



THIRD SECTION

CASE OF BOCHKAREVA v. RUSSIA

(Application no. 49973/10)

JUDGMENT

STRASBOURG

12 October 2021

This judgment is final but it may be subject to editorial revision.

In the case of Bochkareva v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Georgios A. Serghides, *President*,

Anja Seibert-Fohr,

Frédéric Krenc, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to:

the application (no. 49973/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Lyudmila Anatolyevna Bochkareva (“the applicant”), on 21 August 2010;

the decision to give notice to the Russian Government (“the Government”) of the complaints concerning infection of the applicant’s husband with hepatitis C and ineffective investigation into the matter;

the parties’ observations;

Having deliberated in private on 21 September 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the applicant’s complaint that her husband was infected with hepatitis C (“HCV”) during a blood plasma transfusion in a civilian hospital and that the investigation of that accident was not effective.

THE FACTS

2. The applicant was born in 1948 and lives in Saratov. She is represented before the Court by Ms O. Semyk, residing in Krasniy Tekstilschik settlement in the Saratov Region.

3. The Russian Government (“the Government”) were represented initially by Mr G. Matyushkin, then by Mr M. Galperin, the Representatives of the Russian Federation to the European Court of Human Rights, and lately by their successor in that office, Mr. M. Vinogradov.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT’S HUSBAND’S MEDICAL TREATMENT AND HIS DEATH

5. In January 2004 the applicant’s husband (Mr A.) was diagnosed with kidney cancer. The next month his sick kidney was removed.

6. A year later, in February 2005, Mr A. was admitted to Saratov Hospital no. 3 on account of his cancer progress. After series of medical tests, including tests for HCV (which was negative), doctors from Saratov Hospital no. 3 performed a surgery. They changed his bladder to one created of his intestine on 1 March 2005.

7. During that surgery Mr A. received plasma transfusion from two people. After that he received one more portion of plasma from a third person. Each portion of blood plasma had been tested negatively for HCV.

8. On 24 May 2005 Mr A. was diagnosed with HCV. To identify the source of infection, medical authorities carried out internal inquiry and tested Mr A.'s donors for HCV. On 28 June 2005 the doctors found HCV antibodies in one of the donors, Mr B.

9. On 3 August 2005 a commission of medical experts concluded that most probably Mr A. contracted HCV from Mr B. during the blood plasma transfusion.

10. According to the applicant, HCV undermined the effectiveness of her husband's medical treatment, particularly, because chemotherapy could not be given to him because of HCV.

11. On 22 November 2005 Mr A. died of cancer intoxication.

II. CRIMINAL INVESTIGATION

12. On 14 July 2005 the applicant contacted the Saratov Regional Prosecutor's office. She alleged that her husband had been infected with HCV owing to medical negligence and requested that a criminal case into the incident be opened.

13. The parties did not provide the Court with entire material concerning the proceedings conducted at the applicant's request. As far as can be seen from the documents in the Court's possession, the proceedings were conducted as follows.

14. On 29 August 2005 the investigators refused to open a criminal case into the incident. That decision was overruled by a supervising prosecutor for being premature and ill-founded on 26 September 2005.

15. Two days later the investigators requested the Saratov Regional Bureau of Forensic Examinations to assess the quality of medical assistance provided for Mr A.

16. The experts' conclusions were summarised in forensic report no. 275 of 5 December 2005. It stated that Mr A. had received adequate treatment. The plasma transfusion had been performed in line with the applicable regulations which had not set out a mandatory quarantine requirement for donor blood. Given that the incubation period for HCV could vary from 14 to 182 days, it was impossible to establish when Mr A. had contracted it. He could be infected during the blood plasma transfusion, or after his discharge from the hospital. Mr B. could be infected with hepatitis either before or

after the blood donation. Lastly, the development of HCV did not affect the progress of Mr A.'s cancer.

17. On an unspecified date in December 2005 the investigators for the second time refused to open a criminal case into the incident. That decision was also overruled by the supervising prosecutor on 12 December 2005, who ordered a criminal investigation to be opened into the offence of professional negligence resulting in a person's death.

18. On 12 April 2006 the criminal proceedings were closed "for the absence of a criminal event". On 5 May 2006 the supervising authority resumed the proceedings. Subsequently, the proceedings were suspended on 7 June 2006 and then resumed on 6 November 2006.

19. On 28 November 2006, at the investigators' request, the Saratov Regional Bureau of Forensic Examinations prepared a new report (no. 418/06). The experts stated that because of the variations in the HCV's incubation period and the absence of information about ribonucleic acids ("RNA") of Mr A.'s case it was impossible to establish if Mr A. had contracted it from Mr B. or not. It could not be excluded that the applicant had been infected during the blood plasma transfusion, even if the medical specialists had fully complied with the applicable regulations. The domestic law set out requirement for donors' testing prior to blood donation, but did not provide for mandatory quarantine period for the donated blood because of the lack of facilities for that (the only exception was set out for paediatric and obstetric procedures as well as receipt of organs or tissues by a donor). According to statistics, about 0.9% of donors who had been tested negatively for HCV before blood donation had in fact been suffering from that disease at the time of the blood donation.

