OKKIR
FILE

THE UNION TURKISH BAR ASSOCIATIONS
Human Rights Centre
Legislation Monitoring Centre

October 2014
ANKARA

THE UNION TURKISH BAR ASSOCIATIONS

The Union of Turkish Bar Associations Publishing: 264

Okkır File

ISBN: 978-605-9050-14-2

1st edition: October 2014, Ankara

The Union of Turkish Bar Associations
Oğuzlar Mah. Barış Manço Cad.
Av. Özdemir Özok Sokağı No: 8
06520 Balgat - ANKARA
Tel: (312) 292 59 00 (pbx)
Fax: 312 286 55 65
www.barobirlik.org.tr
yayin@barobirlik.org.tr

Printing
Şen Matbaa
Özveren Sokağı 25/B
Demirtepe-Ankara
(0312. 229 64 54 - 230 54 50)

CONTENTS

OVERVIEW

Having been arrested by Istanbul 9th Heavy Penal Court (decision no. 2006/96) on 23.06.2007 on the grounds of becoming a member of the Ergenekon Terrorist Organization, Kuddusi Okkır passed away on 06.07.2008 when he got sick in the course of his imprisonment. It was claimed that Kuddusi Okkır was not treated correctly, his treatment was hindered during his imprisonment and his health condition was ignored when decisions regarding his arrest and continuation of the arrest were taken. The medical evaluations with regard to the treatment process of Kuddusi Okkır mentioned in this report that contains legal assessment concerning Kuddusi Okkır's arrest and treatment processes are based on the evaluations and conclusions laid down in the Research Board Report of Turkish Medical Association dated 5 September 2008.

In the first section of the report, national and international standards related to the utilization of health services by detainees and convicts have been set out. While the second section handles the omissions and violations that occurred in the treatment process of Kuddusi Okkır, the third section deals with whether the sick detainee was tried correctly in terms of the principle of fair (proper) trial. The Fourth Section, however, touches upon various aspects of the issue in terms of "Right to an Effective Remedy".

Chronological information that indicate the stages of the judicial process have been added to the end of the text[1].

[1] This information has been compiled from the data under the headings of "Issues related to Personal Freedom and Safety / Prisons Issue / Right to Health and Life / Dying Patients" in the Human Rights Report (April 2013) published by the UTBA Human Rights Centre.

STANDARDS RELATED TO THE UTILIZATION OF HEALTH SERVICES BY DETAINEES AND CONVICTS

First Section

STANDARDS RELATED TO THE UTILIZATION OF HEALTH SERVICES BY DETAINEES AND CONVICTS

Right to health has been set out in Article 25 of the Universal Declaration of Human Rights, Article 12 of United Nations (UN) Convention on Economic, Social and Cultural Rights, Article 11 of the European Social Charter, Article 35 of the European Union Charter of Fundamental Rights and Article 56 of the Constitution. Right to health of people in prisons have been regulated in detail in Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules and Resolution (73) 5 on Standard Minimum Rules for the Treatment of Prisoners.

Minimum medical services to be provided to detainees and convicts are set out in Article 22 titled "Medical Services" of the Minimum Standard Rules for the Treatment of Prisoners that were adopted by the First UN Conference in Geneva in 1955 on Prevention of Crime and the Treatment of Offenders and approved by the UN Economic and Social Council Resolution 663C (XXIV) of 31 July 1957 and Resolution 2076 (LXII) of 13 May 1977.

In addition to the provisions of the international instruments, convict's requests for examination and treatment have been regulated in Article 71 of the Law No. 5275 on the Execution of Penalties and Security Measures while the issues such as examination and treatment of the convict, health inspection, referral to hospital and illness to prevent execution have been governed by Articles 78 to 81 of the same Law. According to Article 116 of the Law No. 5275 on the Execution of Penalties and Security Measures, these regulations relating to the convicts shall apply to the detainees as well.

Responsibility of ensuring the health and safety of people who are caught, detained, arrested and convicted in accordance

with the laws for the duration in the course of which they have been deprived of their freedoms belongs to the state as the opportunity of the detained people to get treated and ensure their own safety with their own means is very limited during this time. As a matter of fact, in the case of Gülay Çetin v. Turkey, the European Court of Human Rights (ECHR) ruled2 that especially "in the case of people deprived of their freedoms, states had positive obligation to ensure imprisonment of these people under conditions compatible with human dignity and not to expose these people to more distress than the stress and sadness inherent in prison life with the applications of execution in accordance with Article 3".

In addition to ensuring the safety of prisoners, protecting health of the people kept in penal institutions as detainees or convicts require special precautions. Apart from protecting their health, the state is required to ensure access of these people to medical care if they need any sort of treatment. Patient rights set out in international conventions and the Constitution provide for the obligation of public authorities to take special measures for people who are included in disadvantaged groups as they are in prisons or jails.

The foundation of patients' rights and access to medical care in prisons is that these people who have been deprived of their freedoms lack the opportunity to access physicians by themselves, freely and whenever they wish. Therefore, the state is obliged to provide the prisons and jails, where the detainees and convicts are kept, with necessary personnel and resources for medical care in accordance with universal values and related norms concerning patients' rights. In some cases, use of new technologies in prisons, provision of medical services necessary for the treatment by experienced physicians and ensuring other medical care standards may not be possible. In such cases where such facilities are inadequate, the detainees and convicts need to be transferred to hospitals where they can be treated.

2 The ECHR Gülay Çetin v. Turkey (Application no: 44084/10, Decision date: 5 March 2013, paragraph 101)

Access of the detainees and convicts to health care services should be as direct as possible and the personnel working in prisons and other judicial officers must be prevented from conditioning or abusing the access of detainees and convicts to their right to health. The way to achieve this is to inform the patients' relatives and attorneys about the processes of transport to the hospital and treatment of the patients and the places where they are treated.

