CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28526/05
by Hayriye KALDIK
against Germany

The European Court of Human Rights (Third Section), sitting on 22 September 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Ms R. JAEGER,
Ms I. ZIEMELE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 27 July 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Hayriye Kaldik, is a Turkish national of Kurdish origins who was born in 1970 and lives in Solingen in Germany. She was represented before the Court by Mr K. Roβ, a lawyer practising in Essen.

A. The circumstances of the case

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

1. General background

In December 2001 the applicant's husband entered German territory, where he unsuccessfully lodged an asylum request. Following her husband's departure, the applicant had been visited several times by Turkish security officers who interrogated her about her husband's whereabouts. In April 2002, Turkish soldiers took her to a military station and raped her. This became known to the applicant's family and to the whole village. Following this incident, the applicant suffered a post-traumatic stress disorder (PTSD, *posttraumatische Störung*) and considered suicide.

2. Asylum proceedings

On 14 June 2002 the applicant, together with her two children, born in 1999 and 2001, travelled by plane from Ankara to Düsseldorf in Germany. She had been assisted by her father and other relatives, who had helped her to obtain false passports.

On 10 July 2002 the applicant lodged an asylum request with the Federal Refugee Office (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*). She alleged that she had been persecuted because of her husband's activities in support of the Kurdish separatist movement. She further submitted that men from her village had urged her father to kill her in order to restore the honour of her family.

Later on the applicant submitted a medical report from her attending physician Dr Z. dated 11 September 2002, who drew the following conclusions:

> "According to our...examinations, Ms Kaldik suffers from symptoms of anguish and a depressive disorder with dissociative symptoms and somatic disorders based on a severe post-traumatic stress disorder following suppression, abuse, threats and rape in Turkey.
>
> In order to carry out psychotherapy, it is necessary to provide a stable environment, because the treatment of traumas necessitates security and stability. Ms Kaldik is in need of both psychological and psychotherapeutic treatment. An antidepressant medication (Doxepin 100 mg) has been started. The psychotherapy will last approximately two or three years. A continuing treatment with supportive conversations is necessary in order to stabilise her mental condition and to avoid an aggravation.
>
> In case of lack or interruption of treatment there is the risk of an aggravation of the illness, a decompensation of the condition, or suicide.

> An escalation of her situation with respect to her right to stay would very probably lead to an aggraviation of Ms Kaldik's clinical symptoms and thus to a mental decompensation and suicidal tendencies (*Bei einer aufenthaltsrechtlichen Zuspitzung der aktuellen Situation ist eine weitere Verschärfung der klinischen Symptome bei Frau Kaldik und damit eine psychische Dekompensation mit suizidalen Verhaltensweisen als extrem wahrscheinlich einzuschätzen*).
>
> In case of an expulsion to Turkey, it has to be assumed that she could carry out her suicide thoughts and the expulsion to Turkey has to be regarded as a re-traumatisation."

In June 2003 the applicant was temporarily hospitalised in a psychiatric clinic.

On 29 July 2003 the applicant submitted further medical attestations according to which her situation had aggravated.

On 27 August 2003 the Federal Refugee Office rejected the applicant's asylum request, ordered the applicant to leave the German territory within one month and announced expulsion in case of non-compliance. They found that the applicant had failed to establish that her rape had been politically motivated. According to the Refugee Office, there was no concrete risk that the applicant would, once again, be abused on her return to Turkey. With respect to the alleged risk to be killed by family members in order to restore the family's honour, the Office noted that the Turkish State prosecuted so-called "crimes of honour" and that there existed the possibility to obtain protection in women's refuges. Furthermore, the Office did not attach much credence to the applicant's submissions relating to the risk of persecution by her family.

Referring to a report by the German Foreign Office dated 9 October 2002 and to a further report dated 12 June 2002, the Refugee Office further found that the necessary medical treatment for the applicant's illness was available in all major psychiatric clinics, such as the university clinics in Ankara and Istanbul and the public hospital in Istanbul. According to the Refugee Office, these clinics applied internationally approved diagnostic standards and offered the same therapeutic concepts which were common in Western Europe. In case of need, it was possible to obtain free medical treatment with the so called "green card". This did also apply in case of a possible re-traumatisation.

The Federal Refugee Office further found that it was not competent to examine if the applicant's deportation as such could lead to suicide attempts, as this primarily concerned the question of the feasibility of deportation.

The applicant, represented by counsel, lodged a motion with the Düsseldorf Administrative Court (*Verwaltungsgericht*). She argued, *inter alia*, that the necessary medical treatment was not available in practice. In support of her allegations, she submitted a report by the German Consulate in Istanbul on the medical care provided for persons with mental illnesses dated 16 July 2003. This report noted, *inter alia*, that care for

mentally ill patients was provided for in the major cities and provincial centres of Turkey. On the other hand, there was a lack of possibilities of long-term treatments for adult patients.

