

Positive obligations to protect lives in cases of psychiatric illnesses

Belenko v. Russia (ECHR December 18th 2014, appl. no. 25435/06) and *Bljakaj and others v. Croatia* (ECHR September 18th, appl. no. 74448/12) – positive obligation for the authorities, i.e. medical staff (*Belenko*) and the police (*Bljakaj*), to protect a life (Article 2 ECHR, the right to life).

Dave van Toor, Univ. Bielefeld

I. General introduction

The right to life, together with Article 3 of the Convention, enshrines one of the basic values of a democratic society.¹ 'Life' is a necessary condition to enjoy the other Convention rights, physical freedom or freedom of expression are only worthwhile when a person is alive. The importance of Article 2 of the Convention can also be found in Article 15 of the Convention, which excludes the right to life (as one of the four Convention rights) of derogating in time of war. What makes Article 2 of the Convention even more interesting is that the text, in contrast with other Convention rights, suggests that a positive obligation rests on the State 'to protect lives by law', and not only to withheld interference in a individuals life. The positive obligations are the topic of this case-law overview. On the basis of two recent judgments (September and December 2014), the substantive and procedural positive obligations are discussed.

The *Belenko* case is filed by the mother of Oksana Belenko, who died while she's confined in a psychiatric clinic. Allegations were uttered about ill-treatment and neglect of Belenko, while she was in the care of the staff of the clinic. The judgment focusses primarily on the responsibilities of the staff to safeguards the applicant's daughters life (substantive aspect of Article 2 ECHR) and secondly on the State's responsibilities to proper and effective investigate a death of a person in care of the State (procedural aspect of Article 2 ECHR).

The *Bljakaj* case is about the attempted murder and murder in March 2002 committed by A.N. of, respectively, his soon to be ex-wife and her attorney. The case is interesting because A.N. presented himself on the police station earlier that day because of a violent outburst and had a history of violence, substance abuse and illegal possession of a firearm. He was however released immediately. Allegations were uttered by relatives of the attorney that the police did not take reasonable preventive measures to afford protection from the violent acts of A.N.

So both discussed cases involve the responsibilities of State organs, *id est* the police and medical staff, to safeguard lives and/or to proper investigate a death. Following the design of the Courts case-law, the facts of both cases and relevant domestic law are discussed firstly.

¹ ECHR September 27th 1995, appl. no. 18984/91, par. 147 (McCann v. The United Kingdom).

Thereafter, the alleged violations of the Convention law is discussed, in particular the applicants submissions, the general principles and the Courts conclusion on both cases.

II. Belenko – facts and domestic law

1. The facts (paragraph 6-55)

On 14 August 2003 Belenko complained of feeling ill. The next day she was examined in the town hospital. The applicant's daughter was behaving hysterically: she was laughing, shouting, trying to run around and threw a trolley over. As she was showing signs of a serious psychiatric disorder, later that day she was transferred to a psychiatric clinic.

On 16, 17 and 18 August, Belenko was examined by, respectively, two doctors, a psychiatrist and a team of three doctors including the chief doctor. On 20 August, the District Court of Novosibirsk issued a confinement order to allow inpatient treatment (because of the severity of the illness and to counter the request of the applicant to allow outpatient treatment). Belenko was diagnosed with a very rare disease, known as febrile expressionless schizophrenia of a pernicious nature and received treatment till 31 August 2003.

On 31 August, Belenko had a high fever, which got worse the next day and she was diagnosed with pneumonia. Therefore she was transferred to the town's hospital that day. On 9 October Belenko was transferred back to the clinic. Meanwhile the applicant lodged several complaints, including a written criminal complaint, against the medical staff of the clinic because of ill-treatment and neglect. On 7 December Belenko died, while she still was in the clinic. The doctors who carried out the post-mortem concluded that she had died as a result of cerebral oedema, related to her psychiatric condition and aggravated by the pneumonia.

On 31 December 2003 a police investigator decided not to open a criminal investigation into her death, which was overruled in February 2004. The Regional Prosecutor entrusted the case to the police investigator who decided not to open an investigation. From 2004 till May 2011, the investigation was closed by the leading investigator seven times with the conclusion that Belenko died of natural causes. The reopening was ordered a few times by the court and the supervising prosecutor. From May 2011 onward, there hasn't been any developments.

