



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

Communicated on 29 September 2016

THIRD SECTION

Application no. 5578/12
S.K.
against Russia
lodged on 18 January 2012

STATEMENT OF FACTS

The applicant, Ms S.K., is a Russian national who is represented before the Court by Ms O.A. Sadovskaya and Mr A.G. Ryzhov, lawyers practising in Nizhniy Novgorod.

A. The circumstances of the case

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

At the material time the applicant was a distance-learning student of Bashkortostan Agricultural University and lived with her parents.

In 2009 the applicant met Mr G., and some time later they started living together, having, in the applicant's words, "entered into a marriage according to Muslim traditions".

1. Events of April-May 2010

On 27 April 2010 Mr G. was arrested on suspicion of having committed a violent criminal offence.

On 28 April 2010, during a routine medical check-up, the applicant was informed that she was in the fourth or fifth week of pregnancy.

According to the applicant, her parents, who it appears had initially been against her relationship with Mr G. but had then consented to it, insisted on her terminating the pregnancy. Her father allegedly beat her.

On 1 May 2010 the applicant's parents took her to a hospital to undergo an abortion; the applicant only found out that this was their intention on her way to the hospital. She protested strongly and cried, but her father hit her on her head and threatened to beat her and throw her out of the car in order to make her miscarry. The applicant managed to send a text message to her brother, informing him of the situation. The latter, it appears, alerted the police.

The applicant and her parents arrived at the maternity division of the municipal State-financed Tuymazy Central District Hospital (*Муниципальное бюджетное учреждение здравоохранения «Центральная районная больница» Туймазинского района Республики Башкортостан, “Tuymazy Central Hospital”*). A nurse approached the applicant and asked why she was crying. The applicant replied that she did not wish to terminate her pregnancy. The nurse and a gynaecologist, who was on duty that day, attempted to persuade the applicant to have an abortion. The applicant objected strongly and stated that she would sue them.

Then they accompanied the applicant and her mother to an operating theatre. The nurse and the applicant’s mother then left the room, and the applicant asked the doctor to let her continue with the pregnancy, but to tell her parents that she had allowed the abortion to be performed; the doctor replied that she was unable to do so, as the applicant would not be able to keep her pregnancy secret, and that the lie would be exposed. Then the applicant’s mother came and stated that the applicant’s father, who was waiting outside, would kill both of them (that is to say the applicant and her mother) if she refused to undergo an abortion. According to the applicant, she had seriously feared for her life; therefore she had given in and let the doctor perform the abortion. The applicant’s parents took her home immediately after the surgery.

Neither before nor after the abortion did the applicant receive any information, or sign any documents, or undergo any medical examinations or tests.

2. Police inquiry

On 1 May 2010, after the applicant and her parents had returned from hospital, the police came to their home address within the context of an inquiry (*проверка*) that they had started after receiving a telephone call (registered under no. 723) from the applicant’s brother, who had complained that his sister had been taken to hospital for an enforced abortion.

An investigator interviewed the applicant, her parents and her brother.

The applicant’s parents confirmed that following Mr G.’s arrest, they had decided that it would be better for their daughter to terminate her pregnancy and had therefore taken her to Tuymazy Central Hospital on that day. The applicant’s father then stated that he did not know the identity of the doctor who had performed the abortion, as it was his wife who had negotiated with the doctor. The applicant’s mother refused to disclose the identity of the doctor who had performed the abortion. The applicant’s brother confirmed the applicant’s version of events.

On the same date the applicant wrote a formal complaint in which she requested that criminal proceedings be instituted against her parents, who had forced her to terminate her pregnancy. In the interview with the investigator she confirmed that she had been against having an abortion, and had forcefully informed both her parents and the personnel of Tuymazy Central Hospital of this; nevertheless, her pregnancy had been terminated by a duty doctor whom the applicant had not known but whom the others had addressed by her first name, F.

On the same date the applicant underwent a medical examination, which found signs of a terminated pregnancy: traces of injections in the area of the uterine neck and scattered blood-tinged discharge from the uterus.