The last paragraph of the report reads as follows:

> "Countrywide there are 137 hospitals in 68 towns which are entitled to issue medical attestation for handicapped and/or mentally ill persons... It follows that there is not in every province the possibility to obtain specialist medical treatment.
>
> One of the most serious problems is the almost complete hopelessness ("*fast völlige Ausweglosigkeit*") of certain groups of patients – in particular adults – to obtain adequate treatment: this concerns traumatised persons, raped women, persons suffering from anguish traumas, highly suicidal persons, to name but a few. The local Health Ministry confirmed that while the purely medical care of handicapped or mentally ill people could be provided, it was generally (*in der Regel*) impossible to offer continuing therapy for lack of professional and financial resources. It is not possible to continue therapies for patients returning from Germany or the Netherlands, as follows already from the different therapeutic concepts of these countries."

The applicant further alleged that her return to Turkey would, with a high probability, lead to her re-traumatisation, which would eventually endanger her life. She submitted a further medical report by Dr Z. dated 6 February 2004, which reads as follows:

> "I am treating Ms Kaldik since 25 June 2002. Ms Kaldik is a severely traumatised person, who suffers from typical disturbances caused by a posttraumatic stress disorder (ICD 10 F43.1) with extreme nervousness and attacks of fear and panic.
>
> Ms Kaldik is regularly treated with supportive conversations which take place at 14 days intervals. Additionally, she is treated with antidepressant medication, currently with 100 mg Trimipramin per day. The patient's state of health has further deteriorated. She increasingly complains about insomnia and gives credible accounts of suicidal thoughts. She reports about the escalation of her situation with respect to her right to stay. This scares her additionally. She suffers from serious losses of self-esteem.
>
> On the basis of today's conversation, a further aggravation of her clinical symptoms and thus a mental decompensation with suicidal behaviour has to be regarded as being extremely likely."

On 1 March 2004 the Düsseldorf Administrative Court rejected the applicant's motion. That court found that the applicant had neither a right to asylum as guaranteed by Article 16a of the Basic Law, nor was she protected from expulsion as a political refugee pursuant to section 51 of the Aliens Law (*Ausländergesetz*, see relevant domestic law below). The Administrative Court accepted the applicant's submissions that she had been raped and subsequently suffered from a post-traumatic disorder. It further assumed that the applicant's persecution had been politically motivated. While the applicant had failed to establish that she herself or her husband had been persecuted as suspects of supporting the Kurdish separatist movement, the Court accepted that the applicant's rape may have been related to her Kurdish origins.

However, the applicant did not risk further persecution, as she would be safe if she travelled to the Western part of Turkey (*inländische Fluchtalternative*). As neither the applicant nor her husband could be regarded as being suspected of separatist activities, there was no indication that the security forces would persecute her there. The Administrative Court further found that the applicant had not established that she risked falling victim to a "crime of honour" in the Western part of Turkey, taking into account that her father had helped her to escape to Germany.

The Administrative Court further found that there was no impediment to the expulsion under section 53 (6) of the Aliens Act for lack of a serious and concrete risk for her life or physical integrity. According to consistent reports (*nach ständiger Auskunftslage*), there was a possibility to treat mental illnesses in Turkey. Referring to a judgment of the North Rhine-Westphalia Court of Appeal and considering all material in its possession, the Administrative Court followed this assessment. It found, in particular, that the applicant was not restricted to seek medical treatment in her home region, but could also be expected to expand her search into her further environment and into Western Turkey. The applicant had not established that her illness could not be treated in Western Turkey.

The Administrative Court finally considered that the possibility of a re-traumatisation could in principle constitute an impediment to expulsion. According to the Administrative Court, however, it could not be deduced from the medical attestations submitted by the applicant that this applied to the applicant for the time being. It found that in the report dated 11 September 2002 Dr Z. indicated that the applicant's deportation as such might aggravate her medical condition. This might lead to an impediment to deportation relating to German territory (*inlandsbezogenes Abschiebungshindernis*), but not to a danger in the receiving country (*zielstaatsbezogenes Abschiebungshindernis*). In his more recent medical attestation dated 6 February 2004, Dr Z. more generally stated that a further aggravation of her clinical symptoms and thus a mental decompensation with suicidal behaviour had to be regarded as being extremely likely. This indicated that the aggravation of the applicant's illness was independent from her return to Turkey. The Administrative Court finally found that the other medical attestations submitted by the applicant did not lead to other conclusions.

The question if the applicant's deportation as such would cause a danger to her health had to be examined separately by the local Aliens Office (*Ausländerbehörde*). The Administrative Court further noted that the applicant could seek the Aliens Office's and the German Embassy's assistance in finding the necessary health facilities.

