**APPLICATION N° 20948/92**

Mehmet IŞILTAN v/TURKEY

**DECISION** of 22 May 1995 on the admissibility of the application

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**Article 2, paragraph 1 of the Convention** *The obligation to protect the right to life is not limited for the High Contracting Parties to the duty to prosecute those who put life in danger but implies positive preventive measures appropriate to the general situation - in particular the duty to ensure that hospitals have regulations for the protection of patients and to establish an effective system of judicial investigation into medical accidents*

*In the present case no appearance of arbitrariness in the Turkish courts' assessment of the facts which led to the death of a patient following an operation*

**Article 6, paragraph 1 of the Convention** *This provision cannot be invoked by a complainant in criminal proceedings*

**Article 25 of the Convention** *The father of a minor who dies following an operation considered to be an indirect victim of an alleged violation of Article 2 of the Convention*

**Article 26 of the Convention**

*a) An applicant must make normal use of those domestic remedies which are apparently effective and sufficient*

*b) Where there is a choice of various domestic remedies open to the applicant, Article 26 must be applied to reflect the practical realities of this individual's position in order to ensure the effective protection of the rights guaranteed*

*The father of a minor who dies following an operation, who cannot bring a prosecution because the public prosecutor's office has declared that it has no power to do so (Turkey), is not obliged to sue the surgeons for damages in order to fulfil the 'exhaustion of domestic remedies" requirement*

c) *A person who has raised in substance before the highest competent national authority, the complaint he makes before the Commission has exhausted domestic remedies Even in a State where the Convention is directly applicable the applicant may, instead of invoking a precise provision of the Convention, raise equivalent arguments before the national authority*

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**THE FACTS**

The applicant is a Turkish citizen He was born in 1945 and lives in Istanbul He is a financial adviser

The applicant was represented before the Commission by Mr Burhan Apaydın, a lawyer practising in Istanbul

The facts, as submitted by the parties, can be summarised as follows

On 6 December 1988, at Cerrahpaşa University Hospital (Istanbul) the applicant's daughter underwent, with the applicant's permission, an operation for a malignant brain tumour She died on 21 July 1989 after eight months in a coma She was nine years old

On 24 October 1989 the applicant reported the surgical team who had operated on his daughter to Fatih Public Prosecutor's Office in Istanbul, alleging that his daughter's death had been caused by professional negligence on the part of the team

Fatih Public Prosecutor's Office declared that it had no power to deal with the matter and transferred the file to the Vice Chancellor of Istanbul University, as required by the law on proceedings against state employees The Dean of the Faculty of Medicine opened an enquiry into the conduct of the persons in charge of the team involved and appointed a [Professor] of Medicine from the faculty to lead it

The Professor leading the enquiry appointed the Head of Neurosurgery at another hospital to prepare an expert report in the case

In his report, the expert stated that it had been essential to operate in this case since the malignant tumour had spread over a large area. He explained that radiation therapy would not have had any effect He concluded that, from his examination of the records of the operation, which inherently entailed serious risks and which in this case had been dogged by complications, he could find no negligence on the part of the surgeons

On the advice of the Professor leading the enquiry, and in accordance with the expert's conclusions, the University "Indictments Committee" ruled that the proceedings against the members of the surgical team should be discontinued This decision was served on the applicant on 17 May 1990.

The applicant challenged the decision before the Council of State, which sought an opinion from the High Council of Health as to whether it had been necessary to operate in this case

In its opinion of 24 25 September 1991, the High Council expressed the view that, in cases of tumours of this size, it was preferable to try radiation therapy first The Council considered that the surgeons responsible for the treatment carried out were one-eighth liable because they had chosen to operate without first trying radiation therapy and so had put the patient's life at risk

In a judgment dated 24 January 1992 the Council of State, by a majority, upheld the decision under challenge It held that the High Council of Health's report did not in any way invalidate the expert report prepared for the first instance proceedings, which had explained in detail why it had been necessary to operate in the circumstances The Council of State held that the choice of medical treatment was primarily a decision for the practitioner in charge of the case

## COMPLAINTS

1 The applicant complains that his daughter's right to life was violated in that she died as a result of being operated on at the hospital and in that the administrative courts refused to find the surgeons who operated on her criminally liable He invokes Article 2 of the Convention

2 On the basis of the same facts, the applicant further complains that he was not given a fair hearing by an impartial tribunal He claims that Article 6 para 1 of the Convention has been violated

. . ..

**THE LAW**

1. The applicant complains that his daughter's right to life was violated in that she died as a result of the operation and in that the administrative courts refused to find the surgeons criminally liable He invokes Article 2 para 1 of the Convention, which reads as follows·

> "Everyone's right to life shall be protected by law No one shall be deprived of his life intentionally . . "

The Commission, considering the complaint in the light of Article 2 of the Convention, recalls at the outset that the applicant, in his capacity as a father affected by the death of his daughter may claim to be a victim in the sense of Article 25 of the Convention (see, *inter alia*, No. 11257/84, Dec 6 10 86, D R 49 pp 213, 215)

The Government object at the outset that the applicant has not exhausted domestic remedies (see Article 26 of the Convention), under two heads

First, the Government argue that the applicant could have sued the surgeons who operated on his daughter for damages

In response, the applicant submits that no financial compensation which he might receive could repair a violation of Article 2 of the Convention, nor circumvent the responsibility of the State to ensure compliance with this provision