The police inquiry lasted from 1 May until 3 June 2010. On the latter date the investigating officer decided not to institute criminal proceedings against the applicant's parents on account of the absence in their actions of the constituent elements of a crime punishable under Article 126 of the Russian Criminal Code; the investigating officer stated that they had "had no malicious intent" to cause the applicant any harm and that they had "believed that they had acted in the best interests of their child".

On 15 June 2010 another police inquiry was instituted under Article 123 of the Russian Criminal Code and some time later continued also under Article 111 of that Code.

During the course of that inquiry, the doctor who had been on duty in the maternity department of Tuymazy Central Hospital on 1 May 2010 and whose first name was F. was identified as Ms F. Kh. The latter denied having ever performed surgery to terminate the applicant's pregnancy. She also stated that "a certain girl" had once approached her in an attempt to receive a medical certificate which would "confirm" that she had terminated her pregnancy without her actually having undergone an abortion. According to Ms F. Kh., the girl had intended to show the certificate to her mother, but Ms F. Kh. had refused her request. She also stated that the said "certain girl" had not been the applicant, and denied knowing or having ever met the applicant.

A report dated 8 July 2010 on a medical forensic examination of the applicant confirmed the findings of the medical examination of 1 May 2010, but failed to establish the degree of physical harm suffered by the applicant; in the latter respect, the report referred to the absence of the applicant's medical history file from Tuymazy Central Hospital and to paragraph 27 of decree no. 194n of 27 April 2008 of the Russian Ministry of Health Care.

The police inquiry lasted until 13 September 2010, when the investigating officer took the decision not to institute criminal proceedings against Ms F. Kh. owing to the absence in her actions of any of the constituent elements of crimes punishable under Articles 111 and 123 of the Russian Criminal Code. The decision stated, in particular, that "on their face" Ms F. Kh.'s actions had displayed certain elements of the aforementioned crimes. However, for those actions to have constituted an offence punishable under Article 123 of the Russian Criminal Code, they would have had to have been undertaken by a person without a higher medical education in the relevant specialisation, whereas Ms F. Kh. had had such an education and therefore could not be regarded as having perpetrated the aforementioned crime. Moreover, an abortion could only have been regarded as "illegal" within the meaning of Article 123 of the Russian Criminal Code if it had not been performed in a specialist medical institution, whereas in the present case the applicant's pregnancy had been terminated in the maternity division of Tuymazy Central Hospital. Lastly, the abortion would have been "illegal" if there had been medical counter-indications to it – for instance, if the term of pregnancy had already exceeded twelve weeks, whereas the applicant had been approximately five weeks pregnant at the moment of the abortion. The decision went on to state

that as the report of 8 July 2010 on the applicant's medical forensic examination had failed to establish the degree of physical harm inflicted on her, it was also impossible to prosecute Ms F. Kh. on the basis of Article 111 of the Russian Criminal Code.

In another report of 13 September 2010, the investigating officer stated that Tuymazy Central Hospital had no records regarding the applicant's stay there and that no medical history file had ever been drawn up in respect of her.

According to the applicant, at the moment of her lodging her application to the Court she had been in the process of challenging the investigator's decision of 13 September 2010 before the domestic courts. The outcome of those proceedings is unknown.

3. The applicant's complaint to the prosecutor's office

On an unspecified date the applicant also complained about the incident of 1 May 2010 to the Tuymazy inter-district prosecutor's office ("the Tuymazy prosecutor's office").

On 23 November 2010 the Tuymazy prosecutor's office sent to the Chief Medical Officer of Tuymazy Central Hospital a note on the elimination of violations of the healthcare legislation (*представление об устранении нарушений законодательства*). The notice stated that the termination of the applicant's pregnancy had been carried out without her consent, in breach of the relevant law, and that before the abortion, in breach of relevant medical regulations, she had not undergone necessary medical examinations and no medical tests had been carried out, and that after the abortion the state of her health had not been monitored for at least four hours, which may have led to undesirable consequences for her health. The note urged the Chief Medical Officer to take the steps necessary to hold those responsible liable to disciplinary measures, to "increase the personal accountability" of all those employees responsible for the incident in question, and to ensure that no such incidents took place in the future.

