CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26557/04
by Mehmet SAYDAM
against Turkey

The European Court of Human Rights (Second Section), sitting on 7 March 2006 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr S. Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 July 2004,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant, pursuant to Rules 40 and 54 § 2 (a) of the Rules of the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mehmet Saydam, is a Turkish national who was born in 1948 and lives in Istanbul. He was represented before the Court by Mr N. Ertekin, Mr T. Aycık and Mr K. Öztürk, lawyers practising in Istanbul.

A. The circumstances of the case

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

On 12 March 1998 the Istanbul State Security Court convicted the applicant of drug trafficking and sentenced him to seventeen years and six months' imprisonment. The applicant was placed in Kırklareli Prison.

On 8 December 2002 the applicant was diagnosed as suffering from lung cancer. He was transferred to the Edirne open-farm prison in order to facilitate his medical treatment.

On 7 January 2003 the applicant was operated on at Cerrahpaşa Hospital, attached to the Faculty of Medicine of Istanbul University. The top right lobe of his lung was removed (lobectomy). The applicant remained in hospital between 6 and 24 January 2003.

Between 5 March and 8 April 2003 the applicant received radiotherapy at the hospital of the Faculty of Medicine of Thrace University. On 8 April 2003 the doctors in charge of the applicant recommended house rest for three months.

Between 9 April and 12 June 2003 the applicant was transferred seven times to the prison clinic for a check-up.

On 29 April 2003 the applicant was examined by six doctors at Edirne State Hospital. The doctors noted that he was suffering from chronic obstructive lung disease of a permanent nature.

On 9 June 2003 the 3rd Section of the Forensic Medicine Institute, referring to the applicant's health condition, held that his continued incarceration could be life-threatening and recommended the suspension of his sentence for a year. It further held that at the end of that period his state of health would be reviewed.

On 13 June 2003 the Edirne public prosecutor suspended the execution of the applicant's sentence for one year, in accordance with Article 399 § 1 of the Code of Criminal Procedure, and ordered his release. He was released on the same day.

According to a medical report issued by Cerrahpaşa Hospital on 21 April 2004, the applicant was placed under medical supervision in case he suffered a relapse.

On 26 April 2004 the applicant filed a petition with the Edirne public prosecutor. In his petition the applicant submitted that he was still ill and that his sentence should be suspended. He also requested to be pardoned under Article 104 § 2 (b) of the Constitution.

According to a medical report issued by Edirne State Hospital on 4 May 2004, the applicant's illness and treatment were continuing and his condition constituted a handicap and a state of ageing.

On 23 June 2004 the 3rd Section of the Forensic Medicine Institute, after evaluating the medical reports on the applicant together with his blood

analysis and lung images, held that the applicant, who had been suffering from adenocarcinoma of the lung and had been operated on, presented no symptoms of a recurrence. It concluded that, at the time of the report, the applicant no longer fulfilled the requirements of Article 399 § 1 of the Code of Criminal Procedure and Article 104 of the Constitution. It further stated that, in the event of any change in his medical condition, it would reconsider its decision.

Consequently, on 7 July 2004 the Edirne public prosecutor informed the applicant that he had seven days in which to apply to the public prosecutor's office for his incarceration. That decision was served on the applicant on 19 July 2004.

According to a medical report issued by Cerrahpaşa Hospital on 12 July 2004, an analysis of the applicant did not reveal any atypical cells and his illness had not progressed. The report further stated that the applicant was under medical supervision in case of a relapse.

On 21 July 2004 the applicant applied to the Edirne public prosecutor's office for the suspension of his prison sentence. He challenged the veracity of the medical report issued by the Forensic Medicine Institute on 23 June 2004 and claimed that he would face the risk of a relapse if he were returned to prison. He stated that in order to provide for his children he had been trying to reactivate his company and that he needed a further three or four months.

On 26 July 2004 his application was dismissed by the Edirne public prosecutor's office. On the same day the applicant was incarcerated at Edirne open-farm prison.

On 4 August 2004 the applicant was transferred to the prison clinic for a check-up.

On 1 September 2004 the Edirne public prosecutor decided that, in view of the conflicting reports issued by the Forensic Medicine Institute on 23 June 2004 and by Edirne State Hospital on 4 May 2004, the applicant's case should be examined by the General Assembly of the Forensic Medicine Institute. The public prosecutor considered that, since the date of the meeting of the General Assembly was not known, it was appropriate to suspend the execution of the applicant's sentence for a period of six months. The applicant was released on the same day.

