APPLICATION N° 17864/91

Ilkay Erhan ÇINAR v/TURKEY

DECISION of 5 September 1994 on the admissibility of the application

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Article 3 of the Convention *To fall within the scope of this provision, ill-treatment must attain a minimum level of severity In this case, no appearance of a violation of Article 3, in the absence of a real risk of enforcement of the death penalty imposed on the applicant (Turkey), who was not therefore exposed to the death row phenomenon*

Article 26 of the Convention *Where a complaint relates to a continuing situation against which no remedy is available, the six month period runs from the end of the situation As long as the situation continues, the six month rule does not apply*

THE FACTS

The applicant, of Turkish nationality, was born in 1960 At the time of the facts, he was in Bartin prison (Turkey)

The facts of the case, as described by the parties, may be summarised as follows

The applicant, suspected of having taken part in a number of murders, was arrested on 31 March 1980 On 7 July 1981, he and 203 other defendants were prosecuted for their alleged participation in acts of violence perpetrated in the name of an illegal group (Ilkko Turkish Army for the Liberation of Workers and Peasants)

In a judgment of 28 May 1984, the 2nd court martial of Istanbul sentenced the applicant to capital punishment for committing acts of violence with intent to alter the Turkish constitutional system The court found that the applicant, together with two other accused, had murdered on 8 February 1980 in a train three workmen, of right-wing political persuasion, who had not heeded the call for strike action given by the Tikko

In a decision of 20 October 1987, the Court of Cassation upheld the judgment of 28 May 1984

Thereafter, the six prosecution witnesses who had given evidence at the trial told journalists that they were no longer sure of the accuracy of the evidence they had given as witnesses The military prosecutor in charge of this investigation (a military judge with the rank of commander) swore on affidavit that in view of the changes made in the evidence of certain witnesses, he thought it possible that the prosecution and the court, in establishing the facts, may have been mistaken as to the identity of the applicant

Thereafter, the applicant's lawyers filed a number of applications for a retrial They pointed out that the six prosecution witnesses had made statements some of which appeared in the newspapers, in which they cast doubt on the accuracy of their testimony They stressed that the military prosecutor in charge of the proceedings had declared that, as a number of witnesses had perjured themselves the possibility that the court had been mistaken as to the identity of the offender could not be ruled out

In judgments of 1 March 1988, 30 May 1989 and 26 June 1990, the Supreme Military Court (5th Criminal Division) dismissed the applications for a retrial filed by the applicant It held firstly that the statement by the witnesses that they were mistaken concerned only the procedure relating to the applicant s arrest whereas his guilt had been established by other evidence It observed further that a witness could not be considered to have perjured himself until the end of judicial proceedings and that the statements which had appeared to this effect in the newspapers were of no legal value

In accordance with the provisions of the Anti Terrorist Act promulgated on 12 April 1991 the applicant who had spent more than ten years in detention was granted conditional release on 31 July 1991 The said Act also provides that death penalties passed in respect of crimes committed before 8 April 1991 will not be enforced

COMPLAINTS (Extract)

1 The applicant complains to the Commission that he was exposed to the death row phenomenon He explains that the National Assembly to which his death sentence which became definitive on 20 October 1987 had been referred for confirmation failed

to respond until the Anti-Terrorist Act of 12 April 1991 was promulgated He alleges a violation of Article 3 of the Convention

THE LAW (Extract)

1 The applicant, sentenced definitively to the death penalty on 20 October 1987, complains that he was exposed to the death row phenomenon in so far as the Turkish National Assembly, which is competent to approve or refuse execution of the death penalty, did not respond until 12 April 1991

He invokes in this respect Article 3 of the Convention, which provides "No one shall be subjected to torture or to inhuman or degrading treatment or punishment "

The respondent Government argue firstly that the application is inadmissible on the ground of the delay in submitting the application, under Article 26 of the Convention They argue, *inter alia*, that the six month period provided for in this provision began to run from 20 October 1987, the date of the Court of Cassation decision upholding the applicant's sentence

The applicant disputes the Government's argument and submits that he suffered from the death row phenomenon throughout the period from 20 October 1987, the date on which he was finally sentenced, until 12 April 1991 the date of the Act granting an amnesty to prisoners awaiting capital punishment

The Commission observes first of all that the applicant's complaint does not concern an instantaneous act but relates to the period spent awaiting execution of the death penalty This waiting period is a continuing situation against which the applicant had no remedy under Turkish law

It follows from the case-law of the Commission that where the alleged violation is, as in this case, a continuing situation, the six month period starts to run only from the end of this continuing situation (see No 11123/84, Dec 9 12 87, D R 54 pp 52, 58) As the circumstances of which the applicant complains continued until 12 April 1991, the six month period is inapplicable in this case

