



COLAK AND TSAKIRIDIS v. GERMANY

Case of Colak and Tsakiridis v. Germany, Applications nos. 77144/01 and 35493/05. Strasbourg, 5 March 2009.

Country: Germany

Region: Europe

Year: 2009

Court: European Court of Human Rights European Court of Human Rights

Health Topics: Health information, HIV/AIDS, Infectious diseases, Medical malpractice

Human Rights: Right to due process/fair trial, Right to family life, Right to life, Right to privacy

Facts

The first applicant (the applicant) was born in 1968 and lives in Wiesbaden. In December 1992 the applicant's companion found out that he was suffering from cancer and AIDS. He informed the applicant about the cancer but concealed his AIDS infection. On 21 January 1993 he informed their family physician about his diseases but forbade him to disclose to anybody that he had developed AIDS. When the applicant consulted the physician on 29 January 1993, the physician did not mention to her that her companion was suffering from AIDS. After the applicant's companion passed away, the physician informed the applicant that her companion had died from AIDS. In April 1995 a blood test established that the applicant was HIV-positive.

The applicant sued her physician for damages before the Wiesbaden Regional Court for failing to inform her that her companion was suffering from AIDS and had thus prevented her from protecting herself against infection. A court-appointed expert examined the case file and a number of laboratory results and concluded that it was probably and testified later that it was "very likely" that the applicant had contracted the virus before 29 January 1993.

The Wiesbaden Regional Court rejected the action, stating that the physician had not been obliged to disclose her companion's infection to the applicant. Having regard to his duty of confidence towards the applicant's companion, he would only have been under such an obligation if this could be regarded as the only possibility of preventing the applicant's infection.

The Frankfurt Court of Appeal dismissed the applicant's appeal holding that that the physician had misconceived his duty of care owed towards the applicant in his position as family physician and overestimated his duty of confidence owed towards her companion. By not informing the applicant about the fatal threat to her health, he had committed an error in treatment, but because the physician had only overestimated his duty of confidence while balancing the different interests, his behavior could not be qualified as a gross error in treatment. The Court of Appeal held that the applicant had not been able to prove that she had contracted the virus after January 1993, when the physician himself had been informed that her companion was HIV-positive.

The Court of Appeal further considered that the expert was highly competent, and that under these circumstances it was not necessary to hear further expert opinion as requested by the applicant.

The Federal Court of Justice dismissed the applicant's appeal on points of law for lack of prospect of success, and the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

In August 2002, in the course of separate criminal investigations against the physician, another medical

expert submitted his opinion on the applicant's HIV-positive status to the Wiesbaden Public Prosecutor, which while not concurring with the first expert's opinion that it was very likely that she had contracted the virus before January 1993, considered that a date prior to January 1993 could not be excluded. In April 2003 the Public Prosecutor discontinued criminal investigations on the ground that it could not be excluded beyond reasonable doubt that the applicant had contracted the virus before January 1993. Appeals by the applicant were to no avail.

On 14 September 2007 the applicant requested the physician to hand her the complete medical files. On 5 October 2007 the physician informed her that he had destroyed the medical files after expiry of the time-limit for storage.

The applicant complained that the domestic courts' refusal to award her compensation for the damages she suffered had violated her right to life, and a violation of her right to respect for private and family life, home and his correspondence, relying on Article 2 § 1 and Article 8 of the European Convention of Human Rights, respectively.

Additionally, the applicant complained that she had been denied a fair trial before the domestic courts in violation of Article 6 of the Convention, due to the Court of Appeals' misconstruing of the concept of "gross error in treatment" basing their decisions on an inconsistent expert opinion, and failing to hear further expert opinion. The applicant finally complained that the Court of Appeal had relied on the expert's opinion to assess whether the physician's behavior constituted a gross error in treatment, while it should have been up to the court to answer this legal question.

Decision and Reasoning

The court held that there had been no violation of Article 2 § 1, Article 8, or Article 6 § 1 of the Convention.