On 1 April 2004 the applicant lodged a request to be granted leave to appeal. She alleged, in particular, that the Administrative Court had failed to consider the report of the German Consulate of 16 July 2003 which,

according to the applicant, raised serious doubts if her illness could be treated in Turkey. She further complained that the Administrative Court had failed to consider her submissions with respect to the risk of re-traumatisation.

On 4 January 2005 the North Rhine-Westphalia Administrative Court of Appeal (*Oberverwaltungsgericht*) refused the applicant's request. It found, in particular, that the Administrative Court had duly examined the possibility to obtain medical treatment in Turkey. It noted that the Administrative Court had found that the applicant was not restricted to her home area, but could be expected to search medical care in Western Turkey. Under these circumstances, the Administrative Court did not have to refer explicitly to the German Consulate's report. The Court of Appeal further found that the Administrative Court had duly considered the expert reports on the applicant's state of health.

On 3 February 2004 the applicant, represented by counsel, lodged a constitutional complaint. She alleged that the administrative courts had violated her right to a fair hearing and her right to asylum as guaranteed by the Basic Law. She complained, in particular, that the Administrative Court had failed to duly consider the fact that the applicant, according to the medical report dated 11 September 2002, risked re-traumatisation on her return to Turkey. She further complained that the Administrative Court had failed to hear expert opinion on the risk of re-traumatisation.

On 27 April 2005 the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's complaint.

3. Further developments

The applicant, her husband and children subsequently lodged a request with the North Rhine-Westphalia Commission for the Prevention of Hardships (*Härtefallkommission*). No decision has yet been given. These proceedings do not have a suspensive effect; the Commission's recommendations are not binding on the domestic authorities.

By order of 31 May 2005 the Langenfeld Regional Court (*Amtsgericht*) placed the applicant into a psychiatric hospital. The Regional Court found a strong indication that the applicant suffered from a psychotic disorder which necessitated treatment and which could pose a danger to her life or integrity. According to a medical report of that same day, she had recently been suicidal. The Regional Court further ordered the preparation of an expert opinion on the applicant's state of health.

B. Relevant domestic law and practice

Article 16a(1) of the German Basic Law (*Grundgesetz*) provides that persons persecuted on political grounds enjoy the right of asylum.

Section 51 of the Aliens Act – as in force at the relevant time – prohibits the deportation of aliens to a state where they would face political persecution.

Section 53 prohibits deportation into a state where the alien faces a serious risk of being subjected to torture. Section 53(4) of the Aliens Act further prohibits any expulsion which would be contrary to the provisions of the Convention.

If the preconditions for the application of section 53(4) are not met, protection may be granted under section 53(6) of the Aliens Act, which grants a discretion to the authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of an alien.

According to the case-law of the Federal Administrative Court (*Bundesverwaltungsgericht*) the Federal Refugee Office, during asylum proceedings, only examines if the alien would be in danger in the receiving country (*zielstaatsbezogene Abschiebungshindernisse*). Other impediments to deportation, which could arise on German territory (*inlandsbezogene Abschiebungshindernisse*) have to be examined in separate proceedings by the local Aliens Office.

COMPLAINTS

1. The applicant complained that her expulsion to Turkey would expose her to a serious risk of treatment contrary to Article 3 of the Convention.

2. Invoking Article 13 of the Convention, the applicant further complained that the domestic authorities had not duly examined the alleged dangers a deportation to Turkey would pose to her health and life, in particular the risk of re-traumatisation.

THE LAW

1. The applicant claimed that her envisaged expulsion to Turkey would amount to a breach of Article 3 of the Convention, which provides as follows:

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

The applicant maintained that she would risk further abuse on her return to Turkey. She claimed, in particular, that all Turkish nationals expelled from Germany were subject to severe controls and interrogations on their arrival. In numerous established cases, this had led to torture respectively inhuman and degrading treatment by Turkish security officers. She further alleged that the Turkish security forces suspected her of supporting the PKK (the Kurdish Workers' Party). She further referred to a report by Amnesty International of July 2005 and to a report to the European Parliament of 10 June 2005 on the social, economic and political role of women in Turkey. The applicant further complained that her deportation and return to Turkey would lead to a re-traumatisation and to further suicide attempts.

The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their obligations under international treaties including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see, among many other authorities, *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 102; *Akyüz v. Germany* (dec.), no. 58388/00, 28 September 2000; and *Dragan v. Germany* (dec.), no. 33743/03, 7 October 2004).

A deportation or expulsion decision may, however, give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the State, where substantial grounds have been shown for believing that the person concerned would face a real and personal risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled (see for example *Vilvarajah*, cited above, § 103). A mere possibility of ill-treatment on account of an unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 of the Convention (ibid., § 111).