In a letter of 9 December 2010 the Chief Medical Officer of Tuymazy Central Hospital informed the Tuymazy prosecutor's office that a general meeting of the staff of Tuymazy Central Hospital had been held on 2 December 2010, and that during that meeting all those in attendance had been made aware of the provisions of the relevant healthcare legislation. The letter also stated that in the absence of any documents confirming the illegal termination of the applicant's pregnancy in Tuymazy Central Hospital, and in view of the fact that no criminal charges had ever been brought against Dr F. Kh. to that effect, it was impossible to hold her liable in disciplinary proceedings.

4. Civil proceedings

On 23 March 2011 the applicant lodged a claim against Tuymazy Central Hospital with the Tuymazy District Court. She sought compensation for non-pecuniary damage in respect of the severe moral and physical suffering she had allegedly endured in connection with her enforced abortion. The applicant pointed out that the termination of her pregnancy had been carried out against her will, in breach of section 36 of the Health Care Act. She

stressed that her parents and the medical personnel of Tuymazy Central Hospital had exercised physical and moral pressure on her in a situation in which she had made it clear that she had not wished to terminate her pregnancy. She also stressed that no medical history or record of the surgery or her stay in the hospital had ever been drawn up. The applicant further pointed out that, in breach of a number of the relevant rules and regulations of the Russian Ministry of Health Care, she had not been afforded adequate medical assistance either before or after the abortion (including mandatory medical examinations and tests and follow-up examinations after the surgery), which could have resulted in the development of unexpected complications to her state of health. The applicant also claimed that her enforced abortion and the conditions in which it had been performed had constituted inhuman treatment, in breach of Article 3 of the Convention, and had violated her right to respect for her private life, including her right to be a mother, under Article 8 of the Convention. She also argued that she had been deprived of effective remedies in respect of the violations alleged, in breach of Article 13 of the Convention, as Russian law had given her no possibility to hold those responsible criminally liable.

The applicant attached the Tuymazy prosecutor's office's notice of 23 November 2010 to her claim.

(a) Proceedings before the first-instance court

At the hearing before the Tuymazy District Court the applicant maintained her claim and reiterated her version of events. She stated, in particular, that the abortion surgery had been very painful, and that ever since she had been suffering constant, strong abdominal pain.

A representative of Tuymazy Central Hospital disagreed with the applicant's claim and stated that in the absence of any relevant record, there was no evidence that the applicant had undergone any abortion there on 1 May 2010. The representative confirmed that Ms F. Kh. had been a duty doctor on the date in question.

Ms F. Kh. denied knowing the applicant or having performed any abortions on the date in question.

The applicant's parents confirmed that they had brought the applicant to Tuymazy Central Hospital on 1 May 2010 for an abortion, but refused to disclose the identities of the medical personnel with whom they had negotiated and communicated.

In a judgment of 11 May 2011 the Tuymazy District Court rejected the applicant's claim as groundless. The court found it established, with reference to the material gathered during the above-mentioned preliminary check, including the medical report of 1 May 2010, that the applicant's pregnancy had been terminated and that the abortion had been performed in the maternity division of Tuymazy Central Hospital. At the same time, the court held as follows:

“[The applicant] has not submitted evidence proving that she sustained any non-pecuniary damage on account of interference in her private life or evidence proving that the termination of her pregnancy was carried out by means of inhuman and degrading treatment, or that the abortion caused any harm to her health.

No evidence has been submitted to the court proving that the surgery was carried out forcibly, against [the applicant's] will. [The applicant's oral and written] statements

during the police check and before the court reveal that she gave her consent to the abortion as she feared her father's threats, from which it follows that her consent to the abortion was voluntary; no evidence that the termination of [the applicant's] pregnancy in the [Tuymazy Central Hospital] was enforced has been found."

