Refused admission to a hospital of a newborn child in a life threatening situation

Asiye Genç v. Turkey (ECHR January 27th 2015, appl. no. 24109/07) – refused admission to a hospital of a newborn child in a life threatening situation (Article 2 ECHR, the right to life).

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I. General introduction

The right to life (Article 2 of the Convention), 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 case of Asiye Genç is the second case note about the right to life. Like the applicants in the cases of *Belenko* and *Bljakaj* (*Medstra-online case note* 1), the applicant in this case complained about a substantive and procedural violation of Article 2 of the Convention. Because the general principles of the right to life are discussed in detail in *case note* 1, the discussion in this case note will be brief when possible with a reference to *case note* 1.

II. Facts and domestic law

1. The facts (paragraph 4-46)

The applicant, Mrs. Asiye Genç, was born in 1976 and lives in Burdur. On 30 March 2005, while pregnant and suffering from pain, she went with her husband, Mr. Bülent Genc, to the public hospital in Gümüşhane. On 31 March 2005 at 11:00 p.m., the applicant gave birth by Caesarean section to a boy (Tolga Genç). Shortly after his birth, Tolga was in respiratory distress. In the absence of a neonatal unit in Gümüşhane State Hospital, the doctors decided to transfer the infant to the public hospital Karadeniz Technical University Farabi ("KTÜ Farabi") located in Trabzon, 110 km distance from Gümüşhane. On 1 April 2005 1:15 a.m., 2 hours 15 minutes after his birth, the public hospital KTÜ Farabi refused admission of Tolga on the grounds that there was no room in the neonatal intensive care unit. Around 2:00 a.m., Tolga was transferred to the medical-surgical and obstetrical center of Trabzon ("CMOT"). There, the doctor on duty explained to Mr. Genç that there was no incubator available and asked him to return to the public hospital KTÜ Farabi. Upon arrival in KTÜ Farabi, the doctors at the public hospital argued again the impossibility for them to ensure the admission. Again, Folga was driven to CMOT but he died in the ambulance.

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

Five days later, on April 6th, the Genç couple lodged a complaint by the authorities, especially about the doctors at the public hospital KTÜ Farabi. On basis of that complaint a criminal investigation, issued by the prosecutors department, and an administrative investigation, issued by the Ministry of Health, were opened. However, they did not limit the investigation to the KTÜ Farabi hospital only.

The case against the doctors of the KTÜ Farabi was dismissed, because according to the investigators, who also conducted a survey under colleagues, the staff committed no faults. This decision was upheld on appeal. This is the same for the doctors of the Gümüşhane hospital and CMOT. On 2 May 2005, the prefect of Gümüşhane refused to open a criminal investigation against the doctor NA, considering that he had not committed any breach of his professional duties. On 3 May 2005, the Prefect of Trabzon refused the prosecution against the doctors of the CMOT, believing that no negligence in the performance of their duties happened.

On 9 May 2005, the prosecutor of Gümüşhane challenged that decision, arguing that the NA doctor should not have transferred the child to a hospital where there was no room available. On 18 May 2005 the Regional Administrative Court of Trabzon dismissed the opposition of the prosecutor. In the absence of opposition before the Assize Court, this dismissal became final on 23 June 2005.

Against the dismissal of prosecution of the CMOT personal, the public prosecutor lodged an objection in Trabzon, considering that the respondents had indeed committed a crime and that they should be brought for negligence in the exercise of their profession. On 8 June 2005 the Trabzon Regional Administrative Court dismissed the objection of the prosecutor. In the absence of opposition before the Assize Court, this decision became final July 22, 2005.

A commission of inquiry of the Ministry of Health in Trabzon decided *ex officio* to undertake administrative investigations. This did not lead to new evidence and (re)opening of the criminal investigations.

2. Relevant domestic law (paragraph 47; with reference to ECHR April 14th 2009, appl. no. 75173/01 (Sevim Güngör v. Turkey (dec.)))

