Selected Legislation and Jurisprudence

European Court of Human Rights

ECHR 2018/6 *Case of Ceesay v. Austria*, 16 November 2017, no. 72126/14 (*Fifth Section*)

The Facts

The applicant is a Gambian national who was born in 1969 and lives in Hamburg (Germany). The applicant's brother, Y.C., also a Gambian national, born in 1987, applied for asylum in Austria in 2004. The application was dismissed in April 2005 and Y.C.'s appeal against the decision was rejected by the Federal Asylum Office. In April 2005 he was convicted of drug trafficking and sentenced to seven months' imprisonment. He started serving his sentence and, on 12 September 2005, was placed in detention with a view to his expulsion to The Gambia, following an order issued by the Federal Police Authority.

On 27 September 2005, Y.C. went on a hunger strike, of which he informed the authorities on the following day. On that day he was handed an information pamphlet on hunger strikes. He was also orally informed about the risks involved and subjected to an initial hunger-strike examination.

Subsequently health checks were carried out daily. In the morning of 4 October 2005, he was taken to a general hospital for examination and an

* These summaries are based on the provisional text of the judgements of the European Court of Human Rights. These judgments are still subject to editorial revision before their reproduction in Reports of Judgments and Decisions. For the full provisional text, see: <http://www.echr.coe.int>.

assessment of whether he was fit to remain in detention. In its report the hospital noted, in particular: that he had dry lips and kept his eyes closed; that taking his blood had been difficult because he had resisted examination; and that, if his general condition worsened, he would have to be force-fed and taken to a psychiatric ward because he “lashed out from time to time”. The treating doctor confirmed that Y.C. was fit to remain in detention. He was subsequently taken back to the detention centre and at around 11 a.m. he was placed alone in a security cell in view of his behaviour at the hospital. A police officer checked on him every 15-30 minutes. When he checked at 12.50 p.m., Y.C. was not breathing and had no pulse. At 1.20 p.m., Y.C. was declared dead by an emergency doctor who had immediately been called to the scene.

A criminal investigation into Y.C.’s death was instituted on the same day; an autopsy was conducted on the following day. The applicant joined the criminal proceedings into his brother’s death as a private party. In early January 2006 the forensic expert who had conducted the autopsy submitted his final report. He concluded that the cause of Y.C.’s death had been dehydration combined with the fact that he had been a carrier of the sickle cell trait, which had caused a shift in the electrolyte system and had ultimately caused his heart to stop beating. Neither the authorities nor Y.C. himself had been aware that he had been a carrier of sickle cell trait. On 13 January 2006 the public prosecutor decided to discontinue the criminal investigation, as sufficient evidence could not be found to warrant criminal proceedings.

In parallel, in November 2005, the applicant brought administrative proceedings to review the lawfulness of Y.C.’s detention and lodged a complaint about the conditions of his detention. In February 2006 the Upper Austria Independent Administrative Panel (IAP) ruled that Y.C.’s detention pending his expulsion had been unlawful and that the conditions of his detention during the hunger strike had been in violation of his rights under Article 3 of the Convention. However, its decision was subsequently quashed on appeal on two occasions. On the first of those occasions, the Administrative Court held that the applicant had no standing to request a review of the lawfulness of his brother’s detention under Article 5 of the Convention (right to liberty and security). As regards the complaint about the conditions of Y.C.’s detention it held that the mere fact that a person was detained did not place any duty on the State to take measures because of the genetic disposition of that person without a manifest outbreak of disease in that person. Eventually the Panel dismissed the applicant’s complaint in July 2012, based on an expert report which had found that the need for testing Y.C.’s blood for sickle cell trait had not been indicated. The applicant’s appeals were unsuccessful.

The Law

Alleged Violation of Article 2 of the Convention

The applicant complained that there had not been an effective and comprehensive investigation into his brother's death, and that the causes of Y.C.'s death thus far remained unclear. The Court considers it appropriate to assess this complaint under the procedural limb of Article 2 of the Convention (right to life).

The Court notes at the outset that under Article 2 of the Convention, the applicant did not allege that Y.C. had died as a result of the use of force by the authorities. He complained of an insufficient investigation into his brother's death. The Court's task therefore consists of examining whether the guarantees under the procedural limb of Article 2 of the Convention have been respected — namely whether the authorities have complied with their duty to carry out an effective and comprehensive investigation in respect of Y.C.'s case.

The Court reiterates that a criminal investigation was opened by the public prosecutor on the day of Y.C.'s death. The Court finds that the steps taken by the public prosecutor were carried out promptly and without unnecessary delays. All relevant witnesses were questioned, evidence was immediately secured and seized, and an expert report concerning the cause of death was ordered. It was not disputed by the applicant that the expert Dr H. had been independent. The applicant, as a member of Y.C.'s family, was able to join the proceedings as a private party. The Court cannot discern any indication of shortcomings in the public prosecutor's investigation. The criminal investigation was ultimately closed by the public prosecutor as no sufficient evidence was found to indicate misconduct on the part of the persons in charge. The public prosecutor thereby relied on the comprehensive autopsy report and expert report issued by Dr H., which clearly stated that death through the use of force could be excluded, and that Y.C. had in fact died of dehydration, combined with the fact that he had been a carrier of sickle cell trait.