2. Relevant domestic law (paragraph 56-60)

Article 109 § 2 of the Criminal Code of the Russian Federation provides that *"negligent infliction of death due to improper execution of professional duties shall be punishable by compulsory works for a period of up to three years and/or the stripping of the right to occupy certain posts or to work in certain spheres for a period of up to three years."* Furthermore, in this case some Articles of the Code of Criminal Procedural of the Russian Federation are important because of the several (re)opening and closing of the investigation, mainly to decide if the investigation was proper and effective. Most important is that the investigation can only

be terminated with a reasoned decision, which should be send to the prosecutor and the victim (Article 213) and that the prosecutor's office is responsible for supervising the investigation (Article 221).

III. Bljakaj – facts and domestic law

1. The facts (paragraph 6-78)

On 21 March 2002, A.N. (the later culprit) and M.N. (his wife and later victim) presented themselves to the police because M.N. filed a complaint about her soon to be ex-husband harassing her. The police officer who interviewed the couple, warned A.N. to stop harassing his wife and instructed them to settle all their disputes in the divorce proceedings. The hearing of the divorce proceedings were scheduled for April 2002.

The following day A.N. tried to withdraw all his money from his bank account and he, while in tears, told the bank employee that they would not see each other again. He also told the bank manager that he was sick about his wife, his son and he was going to do something about it. The bank manager informed the police and A.N. was found at his home less than an hour later. Although, A.N. voiced suicide thoughts, the police officers advised him that everything would be fine and left.

Following the police visit, A.N. went back to the bank to talk with the manager about calling the police. Next, he went to the police station and demanded to know why the police had been to see him, were his was released immediately after a short interview. A.N. then went in search of his wife, who started her shift in a bakery. After finding her, he shot her four times and kicked her in the head. After shooting his wife, A.N. went to his wife's attorney and shot her dead. Five hours later A.N. was found dead in his home.

2. Relevant domestic law (paragraph 79-85)

The relevant provisions of the Protection of Individuals with Mental Disorders Act provide that a person who is 'mentally disturbed' and therefore seriously and directly endangers how own life or the life and safety of others, can be placed (involuntary) in a psychiatric hospital (Section 22 (1)). Furthermore, Section 24 police officers are entitled *"to take the individual to the psychiatric institution nearest to his place of residence or the place of his apprehension without the prior medical examination referred to in section 23 § 1 of this Act."*

IV. Alleged violation of Article 2 of the Convention

1. The applicants submissions (Belenko paragraph 64-65 / Bljakaj paragraph 96-98)

The mother of Belenko argued that her daughter had not received timely and adequate medical treatment, which in her case consists of several individual ill-treatments or neglects

complaints. Among them are, negligence of a cold which led to pneumonia, tying up which led to a broken hip and, in general, unlawful confinement in a psychiatric clinic. Furthermore, the applicant argued that a proper and effective investigation to the responsibility of the medical staff did not look place, *inter alia* because of medical records and tissue samples got lost.

The descendants (Bljakaj and others) of the killed attorney argued that there had been serious irregularities and failures on the part of the police preceding the killing of their relative. Among them are, the failure to submit A.N. to a hospital on the morning of his violent outburst after the visit to his home and the discharge of A.N. for the police station an hour for the killing. According to the applicants it is also of importance that the police noticed the violent and substance abusing history of A.N during a background check.

In both cases the first issue that the Court needs to address is whether the authorities were under an obligation to take “appropriate steps to safeguard” Belenko’s and the attorneys life, the so called substantive positive obligation. Furthermore, in the case of Belenko the second matter the Court needs to address is the working of an judicial system so that the cause of death of persons can be determined and those responsible made accountable, the so called procedural positive obligation.

2. General principles (Belenko paragraph 69-70 & 76-77 / Bljakaj paragraph 103-111)

a) Negative and positive obligations

The Court reiterates at the outset that Article 2 enshrines one of the basic values of the democratic societies making up the Council of Europe. The first sentence of Article 2 § 1 enjoins the State to refrain from the intentional and unlawful taking of life, so a negative obligation, an obligation *not* to act. Article 2 does not, however, only encompasses a negative right. The Court acknowledges also that a State has to take appropriate steps to safeguard the lives at risk from the criminal acts of another individual or the State,² or from self-harm³ of those within its jurisdiction (*substantive aspect* of the positive obligations). This includes putting in place of effective criminal law provisions, back up by law enforcement, to prevent, suppress and (eventually) punish deaths of non-natural causes. The right to life also imposes, in combination with Article 1 of the Convention, an obligation upon the State to investigate all cases of deaths other than from natural causes (*procedural aspect* of the positive obligation).

b) Substantive aspect

The substantive aspect of the positive obligation under Article 2 of the Convention places an obligation on the State to take measures to *actively protect* a individuals life. The State must

² ECHR April 27th 2014, appl. nos. 60908/11, 62110/11, 62129/11, 62312/11 & 62338/11, par. 80 (Brincat and others v. Malta).