In this context, the Commission recalls the judgment in the Airey case (judgment of 9 October 1979, Series A no 32, p 12, para 23) where the Court held that it was primarily for the individual to select which legal remedy to pursue. Where there is a choice of domestic remedies open to the applicant in relation to an alleged violation of the Convention, Article 26 should be applied to reflect the practical reality of the applicant's situation in order to ensure that he or she may enjoy an effective protection of the rights and liberties laid down in the Convention An applicant is under an obligation to make "normal use" of those domestic remedies which are apparently effective and sufficient, provided that the remedy chosen is capable of redressing the matters complained of at the domestic level (see, for example, No 9697/82, J and others v Ireland, Dec. 7 10 83, D R. 34 p 131)

The Commission notes that, by reporting the matter to the domestic judicial authorities as a crime, the applicant was trying to set a prosecution in motion based on his complaints about the reckless killing of his daughter, the same complaints as he is raising before the Commission Fatih Public Prosecutor's Office declared that, under the law on proceedings against state employees (Memurin Muhakemati Hakkinda Kanun), it had no power to deal with the case From then on, it was impossible for the applicant to raise his complaints before the domestic courts although he had used an adequate and effective domestic law remedy In these circumstances, the applicant cannot be blamed for not using other types of remedy, such as an action for damages as referred to by the Government

Secondly, the respondent Government point out that at no stage in the proceedings before the domestic courts did the applicant invoke the relevant provisions of the Convention, despite the fact that these are part of domestic law

The applicant challenges the Government's argument

The Commission recalls its consistent case-law, according to which a person who has, in substance, raised the same complaint as he is making before the Commission before the highest competent national authority, has exhausted domestic remedies Even in a State where the Convention is directly applicable in the domestic legal system (as it is in the case of Turkey), the applicant may also raise "equivalent arguments" before the domestic courts (see No 7367/76, Dec 10 3 77, D R 8 p 185)

The Commission notes that, in the present case, the applicant raised the argument that his daughter's right to life had been violated in his crime report accusing the surgeon of involuntary manslaughter The Commission considers that the applicant has raised, within the domestic proceedings, the substance of the complaint which he is making before the Commission.

It follows that the objection that the application is inadmissible for non-exhaustion of domestic remedies cannot be upheld.

As regards the merits of the complaint brought under Article 2 of the Convention, the Government consider that no violation of this Article can be found Relying on the expert reports, they assert that it was essential to operate in this case since the tumour had spread over a large area They argue that the choice of medical treatment is primarily a decision for the surgeon in charge of the patient The Government refer to Article 455 of the Turkish Penal Code (which deals with involuntary manslaughter) and add that Articles 10 and 11 of the medical profession's Code of Conduct, which prohibit experimentation in the course of medical treatment and operations, may be directly relied upon before the domestic courts

As regards the investigative system established by the law on proceedings against state employees, the Government point out that this aims to ensure that legislation in force is effectively applied to state employees

The applicant challenges the Government's argument He maintains that his daughter died as a result of professional negligence on the part of the surgical team He alleges that Article 10 and 11 of the medical profession's Code of Conduct were breached in that the surgeons performed the operation despite the fact that his daughter's condition could not be treated in Turkey

The Commission recalls that the first sentence of Article 2 obliges the State, not merely to refrain from "intentionally" causing death, but also to take adequate measures to protect life (see No. 7154/75, Dec. 12.7 78, D R 14 p 31, and No. 9348/81,

Dec 28 2 83, D R 32 p 190) The Commission considers that the positive obligations which a State has to protect life include the requirement for hospitals to have regulations for the protection of their patients' lives (see No 16593/90, Dec 12 9 91, unpublished) The Commission notes that, in the present case, it is not disputed that the medical practitioners concerned were subject to regulations at Cerrahpaşa hospital

A State's positive obligations also include the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned

In the present case, the Convention notes that the applicant disputes the conclusion reached by the administrative authorities and the courts, in particular, the Council of State

In this regard, the Commission notes that the applicant's report accusing the surgical team which carried out the operation of a crime was examined by an investigator from the administrative authorities, who, after obtaining an expert report from a specialist in neurosurgery, ruled that the prosecution should be discontinued

The applicant's challenge to this ruling was examined by the Council of State, the highest administrative court After obtaining its own expert medical report, the Council of State dismissed the applicant's challenge, holding that the choice of medical treatment was primarily a decision for the practitioner in charge of the patient and that an examination of the records of the operation did not reveal any professional negligence on the part of the doctors who performed it

Given that no fresh evidence has been submitted to the Commission and that there is no indication that the administrative and judicial authorities assessed the evidence submitted to them in an arbitrary manner, the Commission must base its assessment on the facts as found by the domestic courts

In the present case, the Commission observes that the Council of State found no negligence on the part of the hospital surgeons In reaching this conclusion, the Council of State took into account the expert medical reports, which were mutually consistent

The Commission is of course aware of the tragic circumstances of this case However, the mere fact that the surgeons carried out an operation in order to treat a malignant brain tumour and that the applicant's daughter subsequently died is not sufficient in itself and on the particular facts of the case to found the conclusion that the obligation to protect life within the meaning of Article 2 of the Convention has been breached

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

2 The applicant also raises a complaint concerning the prosecution commenced against the surgeons in charge of the operation on his daughter, claiming that he was not given a fair hearing by an impartial tribunal

The Commission notes that the applicant chose to use only the criminal law against the surgeons in question The resultant proceedings do not relate to the applicant's civil rights and obligations, nor to the determination of a criminal charge against him

Consequently, this provision of the Convention is not applicable to the proceedings in question

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must therefore be rejected pursuant to Article 27 para 2 thereof

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE