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

FIFTH SECTION

CASE OF COLAK AND TSAKIRIDIS v. GERMANY

(Applications nos. 77144/01 and 35493/05)

JUDGMENT

STRASBOURG

5 March 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Colak and Tsakiridis v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 February 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 77144/01 and 35493/05) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Mrs Ayse Colak, Mr Aris Tsakiridis and Ms Anastasia Tsakiridis ("the applicants"), on 14 May 2001.

2. The applicants were represented by Mr H.J. Poth, a lawyer practising in Bruchköbel. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice. The Turkish Government, having been informed of their right to intervene in the proceedings (Article 36 § 1 and Rule 44), did not indicate that they wished to exercise that right.

3. The first applicant alleged in particular that she had been denied a fair trial before the civil courts and that the denial of compensation violated her right to life.

4. The Chamber decided to join the proceedings in the applications (Rule 42 § 1).

5. By a decision of 11 December 2007, the Court declared the first applicant's complaints partly admissible and the second and third applicants' complaints inadmissible.

6. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties submitted further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant ("the applicant") was born in 1968 and lives in Wiesbaden.

8. In December 1992 the applicant's companion found out that he was suffering from lymph gland cancer and Aids. He informed the applicant about the cancer but concealed his Aids infection.

9. 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 he did not mention to her that her companion was suffering from Aids. On 22 December 1994 the applicant's companion died. During a further consultation in March 1995 the physician informed the applicant that her companion had died from Aids.

10. In April 1995 a blood test established that the applicant was HIV-positive. Since 1995 the applicant has been following antiretroviral treatment. She is not suffering from full-blown Aids.

11. Subsequently, the applicant sued her physician for damages before the Wiesbaden Regional Court (*Landgericht*). She submitted that the physician had failed to inform her that her companion was suffering from Aids and had thus prevented her from protecting herself against infection.

12. On 28 April 1998 the court-appointed expert, having examined the case file and a number of laboratory results, submitted his expert opinion. The expert considered that it was probable that the applicant had contracted the virus before 29 January 1993. The laboratory results dating from April 1995, combined with general statistical data, only allowed a rough estimate of the time of infection. The expert further considered that it was not general medical practice in early 1993 to treat early HIV infections with antiretroviral drugs. During the oral hearing before the Regional Court the expert expressed the view that an infection before January 1993 was very likely.

13. On 24 February 1999 the Wiesbaden Regional Court, which was in possession of the physician's medical records on the first applicant and on her late partner, rejected the action. That court considered 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. This had not been the case, as the physician had consistently advised the applicant's companion to take the necessary steps to prevent infection and could reasonably believe that the latter would follow his advice. Under these

circumstances, the Regional Court did not find it necessary to determine whether there was a causal connection between the applicant's contracting HIV and the physician's alleged failure to inform her about her companion's infection.

14. On 5 October 1999 the Frankfurt Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal. Contrary to the Regional Court's opinion, the Court of Appeal considered 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. As laid down in section 34 of the Criminal Code (see Relevant domestic law below) a physician's duty of confidence owed towards a patient had to be restricted or even given up if a superior value was at stake. By not informing the applicant about the fatal threat to her health, he had committed an error in treatment. The court considered, however, that the physician had not disregarded medical standards in a blindfold way, but had only overestimated his duty of confidence while balancing the different interests. It followed that his behaviour could not be qualified as a gross error in treatment which, according to the established case-law of the Federal Court of Justice, would have entailed a reversal of the burden of proof as to the causality of the error in treatment and the first applicant's HIV-positive status. Referring to the written opinion submitted by the court-appointed expert in the first-instance proceedings, the Court of Appeal considered 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. According to the expert's opinion, it was more likely that she had already become HIV-positive before January 1993. The Court of Appeal further considered that there was no doubt about the expert's high competence. The expert opinion was well reasoned and took into account relevant scientific publications. Under these circumstances, the Court of Appeal did not find it necessary to hear further expert opinion as requested by the applicant.

The Court of Appeal further considered that medical treatment such as was available in 1993 would not have improved the first applicant's physical condition, even if she had been informed of her HIV status by that time.

15. On 4 April 2000 the Federal Court of Justice (*Bundesgerichtshof*) dismissed the applicant's appeal on points of law for lack of prospect of success.

16. On 14 November 2000 the Federal Constitutional Court (*Bundesverfassungsgericht*), sitting as a panel of three judges, refused to admit the applicant's constitutional complaint.

17. 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. While

not concurring with the first expert's opinion that it was very likely that she had contracted the virus before January 1993, the expert 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.