8- According to Article 5 of the Regulation on Patients' Rights3, "Everyone shall be treated humanely in the light of the fact that everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence and no authority or person has the power to eliminate this right. In the delivery of health services, differences in patients' race, language, religion and creed, sex, political opinion, philosophical belief and economic and social status shall not be taken into account. Health care services shall be planned and organized in a way that is easily accessed by everyone." According to Article 35 of the Code of Professional Ethics for Physicians, "Examination of the detainees and convicts shall be conducted under conditions that respect personal rights and are favourable to exercise the art of medicine, and the privacy rights of the patients shall be protected. The physician has the right and responsibility to request from the competent authorities to ensure such conditions. The documents or reports to be drawn up after the examination shall be required to bear the name, surname, diploma number and signature of the physician. A copy of the document or report shall be submitted to the person in question. In the event that the document or report has been drawn up under pressure, the physician shall notify the relevant professional organization of the situation as soon as possible." Therefore, the detainees and convicts must not be discriminated in terms of treatment, they must be treated in accordance with the standards and the reasons for their accusation must not pose an obstacle in their access to medical care and continuation of their treatment.

---

3 Official Gazette, Date: 01.08.1998, No: 23420.

9- Article 61 concerning the examination of the detainees and convicts of the Protocol (tripartite protocol) dated 30.10.2003 that was prepared by the Ministries of Justice, Health and Interior stated4 that "The gendarmerie shall wait outside the door in cases where the room is protected during the course of examination at hospitals of those who are detained or convicted of the offences that fall outside the scope of laws on fight against terrorism and benefit-oriented criminal organizations; in the event that the room concerned is not protected, the gendarmerie shall stay inside the examination room and take protection measures from a distance where he will not hear the conversation between the patient and the doctor. However, all kinds of illegal demands to be placed by the detainee or convict during the examination shall be immediately communicated to the gendarmerie patrol commander by the relevant medical personnel."

This Protocol which is clearly contrary to the international standards, Biomedicine Convention and Patients' Rights Regulation was amended on 22 August 2011 as "The gendarmerie shall wait outside the door during examination and be allowed to remain inside the room upon the written request of the doctor. However, all kinds of demands to be placed by the detainees or convicts during the examination that are in violation of the legislation shall be immediately communicated to the gendarmerie patrol commander by the relevant medical personnel. The gendarmerie shall stay inside the room until protected examination rooms are built for detainees or convicts at hospitals; however, he shall stand at a distance from where he cannot hear the conversation between the patient and the doctor."

[4] For example, Dr. Sadık Çayan Mulamahmutoğlu, who examined a convict that was referred to Midyat State Hospital in the internal diseases clinic, was tried for asking the gendarmerie to leave the room in the course of the examination of the convict. The doctor asserted in his plea that asking the gendarmerie to leave the room was in compliance with medical ethics and right to privacy of the patient as the patient suffered rectal haemorrhage. In fact, the act of the doctor is in compliance with international medical ethics and it is interesting in terms of reflecting how far the situation is from the standards concerning the exercise of the right to health of patient detainees and convicts.

10- During the processes of referral to the hospital and treatment of detainees and convicts, unnecessary and painful conditions should be avoided and these people must not be subjected to ill-treatment during their transportation from the places they are kept in to the hospitals. In the event that they need to be treated in a hospital setting, the treatment must be continued by ensuring the safety of the detainees or convicts and taking necessary measures to prevent their escape. Measures to be taken to prevent the escape of the detainees or convicts fall within the responsibility of the law enforcement authorities who are entrusted with it, not of the physicians, health care personnel or hospital administration. Expecting the health care personnel to take measures necessary to ensure the safety of the detainees or convicts inside the hospital and prevent their escape may prevent the correct treatment of the patient.

By stating that "The physician tries to provide the patients in the terminal stage with all kinds of humanitarian assistance, ensure conditions worthy of human dignity and relieve the pain as much as possible", Article 28 of the Code of Professional Ethics for Physicians has set the standard for patients in the terminal stage.

Depriving the detainees or convicts of their right to health, or their incorrect treatment constitutes a breach of the right to life as stated in Article 2 of the European Convention on Human Rights (ECHR) and of the prohibition of torture and ill-treatment set out in Article 3 of the same Convention.

It should be accepted that the right to a fair trial, laid down in Article 6 of the ECHR, of a detainee whose access to the right to health was blocked was violated. The offence of misconduct in office that is set out in Article 257 of Turkish Criminal Code (TCC) will come into question in the event that the physicians and other health care personnel act contrary to the above-mentioned professional rules.

Felonious homicide due to failure or negligence that is laid down in Article 83 of the TCC may come into question

in the event that the people concerned intentionally ignore their obligations entrusted to them by laws in order to cause the death of the detainees or convicts. However, "the failure or negligence creating such consequence should be equal to commissive act in degree" in order for the provision of Article 83 titled "Felonious homicide due to failure or negligence" of the TCC to be applied.

That the administration will be accused of neglect of duty in such cases where civil and criminal liabilities of public officials arise will also need to be accepted.

TREATMENT PROCESS OF KUDDUSİ OKKIR IN TERMS OF RIGHT OF ACCESS TO HEALTH

Second Section

TREATMENT PROCESS OF KUDDUSİ OKKIR IN TERMS OF RIGHT OF ACCESS TO HEALTH[5]

1- There is no information regarding that Kuddusi Okkır had a specific health problem when he was arrested on 23.06.2007. Therefore, there is no information related to a problem arising from Okkır's state of health, apart from the general problems related to the arrest arising from the practices of the special courts of the Turkish law on the date in question. For this reason, it needs to be accepted that Kuddusi Okkır was generally healthy and had no chronic disease at the time of his arrest.

2- According to the records kept in the infirmary of Tekirdağ F-Type High Security Closed Prison No. 1, Okkır was examined many times due to prostate, dental and respiratory ailments between the dates of 16.07.2007 and 15.03.2008, but no unusual health problems were observed.

When Okkır needed to be treated by specialist physicians at a hospital instead of in the infirmary of the prison upon the emergence of respiratory and gastrointestinal complaints as of 17.03.2008, he was referred to Tekirdağ State Hospital, but instead of maintaining his inpatient treatment, it was decided that he would continue to be treated in where he stayed with regular controls.

