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. 76749/01
by Gazmen MEHO and Others
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 20 January 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 19 September 2001,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Gazmen Meho and Ms Stasa Limani, are apparently nationals of Serbia and Montenegro (formerly the Federal Republic of Yugoslavia), who were born in 1962 and 1960 respectively, and live in the Netherlands. They are represented before the Court by Mr M.P.H. van Wezel, a lawyer practising in Utrecht (Netherlands).

A. The circumstances of the case

The facts of the case, as apparent from public information and the documents submitted by the applicants, may be summarised as follows. The applicants are Kosovar Albanians. They have been living in the Netherlands apparently since October 1993. They applied for asylum in November 1994; ultimately, the dismissal in February 1998 of their appeal made the rejection of their asylum requests final.

The first applicant has been suffering increasingly from psychotic decompensation ever since 1996.

On 21 January 1997 the first applicant was found guilty by the Breda Regional Court (*arrondissementsrechtbank*) of rape and abduction and sentenced to two years and six months' imprisonment, six months of which were suspended. The Regional Court's reasoning included the following:

> "On 23 June 1996 the accused, together with D., deprived a woman called M. of her freedom and raped her. The victim was blindfolded, tied up, kicked, beaten and a burning cigarette was held to her back. In addition to this violence, she was threatened by being told that she would be murdered and by saying, close to the victim: 'What do you think Mohammed, should we let her live for the children or shall we murder her'. Eventually the two accused left the victim tied and blindfolded on a lavatory. The Regional Court is of the opinion that a rape such as this may be counted as one of the most serious crimes known to us. After all, not only did this rape constitute a serious interference with the victim's integrity, but in addition she was threatened in such a way that it is readily imaginable that she must have feared for her life during and after the rape.
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> In setting the sentence the Regional Court takes into account the fact that it appears from, in particular, the statement of the victim M. that the accused has had a minor part in the crime, compared to that of the co-accused D. It was in fact D. who committed the major part of the violence against the victim and who threatened the victim with death in various ways.
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> In setting the sentence, the Regional Court also takes into account the psychiatric report of Dr A.D. Haverkamp dated 6 January 1997, in which Dr Haverkamp reaches the conclusion that the accused, at the moment when the facts charged were committed, was suffering from retarded mental development in the form of illiteracy and mental disturbances in the form of character-neurotic disturbances, depression and periodic alcohol abuse, with its inhibition-reducing effect on the accused's behaviour in the criminal situation, and that the accused's accountability for the crimes is thereby diminished. The Regional Court accepts this conclusion as established fact."

It seems that this judgment was never appealed against and that the first applicant served a term of imprisonment.

In March 1998 the first and second applicants lodged requests for residence permits for themselves and their underage children, citing "humanitarian reasons or, in the alternative, medical treatment".

On 9 March 2000 the competent domestic authority, the Deputy Minister of Justice, rejected the first applicant's request. A residence permit on humanitarian grounds was refused in view of the above conviction. A residence permit for the purpose of medical treatment was refused for the following reasons:

> "Aliens wishing to undergo medical treatment in the Netherlands may be granted admission for that purpose subject to certain conditions. Pursuant to the policy conducted in this respect, temporary residence for the purpose of medical treatment is normally granted only if the Netherlands are the most appropriate country (*het meest aangewezen land*) in which to undergo that medical treatment.
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> The fact of the Netherlands being the most appropriate country may follow from the nature of the condition, a particular specialist treatment [available] in this country, or other factors by reason of which treatment elsewhere of the person concerned is less appropriate.
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> For this reason the medical advisor of the Medical Advisory Office (*Bureau Medische Advisering*) of the Ministry of Justice has been asked for advice.
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> It appears from the report of the medical advisor, given in this case on 7 February 2000 by the medical advisor of the Medical Advisory Office, the content of which is to be deemed repeated and included here, that the person concerned [i.e. the applicant] is suffering from a psychotic disturbance. The person concerned has been undergoing treatment since December 1997 by a social-psychiatric nurse under the supervision of a psychiatrist. Treatment consists of talk therapy and periodic medication administered by injection and is lasting in nature. It is apparent, however, that such treatment is possible also in Kosovo. Various hospitals have psychiatrists who can treat the complaints both on an inpatient basis and on an outpatient basis. These possibilities are being extended further with international aid. Although the medicine Cisordinol is not available in Kosovo, alternative antipsychotic medication is.
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> If the current course of treatment is stopped, this will cause an acute medical emergency but, in view of the possibilities of treatment in the country of origin, this treatment need not be discontinued upon return. That being so the Netherlands are not considered to be the most appropriate country for undergoing this medical treatment."