18. 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.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Provisions of the Civil Code

19. Section 823 of the Civil Code provides *inter alia*:

> "A person who, wilfully or negligently, unlawfully injures another person's life, body, health (...) is bound to compensate him for any damage arising therefrom."

Section 847 as in force at the material time provides *inter alia*:

> "In the case of injury to the body or health (...) the injured party may also demand fair compensation in money for moral prejudice."

20. A patient requesting damages from a physician under section 823 of the Civil Code generally carries the burden of proof for the requisite causal connection between the physician's negligence and the damage to his health. According to the established German case-law, in case of gross error in treatment the burden of proof is reversed to the physician. A gross error in treatment is generally assumed if the physician clearly breaches well-established medical rules or assured medical knowledge, and has committed an error which does not appear to be comprehensible from an objective point of view, as a physician must absolutely not commit such an error (see Federal Court of Justice, 26 November 1991, no. VI ZR 389/90, and 4 October 1994, no. VI ZR 205/963). The existence of a gross error has been accepted in cases where a physician had not discovered a serious disease (meningitis) in spite of unambiguous symptoms (see Stuttgart Court of Appeal, 31 October 1996, no. 14 U 52/95, or Oldenburg Court of Appeal, 20 February 1996, no. 5 U 146/95) or had failed to order undoubtedly necessary medical examinations or treatments (Federal Court of Justice, 29 March 1988, no. VI ZR 185/87) or to inform the patient about the necessity to undergo further medical examinations (Federal Court of Justice, 25 April 1989, no. VI ZR 175/88).

2. Provisions of the Criminal Code

21. Section 229 of the Criminal Code provides:

"Whoever negligently causes bodily injury to another person shall be punished with imprisonment for not more than three years or a fine."

Section 203 provides *inter alia*:

"Whoever, without authorisation, discloses the secret of another, in particular, a secret which belongs to the realm of personal privacy (...) which was confided to, or otherwise made known to him in his capacity as a physician (...) shall be punished with imprisonment for not more than a year or with a fine."

Section 34 provides as follows:

"Whoever, faced with an imminent danger to life, limb, freedom, honour, property, or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of danger threatening them, the protected interest substantially outweighs the one interfered with. This shall apply, however, only to the extent that the act is a proportionate means to avert the danger."

3. Rules of Criminal Procedure

If the Public Prosecutor refuses to prefer criminal charges against an alleged offender, the aggrieved party may, pursuant to section 172 of the Code of Criminal Procedure, lodge a request for a court decision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 § 1 AND 8 OF THE CONVENTION

22. The applicant complained that the domestic courts' refusal to award her compensation for the damages she suffered had violated her right to life. She relied on Article 2 § 1 of the Convention, which provides as relevant:

"Everyone's right to life shall be protected by law."

Alternatively, the applicant relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The applicant's submissions

23. The applicant considered that the facts of the present case fell within the ambit of Article 2 § 1 of the Convention, as the assault which had been carried out by her late companion on her health amounted to attempted murder. She further pointed out that she would most probably die of it.

24. As regards the merits of her complaint, the applicant maintained that the Government had failed to issue clear guidelines to the medical profession on how to react in a case in which a patient refused to disclose his infection to his relatives. The existing legal provisions were inadequate to resolve the resulting conflict of interests. The applicant further considered that the Frankfurt Court of Appeal, in its judgment of 5 October 1999, had failed to construe the legal term "gross error in treatment" in the spirit of Article 2 § 1 of the Convention. She further alleged that the physician's failure to disclose her companion's HIV-positive status had prevented her from seeking treatment earlier, thus further aggravating the violation of her Convention right.

2. The Government's submissions

25. The Government considered, at the outset, that the applicant's complaint did not fall within the scope of Article 2 § 1 of the Convention, as her HIV-positive status did not constitute an immediate threat to the applicant's life.

26. Alternatively, the Government submitted that the Federal Republic of Germany had fulfilled and continued to fulfil its positive obligations under Article 2 § 1 of the Convention to protect the life and health of its subjects by taking adequate and reasonable measures to protect all persons within its jurisdiction against HIV. In the area of public health law the Government focused on informing the general public about the risks and prevention of HIV. Furthermore, the Federal Health Office issued recommendations to the medical profession.

27. The Government further submitted that the German Criminal Law had established criminal liability of persons who voluntarily or negligently caused another person to become HIV-positive, including, in certain cases, a physician's criminal liability. Furthermore, section 823 of the Civil Code obliged a physician to pay compensation if his patient contracted HIV through medical malpractice. The legal framework, notably section 34 of the Criminal Code, provided adequate instruments for weighing up the conflicting interests in each individual case. It would be impossible for a mandatory rule to cover all conceivable cases.

