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

FIFTH SECTION

DECISION

Application no. 61836/17
K.O'S.
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 10 November 2020 as a Chamber composed of:

Mārtiņš Mits, *President,*
Síofra O'Leary,
Stéphanie Mourou-Vikström,
Latif Hüseynov,
Jovan Ilievski,
Ivana Jelić,
Arnfinn Bårdsen, *judges,*

and Victor Soloveytchik, *Section Registrar,*

Having regard to the above application lodged on 10 August 2017,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, K.O'S., is an Irish national who was born in 1934 and lives in County Cork. She is represented before the Court by Mr C. MacGeehin of MacGeehin Toale Solicitors, a lawyer practising in Dublin.

2. The Irish Government ("the Government") are represented by their Agent, Mr P. White of the Department of Foreign Affairs and Trade.

A. The circumstances of the case

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

1. The birth of the applicant's first child

4. The applicant gave birth to her first child at Bon Secours Hospital, Cork on 13 April 1965, when she was two weeks beyond her due date. At the time, the hospital was privately owned by the Bon Secours Health System, a not-for-profit organization which is the largest private healthcare provider in Ireland. There is no indication in the case file whether or not the applicant signed a general consent form when admitted and because she abandoned her civil claim before the domestic courts factual details of this nature have not been established by the latter.

5. The delivery register recorded that it was a vaginal delivery assisted by symphysiotomy. According to the applicant, the symphysiotomy was performed without her knowledge or consent.

6. The background to the use of symphysiotomies in Irish maternity hospitals is set out in paragraphs 12-20 of the decision in *L.F. v. Ireland* (dec.), no. 62007/17.

7. The applicant claims that following the birth she was unable to sit up in bed and was unable to look after her baby. When she was discharged from hospital she had a bad limp and described feeling the pelvic bones rubbing together when she moved. In addition, she continues to complain of frequency and incontinence of micturition.

8. The applicant subsequently gave birth to two other children.

2. The applicant's legal proceedings

9. According to the applicant, she first learned that she had undergone a symphysiotomy in 2005. On 13 April 2006 she issued proceedings against the hospital, claiming damages for pain suffered as a result of the defendant's negligence and breach of duty. In particular, she claimed that the hospital had failed to take reasonable care for her health and safety; that it had failed to perform a caesarean section when it knew or ought to have known that a caesarean section should be carried out; that it had failed to inform her of the operation or seek her consent; and that it had failed to provide her with adequate care after the operation.

10. The applicant renewed her personal injuries summons on 30 July 2012. In a defence delivered on 15 December 2015, the defendant hospital made a preliminary objection on the grounds that the claim was statute-barred and that its right to a fair trial would be severely prejudiced by reason of the severe delay in the commencement and prosecution of the proceedings. In particular, it relied on the fact that two individuals involved in the applicant's care had since died and limited medical records were available.

11. By letter dated 8 August 2017 the applicant's counsel advised that in light of the Supreme Court judgment in *Kearney* and the decision in the *L.F.* case to refuse leave to appeal (see *L.F. v. Ireland* (dec.), no. 62007/17)

which had been handed down in July 2012 and February 2017 respectively, her claim for damages had no realistic prospect of success. She followed this advice and abandoned her claim.

3. The ex gratia *payment scheme*

12. The applicant did not apply to the *ex gratia* payment scheme established by the respondent State seeking an award because she believed that there was no possibility of any acknowledgement of a breach of her rights; the quantity of the awards did not reflect the gravity of the harm inflicted on her; and the application window was unreasonably short.

B. Relevant domestic law and practice, etc.

13. Details of the relevant domestic law and practice, the public investigations into the use of the symphysiotomy procedure in Irish maternity hospitals, the *ex gratia* payment scheme implemented by the respondent State, and the relevant reports of international bodies are set out in paragraphs 43-90 of the decision in *L.F. v. Ireland* (dec.), no. 62007/17.