³ ECHR April 11th 2006, appl. no. 52392/99, par. 83 (Ucar v. Turkey).

take, in certain circumstances, *preventive operational measures* to protect an individual whose life is at risk from the criminal acts of another individual (such as in the case of Bljakaj),⁴ to prevent self-harm⁵ or to take preventive operational measures where the right to life may be at stake in the case of dangerous industrial activities, such as waste-collection sites,⁶ nuclear testing⁷ and the use of asbestos⁸. The State must also make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives (such as in the case of Belenko).

Not every claimed risk leads to the requirement of preventive operational measures. In *Osman*, the Court observed, "*bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities*".⁹ There are two factors to take into account to establish the requirement for preventive measures: (1) the authorities knew or ought to have known about; (2) a real and immediate risk. Furthermore, for a violation of Article 2 of the Convention it must be established that the authorities *failed* to take appropriate measures accordingly.¹⁰ Appropriate measure to reduce risk are *inter alia* the revision of firearm license¹¹ and detention or confinement under a Mental Health Act¹².

c) Procedural aspect

*"The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation".*¹³ The Court never gave a definitive and conclusive answer to when an investigation is 'effective' but from its case-law, five points can be formulated on which the investigation is judged.

Firstly, *"the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible."* With other words, the methods of investigation must be able to gather evidence which can be used to

⁴ ECHR October 28th 1998, appl. no. 23452/94, par. 115 (*Osman v. The United Kingdom*).

⁵ ECHR April 11th 2006, appl. no. 52392/99, par. 83 (*Ucar v. Turkey*).

⁶ ECHR November 30th 2004, appl. no. 48939/99, par. 71 (*Öneryildiz v. Turkey*).

⁷ ECHR June 9th 1998, appl. no. 23414/94, par. 36-37 (*L.C.B. v. The United Kingdom*).

⁸ ECHR April 27th 2014, appl. nos. 60908/11, 62110/11, 62129/11, 62312/11 & 62338/11, par. 80 (*Brincat and others v. Malta*).

⁹ ECHR October 28th 1998, appl. no. 23452/94, par. 115 (*Osman v. The United Kingdom*).

¹⁰ ECHR October 28th 1998, appl. no. 23452/94, par. 115 (*Osman v. The United Kingdom*); ECHR September 18th 2014, appl. no. 74448/12, par. 106-107, 124 (*Bljakaj and others v. Croatia*).

¹¹ ECHR January 12th 2012, appl. nos. 36146/05 & 42418/05, par. 39 (*Gorovenky & Bugara v. Ukraine*).

¹² ECHR October 28th 1998, appl. no. 23452/94, par. 121 (*Osman v. The United Kingdom*).

¹³ ECHR July 27th 2006, appl. no. 69481/01, par. 117 (*Bazorkina v. Russia*).

the determination of the involvement, culpability and punishability of individuals. There is ‘an obligation of means’, not results, so that an investigation is effective. An autopsy is an essential requirement for the establishment of the cause of death.¹⁴ Most other methods depend on the circumstances of the case: a ballistic research is required when a firearm is used¹⁵ and eye-witnesses have to be interviewed when available, possibly with a legal compulsion to testify.¹⁶

Secondly and thirdly, the investigator has to be *impartial* and *independent*. This is normally the case when the police and the justice department investigates a death, but can be problem when the State’s police or justice authorities are investigated regarding their role in a lethal accident.¹⁷ In the case of *Atimen*, the applicant and his cousin were forced to stop by Turkish gendarme officers, who shot first in the air and then several rounds at the car, upon receipt of terrorists activity in the neighbourhood.¹⁸ *“The Court observes that the scene of the incident and the vehicle in question were examined by gendarme officers from the same unit and that no independent expert was involved in the investigation for the purposes of providing a ballistic analysis or a reconstruction of the events, taking into account a possible malfunctioning of the brake system, as well as the road conditions.”*¹⁹

