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

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Failures by the authorities following an operation that resulted in severe neurological damage

In today's **Chamber** judgment[1] in the case of **Erdinç Kurt and Others v. Turkey** (application no. 50772/11) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights

The case concerned two high-risk operations performed on a patient which left her with severe neurological damage (92% disability).

The applicants maintained that the authorities were responsible for the damage in question, and complained of the lack of an effective remedy by which to assert their rights in the civil proceedings. They alleged that they had contested, without success, the relevance and sufficiency of the expert report on which the domestic courts had based their dismissal of the applicants' compensation claim.

The Court found, in particular, that the applicants had not received an adequate judicial response that satisfied the requirements inherent in the protection of the right to physical integrity of the patient (Duru Kurt). The expert report on which the domestic courts had based their dismissal of the applicants' compensation claims, and which concluded that the doctors had not been at fault, had given insufficient explanations regarding the issue on which it was supposed to provide technical insight (the issue whether the doctors had contributed to the damage). Only where it was established that the doctors had carried out the operation in accordance with the rules of medical science, taking due account of the risks involved, could the damage caused be regarded as an unforeseeable consequence of treatment; were it otherwise, surgeons would never be called to account for their actions, since any surgical intervention carried a degree of risk.

Principal facts

The applicants, Mr Erdinç Kurt, Mrs Nursen Kurt, and their daughter, Duru Kurt, are Turkish nationals who were born in 1974, 1975 and 2003 respectively and live in Ankara.

In 2004 Duru began receiving treatment for heart problems in Sami Ulus children's hospital. The doctors decided to operate and her father signed a consent form which set out the potential risks. Following a decision by the hospital's medical board, a further operation was performed and the girl's father signed an identical form. On 11 July 2007 the medical board of Dışkapı children's hospital in Ankara diagnosed the child with severe and incurable delayed psychomotor development, caused by hypoxic-ischaemic encephalopathy, and assessed her level of disability at 92%. Her parents lodged a complaint against the surgeons.

The report issued following an internal investigation carried out at the request of the Governor's Office stated that the child was suffering from a very serious congenital heart condition, and

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

concluded that the medical team had not acted negligently during the operations. In September 2008 the public prosecutor's office discontinued the proceedings.

In May 2008 the applicants brought an action against the doctors in the Ankara Court of First Instance. The court appointed a panel of experts, which submitted its report in July 2009. According to the report, the child was suffering from a very serious and rare congenital disease known as Bland-White-Garland syndrome. The parents had signed a consent form prior to the two operations, and the report concluded that the doctors had not committed any medical or surgical error. The applicants contested the report, which they considered to be insufficient. The Court of First Instance dismissed their request for a second expert medical report. The applicants lodged an appeal, which was dismissed in April 2010. In October 2010 the Court of Cassation also dismissed their application for rectification.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life), 6 (right to a fair hearing) and 13 (right to an effective remedy), the parents maintained that the authorities were responsible for the neurological damage suffered by their daughter. They also alleged that they had not had any effective remedy by which to assert their rights, and that the civil proceedings had been ineffective.

The Court decided to examine the applicants' complaints from the standpoint of Article 8 (right to respect for private and family life), which covered, among other issues, those relating to individuals' mental and physical integrity.

The application was lodged with the European Court of Human Rights on 24 March 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Georges **Ravarani** (Luxembourg),

and Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 8 (right to respect for private and family life)

The Court considered that the complaint related to the ability of the judicial system to ascertain whether the members of the medical team had complied with their professional obligations and to impose sanctions for any breaches committed. It noted that the domestic judicial system afforded the applicants two remedies, one civil and the other criminal. The Court confined its attention to the civil proceedings, as the procedural obligation arising out of Article 2 of the Convention did not necessarily require the State to provide for a criminal prosecution in medical negligence cases.

Following the civil proceedings, the domestic courts had dismissed the applicants' compensation claims on the basis of an expert report which found that the doctors had not been at fault. The applicants had contested the relevance and sufficiency of that report and had requested a second expert report, without success. The question to be addressed by the experts had been whether, leaving aside the risk involved in the operation, the doctors had contributed to the damage caused. Only where it was established that the doctors had carried out the operation in accordance with the

rules of medical science, taking due account of the risks involved, could the damage caused be regarded as an unforeseeable consequence of treatment. Were it otherwise, surgeons would never be called to account for their actions, since any surgical intervention carried a degree of risk. The expert report had not even touched on this issue, as it had not examined whether and to what extent the doctors in question had acted in compliance with modern medical standards before, during and after the operation. For instance, it had not stated what specific procedures had been performed by the doctors during the operation and during the post-operative monitoring phase, when the neurological damage had apparently occurred, nor had it assessed these procedures in the light of the relevant rules and protocols. Although the report in question ultimately concluded that the doctors had not acted negligently, it had not made clear what specific elements, other than data from the literature indicating the existence of risks, had formed the basis for that conclusion, which was thus to be regarded more as affirmation than as proof. The report had therefore given insufficient explanations regarding the issue on which it was supposed to provide technical insight.

While the findings of an expert report were not binding on the courts, they were apt to have a decisive influence on the latter's assessment, in so far as they concerned a technical field outside the courts' sphere of expertise. Confronted with the insufficient explanations provided by the report in question and the applicants' protests, the Ankara Court of First Instance had not deemed it necessary to agree to the applicants' request for a second expert report, taking the view that the first report was sufficient. The Court of Cassation had likewise rejected the request for a second report, in support of which the applicants had submitted a number of arguments.

Consequently, the Court considered that the applicants had not received an adequate judicial response that satisfied the requirements inherent in protection of Duru Kurt's right to physical integrity. **There had therefore been a violation of Article 8 of the Convention.**

Article 41 (just satisfaction)

The Court held that Turkey was to pay the applicants 7,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,023 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.