The applicant also instituted administrative proceedings before the IAP for a review of the lawfulness of Y.C.'s detention and lodged a complaint about the conditions of his detention. In the course of these proceedings, several witnesses and two experts were questioned. The IAP examined the evidence and delivered three decisions, two of which were quashed by the Administrative Court. While the IAP found that the authorities should have known that Y.C. came from a country whose inhabitants bore a high likelihood of being a carrier of sickle cell disease and therefore should have informed Y.C. of this potential

risk after he had embarked upon his hunger strike, the Administrative Court found that the mere fact that a person came from a country with a high rate of sickle cell disease did not mean that the State had a duty to test every person from a certain area for this genetic predisposition. After obtaining a second expert report, the IAP eventually acted in accordance with the legal opinion of the Administrative Court and dismissed the applicant's complaints.

The Court notes in relation to the administrative proceedings that they were equally comprehensive as the criminal proceedings. Relevant witnesses were heard, an additional expert report was obtained, and the applicant played an active role in those proceedings, was able to lodge requests, and had access to the case file. Again, the independence of the court-appointed expert was at no point called into question by the applicant. However, he did submit as evidence a statement which focused on the calculation of Y.C.'s critical weight and possible mistakes which allegedly were made in that respect. The Court, contrary to the applicant's allegation in that respect, sees no indication from the documents at hand that the IAP did not take into account the statement. In addition, the expert Dr H. concluded that the cause of Y.C.'s death had been dehydration, combined with the fact that he had been a carrier of sickle cell trait, and his death could therefore only have been prevented if he had been tested earlier for sickle cell trait, or if he had been aware that he was a carrier thereof. Another expert equally found that the calculation of the critical weight had had no bearing on Y.C.'s death.

As to the applicant's argument that the domestic authorities erred in finding that they had not been under a duty to test Y.C. for sickle cell disease merely because he came from a high-risk area, the Court notes first of all that apparently not even Y.C. had been aware of his being a carrier of sickle cell trait, and secondly finds no ground for disagreeing with the Administrative Court that the authorities had not been under an obligation to conduct medical tests without there being a clear indication or necessity to that end.

The Court therefore concludes that the manner in which the investigation into Y.C.'s death was carried out by the domestic authorities does not give rise to a violation of Article 2 of the Convention under its procedural limb.

Alleged Violation of Article 3 of the Convention

The applicant complained that the medical assistance to his brother during his hunger strike had not been in accordance with the law. Furthermore, because (1) Y.C. had been kept in detention even though he had no longer been fit to be so held, and (2) had been placed just before his death in a security cell without a water outlet, his brother had been subjected to inhuman and

degrading treatment. The Court considers that these complaints fall to be examined under the substantive limb of Article 3 of the Convention (prohibition of inhuman or degrading treatment).

In relation to the applicant's complaint that the medical treatment of Y.C. during his hunger strike was not in accordance with the relevant laws and ordinances, the Court notes in general that with regard to the steps to be taken in the event of a hunger strike, clear instructions were issued by the Ministry of the Interior to the authorities, which had been prepared after consultations with its medical service and various NGOs. The Court sees no indication that these instructions were in themselves insufficient or unclear, or that overall in the instant case they were not sufficiently followed. When Y.C. announced his hunger strike to the authorities, he was handed an information sheet in his mother tongue detailing the risks associated with a hunger strike, and he was examined by a medical doctor without delay. A hunger strike form was filled out and certain medical measures were taken on a daily basis by the police doctor on duty. There is no indication that any legal provision, internal order, recommendation or international material concerning medical care for detainees on hunger strike was disregarded. Furthermore, there were no indications that Y.C. suffered from sickle cell disease and he was not aware of it himself. At the time, even hospitals did not conduct standardised tests for that blood anomaly. The Court therefore cannot blame the authorities for not having given appropriate instructions at the outset to conduct such a test for the applicant.

The Court notes that on the morning of 4 October 2005 Y.C.'s external appearance was that of a physically fit man who was aggressive because he did not want to be examined. Even though the applicant's behaviour might, with hindsight, be considered as a sign of already advanced dehydration and a consequent disintegration of his blood cells owing to sickle cell disease, that was not foreseeable at the time of the events. When he died, Y.C. weighed 59 kg. There were no indications that his weight had ever been wrongly calculated and that he had possibly reached his critical weight (54 kg) before he died on 4 October 2005.

In the light of those facts and the witness and expert statements, the Court sees no reason to question the domestic courts' conclusion that the authorities could not have been aware that Y.C. was in a life-threatening situation requiring urgent medical attention. It was not foreseeable that, if his health declined, the rate of decline would be precipitous due to the undetected sickle cell disease.