COMPLAINTS

14. The applicant complains under the substantive aspect of Article 3 of the Convention that the State knew or ought to have known that symphysiotomies were being performed in certain maternity hospitals and was therefore in breach of its positive obligation to protect women from inhuman and degrading treatment. She further complains under the procedural aspect of Article 3 of the Convention, read alone and together with Article 13, that there has been no independent investigation into the use of symphysiotomy in Ireland. Finally, she complains under Article 13 read together with Articles 3 and/or 8 that as a result of the judgments in *Kearney* and the *L.F.* case (see *L.F. v. Ireland* (dec.), no. 62007/17) she was unable to pursue a claim for damages based on the performance of the operation without her consent.

THE LAW

15. As explained in *L.F. v. Ireland* (dec.), cited above, the applicant's case is one of ten applications introduced by women who underwent symphysiotomies in different Irish maternity hospitals in the 1960s and 1970s.

16. Only the applicant in the *L.F.* case pursued her civil claim against the hospital which had treated her before the domestic courts (see *L.F. v. Irelan*d (dec.), no. 62007/17, § 93). Although the applicant in the present case had also introduced a personal injury claim against the hospital, in her

case as early as 2006, she abandoned it on the advice of counsel, who believed that it had no prospect of success following the judgments of the Supreme Court in two other cases, including L.F.'s, brought by women who had undergone symphysiotomies in the same time period (see paragraph 11 above).

17. The applicant now complains under Articles 3 and 8 of the Convention, taken in conjunction with Article 13.

18. The Court notes that while two of the applicant's complaints are identical to those raised in *L.F. v. Ireland* (no. 62007/17) and *W.M. v. Ireland* (no. 61872/17), a third complaint to the effect that the performance of a surgical symphysiotomy in 1965 constituted inhuman and degrading treatment was not raised by the other two applicants but is common to some of the other applications lodged with the Court in relation to historical symphysiotomies performed in the respondent State. In paragraphs 94-97 of the decision in *L.F. v. Ireland* and paragraph 15 of *W.M. v. Ireland*, the Court considered that the applicant's complaints, which did not extend to the substantive limb of Article 3 of the Convention, could be considered solely under the positive limb of Article 8 of the Convention. In the instant case, apart from the question whether recourse to a surgical symphysiotomy by a hospital several decades previously could engage the responsibility of a State under Article 3 or reach the threshold thereunder (see § 97 of the decision *in L.F.*), an examination of whether the complaint under the substantive limb of Article 3 of the Convention has been exhausted may also prove necessary.

19. Article 3 of the Convention provides, as relevant:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

20. Article 8 of the Convention provides, as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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."

A. The parties' submissions

21. The Government observed at the outset that the applicant's civil proceedings were brought against the hospital only. At no time was the State joined to the proceedings.

22. The Government contended that the applicant had failed to exhaust domestic remedies. She had, in particular, abandoned the civil proceedings following the aforementioned decision of the Supreme Court in the *L.F.* case. It argued that her claim against the hospital could have proceeded

as originally pleaded unless that would have resulted in irremediable prejudice to the defendant. Although the defendant hospital had made a preliminary objection on the grounds that its right to a fair trial would be severely prejudiced by reason of the severe delay in the commencement and prosecution of the proceedings, the issue of prejudice was fact-specific. The fact that in the *Kearney* case the Supreme Court found that the hospital would have had a "very strong claim ... to have the action dismissed against it on the grounds of prejudice arising from delay" did not mean that that question had been decided or that the same outcome was inevitable in the applicant's case. If prejudice had been argued by the defendant, the onus would have been on it to establish that the case could not continue as pleaded. Any determination on this issue would have been subject to a further and full appeal.

23. Even if such prejudice had been present, so that the applicant's claim could not have proceeded as originally pleaded, she could still have pursued her claim on a reformulated basis (see *Kearney v McQuillan and North Eastern Health Board* and the *L.F.* case, details of which can be found in *L.F. v. Irelan*d (dec.), no. 62007/17, §§ 21-26). She did not, however, attempt to reformulate her claim. Although she has submitted an opinion of senior counsel which states that any claim would have had no prospect of success following *Kearney* and the *L.F.* case, this opinion does not take into account the fact that both of those judgments were fact-specific. In this regard, the Court of Appeal in the *L.F.* case had made it clear that its decision did not "necessarily mean that a court considering the circumstances in which another symphysiotomy procedure was performed on a different patient might not come to a different conclusion". The Supreme Court had added the same proviso in its 2017 decision (see *L.F. v. Irelan*d (dec.), no. 62007/17, §§ 36 and 40).