It follows that the ground of inadmissibility raised by the Government under Article 26 of the Convention cannot be upheld

As to the merits of the complaint, the respondent Government indicate that under Article 87 of the Turkish Constitution, the National Assembly has power, *inter alia*, to decide whether to enforce death sentences passed and definitively upheld by the courts

The Government indicate that, taking account of the circumstances of the case, this application is not comparable to the Soering case (Eur. Court H.R., judgment of 7 July 1989, Series A no. 161). They argue that the two cases differ on the following points: length of detention while awaiting enforcement of the death penalty, risk of the defendant being exposed to harassment and assaults during that period, possibility of the death penalty being carried out.

They emphasise the fact that since October 1984, the Turkish National Assembly has followed a clear and established policy of not authorising enforcement of the death penalty.

They conclude that the applicant was not at any time exposed to a real risk of treatment falling within the scope of Article 3 of the Convention and that this part of the application is manifestly ill-founded.

The applicant disputes the argument submitted by the respondent Government.

As regards the duration of the death row phenomenon, the applicant argues that this period began on 28 May 1984, the date on which he was convicted at first instance, and terminated with his conditional release on 12 April 1991.

As regards the likelihood of the death penalty being carried out, the applicant observes that between 1937 and 1984, there were 443 executions in Turkey. He points out that the last two executions took place in October 1984 while a non-military Government was in power.

The applicant also stresses the consistent tendency of the Turkish legislation to increase the number of crimes liable to capital punishment.

The applicant notes further that at the time when he was sentenced to death, several politicians were advocating the enforcement of death penalties.

The Commission observes firstly that Article 3 of the Convention cannot be interpreted as prohibiting the death penalty as a matter of principle. By drafting Protocol No. 6 after the Convention, the Contracting Parties sought to achieve their aim of introducing an obligation to abolish capital punishment in time of peace by means of an optional instrument allowing each State to choose when to enter into such a commitment (above-cited Soering judgment, pp. 40-41, para. 103).

The Commission also observes that ill-treatment, including punishment, must attain a minimum level of severity to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case and, in particular, on the nature and context of the treatment or punishment and the manner and method of its execution, the duration, physical or

mental effects thereof and in some cases, the sex, age and state of health of the victim (Eur Court H R , Ireland v United Kingdom judgment of 18 January 1978, Series A no 25 p 65, para 162, Tyrer judgment of 25 April 1978, Series A no 26, pp 14 15, paras 29-30)

It is clear that no prisoner sentenced to death can avoid an element of delay between imposition and enforcement of the sentence or the experience of severe stress inherent in the rigorous conditions of the incarceration which is necessary The applicant is exposed to a real risk of treatment going beyond the threshold set by Article 3 of the Convention if he spends a very long time on death row in extreme conditions with the ever-present and mounting anguish of awaiting enforcement of the death penalty (above cited Soering judgment, p 44 para 111)

In this case, the Commission s examination must consider firstly the issue as to whether the applicant was in the light of the developments in the policy of the Turkish Government, really faced with the possibility of being executed during the period between 20 October 1987, the date of the Court of Cassation decision sentencing him to death, and 12 April 1991 the date of the Act granting an amnesty to prisoners awaiting enforcement of the death penalty

The Commission recalls that the Convention is a living instrument which must be interpreted in the light of present day conditions The developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in a particular field have to be taken into account (see above cited Tyrer judgment, pp 15 16, para 31)

As the Court held in its Soering judgment (above cited judgment, p 40, para 102) capital punishment no longer exists in time of peace in the Contracting States In the few Contracting States which retain the death penalty in law for some peace time offences death sentences if ever imposed are nowadays not carried out

The Commission finds that in this case, during the period to which the applicant refers, the Turkish National Assembly did not render any decision authorising the enforcement of a death penalty The last decision by the Turkish legislator to allow such an execution dates back to October 1984

The Commission also notes that the 12 April 1991 Act provides not only that in respect of offences committed until 8 April 1991 the death penalty will not be carried out but also that those sentenced to death will be granted conditional release after serving ten years in prison The Turkish legislator thereby made a commitment, as regards the period prior to April 1991, which extended beyond merely abolishing the death penalty and the applicant was granted conditional release nearly four years after he was sentenced

The Commission concludes that in the circumstances of the case the enforce ment of the death penalty against the applicant was illusory and that the applicant

cannot be considered to have suffered ever-present and mounting anguish at the prospect of being executed, exposing him to treatment going beyond the threshold set by Article 3 of the Convention

It follows that this part of the application is manifestly ill founded within the meaning of Article 27 para 2 of the Convention