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

FIFTH SECTION

DECISION

Application no. 45046/16
P.H.
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 10 October 2017 as a Committee composed of:
Nona Tsotsoria, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*
Having regard to the above application lodged on 30 July 2016,
Having deliberated, decides as follows:

THE FACTS

1. The applicant is an Irish national, who was born in 1977 and lives in Co. Cork. He was represented before the Court by Denis O'Sullivan & Co., a law firm in Cork.

The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant, who suffered from abdominal trouble, was admitted to hospital with ulcerative colitis on 6 February 2007. His condition deteriorated and, six days later, he underwent an emergency subtotal colectomy. His condition at first improved but then worsened, leading to a second operation on 20 February. This revealed an internal leak and infection causing the surgical wound to break down. The leak was attributed to the fact that the applicant had been taking steroids on a long-term basis, which diminished the body's capacity to heal. The applicant's condition

required the repeated washing of the infected area, which took place under general anaesthetic every two days. On 1 March, a pelvic swab that had been used during the washing procedure of 27 February tested positive for the Methicillin-resistant Staphylococcus aureus (MRSA) infection. The applicant was then placed in an isolation unit, where he had to remain until he had three consecutive negative tests for the infection. He was discharged from hospital on 5 April 2007.

1. Proceedings in the High Court

4. In January 2009 the applicant instituted proceedings against the hospital alleging negligence by the medical staff in relation to the information and explanations provided to him about his condition. He claimed as well that he had been allowed to believe that MRSA had set in, and that his life was in danger. He asserted that the medical staff had negligently failed to explain the significance of the MRSA-positive test result of 1 March 2007, having regard to the fact that he was already receiving the necessary medication to treat the infection. He further claimed that he had been misled into believing that the MRSA infection persisted through to the date of his discharge from hospital. On account of these alleged shortcomings, he had experienced very great distress and anxiety.

5. During 2009 and until February 2010 there were several exchanges between the parties' solicitors, seeking and providing further and better particulars of the claim and the defence. In July 2011 the applicant obtained a second expert report for use at trial. At the end of September 2011 the applicant's solicitor provided further particulars to the defence about the negligence claim.

6. The hearing commenced before a judge of the High Court on 18 October 2011 and took place over seven days, ending on 2 November 2011. Judgment was delivered on 25 November 2011. The trial judge noted the conflicting evidence of the parties, and stated that, having seen and heard the witnesses, she had little difficulty in resolving the conflicts in favour of the defendant hospital. She rejected the applicant's assertion that he had not been advised of the true nature of the medical problems that arose after the surgery of 6 February 2007. She found that the situation had been correctly explained to him in terms he could readily understand, and that there had been no gaps in the information provided that could have led him to believe that MRSA, rather than leakage at the site of the surgical wound, was the cause of the complications.

7. The trial judge also found that the applicant had been told of the result of the test that gave the positive result for MRSA, that he would be given antibiotics to treat it and placed in isolation to protect other patients. She was satisfied that the nursing staff offered reassurance and explained the need to have three negative test results before he could be considered free of

the infection, and that he was informed of each test result, up to the final result that made it possible to discharge him.

8. One of the contested issues of evidence concerned the communication between the hospital consultant and the applicant and his family. According to the applicant, his partner and his sister, all of whom gave evidence at the trial, the consultant had told them that MRSA had been detected in the wound and that he was now trying to save the applicant's life. Subsequently, when the consultant took the stand, he denied having spoken in this way. He added that he had given a much more complete explanation to the partner and sister, which took place outside the applicant's room and lasted for up to forty minutes. This meeting had not been mentioned by counsel for the defence during his earlier cross-examination of the two witnesses. The barrister explained to the court that this was an oversight on his part, since he had been informed of this evidence but had omitted to put it during cross-examination. Counsel for the applicant indicated to the trial judge that, in light of this new evidence, he would not be able to conduct his cross-examination of the witness without receiving further instruction. The trial judge adjourned the hearing until later in the day. When it resumed, the applicant's counsel, who had been able to confer with the two witnesses, cross-examined the consultant at length, suggesting to him that his evidence about meeting the applicant's partner and sister was untrue. The consultant denied this. Before the trial concluded, the two witnesses were recalled and the consultant's evidence put to them about meeting them outside the room. They denied that such a meeting had taken place.

9. On this point the trial judge preferred the evidence of the consultant, stating that she found him to be an impressive witness and that his evidence was more credible than that offered on behalf of the applicant. She stated that she had reached this conclusion having regard to the applicant's written submissions on the matter, and taking into account that the two witnesses had had to be recalled to be cross-examined on the matter. She had also taken account of the fact that defence counsel should have put the matter to the two witnesses, but had overlooked the point when cross-examining them.

10. Finally, the trial judge observed that, in any event, damages could not be recovered under domestic law for distress and anxiety that did not attain the level of psychiatric injury.