Referral of Okkır to a Chest Diseases Hospital due to the progression of respiratory complaints as a result of the control conducted on 01.04.2008 was deemed appropriate, but Okkır did not want to abide by this referral decision. In the control conducted on 08.04.2008 by the physician of the institution in which the detainee was kept although he had not asked for it, it was decided that he needed to be referred immediately to Tekirdağ State Hospital for examination for internal diseases,

[5] In this section, the paragraphs are numbered in an order that will reflect the stages of Okkır's treatment process.

psychiatry and urology due to loss of weight and alarming level of deterioration in his general state of health. Okkır was diagnosed with Major Depression and Pneumonia at Tekirdağ State Hospital, but despite this severe health problems, his inpatient treatment was not ensured and he was just suggested to be controlled at certain intervals. Following the control examination conducted on 14.04.2008, the patient whose state of health was deteriorating gradually was not decided to take inpatient treatment despite the demand and recommendations of the physician of the institution.

Article 22/2 of the Minimum Standard Rules for the Treatment of Prisoners states that "Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers." In this present case, it is evident that compliance with this standard was not ensured, the patient whose state of health was determined to deteriorate as a result of the control examination conducted on 14.04.2008 was needed, but avoided to be treated at the hospital despite the demand and recommendations of the physician of the institution, and that the patient who was diagnosed with Major Depression and Pneumonia in the examination conducted earlier at Tekirdağ State Hospital and required inpatient treatment according to the code of professional ethics for physicians was not provided with such opportunity.

In this case, it should be recognized that the physicians, who did not ensure inpatient treatment of Okkır although they had to, neglected their duties. On the other hand, according to Article 25/2 of the Minimum Standard Rules for the Treatment of Prisoners, "The medical officer shall report to the director of the institution whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment". As noted above, that the treatment of the

patient was not continued in the hospital although it needed to be done so and that the physicians did not notify the director of the institution of the fact that physical and mental health of Okkır deteriorated indicate that the physicians did not duly perform their duties.

According to Article 44/1 of the Minimum Standard Rules for the Treatment of Prisoners, "Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner." According to Article 44/3, "Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution". However, in this instant case, Okkır's relatives and attorneys were not informed of his illness or transfer to a hospital by the directorate of the institution he stayed in.

5- As a result of the detailed assessment of those in charge of the Psychosocial Service, in which the detainee stayed, upon the need felt between 09.04.2008 and 17.04.2008, taking into consideration the current conditions, it was reported that Okkır needed to stay in a Medical Institution until his treatment was completed; the next day, on 18.04.2008, the patient, who was examined once more and whose state of health was determined to have further deteriorated, was referred to Bakırköy Ord. Prof. Dr. Mazhar Osman Mental Health and Neurological Diseases Training and Research Hospital, instead of being hospitalized.

According to the Declaration on the Rights of the Patient adopted by the World Medical Association, "The patient shall always be treated in accordance with his/her best interests and the treatment applied shall be in accordance with generally approved medical principles." In addition, Article 11, titled "Diagnosis, Treatment and Care in compliance with Medical Requirements", of the Regulation on Patients' Rights6 states

6 Official Gazette, Date: 01.08.1998, No: 23420

that "The patient shall have the right to request to be diagnosed, treated and cared in accordance with the requirements of modern medical knowledge and technology. No diagnosis or treatment that is deceptive in nature or is contrary to the principles of medicine and provisions of the legislation on medicine shall be conducted." According to Article 14, titled "Display of Medical Attention", of the same Regulation, "The personnel shall display the attention required by the state of health of the patient". Therefore, the fact that the patient was examined and treated superficially although Major Depression and Pneumonia required inpatient treatment as per the rules of the profession of medicine and that the patient was referred to a Mental Health and Neurological Diseases hospital although he was supposed to be transferred to a hospital appropriate for the treatment of the diagnosed illness should be evaluated as a hefty malpractice. Once again, according to the above-mentioned international instruments and Article 15 of the Regulation on Patients' Rights, the patient's family was not informed of his health status. Violations of all these rules should be considered as a misconduct by the responsible persons. In the event of concluding that the patient's treatment was delayed intentionally or the treatment was hindered deliberately (that the negligence is equal to commissive act in degree), the offence of felonious homicide due to failure or negligence laid down in Article 83 of the TCC needs to be accepted to have occurred.

In the assessment made by Tekirdağ Medical Chamber with regard to the medical applications that have been mentioned so far, it was reported7 that "Tekirdağ F-Type Prison No. 1 where the patient detainee was kept had no Institutional Physician; instead, 1-month temporary duty physicians from

7 Pointing out to the same situation, Dr. Metin Bakkalcı, Secretary General of the Human Rights Foundations of Turkey, and Sevim Kalman, Head of Istanbul Branch of Human Rights Association and a member of Prisons Commission, also stated that most of the health personnel assigned to the prisons were practitioners, not specialist physicians and that serious intervention was not made to the patients when they resorted to them with various health issues. See (http://www.bianet.org/bianet/insanhaklari/108219-tutuklu-haklarinin-ihlali-sadece-okkir-dan-ibaret-degil, latest access on 15.05.2014)

Tekirdağ State Hospital Emergency Unit and 112 Emergency Units worked in the prison as "Institutional Physicians" and this situation eliminated the possibility of continuity in monitoring the health status of the patient", and that Okkır was not referred to a proper medical institution in spite of the sensitivity, struggle and special efforts of the physicians of the prison in referring him immediately to an inpatient medical institution.

As mentioned above, Article 22/2 of the Minimum Standard Rules for the Treatment of Prisoners states that "Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers."

As the inadequacy of medical furnishings in the institution in which the patient stayed and that the physicians do not have necessary expertise prevent the treatment of the patient and his access to health services, fault of the administration comes into question in this case.

6- In the Expert Report of Tekirdağ Medical Chamber, it was determined that Tekirdağ Chest Diseases Hospital to which the patient was referred and the Prisoner Ward of Tekirdağ State Hospital were insufficient for the treatment of Okkır and the specialist physicians thus refrained from the inpatient treatment of the patient; that the diagnoses were not verified, the patient was left at early diagnosis stage and this situation continued repeatedly. The report also concluded that there was sufficient reasonable suspicion of neglect for an investigation to be initiated by the Honour Board of Tekirdağ Medical Chamber against the relevant physicians due to the non-performance of follow-up, consultation, examination and treatment of the patient within the framework of medical standards in order to evaluate the medical practices of these physicians.