On the same date the Tuymazy District Court delivered a special ruling (*частное определение*) addressed to the Chief Medical Officer of Tuymazy Central Hospital. The ruling drew that official's attention to the breaches of relevant medical rules and regulations by the medical staff of that hospital during the abortion surgery performed in respect of the applicant. The ruling stated, in particular, that during the examination of the applicant's claim of 23 March 2011 against Tuymazy Central Hospital it had been established that Ms F. Kh., a doctor at Tuymazy Central Hospital, had terminated the applicant's pregnancy and that prior to that surgery the applicant's informed consent had not been received, the applicant had not undergone a mandatory medical examination, and no mandatory medical tests had been performed; this could have had irreversible consequences for the applicant's health.

(b) Proceedings before the appellate court

The applicant lodged an appeal against the first-instance judgment with the Supreme Court of the Republic of Bashkortostan ("the Bashkortostan Supreme Court").

On 18 July 2011 the Bashkortostan Supreme Court overturned the judgment of 11 May 2011 and delivered a new decision.

The Bashkortostan Supreme Court upheld the factual findings made by the Tuymazy District Court, in particular the fact that the applicant's pregnancy had been terminated and that the abortion had been carried out in Tuymazy Central Hospital.

The Bashkortostan Supreme Court further referred to the relevant provisions of the healthcare legislation, which stated that a person's explicit consent was a prerequisite for any medical intervention, that a woman was free to decide whether or not to be a mother, and that the termination of a pregnancy could only be performed with the consent of the woman concerned. The court further pointed out that the relevant regulations of the Russian Ministry of Health Care imposed on medical personnel the obligation to obtain a patient's written consent to an abortion, as well as to take a number of steps before and after the abortion, including performing medical examinations and tests in respect of the patient before such surgery and monitoring the patient for at least four hours after such surgery.

The Bashkortostan Supreme Court went on to observe that the hospital had not adduced written evidence or any other evidence proving that the applicant had given her consent to the abortion. Moreover, as had been pointed out in the Tuymazy District Court's special ruling of 11 May 2011, the necessary pre- and post-abortion procedures had not been observed in respect of the applicant. The court thus concluded that actions on the part of the medical personnel at the hospital had breached sections 32 and 36 of the Health Care Act and relevant regulations of the Russian Ministry of Health Care, had violated the applicant's rights (including the right to respect for her private life and the right to be a mother), and had caused her psychological suffering.

The Bashkortostan Supreme Court considered it necessary to award the applicant 20,000 Russian roubles (RUB, approximately EUR 500 euros (EUR)) in respect of the non-pecuniary damage she had sustained, stating that there had been no serious consequences to the applicant's health.

B. Relevant domestic law

1. The Russian Criminal Code

The Russian Criminal Code, as in force at the relevant time, provided, in so far as relevant, as follows:

Article 111: intentional infliction of serious harm to one's health

"1. Intentional infliction of serious harm to a person's health ... entailing the termination of pregnancy... shall be punishable by ... imprisonment.."

Article 123: performing an illegal abortion

"1. The performing of an abortion by a person without a higher medical education in the relevant specialisation shall be punishable by a fine ... or forced labour ... or correctional labour ...

...

3. The same offence causing through negligence a victim's death or serious harm to her health shall be punishable by forced labour ... or imprisonment ..."

Article 126: kidnapping

"1. Kidnapping shall be punishable by forced labour ... or imprisonment ...

2. The same offence committed:

(a) by a group of persons after their prior agreement,

...

(c) with the use of violence that endangers [the victim's] life or health, or with the threat of such violence;

...

(f) in respect of a pregnant woman, if the fact of her pregnancy is known to those responsible ...

shall be punishable by ... imprisonment ..."

2. Health Care Act

The Basic Principles of Public Health Law (federal law no. 5487-1 dated 22 July 1993 –("the Health Care Act"), as in force at the relevant time, in its relevant part provided as follows:

Section 32: consent to a medical intervention

"The informed voluntary consent of [the person concerned] is a prerequisite for a medical intervention ..."