Turning to the applicant's complaint that the measure of placing Y.C. alone in a security cell without any legal basis after he had returned from hospital on 4 October 2005 had constituted inhuman or degrading treatment, the Court notes at the outset that the decision was based on the Detention Ordinance and was due to his aggressive behaviour in hospital. Furthermore, the applicant's brother had access to medical care throughout his detention, care which was even provided on a daily basis after he had announced his hunger strike, only six days before his death. This constant medical care was based on a developed domestic practice concerning the treatment of hunger strikers and was in compliance with international standards. Moreover, the applicant's brother was examined in hospital a few hours before his death. While it is true that Y.C. could have requested a water bottle at any time, it would clearly have been advisable given the situation to provide him with direct access to water in the cell and to advise him to take in fluids. However, as it was not possible either for the hospital or the authorities at the detention centre to detect the critical state of the applicant's health and the fact that he might go into rapid decline due to the sickle cell disease, the failure to take such measures cannot, under the circumstances, be considered as inhuman or degrading.

The Court concludes that there has been no violation of Article 3 of the Convention.

For these reasons, the Court, unanimously, holds that there has been no violation of Articles 2 and 3 of the Convention.

ECHR 2018/7 *Case of Lopes de Sousa Fernandes v. Portugal*, 19 December 2017, no. 56080/13 (*Grand Chamber*)

The Facts

The applicant is a Portuguese national who was born in 1969. On 26 November 1997 her husband was admitted to a hospital to undergo a nasal *polypectomy* (extraction of nasal polyps). The operation went well and the patient returned home the next day. Suffering from terrible headaches later that day, he immediately went back to the emergencies unit at the hospital. The doctors on duty diagnosed psychological disorders and prescribed him tranquilisers. They

recommended that he leave hospital but the applicant objected. The next day the patient was examined by a new medical team that detected bacterial meningitis (*Pseudomonas*). He was transferred to intensive care until 5 December 1997. He was then taken into the general medicine department, where he was treated by Doctor J.V. He left the hospital on 13 December 1997, his state of health being regarded as stable. As his pain subsequently persisted, he went again three times to the emergency unit at the same hospital, where he was hospitalised twice. On 3 February 1998 Doctor J.V. authorised him to leave hospital, but, his state of health having worsened, he was admitted on 17 February 1998 to another hospital. He died there on 8 March 1998 from the consequences of septicaemia caused by peritonitis and hollow viscera perforation.

In response to a letter from the applicant wishing to understand the sudden decline in her husband's health, the Inspector General for Health (IGH) ordered an investigation. Reports of 2002 and 2005 concluded that her husband had been treated correctly. The IGH thus decided to close the case, but the applicant contested that decision. Fresh assessments ordered by the IGH showed that the decision by Doctor J.V. to send the patient for outpatient treatment had not been adequate and appropriate, as that doctor had not acted with the requisite prudence and diligence, and had shown negligence in the medical assistance provided. The IGH thus ordered the opening of a disciplinary procedure against him.

The complaint by the applicant to the Medical Association was unsuccessful. She then filed a new complaint for manslaughter with the criminal investigation and prosecution department. The District Court discontinued the proceedings on 15 January 2009 on the ground that there was no evidence to show that Doctor J.V. had been responsible for the death. On 6 March 2003, the applicant lodged a new application, seeking damages for the loss she had sustained as a result of her husband's death. The court dismissed her claims on the grounds that it had not been proven that her husband had undergone treatment that was not adapted to his clinical situation. She appealed against that decision to the Administrative Supreme Court, which dismissed her appeal in a judgment of 26 February 2013.

Next, the applicant lodged an application with the European Court of Human Rights. On 15 December 2015, the Court (Fourth Section) held, by a majority, that there had been a violation of the substantive aspect of Article 2 and, unanimously, that there had been a violation of the procedural aspect of Article 2 (see *European Journal of Health Law*, ECHR 2016/4). Subsequently, the case was referred to the Grand Chamber.

The Law

Alleged Violation of Article 2 of the Convention

Relying on Article 2 (right to life), the applicant alleges that there has been a violation of her husband's right to life.

The Substantive Aspect

The Court observes that in the instant case, the applicant did not allege or imply that her husband's death had been caused intentionally. She submitted that her husband had lost his life as a result of a hospital-acquired infection and of various instances of medical negligence that occurred throughout his treatment, and that the doctors in charge of treating him had failed to undertake the necessary measures to save her husband's life.

The Court observes that the medical treatment provided to the applicant's husband was subjected to domestic scrutiny and that none of the judicial or disciplinary bodies that examined the applicant's allegations ultimately found any fault with his medical treatment. Moreover, none of the medical expert evidence conclusively established the existence of medical negligence in the treatment of the applicant's husband.

The Court reiterates in this regard that, except in cases of manifest arbitrariness or error, it is not the Court's function to call into question the findings of fact made by the domestic authorities, particularly when it comes to scientific expert assessments, which by definition call for specific and detailed knowledge of the subject.

The Court observes that in the present case the applicant did not complain that her husband had been denied access to medical treatment in general or emergency treatment in particular. Nor is there any information in the case file which would suggest such an issue in the present case. Rather, the applicant complained that the medical treatment provided to her husband had been deficient because of the negligence of the doctors who had treated him. In the Court's view, an alleged error in diagnosis leading to a delay in the administration of proper treatment, or an alleged delay in performing a particular medical intervention, cannot in themselves constitute a basis for considering the facts of this case on a par with those concerning denial of healthcare.

Moreover, the Court considers that no sufficient evidence has been adduced in the present case to demonstrate that there existed, at the material time, any systemic or structural dysfunction affecting the hospitals where the applicant's husband was treated, which the authorities knew or ought to have known about and in respect of which they failed to undertake the necessary

preventive measures, and that such a deficiency contributed decisively to the death of the applicant's husband.

It has not been demonstrated, either, that the alleged fault attributable to the health-care professionals went beyond a mere error or medical negligence or that the health-care professionals involved in the treatment of the applicant's husband failed, in breach of their professional obligations, to provide emergency medical treatment to him despite being fully aware that his life was at risk if that treatment was not given. In this regard the Court, contrary to the Chamber's finding, considers that the alleged lack of coordination between the ear, nose and throat department of the hospital and the hospital's emergency department does not, by itself, amount to a dysfunction in hospital services capable of engaging the State's responsibility under Article 2. In the present case, the Court does not have at its disposal any evidence or other elements that would enable it to make any findings or reach any conclusions establishing a situation of structural or systemic dysfunctions in the health-care services in question.

In view of the above considerations, the Court takes the view that the present case concerns allegations of medical negligence. In these circumstances Portugal's substantive positive obligations are limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives.

Having regard to the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court considers that the relevant regulatory framework does not disclose any shortcomings as regards the State's obligation to protect the right to life of the applicant's husband. Nor has the applicant argued otherwise.

Therefore, the Court finds that there has been no violation of Article 2 of the Convention in its substantive aspect.

The Procedural Aspect

The Court observes that the applicant's husband, who had been in good health, underwent a routine operation in hospital and ended up suffering from bacterial meningitis, ulcers, colitis and other medical complications which led to his death three months later from septicæmia caused by peritonitis and a perforated viscus. Thus, the Court considers that the applicant had arguable grounds to suspect that her husband's death could have been the result of medical negligence.

The Court notes that in cases of medical negligence Portuguese law provides, in addition to the possibility of criminal proceedings, for the option of bringing proceedings for civil liability in the administrative courts against

public hospitals. The hospitals may in turn be entitled to claim reimbursement of the damages payable from the officials who acted in breach of their professional duty. Furthermore, an application may be made to the Ministry of Health and the Medical Association seeking to establish disciplinary liability on the part of members of the health-care profession.

In the instant case, the applicant made use of all of the procedures mentioned above. The question is therefore whether, in the concrete circumstances of the case, given the fundamental importance of the right to life guaranteed under Article 2 of the Convention and the particular weight the Court has attached to the procedural requirement under that provision, the legal system as a whole dealt adequately with the case at hand. It has to be ascertained whether the domestic proceedings were effective in terms of being thorough, prompt and concluded within a reasonable time.

As regards the thoroughness, the Court finds it appropriate to respond first to the specific complaints raised by the applicant regarding the lack of an autopsy and of her husband's consent to his operation. As regards the first of these issues, the Court agrees with the Chamber's view that the cause of the applicant's husband's death had not raised any doubts which would have required an autopsy to be performed under the statutory provisions in that regard. As to the second issue, in the absence of a specific substantive complaint on the matter, the Court finds that the domestic judicial and other bodies cannot be faulted for not delving into that issue in depth.

As regards the promptness of the proceedings before the Inspectorate General for Health (IGH) the Court observes that it took the IGH two years to order the opening of an investigation, and a further year to appoint an inspector to head the investigation. Secondly, evidence was heard from the applicant for the first time almost three years and six months after she had contacted the authorities. The investigation before this body therefore lacked promptness. The Court further observes that the proceedings before the IGH had already lasted for slightly more than seven years and ten months before the applicant was informed that the disciplinary proceedings initiated against Dr J.V. would be stayed pending the outcome of the criminal proceedings.

As to the proceedings before the Medical Association, the Court observes that the latter responded promptly to the applicant's request by seeking the opinions of five of its specialist panels immediately after receiving the patient's medical records, and that the overall length of the proceedings before the Medical Association was approximately four years and five months at two levels. This cannot be considered per se as unreasonable. However, the Court cannot lose sight of the fact that the proceedings before this specialised body consisted merely in examining the patient's medical records and the opinions of the specialist panels. The proceedings were written and no evidence was

heard. Seen from this angle and in the absence of any explanation from the Government, the duration of these proceedings was also unreasonable.

The Court considers that the criminal proceedings in the present case were also ineffective for the purposes of Article 2. Firstly, they were concerned only with the narrow issue set out in the charges that had been brought and did not deal with any of the other instances of alleged medical negligence complained of by the applicant. Secondly, the proceedings were neither prompt nor was their overall duration reasonable. No significant procedural steps were undertaken by the prosecuting authorities between 29 April 2002 and 7 December 2007, a period of almost five years and seven months. The proceedings in total lasted for six years, eight months and nineteen days.