3. The Court's assessment

28. With regard to the applicability of Article 2 the Court reiterates that the first sentence of that Article requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *Vo v. France* [GC], no. 53924/00, § 88, ECHR 2004-VIII; *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36; and *Powell v. the United Kingdom*, (dec.) 4 May 2000, nº 45305/99, ECHR 2000-V). Moreover, the State's positive obligations under Article 2 require an effective independent judicial system so that the cause of death of patients in the care of the medical profession can be determined and those responsible made accountable (see *Calvelli and Ciglio v. Italy*, [GC], no. 32967/96, § 49, ECHR 2002-I).

29. An event, however, which does not result in death may only in exceptional circumstances disclose a violation of Article 2 of the Convention (see *Acar and Others v. Turkey*, nos. 36088/97 and 38417/97, § 77, 24 May 2005; *Makaratzis v. Greece* [GC], no. 50385/99, § 51, ECHR 2004-XI; and *Tzekov v. Bulgaria*, no. 45500/99, § 40, 23 February 2006). 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.

30. 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 (see *Calvelli and Ciglio*, cited above, § 51).

31. The Court observes at the outset that the applicant does not contest that the Government pursues a general policy of informing both the public and the medical profession with an aim of preventing new infections with HIV. The Court further observes that domestic law provides the possibility of bringing an action for damages before the civil courts under sections 823 and 847 of the Civil Code and, notably in section 34 of the Criminal Code, provides a general legal framework for resolving the conflict of interests between a physician's duty of confidence owed towards one patient and another patient's right to physical integrity. Having regard to the complexity of the subject matter, the Court accepts that it was not possible for the legislator to issue stricter rules on the solution of all conceivable conflicts of interests even before they arose. The Court further notes that section 172 of the German Code of Criminal Procedure provides the aggrieved party with the possibility of lodging a request for a court decision against the discontinuation of criminal proceedings. As established by the Court in its

decision on admissibility in the present case, the applicant did not, however, exhaust domestic remedies in this respect.

32. The Court concludes 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.

33. The Court further notes that, under the pertinent domestic law, a 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. According to the established domestic case-law, only a "gross error in treatment" would lead to a reversal of the burden of proof to the physician. Such gross error is generally assumed if the physician clearly breaches well-established medical rules (see paragraph 20, above). In the instant case the Frankfurt Court of Appeal, in its judgment on the applicant's compensation claims, expressly acknowledged that the defendant physician had violated his professional duties towards the applicant by failing to inform her about her companion's infection. That court considered, however, that this behaviour 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. Accordingly, it was up to the applicant to prove that she contracted the virus after January 1993, when the physician himself was informed about her companion's HIV status. Relying on expert opinion, the Court of Appeal considered that it could not be excluded that the applicant had contracted the virus before January 1993, when the physician himself learned about the companion's infection.

34. The Court notes that at the time the Frankfurt Court of Appeal rendered the instant judgment in 1999, no established domestic case-law existed as to whether a family physician was obliged to disclose a patient's HIV status to the patient's partner even against the patient's express will. The Court further observes that the three judges deciding on the case in the first-instance court, unlike the Court of Appeal judges, did not consider that the physician had been obliged to disclose her partner's status to the applicant. Under these circumstances, it does not appear contrary to the spirit of Article 2 of the Convention if the Court of Appeal, while fully acknowledging that the physician acted in breach of his professional duties, did not consider that the latter committed a "gross error in treatment" which would have led to a reversal of the burden of proof. This does not exclude the possibility that a higher standard would have to be applied to a physician's diligence in cases which might arise after the Frankfurt Court of

Appeal's judgment given in the instant case, which clarified the physician's professional duties in these specific circumstances, had been published.

35. Having regard to the above considerations, the Court considers that the German courts, and in particular the Frankfurt Court of Appeal, 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.

