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

SECOND SECTION

DECISION

Application no. 24415/12
Güldane TELLİ and Nezir TÜNÇ
against Turkey

The European Court of Human Rights (Second Section), sitting on 1 October 2013 as a Committee composed of:

Peer Lorenzen, *President,*
András Sajó,
Nebojša Vučinić, *judges,*
and Seçkin Erel, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 20 March 2012,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Güldane Telli and Mr Nezir Tünç, are Turkish nationals, who were born in 1974 and 1963 respectively and live in İzmir and Mardin. They were represented before the Court by Mr M. Ş. Yücesoy and Mr M. B. Tek, lawyers practising in Mardin.

On 17 November 2009 the applicants' daughter Gülizar Tünç ("G.T.") was admitted to the Kızıltepe State Hospital on suspicion of swine flu.

On the same day after the administration of a treatment, she was allowed to return home with a drip attached to her arm.

Five hours later, as frothy saliva started to come from her mouth G.T. was brought to the hospital once again.

They were referred to the Dicle University School of Medicine in Diyarbakır since G.T.'s condition was getting worse. They had to wait at the Kızıltepe State Hospital until 11.00 p.m. for an available room and ambulance.

When G.T. reached the Dicle University Hospital, her heart had already stopped.

Following a treatment that lasted eight days the applicants' daughter was diagnosed with meningitis.

On 24 November 2009 she died at 12.00 p.m.

An autopsy was carried out on the same day.

The applicants lodged a complaint with the public prosecutor of Diyarbakır against the health personnel of the Kızıltepe State Hospital for having caused death by negligence. The latter referred the case to the public prosecutor of Kızıltepe for lack of jurisdiction.

The public prosecutor of Kızıltepe carried out the investigation, during which expert evidence was sought from the İstanbul Forensic Medicine Institute. The latter issued its opinion on 30 March 2011. It concluded that the cause of death could not be determined.

Although the applicants objected to its findings, based on the expert opinion of the Forensic Medicine Institute, the public prosecutor of Kızıltepe gave a decision of non-prosecution on 7 July 2011. He took note of the police records kept upon the deceased's second admission to the Kızıltepe State Hospital, according to which the deceased had declared that she had been beaten by her father. However, he observed that there was no evidence suggesting assault and/or battery. As for the health personnel of the Kızıltepe State Hospital, he held that according to the expert report there was no finding suggesting any fault or negligence attributable to them.

On 17 October 2011 Midyat Assize Court upheld the decision of non-prosecution. The applicants were notified of the final decision on 7 December 2011.

COMPLAINTS

The applicants complained under Articles 2, 6 and 13 of the Convention that their daughter had been sent home with a drip based on a wrong diagnosis and kept waiting at hospital for hours. They submitted that the hospitals involved had differed in the treatment administered and diagnosis as a result of which they alleged that their daughter had died. They further called into question the adequacy and sufficiency of the report of the Forensic Medicine Institute and pointed out that it had been submitted two years after the incident of death. They also complained that they had not been informed of the procedure before the Forensic Medicine Institute.

THE LAW

The Court, being master of the characterisation to be given in law to the facts of the case, considers that all of the applicants' complaints fall to be examined under Article 2 of the Convention alone.

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 such as an order for damages and/or for the publication of the decision, to be obtained (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I).

The Court's case-law does not exclude the provision of a criminal-law remedy in the context of medical negligence. However, the Court considers that, in principle, in the Turkish system the appropriate remedy to be used by applicants complaining of medical negligence is a civil and/or administrative action (see *Karakoca v. Turkey* (dec.), no. 46156/11, ECHR 21 May 2013).

Turning to the circumstances of the present case, the Court observes that the applicants have not made use of the possibility of bringing compensation proceedings, a remedy that the Turkish legal system affords and that could have led both to the establishment of the health care professionals' liability and to the payment of damages. In this connection, the Court notes that there is nothing in the case file to allow it to conclude that an action for damages would have no reasonable prospects of success and was bound to fail.

It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention on the grounds of a failure to exhaust domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Seçkin Erel	Peer Lorenzen
Acting Deputy Registrar	President