Section 36: termination of pregnancy

"Each woman has a right to decide, on her own, whether to be a mother. The termination of a pregnancy can be carried out with a woman's consent for any reason if the term of that pregnancy has not exceeded twelve weeks; in the light of social

factors if the term of her pregnancy has not exceeded twenty two weeks; and on account of medical necessity at any term of pregnancy.

...

The illegal termination of pregnancy carries criminal liability under the law of the Russian Federation”.

3. Ministerial decree no. 194 n

Decree no. 194 n dated 24 April 2008 of the Russian Ministry of Health Care and Social Development in its relevant part provides as follows:

“27. A degree of harm caused to a person’s health shall not be established if:

during a medical examination of a person, or the study of a case file or medical documents, it is impossible to determine the essence of any harm to that person’s health;

at the moment of a medical examination of a person, the consequences of any harm to the person’s health not endangering that person’s life are unclear;

a person in respect of whom a medical forensic examination has been ordered has failed to appear and cannot be brought for a medical forensic examination, or refuses to undergo a medical examination;

medical documents are missing or do not contain enough information, including the results of instrumental and laboratory research, in the absence of which it is impossible to establish the nature and degree of harm [caused] to a person’s health.”

COMPLAINTS

The applicant complains that her enforced abortion and the manner in which it was carried out, including the absence of the requisite medical care, amounted to inhuman treatment, in breach of Article 3 of the Convention, and constituted an unjustified interference with her right to respect for her private life under Article 8 of the Convention. She also relies on Article 13 of the Convention, alleging a lack of effective domestic remedies in connection with her aforementioned complaints.

QUESTIONS TO THE PARTIES

1. Regard being had to the applicant's submission that she has challenged before domestic courts a decision of 13 September 2010 not to institute criminal proceedings in connection with her complaint about the events of 1 May 2010 (hereinafter "the incident of 1 May 2010), when her pregnancy was terminated by a doctor of the municipal State-financed Tuymazy Central District Hospital (*Муниципальное бюджетное учреждение здравоохранения «Центральная районная больница» Туймазинского района Республики Башкортостан*), what was the outcome of that challenge?

The parties are invited to provide relevant documents.

2. In the light of the decision of the Supreme Court of the Republic of Bashkortostan of 18 July 2011, can the applicant still claim to be a "victim", within the meaning of Article 34 of the Convention, of the alleged violations of her rights secured by Articles 3 and/or 8 of the Convention, on account of the incident of 1 May 2010?

In particular:

(a) was there an acknowledgement of the alleged violations, on account of the incident of 1 May 2010, of the applicant's rights secured by Articles 3 and/or 8 of the Convention?

(b) can the redress afforded to her be regarded as "sufficient" for the purpose of Article 3 and/or Article 8 of the Convention (see *R.R. v. Poland*, no. 27617/04, §§ 104-109, 28 November 2011, and *G.B. and R.B. v. the Republic of Moldova*, no. 16761/09, §§ 29-35, 18 December 2012)?

On the assumption that the applicant may still claim to be a "victim" of the violations alleged,

3. Was the applicant subjected to inhuman and degrading treatment, contrary to Article 3 of the Convention? In particular, did the applicant suffer any medical or psychological after-effects of the abortion? The applicant is invited to provide relevant medical or other documentary evidence.

4. Has there been an interference with the applicant's right to respect for her private life, within the meaning of Article 8 of the Convention? If so,

(a) was that interference "in accordance with law"?

(b) did it pursue a legitimate aim?

(c) was it proportionate to the aim pursued?

Alternatively, has the State complied with its positive obligation to ensure that the applicant's "private life", within the meaning of Article 8 of the Convention, is respected?

5. Was the State under a positive obligation under Article 3 of the Convention to ensure an effective official investigation into the incident of 1 May 2010? If so, did it comply with that obligation?

6. Did the applicant have any effective remedies, as guaranteed by Article 13 of the Convention, in respect of her complaints under Articles 3 and/or 8 of the Convention? In particular, did she have any remedy enabling the liability of the doctor who had interrupted her pregnancy to be established?