Forensic Institute had commented that repairing the maxillary bone arcade with a fixed prosthesis had not been a correct choice considering the pre-existent pathological condition.

33. Lastly, she contended that she had not been awarded any compensation by the Romanian judicial authorities even though her health had been impaired and her physical integrity interfered with through inadequate medical treatment.

2. The Court's assessment

34. The Court notes that the Government raised a preliminary objection of non-exhaustion of domestic remedies. However, it considers that there is no need to examine it separately, in so far as this complaint is in any case inadmissible for the reasons explained below.

35. The Court notes that it has already held that people's physical and psychological integrity, their involvement in the choice of medical care administered to them and their consent in this respect, as well as their access to information enabling them to assess the health risks to which they are exposed, fall within the ambit of Article 8 of the Convention (see

Trocellier v. France (dec.), no. 75725/01, 5 October 2006; *A.K. v. Latvia*, no. 33011/08, § 63, 24 June 2014; and *S.B. v. Romania*, no. 24453/04, § 65, 23 September 2014). Even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life if it is carried out against the individual's will (see *Storck v. Germany*, no. 61603/00, § 143, ECHR 2005-V).

36. The Court further reiterates that a medical intervention without the free and informed consent of the patient will amount to an interference with the patient's right to private life as protected by Article 8 of the Convention (see, among other authorities*, X v. Finland*, no. 34806/04, §§ 212-214, ECHR 2012 (extracts)).

37. In the present case the dentist acted on a contractual basis and in her private capacity; the interference with the applicant's physical integrity cannot therefore be directly imputed to the respondent Government.

38. However, even though the applicant's complaint concerns a private practitioner and not a State employee, the Court reiterates that Contracting States are under a positive obligation to maintain and apply in practice an adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases (see *S.B. v. Romania*, cited above, § 66; compare, with regard to positive obligations under Article 2 of the Convention, *Colak and Tsakiridis v. Germany*, nos. 77144/01 and 35493/05, § 30, 5 March 2009, and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I).

39. In the present case the applicant did not argue before the Court that the domestic framework itself was inadequate to ensure an appropriate level of care and information. Rather the applicant complained that Dr A.M. had been negligent because she had failed to comply with the applicable domestic regulations and that the civil courts had not properly examined her claim.

40. In these circumstances the Court considers it appropriate to address the procedural aspect of the applicant's complaint, namely the question of whether her rights under Article 8 of the Convention were sufficiently respected in the context of the civil proceedings in which she sought compensation for the alleged failure of Dr A.M. to comply with domestic law.

41. The Court notes that the domestic legislation expressly provides for the patient's right to be provided with information that will allow that patient to give − with a corresponding obligation on the doctor's part to obtain − informed consent prior to any procedure involving risk (see paragraphs 18-20 above).

42. The Court further observes that the domestic courts examined the applicant's arguments concerning her consent and found that the dental treatment had not been carried out against her will. Relying on witness

testimonies and the applicant's replies to the questions asked by Dr A.M., the courts found that the applicant had consented to it in full awareness of the consequences (see paragraphs 14 and 17 above). The Court defers to the findings of the domestic authorities, which are ultimately better placed to assess the matter (see *E.M. and Others v. Romania* (dec.), no. 20192/07, § 55, 3 June 2014).

43. Moreover, the Constanţa District Court held in its judgment of 6 June 2012, upheld by the Constanta County Court in its decision of 28 February 2013, that there had been no medical negligence on the part of the dentist. The domestic courts concluded that the applicant's condition was partly the result of her own negligence, as she had caused the bridges to be kept in place provisionally for a prolonged period of time. In this respect, the Court notes that these findings coincided with the conclusions of the expert report issued on 27 April 2011 which concluded that there had been no medical negligence in the treatment provided to the applicant. The same courts also dismissed the applicant's civil claim for compensation in respect of pecuniary damage, noting that Dr A.M. had reimbursed the applicant EUR 1,700 for the work carried out on the mandible. They also concluded that Dr A.M. should not reimburse the remaining EUR 1,300, as the applicant was still wearing the dental prosthesis fitted onto her maxilla (see paragraph 15 above). It is not for the Court to gainsay these findings.

44. To sum up, there is no evidence that the safeguards laid down by Romanian law were not properly applied in the applicant's case or that the domestic courts can be faulted for not properly delving into the applicant's claims.

45. The mere fact that proceedings concerning medical negligence have ended unfavourably for the person concerned does not in itself mean that the respondent State has failed in its positive obligation under Article 8 of the Convention (see *Vasileva v. Bulgaria,* no. 23796/10, § 68, 17 March 2016).

46. In the light of the above, it cannot be said that the authorities did not provide the applicant an effective procedure enabling her to obtain compensation for the medical malpractice to which she alleged to have fallen victim.

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

B. Other complaints

48. The applicant raised a complaint under Article 6 § 1 of the Convention, alleging that the proceedings had been unreasonably lengthy. However, in the light of all the evidential material in its possession, and in so far as the matters complained of are within its competence, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

49. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 16 February 2017.

Andrea Tamietti
Deputy Registrar

Paulo Pinto de Albuquerque
President