As noted in the Report of the Union of Turkish Bar Associations, the fact that Okkır was superficially left at early

diagnosis stage although he needed to be hospitalized is contrary to the obligation of diagnosis, treatment and care in compliance with medical requirements that is set out in Article 11 of the Regulation on Patients' Rights. As per this Article, "The patient shall have the right to request to be diagnosed, treated and cared in accordance with the requirements of modern medical knowledge and technology. No diagnosis or treatment that is deceptive in nature or is contrary to the principles of medicine and provisions of the legislation on medicine shall be conducted." Again, Article 14, titled "Display of Medical Attention", of the same Regulation states that "The personnel shall display the attention required by the state of health of the patient. Even when it is not possible to save the patient's life or preserve his/her health, the personnel shall be obliged to reduce or relieve his/her suffering." The non-performance of necessary interventions to diagnose the patient accurately in contravention of these obligations and the consequent delay in the treatment of the patient may lead to the criminal liability of the relevant physicians. That the patient was not diagnosed and treated in accordance with the requirements of modern medical knowledge and technology may lead to the offence of neglect of duty under Article 257/2 of the TCC on the part of the physicians who avoided this obligation. In the event of the death of the patient due to non-performance of necessary diagnosis and treatment, negligent homicide may come into question as per Article 85 of the TCC for the physicians concerned while the determination of indifference to the possible death may lead to the offence of felonious homicide due to failure or negligence under Article 83 of the TCC.

According to Article 257/2 of the TCC, "Excluding the acts defined as offense in the law, any public officer who causes suffering of people or public injury, or secures unjust "benefit" for others by showing negligence or delay in performance of his duties, shall be punished with imprisonment from 'three months to one year'." As identified in the Report of the Turkish Medical Association, the physicians and other health care personnel who do not make required medical intervention

according to the professional rules may be responsible due to the offence of misconduct in office by neglecting their obligations arising from laws.

Under Article 83/1 of the TCC, "In order to keep a person responsible from a death due to failure to perform an obligation, the failure or negligence creating such consequence should be equal to commissive act in degree." Article 83/2 of the TCC indicates that "In order to accept negligence and commissive act as equal elements, a person; a) Should have undertaken liabilities arising out of legal adaptations or a contract to execute a certain commissive act, and b) His previous performance should constitute a risk against the other's life." Ensuring that a patient who has resorted to a hospital is diagnosed, treated and cared in accordance with the requirements of modern medical knowledge and technology is an obligation arising from laws in terms of the physicians working in the institution to which the patient has resorted. The physicians who contribute to the death by neglecting their liabilities arising out of legal adaptations to execute a certain commissive act by not treating a patient may thus be liable for the offence of felonious homicide due to neglect.

7- The patient was tried to be treated in Istanbul as from 18.04.2008 starting in Bakırköy Prof. Dr. Mazhar Osman Mental Health and Neurological Diseases Training and Research Hospital and Okkır was referred to this hospital three times in this process.

According to Article 8 of the Regulation on Patients' Rights, "The patient may change the health institution provided that it is in compliance with the referral system determined by the legislation. However, it is essential that the patient is informed by the doctor about whether changing the institution leads to a life-threatening situation or a deterioration in the state of health of the patient and that such a change is not medically dangerous in terms of the patient's life." As a result, referral of the patient, who needed to be hospitalized, three times during this period without adequate medical justification and

avoidance of treatment may be considered as the negligence of the liability of duty of the physicians.

According to Article 22/2 of the Minimum Standard Rules for the Treatment of Prisoners, "Sick prisoners who require specialist treatment shall be transferred to specialized institutions and/or to civil hospitals." Transport of the patient, who was unable to walk on his own, between the prison and hospital in this process instead of being hospitalized is an ill-treatment that causes the patient to suffer physically and spiritually.

8- Bayrampaşa State Hospital was used as the main hospital for the treatment of the patient as it had a 50-bed inpatient ward, but the pulmonologist in this hospital, who had to examine the immediate respiratory problems of the patient, failed to detect the severity of health status of the patient and decided to send the patient back to Tekirdağ F-Type High Security Closed Prison No. 1 on 08.05.2008 on the grounds that his general state of health got better. However, Okkır was immediately referred to Trakya University Medical Faculty Hospital by the physician of the prison when he determined that the patient had to be subjected to inpatient treatment.

The responsible physicians who did not treat the patient concerned in accordance with the professional rules in Bayrampaşa State Hospital and avoided this obligation may be subjected to the offence of misconduct in office laid down in Article 257 of the TCC based on the grounds explained above.

9- The patient was sent by the prison administration to Yedikule Chest Diseases and Thoracic Surgery Training and Research Hospital twice under emergency conditions at 22:30 and 24:00. The reason why the patient was referred to the hospital at these hours is not clear. This fact was also identified in the report of the Turkish Medical Association and it was emphasized that significant delays were seen in the referrals from the prison to the medical institutions and that the referrals were made outside the office hours. Unless the reason why these

referrals were made under these conditions with delay is laid out in a logical manner, the responsible persons and the prison administration may be subjected to the offence of misconduct in office. If the referral of the patient was delayed by the responsible persons in order to prevent the patient, who was in immediate need of care, from getting treated under suitable conditions and by a specialist physician, in such a case, whether the offence of felonious homicide due to failure or negligence that is set out in Article 83 of the TCC exists should be discussed.

According to Article 44 of the Minimum Standard Rules for the Treatment of Prisoners, "Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner." According to Article 8 of the Regulation on Patients' Rights, "In cases where there is no medical benefit in keeping the patient in the medical institution or where his/her transfer to another medical institution is necessary, the situation shall be explained to the patient or the persons specified in the second paragraph of Article 15. Prior to the transfer of the patient, necessary information shall be communicated to the medical institution, which the patient is to be transferred to or is deemed medically appropriate, by the referring institution or the authorities determined by the legislation. In both cases, smooth and uninterrupted provision of service is essential." According to Article 15 of the Regulation, "The patient and, if not possible, his/her relatives shall be informed of his/her transfer to another medical institution." As a matter of fact, this obligation has not been fulfilled. It is clear in this case that the officials acted negligently.