In a simultaneous but separate decision, the Deputy Minister declared the first applicant an undesirable alien in view of his conviction, and decided that any objections that might be lodged against his decisions would not suspend the applicants' deportation.

The applicants objected. At the same time, they lodged an application to the President of the Regional Court of The Hague for a stay of their deportation pending a decision on their objection. They relied on the length of time they had already been living in the Netherlands. They also alleged

that they were integrated into Netherlands society: in particular, two of their children had been born in that country and spoke no other language than Dutch. Finally, they also drew attention to the first applicant's mental health. The first applicant was at that time being treated as an inpatient for psychiatric problems; the treatment he required was unavailable in Kosovo. He submitted a written statement by the psychiatrist who was treating him, to the effect that stress and radical change in his situation such as would result from his removal to Kosovo would jeopardise the progress thus far made. Reliance was also placed on a report published by the United Nations Interim Administration Mission in Kosovo (UNMIK), dated October 2000, according to which "severe and chronic mental illness and psycho-social disorders" could not be satisfactorily treated in Kosovo.

Following a hearing on 6 April 2001, the President of the Regional Court gave his decision in the case on 20 April (transmitted to the applicants on 14 August 2001). Refusing to order a stay of deportation, he decided at the same time to dismiss the objections. As to the length of time already spent in the Netherlands, it was found that this had been caused by the legal remedies pursued by the applicants, so that they could not derive any rights from this period. In addition, there were contra-indications in respect of the first and second applicants.

His reasoning concerning the first applicant's request for residence rights on medical grounds included the following:

> "As regards the residence permit for medical treatment of the [first applicant], the President is of the opinion that the defendant [i.e. the Deputy Minister] has undertaken sufficient investigations before arriving at a decision. In so doing the defendant's medical advisor has obtained information from the sector administering treatment (*behandelend sector*). The conclusion of the medical advisor on the basis of this investigation is that treatment of the [first applicant's] psychiatric complaints consists of talk therapy and medication administered by periodic injection. In addition, it has appeared that this treatment is permanent in nature. Finally, the medical advisor expresses the view that treatment for the [first applicant] is available in Kosovo, as is alternative medication.
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> The President is of the opinion that, although medical treatment of the [first applicant] will be difficult in the country of origin, it is not impossible. The permanently psychiatric condition of the [first applicant] might well deteriorate even in the Netherlands. It cannot be decisive, in considering the [first applicant's] request, that the [first applicant] would be worse off in his country of origin than in the Netherlands."

For the remainder, it was found that the first applicant had been declared an undesirable alien; the objection lodged against this declaration had been out of time, and the declaration had therefore become unappealable. That being so, the first applicant was not entitled to rely on compelling reasons of a humanitarian nature.

On 6 August 2003 the applicants' representative informed the Court that the first applicant was being treated as an inpatient in a psychiatric hospital in Wolfheze, Netherlands.

B. Public information obtained by the Court of its own motion concerning the state of mental health care in Kosovo

In late 1999 or early 2000 a multidisciplinary task force was set up, with the support of the World Health Organisation, to prepare a strategic plan for improving the mental health care situation in Kosovo which was reported to be dire. In December 2000 this task force published a report containing proposals for significant improvements. Among these were the downsizing of an existing psychiatric institution in Shtimle/Štimlje, replacing much of its capacity with community-based care and improving the remaining part of the institution, and increasing the number of psychiatrists and support staff. These goals were to be achieved by 2004. The plan was submitted to UNMIK for approval by January 2001.