On 23 September 2004 the General Assembly of the Forensic Medicine Institute, after examining the medical reports concerning the applicant, concluded that, at the time of its decision, he did not fulfil the requirements of Article 399 § 1 of the Code of Criminal Procedure and Article 104 of the Constitution. It further stated that in the event of any change in the applicant's medical condition it would reconsider its decision.

In the meantime, on 12 October 2004, the new Criminal Code was adopted by Parliament.

On 29 November 2004 the Edirne Assize Court reviewed the applicant's sentence in the light of the provisions of the new Criminal Code resulting from Law no. 5252 and decided to suspend the execution of his sentence pending the entry into force of the new Criminal Code on 1 June 2005.

On 10 February 2005 the Faculty of Medicine of Thrace University submitted to the Edirne public prosecutor a report dated 9 February 2005 by Dr C.U., the head of its oncology department. In the report Dr C.U., referring to the medical reports drafted by the doctors at the hospital of the Faculty of Medicine of Thrace University, submitted that the applicant presented certain symptoms resulting from the various treatments he had received, but no symptoms of lung cancer. Accordingly, he concluded that the applicant had recovered from lung cancer. He held, however, that as there was a small risk of recurrence, the applicant should be kept under medical supervision for a further five years.

In a letter dated 22 August 2005 the applicant informed the Court that he was still under medical supervision in Cerrahpaşa Hospital. He also submitted that no further decisions had been taken by the national authorities as regards his return to prison. Finally, the applicant stated that, at the request of the public prosecutor, he had submitted the results of his latest medical tests to the authorities.

B. Relevant domestic law and practice

1. Article 399 §§ 1 and 2 of the Code of Criminal Procedure

"The execution of penalties restricting the liberty of a person suffering from mental disease shall be postponed until the patient has recovered.

The same provision shall apply in the event of any other illness which would constitute a serious danger to the life of the convicted person in the event of the execution of a sentence restricting liberty."

2. Article 104 § 2 (b) of the Constitution

"The President of the Republic is the head of State...

To this end, the duties he or she shall perform, and the powers he or she shall exercise, in accordance with the conditions laid down in the relevant Articles of the Constitution, are as follows:

... to remit, on grounds of chronic illness, disability or old age, all or part of the sentences imposed on certain individuals..."

3. Law no. 5252

Law no. 5252, adopted on 4 November 2004, concerns the rules and procedures to be applied during the transitional period pending the entry into force of the new Criminal Code. It provides for a review of the suspension of the execution of sentences in respect of convictions which became final before 1 April 2005, if the provisions of the new Criminal Code are more favourable to the convicted person.

COMPLAINT

The applicant complained under Article 3 of the Convention that his return to prison would amount to inhuman and degrading treatment. In that connection, he submitted that he was very ill and susceptible to infection. He claimed that if he was reincarcerated he would be serving his sentence at Edirne open-farm prison, where he would not have the possibility of routine check-ups. He also alleged that the ventilation system in that prison was inadequate and might cause him to suffer a relapse. He finally averred that, if he was reincarcerated, his health could deteriorate, putting his life at risk.

THE LAW

The applicant complained under Article 3 of the Convention that his return to prison would amount to inhuman and degrading treatment.

The Government maintained that the applicant had failed to exhaust domestic remedies since he had not lodged a complaint with the Court for Execution of Sentences. They further claimed that he should have awaited the outcome of his petition to the Edirne public prosecutor's office and the decision of the General Assembly of the Forensic Medicine Institute.

The Government maintained that the applicant had been provided with all the necessary treatment in prison.[1] They submitted that, in accordance with the provisions of the Regulations on the Administration of Prisons and Detention Centres and the Execution of Sentences, each prison had a clinic with at least one doctor in charge of a medical team and that the prison clinics met European standards. They further submitted that if an illness could not be treated in the prison clinic, inmates were transferred to hospitals. In that connection, they pointed out that the applicant had received the necessary medical treatment in the prison clinic and at various hospitals at the expense of the prison authorities.

1. The Government submitted photos of Edirne open-farm prison.

The Government submitted that the ventilation conditions at Edirne open-farm prison were in conformity with sanitary requirements and that there was no risk of the applicant catching infections. In this connection, they underlined the open nature of the prison, which was located outside the urban part of the city, and submitted that, while he was incarcerated, the applicant had been provided with a special diet, had been placed in a special dormitory for prisoners with health problems and had not been assigned any tasks. They further submitted that the prison was 6.5 km away from Edirne State Hospital and 13 km from the hospital of the Faculty of Medicine of Thrace University. They submitted that until now the applicant had been provided with all the medical facilities that his condition required and that he would be able to attend his regular hospital check-ups when he was reincarcerated.