Fourthly, there is a requirement of *promptness*. *“While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”*²⁰

Fifthly, *“there must be a degree of public scrutiny of the investigation or its results sufficient to secure accountability in practice as well as in theory. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”*²¹

V. Application of these principles to the present cases (Belenko paragraph 71-74 & 78-85 / Bljakaj paragraph 112-134)

In *Belenko* the substantive and procedural positive obligations of the right to life are discussed by the Court. On the substantive aspect, the obligation to take preventive measures to protect a life, the Court rules that the medical staff and Russia did not violate Article 2 of the Convention. The Court reasoned that *“the doctors who treated her respected the applicable regulations and procedures, used scientifically tested treatment methods, and employed*

¹⁴ ECHR June 27th 2000, appl. no. 21986/93, par. 105 (*Salman v. Turkey*).

¹⁵ ECHR July 19th 2011, appl. no. 25553/07, par. 148 (*Khashuyeva v. Russia*).

¹⁶ ECHR June 14th 2002, appl. no. 46477/99, par. 78-79 (*Paul and Audrey Edwards v. The United Kingdom*).

¹⁷ ECHR May 15th 2007, appl. no. 52391/99, par. 325 (*Ramsahai and others v. The Netherlands*).

¹⁸ ECHR September 23th 2014, appl. no. 62279/09 (*Atiman v. Turkey*).

¹⁹ ECHR September 23th 2014, appl. no. 62279/09, par. 39 (*Atiman v. Turkey*).

²⁰ ECHR June 14th 2002, appl. no. 46477/99, par. 72 (*Paul and Audrey Edwards v. The United Kingdom*).

²¹ ECHR January 29th 2015, appl. no.5096/12, par. 41 (*Nikolic v. Croatia*).

approved medical substances and equipment." In other words, the medical staff did what was reasonable expected in this case.

On the procedural aspect, the obligation to properly investigate a death, a violation of Article 2 of the Convention was construed by the Court. The Court gave various reasons. Firstly, the criminal investigation was closed by the leading investigator seven times (on 4 February 2005, 12 June 2005, 14 July 2005, 26 February 2006, 9 March 2007, 5 September 2007, and 20 May 2011) and *"on each of these occasions the supervising prosecutors and courts pointed out various defects in the quality of the investigation, refused to confirm the conclusions of the investigation and instructed the investigators to pursue the investigation and carry out new investigative measures."* Furthermore, the sheer number of closing the investigation, with large intervals in time, suggests that no genuine attempt of finding the truth (and possibly hold the responsible accountable for Belenko's death) was made. Last, the medical record of Belenko and the tissue archive were lost (or destroyed) so that an additional expert examination in the seven round of investigation was impossible. So, the Court concludes that: *"Therefore, it confines itself to noting that the investigation in this case was protracted, inefficient and failed to determine with sufficient clarity the cause of death of the patient in the care of the medical profession, so as to make those responsible for it accountable, if anyone"*.

In the *Bljakaj* case only the substantive aspect, more specific the protection of society against potential violent acts of an apparently mentally disturbed person, was at issue. Did the Croatian police take know (or ought to know) that A.N. was potentially violent and did they fail to take preventive protective measures? *"The Court notes in particular that A.N. at the time appeared to be mentally disturbed and dangerous to himself and/or others (see paragraphs 116-117 above) and that competent authorities considered that his further medical supervision was needed (see paragraphs 19, 42, 52 and 69 above). Moreover, he was twice under immediate police control and supervision on the morning of the incidents (see paragraphs 17, 19 and 21 above). This means that the risk to life in the present case was real and immediate and that the authorities had or ought to have had knowledge of it. In such situations the States' positive obligations under Article 2 of the Convention require the domestic authorities to do all that could reasonably be expected of them to avoid such risk."*²² [...] *"The Court thus considers that the failures of the police were not only a missed opportunity, but could, had they not occurred, have objectively altered the course of events by leading to A.N.'s medical supervision and the taking of further necessary action relevant to his apparently disturbed mental state."*²³

²² ECHR September 18th 2014, appl. no. 74448/12, par. 121 (*Bljakaj and others v. Croatia*).

²³ ECHR September 18th 2014, appl. no. 74448/12, par. 132 (*Bljakaj and others v. Croatia*).