Moreover, while it is true that Article 3 has been more commonly applied by the Court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the risk that he or she runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts, however, the Court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see e.g. *Bensaid v. the United Kingdom*, no. 44599/98, §§ 32 and 34,

ECHR 2001-I, and *Arcila Henao v. the Netherlands* (dec.), no. 13669/03, 24 June 2003).

According to established case-law, aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3 (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 794, § 54; *Salkic and Others v. Sweden* (dec.), no. 7702/04, 29 June 2004).

Turning to the present case, the Court notes, first, that the applicant has not established that she has raised the issue of possible abuse during controls on her arrival in Turkey before the domestic courts. It follows that this part of the complaint has to be rejected pursuant to Article 35 §§ 1, 4 for non-exhaustion of domestic remedies.

The Court further notes that the applicant has not submitted any substantial evidence in support of her allegations that she had been suspected of supporting the PKK or other Kurdish movements or that she would face further political persecution or persecution by family members on her return to Turkey. There is in particular no evidence that she would be subjected to persecution or harassment by individuals or the Turkish security forces in the Western parts of Turkey (see, *mutatis mutandis*, *Damla v. Germany* (dec.), no. 61479/00, 26 October 2000).

In respect of the applicant's medical condition, the Court has to examine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3. In so doing, it has to asses the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *Bensaid*, cited above, § 35).

In the present case, the applicant has been diagnosed as suffering from a severe post-traumatic stress disorder associated with the risk of suicide. Since June 2002 she has been treated in psychiatric therapy and twice in compulsory health care, once in June 2003 and the second time from 31 May 2005 onwards. According to the most recent medical attestation of 31 May 2005, which was prepared on the occasion of her most recent hospitalisation, she had been suicidal.

The Court notes that the domestic authorities have accepted the seriousness of the applicant's medical condition. The Administrative Court found, however, that it could not be deduced from the medical attestations submitted by the applicant that the applicant, for the time being, risked being re-traumatised by her return to Turkey. It found that the reports indicated that the applicant's deportation as such might aggravate her medical condition. However, the question if the applicant's deportation as

such would cause a danger to her health had to be examined separately by the local Aliens Office. Considering all material in its possession, the Administrative Court followed the Refugee Office's assessment that the applicant could find medical treatment, especially if she expanded her search to the Western parts of Turkey. It further noted that the applicant could seek the Aliens Office's and the German Embassy's assistance in finding the necessary health-care facilities in Turkey. The Administrative Court of Appeal confirmed this reasoning.

The Court notes that both the Administrative Court and the Administrative Court of Appeal have examined the applicant's submissions and evaluated the evidence which the applicant submitted in support of her allegations. The Court reiterates that, as a general rule, the assessment of the facts and the taking of evidence and its evaluation is a matter which necessarily comes within the appreciation of the national courts and cannot be reviewed by the Court unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them (see *Damla*, cited above; and, *mutatis mutandis*, *Tamminen v. Finland*, no. 40847/98, § 38, 15 June 2004; *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Nothing in the file suggests that the assessment of facts was arbitrary. The fact that the applicant's circumstances in Turkey may be less favourable than those she enjoyed in Germany cannot be regarded as decisive from the point of view of Article 3 (see *Bensaid*, cited above, § 38).

The Court accepts the seriousness of the applicant's present medical condition, which led to her current hospitalisation. The Court notes, however, that the domestic authorities, in the asylum proceedings which form the subject matter of the present complaint, were not called upon to assess the question whether the applicant was fit for travelling or whether her deportation as such would endanger her health or life. As the Administrative Court pointed out, these questions had to be assessed by the Aliens Office in separate proceedings, which do not form the subject matter of the present application. The Court further notes that the German authorities are aware of the applicant's suicidal tendencies, as is demonstrated by the fact that she has been placed into a psychiatric clinic by court order and that the District Court, in the proceedings concerning her hospitalisation, has ordered the preparation of further expert opinion. Under these circumstances, there is no indication that the domestic authorities will deport the applicant as long as this would pose an imminent danger to her health or life.

Having regard to the high threshold set by Article 3, in particular where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, and having regard to the fact that the receiving country is a State Party to the Convention (see *Dragan*, cited above; and *Aronica v. Germany* (dec.), no. 33743/03, 7 October 2004), the Court does

not find that the domestic decisions violated the applicant's rights under Article 3 of the Convention.

It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

2. The applicant further complained under Article 13 of the Convention that the domestic authorities had not duly examined the dangers posed by her deportation to Turkey, in particularly with respect to a possible re-traumatisation.

According to the Court's case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Ellersiek v. Germany* (dec.), no. 77151/01, 23 June 2005).

The Court has found above that the substantive complaints under Article 3 are manifestly ill-founded. For similar reasons, the applicant did not have an "arguable claim" for the purposes of Article 13, and Article 13 is therefore inapplicable to her case. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President