10- Haseki Training and Research Hospital is the most competent one among the medical institutions to which the patient was referred. The patient was referred to this hospital twice on 29.04.2008 and 07.05.2008 due to the necessity of intensive care. However, he arrived at the hospital at around

24:00 in his first referral. According to the report prepared by the Turkish Medical Association, upon his arrival at the hospital, emergent ailments of the patient, including Acute Renal Failure were taken under control until the office hours in the next morning and he was sent back to the prison in order to be returned to Bayrampaşa State Hospital where he stayed although his "further examination and treatment" were compulsory.

The report of the Turkish Medical Institution pointed out that this practice in Haseki Training and Research Hospital was a behaviour that would require the responsibility of the physicians and stressed that non-performance of further examination of the patient was a behaviour contrary to the sense of duty.

As explained above, that the patient was not diagnosed and treated in accordance with the requirements of modern medical knowledge and technology during the practice in question in Haseki Hospital may lead to the offence of misconduct in office under Article 257 of the TCC on the part of the physicians who avoided this obligation and in the event of the death of the patient due to non-performance of necessary diagnosis and treatment, the offence of felonious homicide due to failure or negligence may come into question under Article 83 of the TCC.

11- That, except for Bakırköy Prof. Dr. Mazhar Osman Mental Health and Neurological Diseases Training and Research Hospital, the hospitals concerned did not draw up documents that reflect the clinical history of the patient, who did not have a hospital attendant with him and was unable to speak and stand, namely serious findings such as faecal and urinary incontinence during these referrals and consultations that took place between the hospitals in question contributed to the missing of the chance of emergence of the actual state of health of the patient. That the necessary examinations were not conducted on the patient although the definite indication was identified prevented the chance of early diagnosis and treatment.

That the patient was not diagnosed and treated in accordance with the requirements of modern medical knowledge and technology may lead to the offence of misconduct in office under Article 257 of the TCC on the part of the physicians who avoided this obligation and in the event of the death of the patient due to non-performance of necessary diagnosis and treatment, the offence of felonious homicide due to failure or negligence may come into question under Article 83 of the TCC.

12- In referrals from the prison to the hospitals, expressions such as "Member of Ergenekon Terrorist Organization", "Attention! May escape or be kidnapped" were written on the documents of the patient. Considering the political atmosphere during the years of 2007-2008 when the patient was is prison and his treatment continued, and the accusations about Okkır and the way of execution of the trial he was a part of, it is clear that above-stated expressions are the main factors that led to delays in the treatment process of the patient. In the period concerned, it was reported in the press that a very large and secret organization was responsible for many bloody incidents and massacres in Turkey within the scope of the investigations commonly known by the public as "Ergenekon Terrorist Organization", the news regarding that this very well-organized secret organization was responsible for almost all political crimes were spread and people somehow affiliated with the persons from different professions who were considered to be associated with this organization were also accused of being members of this organization and subjected to trials. Okkır was accused of being the "secret safe" that governed the financial relations of this organization. In such an atmosphere where, on the referral documents, he was stated to be very dangerous and a member of the terrorist organization, it is not possible and reasonable to expect that Okkır who had become bedridden would be treated and cared in compliance with the rules of the profession of medicine. Considering the issue in terms of the political conditions of those years in Turkey, the expressions such as "Member of Ergenekon Terrorist Organization" and

"Attention! May escape or be kidnapped" that were present on the referral documents of the patient were beyond a warning and led to pressure on the physicians who would treat the patient and caused the patient to be subject to discriminatory practices. Moreover, the addressees of the information that necessary measures were taken to ensure the escape of the patient from the hospital and he was a dangerous detainee and the member of a dangerous terrorist organization presence of which is still not certain under an ongoing lawsuit are not the hospital personnel and physicians as the addressees of such information are authorized security officers, not the health care personnel.

According to the Universal Declaration of Human Rights, European Convention on Human Rights and the Constitution, "No one shall be discriminated on any ground such as sex, race, colour, language, religion, political or other opinion." Article 6 titled "Basic Principles" of the Minimum Standard Rules for the Treatment of Prisoners states that "The rules that are to be applied to the prisoners shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." However, this rule was not abided by and the information related to the offence, of which the patient was tried, was added to the referral documents every time he was referred to a hospital. Considering the way of execution of the investigations related to the terrorist organization, of which the patient was accused of being a member in the period in question, in addition to the fact that security measures in line with the nature of the offence, of which the patient was tried at the time of his referral to the hospital, were taken by the prison administration, writing such information on the patient's referral documents, albeit unnecessary, constituted a factor that could cause pressure on the physicians.

EVALUATION OF THE PROCESS OF ARREST OF KUDDUSİ OKKIR IN TERMS OF RIGHT TO A FAIR TRIAL

Third Section

EVALUATION OF THE PROCESS OF ARREST OF KUDDUSİ OKKIR IN TERMS OF RIGHT TO A FAIR TRIAL

1- Although it was evident that Okkır could only be treated as hospitalized in a hospital with necessary medical furnishings, his detention was not terminated by Istanbul 13th Heavy Penal Court where he was tried for allegedly becoming a member of a terrorist organization. His attorney's requests for release in this direction were rejected every time without any justification. However, Okkır's detention should have been terminated due to reasons explained above and his treatment in a hospital environment should have been ensured. Besides, in terms of the logic of the proceedings, the best and most reasonable thing to do was to try to obtain concrete evidences by keeping a person, who was held accountable for the existence of such a serious terrorist organization and financial operations of this organization, alive. However, the patient was insistently kept arrested on the grounds of suspicion of escape in a way that deliberately prevented the treatment of the patient. None of the decisions on the continuation of detention clarified how the probability of escape could occur for a person, who was transferred to various hospitals on a stretcher many times and was in need of care to the extent that he was unable to meet his basic needs on his own due to physical collapse.

2- The ECHR does not impose an obligation on state parties for the release of patient detainees and convicts categorically. However, the right to life and right to access to health that are laid down in the ECHR and the Constitution are also applicable to the detainees and convicts. These people cannot benefit from health services on their own as they are deprived of their freedoms and they are thus included in the specially protected, disadvantaged groups. As a matter of fact, according to the 1990 UN Minimum Standard Rules on Basic Principles for the Treatment of Prisoners, it is the obligation of the state to provide these people with necessary health and treatment services.