In regards to the applicant's complaint that the Frankfurt Court of Appeal had failed to construe the legal term "gross error in treatment" in the spirit of Article 2 § 1 of the Convention, the Court concluded that the German legal system provides for legal remedies which, in general, meet the requirements of Article 2 as they afford parties injured through medical negligence both criminal and civil compensation proceedings. The court restated that under the pertinent domestic law, the patient requesting damages from a physician for medical malpractice generally carries the burden of proof for the requisite causal connection between the physician's negligence and the damage to his or her health, and that only a "gross error in treatment" would lead to a reversal of the burden of proof to the physician.

The court affirmed the Frankfurt Court of Appeal's judgment that the defendant physician had violated his professional duties towards the applicant by failing to inform her about her companion's infection, but that this behavior could not be qualified as a "gross error in treatment", and therefore that it was up to the applicant to prove that she contracted the virus after January 1993. Under these circumstances, the Court of Appeal's decision does not appear contrary to the spirit of Article 2, and therefore that the German courts had sufficient regard to the applicant's right to life and physical integrity.

In regards to the applicant's complaint that she had been denied a fair trial before the domestic courts in

violation of Article 6 § 1 of the Convention, the Court determined that it is not its function to deal with errors of fact or law allegedly committed by a national court unless they may have infringed upon rights and freedoms protected by the Convention, and that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed.

In so far as the applicant complained about the domestic courts' refusal to apply a less strict rule on the burden of proof, the Court was asked to determine whether the concept of equality of arms, as an aspect of the right to a fair trial guaranteed by Article 6, had been complied with. This right entails that each party in litigation must be afforded a reasonable opportunity to present its case and evidence under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent. The Court found that the applicant was not placed at a substantial disadvantage vis-à-vis the defendant and that the principle of equality of arms had been complied with since the holding back or destruction of the medical files could not have an impact on the outcome of the proceedings, as it occurred only after termination of the compensation proceedings and the medical files had been available to the courts.

In his separate opinion, Judge Maruste agreed with the majority that there had not been a violation of Article 2 of the Convention, but posed the question of whether the applicant's claim falls under Article 2 at all since she is "still alive and modern medicine gives her a good chance of living a normal life with some limitation or even the possibility of recovery." Additionally, Judge Maruste that the Court erred by ruling out an Article 8 violation for the same reasons it ruled out an Article 2 violation, because the areas of protection were different and that the present case's substance should have been examined under Article 8's positive obligation to protect private life. Lastly, Judge Maruste stated that the Court overlooked the problem detected by the Court of Appeal that no established domestic case-law existed as to whether a family physician was obliged to disclose a patient's HIV status to the partner even against the patient's explicit will. He concluded that because the applicant "was left in uncertainty for more than two years (from 21 January 1993 to March 1995)...this situation of dangerous uncertainty in which the applicant was left amounted to an unjustified interference in her private life."

Decision Excerpts

"An event, however, which does not result in death may only in exceptional circumstances disclose a violation of Article 2 of the Convention...Those may be found in a lethal disease. Having regard to the particular circumstances of the present case, the Court starts on the assumption that the present case raises an issue as to the applicant's right to life."

"Having regard to the specific sphere of medical negligence, the Court reiterates that the positive obligations under Article 2 may be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the physicians concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained."

"That court considered, however, that this behavior could not be qualified as a 'gross error in treatment', as the physician had not disregarded medical standards in a blindfold way, but had merely overestimated his duty of confidence while balancing the conflicting interests. It followed that it was not possible to apply a less strict rule on the burden of proof in the instant case."

"Having regard to the above considerations, the Court considers that the German courts...had sufficient regard to the applicant's right to life and physical integrity. It follows that the domestic courts did not fail to interpret and apply the provisions of domestic law relating to the applicant's compensation claims in the spirit of the Convention."

"...while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts."

"In so far as the applicant complained about the domestic courts' refusal to apply a less strict rule on the burden of proof, the Court is called upon to examine whether the concept of equality of arms, being an aspect of the right to a fair trial guaranteed by Article 6, was complied with. The principle of equality of arms implies that each party, in litigation involving opposing private interests, must be afforded a reasonable opportunity to

present his case "including his evidence" under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."

"Even taking into account that patients may face difficulties in proving that medical treatment caused the damage suffered...the Court finds that the applicant was not placed at a substantial disadvantage vis-à-vis the defendant and that the principle of equality of arms was complied with."

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