"*2. Criminal law*

The relevant provision of the Criminal Code read as follows:

Article 455 § 1

"Anyone who, through carelessness, negligence or inexperience in his profession or craft, or through non-compliance with laws, orders or instructions, causes the death of another shall be liable to a term of imprisonment of between two and five years and to a fine of between 20,000 and 150,000 Turkish liras."

[…]

5. Regulations applicable in the field of health care

The Government submitted a number of documents regarding the domestic law on professional standards in the field of health care and patients' rights. These included the Code of Medical Ethics of 1960, which comprises the rules and principles that doctors and dentists must respect, particularly in the exercise of their profession, and the Medical Professions Act (Law no. 1219), which concerns, inter alia, the conditions required to practise as a doctor, dentist, nurse or obstetrician in Turkey.

Section 75 of Law no. 1219 provides a possibility for domestic courts to seek the opinion of the Supreme Health Council (Yüksek Sağlık Şurası) at the Ministry of Health on the medical liability of doctors accused, inter alia, of medical negligence.

Regulation no. 23420 on patients' rights, published in the Official Gazette on 1 August 1998, encompasses a number of rights, such as the right to care without discrimination, the right to choose medical personnel, the right to information and the right to privacy.

The Government submitted that a number of international instruments, such as the World Medical Association's Lisbon Declaration (1981), the Amsterdam Declaration (1994) and the Bali Declaration (1995) on the Rights of Patients, had also been considered by the relevant authorities."

III. Alleged violation of Article 2 of the Convention

1. The applicant's submissions (paragraph 59-61)

The applicant argued that the authorities have violated their positive obligation to protect the right to life of her son, in defiance of the general duty of the State to provide the necessary medical treatment, since it is it who manages and controls the entire health protection system. It seems quite abnormal that a newborn in need of medical care cannot be admitted by the hospitals because of lack of means. She therefore concluded that the authorities are responsible for the death of Tolga, failing to offer him urgent care. Furthermore, the applicant alleges that the investigations in this case have not fulfilled the positive procedural requirements of Article 2 of the Convention. According to her, the refusal by the prefect to authorize the opening of criminal proceedings against the doctors involved has prevented the establishment of the actual circumstances of death and punishment of those responsible.

2. General principles (paragraph 65-73)

Negative and positive obligations / substantive and procedural aspect

The Court recalls that the first sentence of Article 2 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take the necessary measures for the protection of life of those within its jurisdiction. The Court acknowledges that a State has to take appropriate steps to *safeguard the lives* at risk from the criminal acts

of another individual or the State, or from self‑harm of those within its jurisdiction (*substantive aspect* of the positive obligations). 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) (see the *case note* of Belenko and Bljakaj for information about the different obligations and aspects of the right to life).

In the area of health policy, the positive obligations that Article 2 of the Convention imposes on the State include, above all, the establishment of a regulatory framework that will ensure a high level of competence among health professionals and imposing on hospitals, whether private or public, the adoption of measures to ensure the protection of life of patients. Section 2 also implies the obligation to establish an effective independent judicial system to submit the facts of the case to public control. In particular, when there are reasonable grounds to believe that the death is suspicious, Article 2 of the Convention requires the authorities to act promptly and trigger their own official investigation, independent, impartial and effective to verify the circumstances (see the *case note* of Belenko and Bljakaj for details about these criteria). However, we must remember that the above obligation to establish an effective judicial system does not necessarily require in all cases a criminal-law remedy. It is an obligation of means, not results.

IV. Application of these principles to the present cases (paragraph 74-87)

In the present case, it should be noted at the outset that the applicant does not lend any of the protagonists of having caused the death of the newborn intentionally. The applicant maintains, however, that the charges against the medical staff in question went far beyond mere negligence or error of judgment, and that the death of her baby is directly attributable to the refusal of doctors to submit the baby to a hospital. In this context, it is for the Court to determine whether the national authorities have done what could reasonably be expected of them to prevent this tragedy, especially if they have satisfied, in general, their obligation to adopt measures to protect the life of the boy Tolga.

Firstly, the Court observes that the facts of the present case differ significantly from those which it had to consider before, because those were about medical negligence in treatment. The case of Genç is not about negligence (or intentional) mistreatment during a procedure, but negligence due to refused admission. So the Court believes that in this case the criteria and principles established in the case law so far cannot be directly transposed as such, although they may partially guide its assessment of the facts.