20. Later, the investigation was discontinued on 6 December 2006, 14 June and 28 September 2007 and 23 July 2009. Those decisions were overruled by supervising authorities on 11 May and 22 August 2007, 28 August 2008 and 8 December 2009. The latter noted the investigators' failure to ensure additional forensic medical examination aimed at clarifying whether the doctors had complied with medical guidelines.

21. On 23 September 2008 the investigators requested the All-Russian Centre for Forensic Medical Examinations in Moscow to prepare an additional forensic expert report. The report no. 54/09 of 10 June 2009 prepared at that request concluded that Mr A. had received appropriate treatment, that there had been no violations of medical rules during the blood plasma transfusion, that it was impossible to establish how and when Mr A. had been infected with HCV and that the infection had not affected the cancer progress or hampered its treatment.

22. On unspecified dates the applicant requested investigators to provide her with individual opinions of the experts involved in the forensic examinations, and to question the experts in her presence. Her requests were dismissed by the investigators on 16 and 21 December 2009.

23. On 21 December 2009 the investigators issued the final decision to discontinue the criminal proceedings having found that the doctors' conduct had not disclosed a criminal offence of professional negligence resulting in a significant damage or death of a person.

III. JUDICIAL COMPLAINTS

A. Lawfulness of the blood plasma transfusion

24. On 9 April 2008 the applicant lodged a claim with the Leninskiy District Court of Saratov challenging the lawfulness of the blood plasma transfusion to Mr A. She was unsatisfied with the use of blood which had not been subjected to quarantine. She asked the court to award her compensation for Mr A.'s health damage which was a result of giving him infected blood plasma.

25. Her claim was dismissed on 27 June 2008 on the grounds that she had not been the victim of the alleged violation of the domestic law. She had not sustained any health damage to be entitled for compensation. Furthermore, the right to compensation for health damage was not transferable and could not be inherited by her as Mr A.'s heir. Referring to the investigators' decision of 28 September 2007 to discontinue criminal proceedings, which at that time had not been overruled, the court stated that the applicant had failed to substantiate her allegation that Mr A. had been infected in hospital.

26. The applicant appealed against that judgment to the Saratov Regional Court ("The Regional Court") on 3 September 2008, which dismissed her claim endorsing the reasoning of the lower court.

B. Other complaints

27. On 9 December 2008 the applicant lodged a civil claim with the Frunzenskiy District Court contesting the accuracy of the conclusions of forensic expert report no. 275 of 5 December 2005. She also claimed compensation for non-pecuniary damage in that connection. By the final judgment of the Regional Court of 11 February 2009 her claim was dismissed on the grounds that the criminal proceedings were ongoing, and that the applicant could only contest the report no. 275 in those proceedings.

28. On an unspecified date later, the applicant challenged before the Oktyabrskiy District Court of Saratov ("the District Court") the investigators' decision of 23 July 2009 to close criminal proceedings. She was dissatisfied with the forensic report no. 54/09 of 10 June 2009, which formed the basis of the impugned decision. By the final judgment of 11 November 2009, the District Court granted her claim and declared the decision unlawful and ill-founded. It found that the investigators had not

fully elucidated the relevant circumstances nor analysed the evidence in an objective manner. They did not resolve the conflict between some pieces of evidence obtained from experts and specialists nor duly assess the evidence related to Mr B.

29. In December 2009 the applicant challenged before the District Court the investigators' decisions of 16 and 21 December 2009. By the final judgment of the Regional Court of 21 April 2010 her claim was dismissed with reference to the independence of the investigators and the absence of interference with the applicant's rights.

30. On 22 December 2009 the applicant challenged before the District Court the decision to discontinue the criminal proceedings dated 21 December 2009. She alleged that the investigators had not carried out a number of important investigative steps, had not assessed the evidence in the meaningful manner and disregarded the conflict between certain pieces of evidence. By the final judgment of the Regional Court of 23 June 2010 her claim was dismissed on the grounds that the major part of the applicant's complaints had already been addressed in previous proceedings. The remainder of her complaints concerned the assessment of evidence which could not be re-assessed by the court.

RELEVANT LEGAL FRAMEWORK

31. For a summary of the relevant legal framework see *Belenko v. Russia* (no. 25435/06, §§ 56-60, 18 December 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

32. The applicant complained that doctors had infected her husband with HCV and that the authorities had failed to investigate that incident. She relied on Articles 2, 6 and 13 of the Convention. Bearing in mind that it is master of the characterisation to be given to the facts of the case (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 145, ECHR 2017, and *Elena Cojocaru v. Romania*, no. 74114/12, § 74, 22 March 2016), the Court considers that the complaints at hand should be examined from the standpoint of Article 2 of the Convention alone, which reads in the relevant part as follows:

“1. Everyone's right to life shall be protected by law ...”