2. Appellate review

11. The applicant lodged an appeal on 17 January 2012, setting out 36 grounds in the notice of appeal. Around that time, a proposal to deal with the chronic overloading of the Supreme Court, contained in a report published in 2009, was under consideration by the domestic authorities. The proposal was later accepted by the Government, necessitating a referendum to amend the Constitution that took place on 4 October 2013. The Court of

Appeal Act was passed in July 2014, and the new court was established on 28 October of that year. The applicant's case was immediately transferred there. On 10 February 2016 the appeal was dismissed.

12. The court noted that of the numerous grounds contained in the notice of appeal, almost all concerned specific findings of fact by the trial judge on the basis of her assessment of the witnesses. The essential question was whether the trial judge had been entitled to come to the conclusion that the hospital had given the applicant full and correct information about his medical condition and about the MRSA. The court rejected the applicant's complaint that the trial judge's reasoning was insufficient. It found that she had systematically examined the evidence and given detailed justification for her various findings of fact.

13. The court noted that the judge's findings regarding the evidence given by the consultant formed a major part of the appeal. Given the omission on the part of defence counsel, one response would have been for the trial judge to exclude the consultant's evidence. That would however have been an extreme course that might have caused injustice by refusing to hear relevant admissible evidence. The trial judge could also have declared a mistrial and arranged a fresh trial of the case, but it would have been difficult to defend this as a fair and just course of action. Instead, the judge had followed the usual approach in such circumstances, allowing the evidence which was subject to cross-examination and permitting the plaintiff to recall his witnesses to deal with the unanticipated evidence. The abiding consideration should be that the evidence was relevant and admissible, and so should be heard, subject to appropriate, fair and just procedural measures. The trial judge had been entitled to deal with the issue in the way she did.

14. Overall, the court was satisfied that the trial judge had addressed all the relevant issues and had drawn her conclusions following a careful analysis of the evidence. She had provided detailed reasons for preferring one version to the other, and there was sufficient evidence to justify her findings. There was no basis in the facts of the case for a finding of negligence or breach of duty by the hospital towards the applicant. The court added that, as had been observed by the trial judge, even were the applicant's factual assertions to be accepted in full it would not amount to a cause of action in law. In its conclusions, the Court of Appeal noted that the case was novel, speculative and its underlying factual basis was fragile in the extreme.

15. The applicant sought leave to appeal to the Supreme Court. In a determination dated 11 May 2016, the Supreme Court refused leave. It noted that the central plank of the appeal was that the trial judge had relied on an unsworn assertion by counsel in resolving a dispute of fact between the parties. The Supreme Court noted that the "assertion" in question referred not to the fact of the meeting, but to the explanation given by

counsel for failing to put the consultant's evidence about the meeting during his cross-examination of the two witnesses for the applicant. It observed that this was not part of the evidence of the case, but an explanation for why the questions had not been put. The evidence in question was the sworn testimony of the consultant about the meeting. Counsel's omission was a regrettable but not entirely unusual scenario. The trial judge had dealt with the situation fairly.

COMPLAINTS

16. The applicant complained under Article 6 the Convention that the proceedings in the High Court had not been fair, and that the trial judge had displayed a lack of impartiality. Secondly, he complained that the Court of Appeal had failed to address the central issue in his appeal. Under Article 13 of the Convention he complained that there was no remedy available at the domestic level in relation to these complaints. Thirdly, he complained that the proceedings had not been determined within a reasonable time.

THE LAW

A. Complaints under Article 6 of the Convention

17. Article 6 of the Convention provides, insofar as relevant:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

1. Complaints in relation to the High Court

18. The Court would first recall that it is not its function to deal with alleged errors of law or fact committed by national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, as a recent authority and with further references, *De Tommaso v. Italy* [GC], no. 43395/09, §§ 170-171, 23 February 2017), for instance where they can be said to amount to "unfairness" in breach of Article 6 of the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. In principle, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration

are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable. The Court's sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing.

19. As regards the manner in which the trial judge dealt with the mistake by counsel over the consultant's evidence, the Court has no reason, on the basis of the material before it, to call into question the view of the Court of Appeal and the Supreme Court that she had sought a practical and just solution to a problem arising unexpectedly during the hearing of the case. While the applicant complains that the trial judge accepted the explanation by defence counsel for his failure to refer to the consultant's evidence about a longer meeting during his cross-examination, describing this as an "unsworn assertion", the Court notes that the Court of Appeal expressly endorsed as just, reasonable and procedurally correct the course taken by the trial judge. A similar view was expressed by the Supreme Court. For its part, the Court cannot see any ground to find that this particular aspect rendered the proceedings as a whole unfair. On the contrary, it is plain that the trial judge made allowance for the difficulty posed to the applicant by allowing his counsel time to take instruction before commencing cross-examination of the consultant, and to recall the two witnesses to respond to the different version of events.