Grand Chamber of the ECHR ruled8 in the case of Kudla v. Poland that it must be ensured that detainees/convicts are detained under conditions that do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that their health and well-being are adequately secured by providing them with the requisite medical assistance.

Pointing out this situation in the case of Gülay Çetin v. Turkey (paragraph 102) as well, the ECHR ruled that "the Convention does not impose on state parties a "general obligation" to release a detainee due to health reasons even if his/her illness is incurable. In addition and in this context, it is accepted that under very exceptional and important conditions, situations that require taking a set of humanitarian measures in order to ensure a solid criminal justice may emerge."

Moreover, in the case of Raffray Taddei v. France, the ECHR concluded9 that Article 3 of the European Convention on Human Rights was violated on the grounds of continuing detention of the applicant suffering from a number of medical conditions and of the failure of authorities to provide appropriate medical care. The ECHR concluded that the failure by the national authorities sufficiently to take into account the need for specialised care in an adapted facility, as required by the applicant's state of health, combined with her transfers, despite her particular vulnerability caused her distress that exceeded the unavoidable level of suffering inherent in detention. The incident in this particular case is similar to what Okkır went through and his state of health was caused to deteriorate when his release in order for him to get treated by specialist physicians in a hospital with necessary medical equipment was insistently avoided without any justification. Therefore, arbitrary continuation of the arrest of Okkır without

8 The ECHR, Kudla v. Poland case (Application no: 30210/96, Decision date: 26.10.2000)

9 The ECHR, Raffray Taddei v. France case (Application no: 36435/07, Decision date: 21.12.2010)

taking any heed of his medical condition and showing any justification also indicates the clear violation of his right to a fair trial.

5- Although Okkır's cause of death was shown as Lung Cancer in the report, since an autopsy was not performed on him, it is not known what the real cause of his death is, who is responsible for his death and what the nature and extent of the negligence are.

Considering the offence, of which Okkır was accused, and the course of the treatment he received, an autopsy should have definitely been performed as his death was suspicious and judicial problems might arise in the future as he was a detainee. In the case of Gülay Çetin v. Turkey (paragraph 87), the ECHR observed (referring to other decisions taken by the Court) that in the event that there are justified reasons to consider that the death of a sick detainee is suspicious, Article 2 of the Convention mandates that relevant authorities initiate an independent, impartial and effective investigation rapidly and on their own initiative in order to determine whether there is a medical negligence in the death of the patient.

6- Avoidance of performing an autopsy following Okkır's death although it was necessary is contrary to the law as it prevented the determination of real cause of his death.

EVALUATION OF THE INCIDENT OF KUDDUSİ OKKIR IN TERMS OF RIGHT TO EFFECTIVE REMEDY

Fourth Section

EVALUATION OF THE INCIDENT OF KUDDUSİ OKKIR IN TERMS OF RIGHT TO EFFECTIVE REMEDY

In the ongoing process, ineffectiveness of the legal recourse taken by Kuddusi Okkır's wife and family following his death needs to be considered within the scope of "the right to effective remedy". In this context, some summary notes obtained by the Human Rights Centre (HRC) of Union of Turkish Bar Associations (UTBA) through İHİRAP (Human Rights Monitoring, Reporting and Archiving Project) have been indicated below:

Kuddusi Okkır's wife, Sabriye Okkır, lodged a written application to Human Rights Investigation Commission of the GNAT (Grand National Assembly of Turkey) on 01.06.2008. Although Zafer Üskül, head of the Commission, stated upon the criticisms on "indifference" that "whether the public officials had negligence in the incident" would be investigated, there have been no results observed. The most recent information reflected to the public is as follows:

08.07.2008- Bianet- Sabriye Okkır announced that "she filed an application to the Human Rights Investigation Commission of the GNAT on 01.06.2008, but the application had not been put in process, yet"; 10.07.2008- Aktif Haber- Üskül interpreted the criticisms as "making policy over some else's sorrow"; 20.08.2008- İHA- Upon the criticisms that they remained indifferent to the issue, Zafer Üskül, head of the Commission, stated that "...he personally stepped in and obtained information about the status of Okkır without taking any notice of the legal waiting period for the application to be put in process... the patient was examined 15 times by the physician of the prison and referred to various hospitals 11 times... the Commission had recently been informed that he was referred to Edirne Medical Faculty Hospital... Okkır went through medical examination 26 times during the course of his detention... however, the result was upsetting... the continuation of the detention of such a sick person was a problematic issue in terms of human rights...

but the intervention to the judiciary was out of question as the detention was at the discretion of the court."

Sabriye Okkır filed a criminal complaint about the health personnel in Istanbul and Tekirdağ, whom she considered responsible for the death of her husband Kuddusi Okkır.

The Governorship of Istanbul did not grant permission for the prosecution of the physicians in Bayrampaşa State Hospital, Haseki Training and Research Hospital and Yedikule Chest Diseases Hospital in Istanbul upon the complaint and no results could be obtained although the decision of the Governorship was contested.

In spite of the fact that no permission was given by the Governorship for the prosecution of the doctors in Tekirdağ, the appeal made against the decision was accepted by Edirne Regional Administrative Court and the way for the prosecution of doctors was opened. A lawsuit was filed against the doctors (15) of Tekirdağ State Hospital and Tekirdağ Chest Hospital before Tekirdağ 3rd Criminal Court of First Instance due to the non-performance of proper examination and the failure to keep records of the results in due form (Art. 257 of the TCC).

The decision of the Supreme Council of Health (no. 13216 dated 14.12.2012) signed unanimously by 12 professors was included in the case file in the 12th hearing of the case:

In the decision, "negligence" of the doctors working in 5 different state hospitals was identified. While the report identifies medical defects such as deficient assessments and failure to ensure inpatient treatment of the patient, it also points out certain administrative defects such as failure to keep records of examination, laboratory and radiological findings, delays in referral procedures, irregular keeping of medical records, failure to ensure that medical records accompany the patient during his/her referral and failure to take the patient to the doctor that advises a medical check. The report stresses that Okkır did not have any health problems when he entered the prison. That

the doctors did not take "professional care" and the prison administration "acted indifferently" is among the findings stated in the report. The report specifically points out to the negligent acts following the patient's hospitalization on 19.03.2008 and states that necessary examinations were not conducted although there were many symptoms of lung cancer.