With regard to the action for compensation brought by the applicant before the administrative courts, the Court observes that the first striking feature of these proceedings is their considerable length. They lasted for nine years, eleven months and twenty-five days over two levels of jurisdiction. The case file does not suggest that such lengthy proceedings were justified by the circumstances of the case.

The Court further finds that, where there is a *prima facie* arguable claim of a chain of events possibly triggered by an allegedly negligent act that may have contributed to the death of a patient, in particular if an allegation of a hospital-acquired infection is concerned, the authorities may be expected to conduct a thorough examination into the matter. The Court considers that no such examination was conducted in the instant case, in which the domestic courts, instead of carrying out an overall assessment, approached the chain of events as a succession of medical incidents, without paying particular attention to how they may have related to each other.

In sum, the Court considers that the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's husband, failed to provide an adequate and timely response consonant with the State's obligation under Article 2. Accordingly, there has been a violation of the procedural aspect of that provision.

For these reasons, the Court holds, by fifteen votes to two, that there has been no violation of the substantive limb of Article 2 of the Convention and, unanimously, that there has been a violation of the procedural limb of Article 2 of the Convention.

Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, establishing that there is a substantive right to health care under the Convention; *partly dissenting opinion* of Judge Serghides; both judges conclude that the substantive limb of Article 2 has been violated.

ECHR 2018/8 *Case of Nedescu v. Romania*, 16 January 2018, no. 70035/10 (Fourth Section)

The Facts

The applicants, both born in 1976 and husband and wife, were childless, but wanted to have children. Therefore, in 2008, they decided to try assisted reproduction at a private clinic, the S. Clinic. The S. Clinic had previously applied to the National Transplant Agency ("the Transplant Agency") for authorisation to function as a cell and tissue bank and user in accordance with the legal requirements, an application which was still pending completion in 2008. Following an ovarian stimulation and in vitro fertilisation, seven embryos were obtained, of which three were transferred immediately to the first applicant, who became pregnant and gave birth. The four remaining embryos were frozen and put in storage at the S. Clinic in November 2008 with a view to their future use by her. On 15 July 2009 the procedure for obtaining the required authorisation from the Transplant Agency was completed and the S. Clinic was authorised to act as a medical centre that could function as a storage bank for genetic material.

On 24 July 2009, following a criminal investigation into the delivery of the above authorisation, the Directorate for the Investigation of Organised Crime and Terrorism attached to the Prosecutor General's Office of Romania (DIICOT) closed the S. Clinic, seized all the genetic material found there, including the applicants' embryos, and transferred it to an institute of forensic medicine ("the IFM"). The applicants' embryos and those of other couples were kept in containers. Each container had different vials for each set of embryos. The embryos of more than 240 families were seized at the S. Clinic. As with other patients of the Clinic, the applicants were neither informed of the seizure, which they learned about from the media, nor consulted about the transfer of the seized embryos from the S. Clinic to the IFM.

On 13 March 2010 the applicants requested that DIICOT allow them to retrieve their embryos, as they wished to undergo a new assisted reproduction procedure in another clinic. They pointed out that it was of the utmost importance that they be allowed to retrieve the embryos rapidly since the storage period was to expire in August 2010 and there was a strict procedure for the transfer.

On 30 March 2010 DIICOT allowed the applicants to recover the embryos directly from the IFM. They had to be accompanied by an embryologist and provide a special container with liquid nitrogen.

On 21 July 2010 the applicants went to the IFM accompanied by an embryologist, however, they were not allowed to retrieve the embryos. They were asked instead to show that the Transplant Agency had approved the transfer. The first applicant therefore attempted to have a new ovarian stimulation in the hope of creating new embryos. However, on 18 August 2010, while being treated for premature menopause, she underwent a medical examination that revealed that her state of health did not allow her to undergo another ovarian stimulation. The applicants therefore resumed their efforts to retrieve the embryos deposited with the IFM but were not successful.

On 12 October 2011 DIICOT appointed a public hospital, the P.S. Hospital, as the new legal custodian for all the embryos, including the ones belonging to the applicants. On 20 December 2011 the High Court of Cassation and Justice ordered the Transplant Agency to implement the prosecutor's decision to return the embryos by allowing their transfer from the IFM to an authorised clinic or hospital of the applicants' choice in Romania or abroad.

On 12 November 2012, P.S. Hospital informed the applicants that it could not transfer the remaining embryos to the first applicant as they had only been appointed as a custodian by DIICOT. In a letter dated 7 January 2013, P.S. Hospital reiterated that the embryos could only be retrieved after prior approval from the Transplant Agency and that an embryologist from the S. Clinic and a DIICOT representative had to be present.

The Law

Alleged Violation of Article 3 of the Convention

The applicants complained that, as a whole, the authorities' behaviour had amounted to a disproportionate interference with their private and family life, because for more than six years they had not been allowed to use their embryos for a new assisted reproduction procedure and had thus lost the possibility to have another child. They relied on Article 8 of the Convention, which protects the right to privacy.

The Court considers that the joint parental project of the applicants, who wish to have a child by making use of assisted procreation using their own embryos is an intimate aspect of their private life. The applicants' complaint concerned the refusal by the various administrative authorities to actually carry out the return of the remaining embryos that had been created at the S. Clinic, despite orders from the judicial authorities, which in turn prevented them from the possibility of having another child. The Court notes in particular that

following the seizure of their embryos and their being deposited with the IFM, the applicants attempted on numerous occasions to recover them, but failed each time. A request by the applicants to be appointed custodians of their own embryos was likewise rejected on 18 April 2013. The Court finds that preventing the applicants from retrieving their embryos as ordered by the High Court of Cassation constituted an interference with their right to respect for their private life.

Such an interference will be contrary to Article 8 unless it is “prescribed by law”, pursues one or more of the legitimate aims set out in paragraph 2 and is “necessary in a democratic society”. The Court must therefore determine whether the various institutions’ actions or omissions that interfered with the applicants’ private life were in line with the lawfulness requirement of Article 8 § 2.

The return of the embryos or their transfer to a clinic of the applicants’ choice was allowed in straightforward fashion by the judicial authorities: on 30 March 2010 by DIICOT, which had taken the seizure measure in the first place, and on 20 December 2011 by the High Court of Cassation and Justice. While the seizure of the embryos appears to have been based on the Criminal Procedure Code because of the criminal proceedings against the S. Clinic, neither the subsequent deposit of the embryos with the IFM within the framework of the criminal proceedings nor the conditions for their retrieval from either the IFM or the new custodian appear to have had a clear basis in domestic law.

The Court takes note of the provisions which regulate the storage and use of genetic material, which were relied on directly or indirectly by some of the authorities and institutions when they refused to implement the judicial authorities’ decisions to put an end to the seizure measure and order the return of the embryos, and also when they set additional conditions for implementing those decisions.

It further notes that despite those provisions, the various institutions involved disagreed on the conditions under which the DIICOT order to return the embryos could be carried out. One disagreement was on the need for prior approval by the Transplant Authority: the IFM, the Court of Appeal and P.S. Hospital considered that the Transplant Agency’s approval was required, while DIICOT did not. The High Court, in turn, found that the requirement for such approval was unlawful.

Moreover, the new custodian, P.S. Hospital, repeatedly argued that DIICOT’s depositing of the embryos with the IFM had been unlawful as the IFM had not been authorised to function as a genetic material bank. It also considered that moving the embryos from the IFM to the Hospital had been carried out in violation of the lawful requirements for such a transfer.

Lastly, the Court cannot ignore the fact that P.S. Hospital considered that the flaws in the legal procedures related to the depositing, moving and handling of the embryos had been such that it seemed to be impossible to identify with certainty which embryos belonged to the applicants. It also stated that it could only store the embryos and could not perform any other operations with them.

In the light of the above, the Court finds that the manner in which the judicial and administrative authorities involved implemented and interpreted the relevant legal provisions concerning the seizure, the storage following such a seizure and the return of the applicants' embryos was incoherent and thus lacked the required foreseeability.

In conclusion, the Court finds that the interference with the applicants' right to respect for their private life was not provided for by law within the meaning of Article 8 § 2 of the Convention.

For these reasons, the Court, unanimously, holds that there has been a violation of Article 8 of the Convention.

ECHR 2018/9 *Case of Afiri and Biddarri v. France*, 25 January 2018, no. 1828/18 (Fifth Section)

The decision is available only in French.

The Facts

The applicants, both born in 1966, are the divorced parents of Inès, who is aged 14 and suffers from autoimmune myasthenia gravis. On 22 June 2017 Inès was found unconscious following acute cardio-respiratory failure. She was taken to a university hospital and was placed on an artificial ventilator in the resuscitation unit. The same day the applicants were informed of the seriousness of their daughter's clinical condition. After carrying out tests the medical team observed very serious neurological deterioration, with severe and widespread brain damage. The applicants were informed accordingly.

On 7 July 2017 a multi-disciplinary consultation meeting was held, attended by the full medical, paramedical and administrative team. All those present were in favour of withdrawing artificial ventilation, regarding its continuation as unreasonable obstinacy. The applicants were informed of the proposed action. On 10 July 2017 Dr B., head of the paediatric resuscitation unit, met with

the applicants and told them that if they opposed the withdrawal of treatment their decision would be respected.

On 21 July 2017, in view of the lack of agreement with the parents on the withdrawal of treatment, the collective procedure provided for by the Public Health Code was initiated, involving the full medical, paramedical and administrative team. Professor M., an honorary professor of paediatrics with a close interest in ethical and paediatric issues, took part as an external consultant. The participants reached the same conclusion regarding the withdrawal of treatment as the meeting of 7 July 2017, on account of the severity of the neurological damage, the virtually non-existent prospects for improvement or recovery, and the fact that the patient was in a minimally conscious state as she was in a persistent irresponsive coma and no longer had brainstem reflexes.

The report on the meeting stated that, should the applicants wish their daughter to be kept alive artificially, a decent and appropriate life plan would be worked out. The report was sent to the applicants, who met the doctors on several occasions between 28 July and 23 August 2017.

On 11 September 2017 the applicants made an urgent application to the Administrative Court seeking a stay of execution of the decision of 21 July 2017 to withdraw treatment. In an order of 14 September 2017, the Administrative Court, sitting on an exceptional basis as a bench of judges, ordered an expert report, to be compiled by a panel of three experts. The experts carried out clinical tests on Inès, reviewed the additional examinations and met with the various staff members concerned and with the applicants. They submitted their report on 17 November 2017.

Replying to the questions put by the Administrative Court, the experts stated that Inès's clinical state corresponded to a "persistent vegetative state", with an "extremely bleak neurological prognosis", in line with the findings of the hospital team, and that she was incapable of communicating with those around her. They noted the irreversible nature of some of the neurological lesions and the worsening of the patient's diagnosis since her admission to hospital. They concluded that it would be unreasonable to continue with respiratory support and artificial nutrition.

The experts noted that the applicants had shown little involvement in their daughter's care, and that their relationship with the paramedical staff had been very difficult generally. They observed that Inès had expressed a wish "not to live in the way she had at home during May and June 2017". They pointed to the practice in situations of this kind — which had been followed in this case by Dr B. and his team — whereby the professionals did not withdraw treatment against the parents' wishes. Lastly, the experts concluded that Inès's

interests did not coincide with those of her parents. They therefore proposed, by way of exception, discontinuing the treatment and providing Inès with high quality palliative care.

In an order of 7 December 2017, the Administrative Court, sitting as a bench of three judges, rejected the applicants' application. The judges based their decision on the findings of the expert report and noted that Inès's wishes had not been clearly established. They specified that the view of the parents carried particular weight but that the parents had displayed distrust of the doctors, without having formulated a plan for their daughter. The court considered that, despite the parents' objections, the continuation of treatment would amount to unreasonable obstinacy, and that the decision of 21 July 2017 had not constituted a serious and manifestly unlawful breach of a fundamental freedom.

On 20 December 2017 the applicants appealed to the Conseil d'État. In an order of 5 January 2018, the Conseil d'État, sitting on an exceptional basis as a three-person bench, dismissed their appeal. It considered that, in view of the medical data in the present case and notwithstanding the opposition of the parents, who had been involved at all times in the decision-making, the continuation of treatment was apt to amount to unreasonable obstinacy within the meaning of the Public Health Code. It considered that the decision to withdraw treatment had satisfied the statutory requirements, and upheld the Administrative Court's finding that it had not constituted a serious and manifestly unlawful breach of a fundamental freedom.

The Law

Alleged Violation of Article 2 of the Convention

The applicants complained of the fact that the decision to withdraw the treatment of their minor daughter ultimately lay with the doctor despite the fact that they opposed it. They argued that they should have a right of co-decision under the collective procedure, in their capacity as the parents and persons with parental responsibility. They further contended that domestic law did not afford any effective remedy for parents opposed to a decision to withdraw treatment in respect of their minor child. The applicants further relied on Article 6 § 2 of the Oviedo Convention which provided that, where a minor did not have the capacity to consent to an intervention, it could not be carried out without the authorisation of his or her representative. In so far as the applicants' complaints concerned the withdrawal of artificial life-sustaining

treatment, the Court will examine all the issues raised by the application from the standpoint of Article 2 of the Convention (right to life).

The Legislative Framework

In the specific case of minor patients, the Public Health Code provides that, where a doctor is treating a minor, he or she is required not just to consult the parents but also to attempt to obtain their consent. In the present case the Conseil d'État has specified that the doctor has a duty "to seek the agreement of the parents (...), to act with maximum beneficence towards the child and to make the child's best interests a prime consideration". The Court concludes that the manner in which domestic law, as interpreted by the Conseil d'État, regulates situations in which the parents oppose a decision to withdraw treatment in respect of their minor child satisfies the requirements of Article 2 of the Convention.

The Decision-making Process

The applicants contest the decision-making process in so far as it merely provides for the parents of a minor patient to be consulted and does not give them a right of co-decision. The Court points out that, while the procedure under French law is described as "collective", the decision solely lays with the doctor treating the patient. In the present case the collective procedure has been conducted in accordance with the legislative framework and the parents in particular, as the persons with parental responsibility, have been consulted over the course of at least six formal meetings between 7 and 21 July 2017. The Conseil d'État has noted that, since Inès's wishes cannot be established with certainty, the parents' view has to carry particular weight, and that they have been involved at all times in the decision-making.

In the absence of consensus among the member States, the Court considers that the way in which the decision-making process is organised, including the designation of the person who takes the final decision to withdraw treatment and the arrangements governing the taking of the decision, falls within the State's margin of appreciation.

The doctors and the care team attempted to reach agreement with the applicants in the course of numerous meetings. The Court notes that the parents' wish not to discontinue their daughter's treatment has been respected by the doctors. Even before the start of the collective procedure, the doctor in charge of Inès's treatment has told the parents that their decision would be respected. At a meeting held after the decision to withdraw treatment, Dr B. again

has made clear to the parents that such a decision would in no circumstances be implemented without their agreement. The Court therefore considers that, despite the fact that the applicants have disagreed with its outcome, the decision-making procedure applied has satisfied the requirements arising out of Article 2 of the Convention.

The Judicial Remedies

The applicants complain of the lack of an effective remedy in domestic law by which to contest the decision to withdraw treatment in respect of their minor child. In its decision no. 2017-632 QPC of 2 June 2017 the Constitutional Council has ruled, firstly, that any decision to withdraw or limit life-sustaining treatment which would result in the death of a person unable to express his or her wishes has to be notified to the persons consulted by the doctor with a view to establishing the patient's wishes, in a manner that enables them to exercise a remedy in good time; secondly, any such decision has to be open to appeal for the purposes of obtaining a stay of execution, and the appeal has to be considered without delay by the competent court. That ruling has been complied with in the present case.

The applicants have made an urgent application to the Administrative Court for protection of a fundamental freedom on the basis of the Administrative Courts Code. The urgent applications judge has not merely assessed the need to stay execution of the doctor's decision but also has conducted a thorough review of the lawfulness of that decision, after ordering an expert medical report.

The Court therefore considers that French law has provided for a judicial remedy in conformity with the requirements of Article 2. It holds that the domestic authorities have complied with their positive obligations under Article 2 of the Convention, in view of the margin of appreciation left to them in the present case. It follows that the applicants' complaints are manifestly ill-founded and have to be rejected pursuant to Article 35 §§ 3(a) and 4 of the Convention.

Article 6 § 2 of the Oviedo Convention

The Court considers that it does not have jurisdiction to consider complaints under other international instruments. This complaint therefore has to be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously, declares the application inadmissible.

ECHR 2018/10 *Case of Akimenkov v. Russia*, 6 February 2018, nos. 2613/13 and 50041/14 (Third Section)

The Facts

The applicant is a Russian national who was born in 1987 and lives in Moscow. On 6 May 2012 he attended a protest against allegedly rigged presidential elections. After a peaceful march, a meeting began at Bolotnaya Square, where clashes broke out between the demonstrators and the police. The following month the applicant was arrested and charged with taking part in acts of mass disorder and committing acts of violence against the police accompanied by violence. He requested bail but detention was repeatedly extended until December 2013 when he was finally released under the new Amnesty Act.

This summary is restricted to the issues raised under Article 3 of the Convention as regards the alleged lack of medical assistance while in detention.

The Law

Alleged Violation of Article 3 of the Convention

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicant alleged that he had not received adequate medical assistance while in detention.

The applicant alleged that his eyesight had seriously deteriorated during his detention, and that he had not received any treatment for that problem. He relied on a medical report of 16 October 2012 as proof that his myopia had worsened. The Government disagreed with the applicant, and argued that he had been regularly examined by medical specialists, including ophthalmologists and had been provided with the requisite treatment. They pointed out that from 17 September 2012 to 4 November 2012, the applicant had undergone an inpatient examination in the prison medical wing and that in 2012 he had had three consultations with an ophthalmologist at a specialist ophthalmology clinic. He had also undergone a special examination, but it had not led to him being given any disability status.

The Court reiterates that even though Article 3 does not entitle a detainee to be released on compassionate grounds, it has always interpreted the

requirement to secure the health and well-being of detainees, among other things, as an obligation on the State to provide detainees with the requisite medical assistance. The adequacy of medical assistance remains the most difficult element to determine. The Court insists that, in particular, authorities must ensure that diagnosis and care are prompt and accurate, and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation.

On the whole, the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be compatible with the human dignity of a detainee, but should also take into account the practical demands of imprisonment.

In the present case, the applicant argued that no action had been taken by the authorities, in spite of his rapidly deteriorating eyesight. The Court notes, however, that the pre-detention diagnosis of the applicant's myopia dated back to 2004, eight years prior to his detention. In the absence of any information about his diagnosis immediately before his arrest, it is impossible to establish that the progress of his myopia from medium to high was attributable specifically to the period in detention. The Court has examined the applicant's medical files submitted by the Government and has found that following his complaints he was given a comprehensive medical examination and was taken to an ophthalmologist on at least three occasions. None of the medical reports drawn up after those consultations indicate any threat to the applicant's eyesight or the need for further tests or treatment. There is nothing in the case file to cast doubt on those reports. Furthermore, the applicant did not argue that he had not been prescribed, or provided with, correctional glasses or contact lenses appropriate to his degree of myopia. According to the last examination in the remand prison, the only recommendation he received was to have regular consultations with an ophthalmologist. The Court therefore finds no reason to believe that the Russian authorities failed to provide the applicant with adequate medical assistance.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 3 of the Convention as regards the alleged failure to provide the applicant with adequate medical assistance.

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