20. As for the complaint that through her handling of this matter the trial judge displayed objective bias against the applicant, the Court finds this to be wholly unsubstantiated.

21. It follows that the applicant's complaints in relation to the High Court are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Complaint in relation to the Court of Appeal

22. Regarding the applicant's criticism of the Court of Appeal, the Court does not agree that the key issues in the appeal were not addressed. As noted above, the Court of Appeal explicitly approved the trial judge's handling of the error in relation to the consultant's evidence and generally endorsed her findings and conclusions on the evidence before her. It may be regarded as implicit in this that the Court of Appeal rejected any suggestion of bias on the part of the trial judge, an allegation for which, as stated above, the Court can see no foundation.

23. This leads the Court to conclude that the applicant's complaint in relation to Court of Appeal is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

3. Duration of the proceedings

24. The applicant complained about the overall duration of the proceedings, and in particular of the delay at the appellate stage.

25. The Court notes that, having begun on 27 January 2009 and concluded on 11 May 2016, the duration of the proceedings was just over seven years and three months.

26. According to the Court's well-established case-law, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard in particular to the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII, and *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, § 34, 8 September 2011).

27. Regarding the circumstances of the case, the Court notes from the elements in the case file that while the applicant instituted proceedings in early 2009, it was some considerable time before the case was ready for trial (see paragraph 6 above). Once the action was ready to be heard, at the end of September 2011, the trial began three weeks later, on 18 October 2011. The applicant has not sought to attribute any delay at this stage of the proceedings to the judicial authorities. Nor did he suggest that it had been caused by the defendant.

28. The Court does not consider that the case was particularly complex. While there were conflicts in evidence presented to the High Court, this did not cause any delay in the trial. Nor, despite the numerous grounds raised by the applicant, was it a complex appeal case, as is clear from the terms of the judgment given by the Court of Appeal.

29. Regarding the conduct of the applicant, the Court considers that once his case had been readied for trial, there is no indication that any of the subsequent delay can be attributed to him.

30. As for the conduct of the authorities, the Court has already noted that the applicant raised no criticism of the High Court in relation to the pre-trial stage. For its part, the Court finds nothing in the case-file suggesting culpable delay on the part of the judicial authorities prior to the hearing of the case. The trial itself was conducted expeditiously, and the judgment was delivered within a matter of a few weeks.

31. Once the applicant had lodged his appeal with the Supreme Court in January 2012, no further action was taken until the file was transferred to the Court of Appeal at the end of October 2014, that is to say a period of inactivity lasting over two years and nine months.

32. The Court has already had occasion to refer to the structural problem which existed in Ireland at that time affecting appeals from the High Court (see *McFarlane v. Ireland* [GC], no. 31333/06, § 93, 10 September 2010, a case involving criminal proceedings in which the Government referred to an

average time of 34 months at that stage for completion of an appeal to the Supreme Court). The applicant's case was also affected by this problem.

33. The Court must however take account of the actions of the Irish authorities in 2013 and 2014 to deal with the appellate backlog. In this period, the respondent State significantly modified its legal system by creating a new Court of Appeal. This required holding a referendum to amend the Constitution, adopting legislation establishing the new court and allocating the necessary resources to it. As soon as it came into being, a very large number of pending appeals were transferred to it. These measures had a positive effect on the applicant's case, which was heard and decided within a period of just over fifteen months. Bearing in mind the large volume of litigation that the Court of Appeal had to deal with from the outset, the handling of the applicant's appeal once it was before that court cannot be regarded as anything other than efficient (see also *Brennan v. Ireland,* [Committee], no. 44360/15, §§ 54-55, 2 November 2017).

34. The final stage of the proceedings, seeking leave to appeal to the Supreme Court, was completed without delay, lasting three months.

35. As for what was at stake for the applicant in the proceedings, the Court recognizes that, as is amply demonstrated by the contents of the case-file, the applicant suffered from very serious physical ailments. However, the proceedings he brought against the hospital did not allege medical error. Instead, the case concerned the quality of communication between the medical staff on the one hand and, on the other, the applicant and his family. While such an issue is undoubtedly of importance, it cannot be placed at the same level as medical malpractice causing injury or damage to the patient's health, or proceedings brought by persons faced with life-threatening conditions where exceptional diligence may be required (see *Oyal v. Turkey*, no. 4864/05, § 89, 23 March 2010, with further references).

36. In light of the above consideration, and having regard to all the elements submitted to it, the Court concludes that the applicant's complaint regarding the duration of the proceedings is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaints under Article 13 of the Convention

37. Article 13 provides:

> "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. According to its established case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). Having regard to the reasoning and

conclusions set out above in relation to the Article 6 complaints, the Court finds that the applicant has no arguable claim for the purpose of Article 13 of the Convention. It follows that this complaint is also 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 2 November 2017.

Anne-Marie Dougin Acting Deputy Registrar	Nona Tsotsoria President