The trial process still continues in Tekirdağ 3rd Criminal Court of First Instance.

Sabriye Okkır also filed a criminal complaint about prosecutors and judges due to continued detention of her husband despite his state of health. A total of 12 requests for "release due to health status" made on behalf of Kuddusi Okkır, who was detained on 20.06.2007, between 16.07.2007 and 13.06.2008 were rejected. The Ministry of Justice did not grant permission for the investigation of the complaint in question. Administrative remedy has been resorted to with regard to the decision concerned and the process in this context continues.

The application of the Okkırs to the European Court of Human Rights (ECHR) has been taken under examination and all documents and reports related to the investigation and health status of Kuddusi Okkır have been requested from the Turkish government. The case is still pending before the ECHR.

Considering the violated "right to life" and "right to a fair trial" of Kuddusi Okkır as well as the processes related to the legal applications, it is clear that the "right to effective remedy" has also been violated.

CONCLUSION

The problems faced by the sick detainees and convicts in accessing to health services in Turkey have been examined by various organizations related to the issue and many reports, books and documents have been published as a result of these studies.

Meeting organized by the HRC of the UTBA themed "Execution Law and Vulnerable Convicts (6-7 June 2008/Antalya)" and its publication10, "Rights of Detainees and Convicts in the Context of Human Rights (2 April 2013/ Ankara)" and "Human Rights Report11 of the HRC of the UTBA, April/2013" are among the first that come to mind on this issue.

The report prepared by the Central Council of the Turkish Medical Institution was announced to the public in a press conference on "Prisons and Health" held on 24 February 2012. In this report, a set of complaints were listed with regard to the lack of a permanent doctor for ambulatory care services, the difficulties in accessing general health services and dental health services, the delays in referrals to hospitals, long periods of waiting in improper prison vehicles during transport, non-removal of handcuffs during examination and treatment, presence of security forces in the examination room, ignoring of the privacy and attitudes of the health staff. Pointing out that in terms of inpatient treatment in hospitals, the prisoners couldn't be treated under prison conditions due to the lack of prisoner wards in hospitals and inconvenience of the existing wards, the report listed the difficulties regarding the suspension of the sentence of detainees and convicts whose illness reach the final stage and stated that Ali Çekin, Hasan Kert, Beşir Özer, İsmet Ablak, Güler Zere, Latif Bodur, Mehmet Aras, who are detained and convicted due to different offences, and Kuddusi Okkır, who is the subject of this report, were unable to access to treatment. Istanbul Medical Chamber of the Turkish Medical Association pointed out in the press release it made on

10 Execution Law and Vulnerable Convicts (6-7 June 2008/Antalya), Publication by the UTBA and Antalya Bar Association, the UTBA HRC Series (UTBA publications: 147)

11 The beginning of the relevant section reads as: "*The issue of dying patients/patient detainees and convicts is among the most devastating problems of prisons in Turkey. Physical and management conditions of prisons and the problems faced in the execution system render it impossible to remain healthy in the prisons, let alone recovering from a disease caught outside. Lack or non-disclosure of detailed official data belonging to detainees and convicts with health problems in the prisons which must be covered under the health guarantee of the state is a very vital deficiency in terms of the determination and resolution of the problem*". (p. 232)

l8.07.2008 that the treatment of those detained and convicted in the cases commonly known by public as Ergenekon, KCK as well as of those detained and convicted of other offences was delayed, and used the expression "Tip of the Iceberg" for the case of Kuddusi Okkır who was released only five days before his death12.

In the press conference held by the Human Rights Association (HRA), Trade Union of Public Employees in Health and Social Services (SES), Human Rights Foundation of Turkey (HRFT) and Turkish Medical Association (TTB) on 8 January 2014, it was announced to the public that there were a total of 544 sick detainees and convicts, 163 of whom were severely ill, according to the data of 2013 obtained from the Human Rights Association and Human Rights Foundation of Turkey, and the injustice experienced by these people in accessing the right to health and the physical conditions inconvenient for providing appropriate health service were shared with the public. For these reasons, it is a fact that the problems set out in this report related to the period of detention and treatment of Kuddusi Okkır are common for other patients in prisons and jails.

As pointed out above in the statements of relevant institutions, referral of especially those detained and convicted of political crimes to hospital and their treatment process therein are hindered due to the extraordinary security measures taken because of the heavy charges they are accused of and the pressure imposed by the expressions on the referral documents of patients on the health personnel and physicians.

Some circles even questioned the reason why the President did not use his pardoning power on the grounds of "health problems" for Kuddusi Okkır due to severe medical and psychological problems he had to suffer for quite a long time. It is also understood that an application was made to the President to use his pardoning power for Okkır on the grounds of health

[12] http://www.ttb.org.tr/en/index.php/tuem-haberler-blog/151-baslamalar/1111-aciklama, latest visit on 15.05.2014

problems. According to Article 104 of the Constitution, the President has the power "to remit or commute the sentences imposed on certain individuals, on grounds of chronic illness, disability or old age". However, "convicts" are the only people who can benefit from this pardoning; as Kuddusi Okkır was not convicted and was thus a "detainee", he did not fall within the scope of Article 104 of the Constitution. Therefore, the written statement made on the subject by the Presidential Press Centre clarified that "The person requested to be pardoned is required to be a convict in order for the President to be able to use his pardoning power under Article 104 of the Constitution. As remitting or commuting a sentence restricting the freedom through pardoning comes into question, there must be a clear criminal conviction."

Due to the reasons explained above, the following legal issues are considered to have occurred in the trial process of Kuddusi Okkır:

Okkır's special health conditions were not taken into consideration and his proper treatment was prevented.

Means of access to treatment and referral to the hospital of Okkır contain negligence in a nature to lead to the violation of his right to life.

3- The expressions written on the referral documents of the patient are in a nature that might cause pressure on the physicians.