As regards the applicant's medical condition, the Government emphasised that both the report by Cerrahpaşa Hospital and by the Forensic Medicine Institute had confirmed his medical history. They pointed out that the Forensic Medicine Institute had assessed the applicant's current state of health and that, in the event of any change in his condition, his situation would be reviewed. They further stressed that the findings of the report by Edirne State Hospital had not been discredited by the Forensic Medicine Institute, and that all medical institutions had agreed on the diagnosis and confirmed that the applicant had to be kept under medical supervision in order to prevent a recurrence of his illness.

Lastly, the Government submitted that the national authorities had made as much allowance as possible in order to facilitate the treatment of the applicant. In this connection, they pointed out that, following the deterioration of his health, the applicant had first been placed in Edirne open-farm prison and had later been released for a year in order to facilitate his full recovery. They contended that, if the applicant's health deteriorated, the national authorities would intervene as necessary. His sentence could be suspended for a while, or he could eventually be pardoned by the President of the Republic.

The applicant claimed that lodging a complaint with the Court for Execution of Sentences was not an effective domestic remedy and that he had not, at the time of the application, received any response from the Edirne public prosecutor's office to his petition. He further disputed the Government's submissions concerning the standard of the prison medical facilities and alleged that Edirne open-farm prison was unhygienic. He averred that his sentence had been suspended on 1 September 2004 only because the Government had realised that the Court was going to apply interim measures in his case and that, had it not been for his application to the Court, he would have been returned to prison.

The Court considers it unnecessary to determine whether the applicant has exhausted domestic remedies within the meaning of Article 35 § 1 of

the Convention, since the application is in any event inadmissible for the following reasons.

The Court reiterates that ill-treatment must attain a minimum level of severity if it is 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, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III).

Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds. It nonetheless imposes an obligation on States to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła,* cited above, § 94).

Moreover, the suffering which flows from natural illness, whether physical or mental, may fall foul of Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from the conditions of detention or other measures for which the authorities can be held responsible (see *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III).

Bearing in mind that the applicant was diagnosed as suffering from lung cancer and was released from prison for treatment, the Court considers that it must be determined whether he could be considered medically fit to serve his prison sentence and, if so, whether the prison where he would be incarcerated would have the necessary facilities for his treatment.

The Court notes that there is no dispute as regards the medical condition of the applicant. In 2002 he was diagnosed as suffering from lung cancer. He was operated on and received radiotherapy. At present he is under regular medical supervision to check on the possibility of a relapse.

As to the medical facilities for his treatment in prison, the Court observes that the applicant was transferred to Edirne open-farm prison in order to facilitate his medical treatment after he was diagnosed with lung cancer. He was released following the medical report of 9 June 2003 by the Forensic Medical Institute stating that his continued incarceration might be life-threatening. However, on 23 June 2004 the 3rd Section of the Forensic Medical Institute considered that his current state of health did not call for the further suspension of his sentence.

The Court observes that, in accordance with domestic law, only the Forensic Medical Institute is competent to decide whether the applicant's state of health falls within the scope of Article 399 of the Code of Criminal

Procedure. In this connection, the Court observes that on 1 September 2004 the Edirne public prosecutor's office suspended the execution of the applicant's prison sentence for a further period of six months and that his case was referred to the General Assembly of the Forensic Medical Institute for re-examination. On 23 September 2004 the General Assembly of the Forensic Medicine Institute confirmed the findings of the 3rd Section of the Forensic Medical Institute after examining the medical reports on the applicant. It further stated that, in the event of any change in the applicant's medical condition, it would reconsider its decision.

The Court takes into account the fact that the applicant has not claimed that he has been denied adequate health care in prison. In this connection, the case file reveals that, prior to the suspension of his sentence, the authorities had taken all necessary steps to ensure that he received adequate treatment for his illness at various hospitals. He was also regularly examined in the prison clinic.

In view of the above, the Court considers that, as matters stand at present, the applicant's situation has not attained a sufficient level of severity to fall within the scope of Article 3 of the Convention (see *Kudła*, cited above, § 99, and *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001).

Consequently, the application is 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 unanimously

Declares the application inadmissible.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President