According to the Court, whose main source of information is the case file from the Ministry of Health, the life of the applicant's son was put at risk by a combination of circumstances with three distinct aspects: (1) failure of effective coordination among hospitals, accompanied by lax bureaucratic concerns; (2) inadequacy of the devices in place in the neonatal units of solicited hospitals, compounded by the fact that some of the incubators were down and; (3) the total absence of urgent medical examinations. Examples of point (1)

are inter alia, the staff of the Gümüşhane State Hospital did not take the necessary steps to ensure that the patient would be admitted in the public hospital KTÜ Farabi. Furthermore, this lack of coordination between hospitals was extended in subsequent episodes, marked by unsuccessful attempts to transfer Tolga between KTÜ Farabi and CMOT Trabzon.

On point (2), the Court observes that in this case the failure of coordination between hospitals and the lack of care of the newborn by any of the doctors called to act could not be justified by a simple lack of space. Indeed, it is sufficient for the Court to find that on the night of the incident the only incubator at Gümüşhane State Hospital was broken. The quantity and condition of equipment in other hospitals in the region could not be considered satisfactory (see paragraphs 17-22). This shows that the state has not paid sufficient attention to the proper organization and functioning of the public hospital service, and more generally of its health protection system and the lack of space was not just related to a lack of space due to an unforeseen influx of patients. Accordingly, the son of the applicant must be considered to have been the victim of a malfunction of hospital services by being deprived of any access to adequate emergency care. Therefore there is a *violation* of a positive obligation in the substantive aspect of Article 2 of the Convention.

Furthermore, the refusal to open criminal investigation by the authorities and prosecution of officials who maltreated Tolga is problematic in light of Article 2 of the Convention, especially because the behavior of some medical staff has indeed been considered by the prosecutor as being likely to constitute a criminal offense. One could legitimately expect, that the national authorities dealing with the case would check whether and to what extent the shortcomings established in this case were in violation with the imperatives of public health service and hospital regulations and to establish responsibility in this regard.

Yet no one has sought to verify how the applicable protocols on newborn emergencies or coordination between neonatology services were implemented, or to establish the reasons for the lack of essential equipment in these services – in particular the number of broken incubators. In this regard, it is significant that the case file does not contain any trace of criticism or disapproval, either by the prefectural organs or prosecutors or administrative courts, on all these elements that have certainly contributed or led decisively to put the life of Tolga at risk. However, a critical look was essential if we take into account the public interest at stake. The establishment of any shortcomings that may have an influence on the course of events is indeed essential in addressing failures of health services, so that similar errors are not repeated.

Thus, the way the Turkish judiciary responded to the drama in question was not adequate to shed light on the decisive circumstances of the death of Tolga. The investigation was in particular not complete, since no critical elements were identified and submitted to the case and the shortcomings in the management of the health service has not been the subject of any investigation. Accordingly, there is also a violation of a positive obligation in the procedural aspect of Article 2 of the Convention.

V. Concluding remarks

What does this case law mean for hospitals and hospital staff? Especially when the concurring opinion is taken into account, this case law cannot be interpreted that hospitals have to admit *all* patients or that they cannot have any broken instruments. Those rules would be way too stringent and the Court would interfere with the large margin of appreciation states have in the determination of the (public) health system.[2] From the opinion of the author, this case law should, firstly, be interpreted in the sense that hospital staff should in principle examine a patient to establish the need for treatment before they refuse admission. Secondly, hospital staff cannot just send patients to another facility. Effective coordination is only possible when medical staff from different hospitals communicate with one another. If, in this case, the Gümüşhane State Hospital called the facilities in Trabzon, they would have known that transferring Tolga to those facilities would be futile.

[2] ECHR November 13th 2012, appl. nos. 47039/11 & 358/12, par. 119 (Hristozov and others v. Bulgaria); ECHR May 20th 2014, appl. no. 4241/12, par. 54 (McDonald v. the United Kingdom).