24. In addition, the Government submitted that it would also have been open to the applicant to apply to the *ex gratia* payment scheme, which would have provided redress for the complaints now raised before the Court.

25. The applicant, on the other hand, argued that she had exhausted all effective domestic remedies within the meaning of Article 35 § 1 of the Convention. Contrary to what the Government suggests, she would have been obliged to reformulate her claim, limiting it to a single plea: that in the circumstances prevailing at the time, there could have been no justification whatsoever for the performance of the symphysiotomy.

26. However, even if she had reformulated her claim, it was clear in her view following the *L.F.* case that all but the rarest cases (for example, where the symphysiotomy was carried out after a successful caesarean section) were doomed to fail.

27. Finally, the applicant submitted that the *ex gratia* payment scheme would neither have addressed her essential grievance nor provided her with

an effective remedy. It provided no acknowledgment of wrongdoing, it required applicants who accepted awards to waive all other remedies for damages, and the compensation available was not commensurate with the gravity of the harm inflicted.

B. The Court's assessment

1. The alleged failure to protect the applicant from being subjected to symphysiotomy

28. As indicated in paragraph 16 above, unlike the applicants in the related cases of *L.F. v. Irelan*d (dec.), no. 62007/17 and *W.M. v. Ireland* (dec.), no. 61872/17, the applicant in the present case has argued that the State knew or ought to have known that symphysiotomies were being performed in certain maternity hospitals and that the respondent State had therefore breached its positive obligation to protect women from a procedure which in her view amounted to inhuman and degrading treatment.

29. The rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention reflects the fundamentally subsidiary role of the Convention mechanism. It normally requires that the complaints intended to be made at international level should have been aired before the appropriate domestic courts, at least in substance, in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III and *Peacock v. the United Kingdom* (dec.), no. 52335/12, § 46, 5 January 2016).

30. The object of the rule is to allow the national authorities to address the allegation of a violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court. If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised, the national legal order has been denied the opportunity which the rule on exhaustion of domestic remedies is intended to give it to address the Convention issue. It is true that an applicant is not obliged to refer explicitly to the Convention. However, where an applicant has not expressly raised a Convention complaint in domestic proceedings, it must be examined whether it was nonetheless raised "at least in substance" (see, for example, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). If not, the application will be inadmissible because of non-exhaustion. It is not sufficient that the applicant may have exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention

argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (*Azinas*, cited above, § 38; and *Peacock*, cited above, § 47).

31. In the present case the applicant brought a civil claim for damages against the hospital. It would have been possible for her to have joined the State and/or its agents as defendants to the claim and argued that it had failed to protect her from the hospital's negligence and/or its breach of its duty of care, but she did not do so. In the Court's view, a substantive complaint of this type is of an entirely different nature to that pursued against the hospital and it could not even arguably be said to have been raised by the applicant in substance in her civil claim for damages. Such a complaint was not examined by the domestic courts in either the *Kearney* case or in the *L.F.* case. As such, nothing that was said by the domestic courts in either of those cases could have predetermined or had any impact whatsoever on the prospects of success of a substantive complaint relating to a violation of Article 3 of the Convention against the State by the applicant.

32. In these circumstances, the Court does not need to deal with the question whether a positive obligation under Article 3 may arise in the circumstances of the case (see, in relation to Article 2 of the Convention, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, §§ 185-196, 19 December 2017; in relation to Article 8 of the Convention, *Mehmet Ulusoy and Others v. Turkey*, no. 54969/09, §§82-86, 25 June 2019; and § 97 of the decision *in L.F.*). Even assuming that it could, the complaint is in any event inadmissible for non-exhaustion since the applicant did not provide the domestic courts with the opportunity of addressing, and thereby preventing or putting right, her Convention complaint concerning the State's failure to protect her from inhuman and degrading treatment.