A. Admissibility

1. Infection with HCV

33. The Government submitted that the complaint was manifestly ill-founded. They referred to the investigators' conclusion that the blood plasma transfusion had been carried out in line with the requirements of medical standards and that HCV had not led to the death of her husband.

34. The applicant claimed that her husband's doctors should have been provided him with the quarantined blood; that he had contracted HCV during the blood plasma transfusion; and that the infection had put his life in danger.

35. The Court observes that the applicant's allegation is not substantiated by sufficient medical evidence. It notes that the plasma which her late husband had received in the hospital had been tested negatively for HCV before the transfusion (see paragraph 7 above). Although later one of the donors was diagnosed with HCV, it cannot be excluded that he contracted it after the blood donation (see forensic medical report summarised in paragraph 16 above). Owing to variations in the "window period" which may last from 14 to 128 days during which the presence of HCV antibodies cannot be determined, three forensic medical examinations were unable to establish whether Mr A. had contracted HCV in the hospital, or not (see paragraphs 16, 19 and 21 above). In particular, forensic medical report no. 275 clearly stated that he could be infected after the discharge from the hospital. Therefore, even if the applicant's version of facts is not excluded, in the present case the Court cannot conclude beyond all reasonable doubt that Mr A. was infected with HCV in the hospital (see, as similar examples, *Mechenkov v. Russia*, no. 35421/05, §§ 79-82, 7 February 2008, and *Mitkus v. Latvia*, no. 7259/03, §§ 68-69, 2 October 2012).

36. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Effectiveness of the investigation

37. The Government argued that the complaint was manifestly ill-founded, because the investigating authorities had carried out effective investigation into the matter.

38. The applicant submitted that the investigation was not thorough, because the investigators had not duly assessed key pieces of evidence or failed to take important investigative steps.

39. The Court finds that the complaint at hand is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Submissions by the parties*

40. The applicant alleged that the investigation was not thorough. She referred to the investigators' failures to perform in-depth comparison between the viruses found in Mr A.'s and Mr B. She also pointed at a number of unresolved contradictions in witness evidence and expert reports. She stated that forensic experts who had prepared expert report no. 275 had been involved in her husband's treatment and therefore had been biased. Experts who had drafted up report no. 54/09 had not been independent from medical authorities. She also repeated her criticism against the investigators used in domestic proceedings.

41. The Government maintained their arguments.

2. *Assessment by the Court*

42. The Court reiterates that it has interpreted the procedural obligation of Article 2 in the context of healthcare as requiring States to set up an effective and independent judicial system so that the cause of death or serious physical injury of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (see *Lopes de Sousa Fernandes*, cited above, § 214). The choice of means for ensuring that the positive obligations under Article 2 are fulfilled is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring that Convention rights are respected, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. (see *ibid.*, § 216, with further references, and *Aftanache v. Romania*, no. 999/19, § 61, 26 May 2020). In cases of medical negligence, a civil remedy may be sufficient (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I).

43. The Court also observes that in the present case the applicant availed herself of the civil remedy (see paragraphs 24-26 above). Her claim was dismissed for the absence of *locus standi*. In dismissing her action, the civil courts relied unreservedly on the results of the investigation, stating that there was no evidence that Mr A. had received the infection in the hospital. No independent investigation into the matter had been undertaken in the context of the civil proceedings (compare *Vovk and Bogdanov v. Russia*, no. 15613/10, §§ 76-77, 11 February 2020).

44. The investigation to which the civil courts referred had a number of shortcomings identified by the supervising prosecutor and the District Court (see paragraphs 14, 17, 18, 20 and 28 above). Those shortcomings included the investigators' premature and ill-founded decisions not to open a criminal case, their failure to order an additional expert examination, analyse

evidence in objective manner, or address the conflict between various pieces of evidence. Moreover, the Court cannot overlook that the crux of the case was the question whether Mr A. received HCV from Mr B or not. It could be answered by comparison of respective samples' RNAs (see paragraph 19 above). However, the investigators failed to order it, although nothing suggests that such test was complex or unavailable. The proceedings lasted for more than four years and five months which appears to be unreasonable given the nature of the case (compare *Denis Vasilyev v. Russia*, no. 32704/04, §§ 155-58, 17 December 2009).

45. In the light of the above it follows that the authorities failed to provide effective judicial response as required by Article 2 of the Convention in respect of the applicant's allegations of medical negligence. There has accordingly been a violation of that Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

47. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage. She did not submit any claim in respect of costs and expenses.

48. The Government stated that the applicant's claim was excessive. They also submitted that no compensation for costs and expenses should be granted to the applicant.

49. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on her. In the absence of the applicant's claim for costs and expenses it makes no award under that head.

50. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 2 of the Convention concerning ineffective investigation into the circumstances of Mr A.'s infection admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 2 of the Convention under its procedural limb;

3. *Holds*

- (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova
Deputy Registrar

Georgios A. Serghides
President