36. Accordingly, the domestic authorities did not fail to comply with their positive obligations owed towards the applicant under Article 2 of the Convention. For the same reasons, the Court considers that there has not been a violation of the applicant's rights under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

37. The applicant further complained that she had been denied a fair trial before the domestic courts. She relied on Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

1. The applicant's submissions

38. According to the applicant, the civil courts had misconstrued the concept of "gross error in treatment" and had based their decisions on an inconsistent expert opinion. The court-appointed expert had based his opinion on general statistical data, which did not allow an assessment of her individual case. Furthermore, his statements were contradictory. In this respect, the applicant pointed out that the expert, in his written opinion, considered that it was probable that she had contracted the virus before 29 January 1993, whereas he had stated during the hearing before the Regional Court that an earlier date of contraction had been "very likely". The applicant further complained that the domestic courts had failed to hear further expert opinion. She alleged that the opinion submitted by the expert was outdated and was disproved by the expert opinion submitted by another expert in the course of the criminal proceedings. The applicant finally considered that the Frankfurt Court of Appeal relied on the expert's opinion when assessing whether the physician's behaviour constituted a gross error in treatment, while it would have been up to the court to answer this legal question. The applicant further considered that the physician, by failing to inform her about her partner's HIV status in January 1993 and by holding back or destroying the medical files, made it impossible for her to prove that she had not contracted the virus before that date. According to the applicant,

these facts were bound to lead to a reversal of the burden of proof in her favour.

2. The Government's submissions

39. The Government maintained that the Frankfurt Court of Appeal's construction of the term "gross error in treatment" was in line with the relevant case-law of the Federal Court of Justice. They furthermore correctly applied the relevant law regarding the taking and assessment of evidence and did not act arbitrarily. According to the Government, the opinion submitted by the court-appointed expert was scientifically well-founded and conclusive. As pointed out by the Frankfurt Court of Appeal in its judgment of 5 October 1999, there was no sufficient reason to hear further expert opinion. They finally submitted that the medical files had been part of the civil court files until the end of the proceedings and had only been destroyed by the physician after expiry of the mandatory ten years' storage period.

3. The Court's assessment

40. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, 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 (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

41. 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 (see *Dombo Beheer B.V. v. the Netherlands,* judgment of 27 October 1993, Series A no. 274, p. 19, § 33, and *Hämäläinen and Others v. Finland* (dec.), no. 351/02, 26 October 2004). It does not, however, imply a general right to a reversal of the burden of proof.

42. The Court, in view of the careful examination of this issue by the Frankfurt Court of Appeal, has already found above that the provisions of German civil law relating to the applicant's compensation claims were interpreted and applied in the spirit of the Convention. 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 throughout. Even taking into account that patients may face difficulties in proving that medical treatment caused the damage suffered (see *Storck v. Germany*, no. 61603/00, § 162, ECHR 2005-V), 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.

43. As regards the alleged deficiencies of the court-appointed expert's opinion, the Court, having regard to all material in its possession, does not consider that the domestic courts' assessment of the facts can be regarded in any way as arbitrary.

In conclusion, the Court considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 2 § 1 of the Convention;

2. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 5 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Maruste is annexed to this judgment.

P.L.
C.W.

SEPARATE OPINION OF JUDGE MARUSTE

In the case at hand the applicant's main complaint was made under Article 2 of the Convention, that the domestic courts had refused to award her compensation for the damage she had suffered and thus had violated her right to life. As an alternative the applicant relied on Article 8. As to the merits she maintained that the Government had failed to issue clear guidelines to the medical profession on how to react in cases where a patient refused to disclose his infection to his close relatives. Such a situation and the doctor's failure to disclose her companion's HIV-positive status had prevented her from seeking early treatment and had thus aggravated the violation of her Convention rights.

As to the complaint under Article 2, I am in agreement with the majority in their conclusion and do not have any particular problems with the reasoning of the judgment, although one might ask the question whether or not this case falls under Article 2 at all, because the applicant is still alive and modern medicine gives her a good chance of living a normal life with some limitations or even the possibility of recovery (for modern treatment in HIV cases see *N. v United Kingdom*, judgment of 27 May 2008).

But the applicant also complained as an alternative under Article 8, which was ruled out by the Chamber for the same reasons as the Article 2 complaint (see § 36) not making any separate examinations under that head. I consider this approach incorrect because the areas of protection of the two articles under discussion are different. The present case in substance falls to be examined rather under Article 8 in my view, more specifically under the positive obligation to protect private life.

The chamber, like the domestic courts, concentrated on the legal issues related to compensation and overlooked the problem detected by the Frankfurt Court of Appeal, namely 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. Had there been clear rules and practice for balancing conflicting interests for the doctors the family physician could have avoided an error in interpretation of his duty. It could also have led him to give adequate information and instructions to the partner at the due time, avoiding unnecessary doubts and maybe even accusations. This would certainly have given the applicant clear grounds to determine her private, including her intimate, life, and take necessary precautions. The applicant was left in uncertainty for more than two years (from 21 January 1993 to March 1995 - see paragraph 9). It seems to me that this situation of dangerous uncertainty in which the applicant was left amounted to an unjustified interference in her private life.