33. In light of the foregoing, this aspect of her application must be rejected as inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The alleged failure to provide complainants such as the applicant access to effective proceedings in which they could obtain compensation for damage

34. The Court recalls that while there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006‑II), the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others v. Turkey*, 16 September 1996, § 71, *Reports of Judgments and Decisions*

1996-IV, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009)).

35. In the present case, the hospital made a preliminary objection on the basis that it would be severely prejudiced by the excessive delay (see paragraph 10 above). The Court notes that the Supreme Court in *Kearney* had welcomed the decision of the plaintiff in that case to reformulate her claim due to the fact that there would otherwise have been a strong case to prohibit the plaintiff's claim from proceeding by reason of the extraordinary lapse of time and the considerable prejudice accruing to the defendant hospital. While the Supreme Court indicated that it did not have to decide the question of prejudice, and indeed, as the respondent State pointed it, it did not do so, the applicant's concerns regarding the effect of maintaining her personal injury claim as initially formulated could not be dismissed as "mere doubts". She underwent a symphysiotomy in 1965, some four years before the procedure was performed on Mrs Kearney. By the time the Supreme Court refused Mrs L.F. leave to appeal the dismissal of her claim in 2017, more than fifty-two years had elapsed since the applicant gave birth to her first child and two individuals involved in her care had since died (see paragraph 10 above). It would therefore seem likely that if she had pursued her initial civil claim the defendant hospital would have had a strong argument that it was severely prejudiced on account of the delay.

36. As the Government have pointed out, however, even if the applicant's broader claim risked being struck out due to the risk of severe prejudice, she could still have reformulated it so as to contend that the symphysiotomy performed on her could not have been justified in any circumstances prevailing at the relevant time. The Court recognises that the reformulated claim had to meet an exacting standard (see also *L.F. v. Ireland*, § 113 and *W.M. v. Ireland*, § 30). Nevertheless, both the Court of Appeal and the Supreme Court in the domestic proceedings in the *L.F.* case made clear that their decisions were fact specific and case related. In the L.F. case the domestic courts demonstrated that a civil claim so reformulated would be subject to a careful and detailed assessment, with extensive expert evidence, in order to establish whether the procedure performed was unjustified when judged by the relevant practice standard's and in a given complainant's case. The Court notes the circumstances in which the applicant decided to abandon her claim, given the advice of counsel, what she thought was her limited chance of success and the potential cost of proceeding. However, it remains the case that by abandoning the proceedings the medical evidence central to a judicial determination of her claim was never assessed or tested.

37. In addition, although the applicant brought civil proceedings against the hospital, she at no time sought to argue before the domestic courts that the judgment in *Kearney* and the decision in *L.F.* case gave rise to a violation of her Convention rights – or any arguments substantially to the

same effect – because they precluded her from making any effective complaint about the symphysiotomy. If she had considered that the impact these judgments had on the formulation of her civil claim was incompatible with Articles 3, procedural aspect, or 8 of the Convention, it would also have been open to her, and indeed would normally have been incumbent on her, to challenge this before the domestic courts (see, in the same vein, *L.F. v. Ireland* (dec.), cited above, § 116 and *W.M. v. Ireland* (dec.), cited above, § 33).

38. As the Court has indicated in the decisions in the *L.F.* and *W.M.* cases, it has great sympathy with the plight of women who only became cognisant of the fact that they had undergone an obstetric procedure several decades after the event (see further paragraphs 129 and 38 respectively of those decisions). The Court has frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 76, 25 March 2014). In addition, the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights (see *Akdivar and Others*, cited above, § 69). However, it cannot simply ignore or abandon the exhaustion rule and deny a national legal order the opportunity which the rule is intended to give it to address Convention arguments later raised before the Court. To do so would not be consonant with the Court's role and with the principle of subsidiarity and would not be conducive to the effective exercise of the Court's judicial mission and the rendering of quality judgments based on sufficient evidence and clear arguments (see, in the context of an application deemed premature in relation to a historic sexual abuse claim, *Allen v. Ireland* (dec.), no. 37053/18, § 74, 19 November 2019).

39. In light of the foregoing, the applicant's complaint under Article 8 of the Convention must also be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 10 December 2020.

Victor Soloveytchik Section Registrar	Mārtiņš Mits President