Okkır's relatives and attorneys were not informed of his treatment and hospital referral procedures.

Although Okkır should have been released pending trial taking his special health conditions into consideration, requests for release placed on behalf of him were rejected every time without any justification.

6- Non-performance or prevention of the performance of an autopsy after the death of Okkır although the conditions laid

down in the Code of Criminal Procedure for an autopsy to be performed were satisfied may be considered as the prevention of the emergence of an offence.

In conclusion;

In the light of the information given in especially the Second and Third Sections of this report in terms of Criminal and Penal Procedure Law, as there are serious doubts regarding that Kuddusi Okkır was intentionally deprived of his right to health or was not treated correctly deliberately:

a) The physicians and other health personnel who are suspected to have intentionally neglected their duties or have acted contrary to the requirements of their office need to be determined and an investigation is required to be initiated against them in respect of the offence of misconduct in office under Article 257 of the TCC.

b) Furthermore, as the offence of negligent homicide may come into question as per Article 85 of the TCC in the event of the death of the patient due to non-performance of necessary diagnosis and treatment, and the determination of intentional indifference to a possible death may lead to the offence of felonious homicide due to failure or negligence under Article 83 of the TCC, these public officials must be determined and an investigation is required to be initiated against them as per Article 85 or 83 of the TCC.

c) Similarly, as, although an autopsy was requested by the relatives of Okkır and it was also mandatory to reveal the material facts in a case of suspicious death, the non-performance of the autopsy is also to be considered an intentional negligent act, the public officials who did not perform the autopsy must be determined and an investigation is required to be initiated against them in respect of the offence of misconduct in office under Article 257 of the TCC.

* The notes in red in the report belong to Prof. Dr. Durmuş Tezcan, a member of the Human Rights Centre of the Union of Turkish Bar Associations.

ANNEX

CHRONOLOGICAL INFORMATION INDICATING THE STAGES OF THE JUDICIAL PROCESS RELATED TO KUDDUSİ OKKIR

1) "File of Kuddusi Okkır" (p. 232- 234) and "File of Güler Zere" have been evaluated in chronological order under heading/sub-headings of "Issues related to Personal Freedom and Safety / Prisons Issue / Right to Health and Life / Dying Patients" in the "Human Rights Report (April 2013)" we have published as the UTBA Human Rights Centre.

It is presented below -with partial additions and alterations- considering that it might be useful in ensuring the integrity of the developments.

20.06.2007- Kuddusi Okkır was accused of being "the safe of the organization", arrested and sent to Tekirdağ F- Type Prison in the first stage of the investigation called "Ergenekon"13;

40 days after his arrest, he was diagnosed with "asthma" in the health unit due to his illness;

Upon his complaints, he was diagnosed with "pharyngitis and rhinitis" in the health unit of the institution. In the course of his increasingly continuous pain, Okkır was circulated between Istanbul and Tekirdağ State Hospitals many times for more than two months after this date;

---

13 Kuddusi Okkır is the owner of the company Orion Yapımcılık ve Orion Reklam ve Marka Danışmanlık and the shareholder of Teknopark Elektronik Bilişim Danışmanlık. A photograph, in which he was together with Oktay Yıldırım, Fikri Karadağ, Hüseyin Görüm and Muzaffer Tekin in an organization held by National Forces Society, was published in the newspapers of the time and it was asserted that the only reason of his arrest was this photograph and his acquaintance with Muzaffer Tekin. Therefore, the police came to his house at 03:00 in the morning to ask whether he knew Muzaffer Tekin and they searched his house until 6:30 am. His wife says, "As far as I know, Muzaffer Tekin has an office in Kadıköy Altıyol. Kuddusi visited him there 4-5 times and never saw him again for three years until he was arrested." According to the statements of his wife, the police came to his house at 03:00 in the morning to ask whether he knew Muzaffer Tekin and they searched his house until 6:30 am.

02.05.2008- Oytun Okkır made written applications regarding his father's health status and request for release on 02.05.2008 and 08.05.2008.

06.05.2008- Okkır was referred to Bakırköy Psychiatric Hospital on suspicion of "depression". When he had a tomography scan upon his complaint, "the volume of his left lung was determined to decrease by 50 percent" and he was suggested to be referred to a full-fledged hospital with intensive care facilities as "his general state of health required more urgent attention than his psychiatric condition". Although he was referred to Yedikule Training and Research Hospital on the same day, he was returned to Istanbul Kartal H-Type Prison in order to be referred to another hospital from there;

07.05.2008- Okkır, who was referred to the Emergency Clinic of Bayrampaşa State Hospital, was transferred to Haseki Training and Research Hospital on the same day;

07.05.2008- He was referred to the prison infirmary from Haseki and returned to the prison with the assessment that "his routine examination was normal";

07.05.2008- On the same day, he was referred from the prison to Bayrampaşa State Hospital again;

08.05.2008- Okkır was returned to the prison in Istanbul as "his general state of health was considered to be fine" as a result of the examination conducted in the Department of Chest Diseases of the hospital;

09.05.2008- Oytun Okkır's applications (on 02.05.2008; 08.05.2008) were rejected by Istanbul 13th Heavy Penal Court;

09.05.2008- Okkır, who was referred from Istanbul to the prison in Tekirdağ on the same day, was referred to the Department of Internal Diseases of Tekirdağ State Hospital on the grounds that "he was half-consciousness".

09.05.2008- The patient, who was referred to Edirne Medical Faculty Hospital on the same day, was diagnosed with "Primary

Lung Cancer, Brain, Bone and Bone Marrow Metastases". At that stage, the cancer had already spread many parts of his body;

01.07.2008- Okkır had already entered the terminal stage when the Special Court in Silivri ruled on his release;

06.07.2008- Kuddusi Okkır was kept in detention for 13 months despite his deadly disease and passed away five days after his release. Okkır was arrested under the investigation of the case to be referred to as "1st Ergenekon case", but the case was opened after his death following the preparation of the bill of indictment. The case against him was dismissed without trial due to his death.

05.08.2013- In the resolution hearing of the case held in Istanbul 13th Heavy Penal Court and referred to as "1st Ergenekon case", Sabriye Okkır exclaimed to the jury, "You imposed the most severe sentence on my husband!"