A report published in August 2002 by the non-governmental organisation Mental Disability Rights International (MDRI) entitled *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo*, mentioned that the Shtimle/Štimlje institution was to be refurbished. It was, however, highly critical of conditions there and in other closed institutions, including the mental ward of Prishtinë/Priština University Hospital, and denounced insufficient staffing and violence among the patients.

In December 2002 UNMIK reported that the detention centre in Lipjan/Lipljan had started to provide proper care for mentally handicapped prisoners.

In 2003 MDRI reported in several press releases critical of current developments that the refurbishment and extension of the Shtimle/Štimlje institution, undertaken at the expense of decentralised community-based services, had been nearly completed, and that a group of mental patients would be transferred to an institution in Serbia itself.

COMPLAINT

The applicants complain under Article 3 of the Convention that returning them to Kosovo will cause an acute medical emergency affecting the first applicant, possibly leading to disablement or death.

THE LAW

Article 3 of the Convention provides as follows:

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

The applicants' complaint is that, in view of what they describe as the complete absence in Kosovo of any possibility to obtain appropriate treatment for the first applicant's life-threatening mental condition, returning them there would constitute treatment violating this provision.

1. The Court notes that the applicants made use of the domestic procedures available to contest the refusal of a residence permit.

However, as a matter of Netherlands law, the decision declaring the first applicant an undesirable alien was a separate one which must be objected to and appealed against separately; a legal remedy against the refusal of a residence permit on humanitarian or medical grounds did not automatically cover it. The applicants in fact lodged an objection against that declaration out of time. The domestic court, in dismissing the appeal against the refusal of a residence permit on humanitarian grounds, relied heavily on the said declaration.

In these circumstances the question arises whether the applicants have exhausted the available domestic remedies, as required by Article 35 § 1 of the Convention.

However, the Court is dispensed from addressing it because the application is in any event inadmissible on the following grounds.

2. The applicants allege that treatment appropriate to the first applicant's condition is not available in Kosovo. They rely on the above-mentioned UNMIK report from October 2000, in which it is stated that "severe and chronic mental illness and psycho-social disorders" cannot be satisfactorily treated there.

In *Bensaid v. the United Kingdom* (no. 44599/98, § 34, ECHR 2001-I), the Court held as follows (case-law references omitted):

> "While it is true that Article 3 has been more commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country (...), the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (...)."

As in that case, the Court will examine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition (*Bensaid*, § 35). In so doing, the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health and the availability of appropriate care in Kosovo.

The first applicant is known to suffer from a serious and long-term mental disorder causing him frequent psychotic decompensation, and he requires long-term specialist medical treatment as a result. According to the most recent information contained in the Court's case file, he is currently being treated as an inpatient in a psychiatric hospital.

The UNMIK report relied on by the applicants states unambiguously that mental illness of this kind cannot be satisfactorily treated in Kosovo. However, it is now three years old. Public information now available (see above) indicates that the situation has significantly changed.

Already in 2000 steps were taken to improve the lot of psychiatric patients in Kosovo. Since then, whatever problems may remain, it appears that it is precisely the conditions of treatment of psychiatric inpatients which has improved. As far as the Court is aware, the first applicant belongs to that category.

It may well be that care appropriate to the first applicant's condition is not up to the same standards in Kosovo as in the Netherlands. Nonetheless, it would appear that medical treatment could be made available to the first applicant in Kosovo. The fact that the first applicant's circumstances in Kosovo would be less favourable than those enjoyed by him in the Netherlands is not decisive from the point of view of Article 3 of the Convention (*Bensaid*, § 38).

In any case, the Court finds that the risk that the first applicant would suffer a deterioration in his condition if he were returned to Kosovo and that, if he did, he would not receive adequate support or care, is to a large extent speculative.

The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the first applicant's removal in these circumstances would be contrary to the standards of Article 3. Like the *Bensaid* case (*loc. cit.*, § 40), the present case does not disclose the exceptional circumstances of *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III), where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts.

The Court finds, therefore, that the implementation of the decision to remove the applicants to Kosovo would not violate Article 3 of the Convention.

In sum, the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President