



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

SECOND SECTION

CASE OF MUSA YILMAZ v. TURKEY

(Application no. 27566/06)

JUDGMENT

STRASBOURG

30 November 2010

FINAL

28/02/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Musa Yılmaz v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 9 November 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 27566/06) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Musa Yılmaz (“the applicant”), on 20 June 2006.

2. The applicant was represented by Mrs F. Karakaş Doğan and Mr A. Doğan, lawyers practising in İstanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 30 June 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1982 and lives in Diyarbakır. He was sixteen years old at the time of the events and according to the official documents in the case file he had a criminal record concerning ten different incidents, *inter alia*, of robbery and pickpocketing.

5. In the application form the applicant submitted that he had been subjected to ill-treatment while he was held in police custody. In this

connection, he claimed to have been blindfolded, punched, kicked, hit with a truncheon, isolated, threatened, starved and sworn at.

A. The applicant's detention in police custody and the medical certificates concerning his alleged ill-treatment

6. On 9 July 1998 Mr M.S. lodged a complaint with the Gaziosmanpaşa police station, in Istanbul, that he had been robbed by three people pointing a knife at him as he was leaving an exchange bureau. One of the suspects, who was arrested shortly after the incident, was identified by Mr M.S. This suspect gave the names of the applicant and the other suspects involved in the robbery as well as that of the hotel where they were staying. On 10 July 1998 the public prosecutor, at the request of the police, extended this suspect's custody period for four days.

7. According to the incident report drafted on 11 July 1998 at 2.30 a.m. and signed by the applicant and two other suspects, when the police officers arrived at the hotel room and asked for identification the applicant and other suspects refused to comply and started cutting themselves with razors and hitting their heads against the wardrobes and they smashed the glass door of the hotel while trying to escape.

8. The police drafted a similar report at 3.00 a.m. which was signed by one member of the hotel staff and the hotel owner.

9. On 11 July 1998 at 10.45 a.m. Mr M.S. identified the applicant as one of the individuals who had taken money from him that day. On the same day the police took Mr M.S.'s statement.

10. According to the custody records the applicant was arrested and taken into police custody on 11 July 1998 at 2 a.m. The applicant claims that he was arrested on 8 July 1998.

11. On 11 July 1998 at 6.50 p.m. the applicant was examined by a doctor at Duygu Hospital who noted an old wound of 3 cm on the right side of the applicant's head.

12. On the same day the applicant met his lawyer appointed by the bar, Mrs F. Karakaş Doğan. After the meeting the applicant's lawyer wrote to the Gaziosmanpaşa public prosecutor and the Magistrates' Court; she stated that her client claimed to have been arrested on 8 July 1998 and that therefore the legal detention period had expired. She further maintained that the applicant had a head injury and redness on his back and requested that he receive medical treatment for his injuries.

13. On 12 July 1998 Mr A.A., the owner of the hotel, gave a statement to the police. In his testimony he submitted that he was told of the incident by the receptionist who had escorted the police to the suspects' room and that after the incident he noted that the glass door of the hotel was broken and that there were bloodstains in the hotel room.

14. On the same day the receptionist, Mr M.A.S., gave a statement to the police where he maintained that he had witnessed, *inter alia*, the applicant and other suspects cutting themselves and hitting their heads against the wardrobes.

15. On 13 July 1998 the applicant was examined by a doctor at the Gaziosmanpaşa Forensic Medicine Institute who noted redness in fifteen places on the applicant's back, swelling on the head and redness on various parts of the applicant's legs.

16. On 13 July 1998 the applicant was brought before the Gaziosmanpaşa public prosecutor where he denied the accusations against him. He admitted cutting and hurting himself in anger when the police asked him to come with them at the hotel. The applicant's lawyer maintained that the applicant was subjected to duress at the police station and that he had physical injuries.

17. On 13 July 1998 the applicant was brought before the Gaziosmanpaşa Magistrates' Court where he denied the charges against him.

B. Investigation instigated into the alleged ill-treatment and the ensuing criminal proceedings against police officers

18. On an unspecified date the public prosecutor commenced an investigation into the applicant's allegations of ill-treatment.

19. On 15 September 1998 the Gaziosmanpaşa public prosecutor heard evidence from Mrs F. Karakaş Doğan, who stated that when she had arrived to meet with her client the police had informed her that he was a psychopath and that he might attack her. When she insisted on meeting her client she noted that the applicant had a head injury. Moreover, she noted bruises on his abdomen and back. The applicant had told her that he had been beaten.

20. On 16 September 1998 the Gaziosmanpaşa public prosecutor heard evidence from the applicant who maintained that he had been beaten by a couple of police officers on the head and abdomen. He admitted that he took drugs and alcohol on a regular basis and that prior to his arrest he had taken drugs and wine and during the arrest he had got angry and cut his arms, abdomen and neck.

21. In the meantime, on 24 July and 5 October 1998, the public prosecutor heard evidence from five police officers on duty that day. They all denied the accusations of ill-treatment and affirmed that the applicant was a person who frequently committed crimes and had a psychopathic personality.

22. On 6 October 1998 the Gaziosmanpaşa public prosecutor filed a bill of indictment with the Gaziosmanpaşa Criminal Court of First Instance against four police officers for ill-treatment under Article 245 of the Criminal Code and abuse of office under Article 230 of the Criminal Code.

23. On 16 December 1998 the Gaziosmanpaşa Criminal Court of First Instance considered that since the applicant claimed to have been beaten in order to get him to confess to a crime, Article 243 of the Criminal Code was applicable. It therefore declined jurisdiction and transferred the case to Eyüp Assize Court.

24. On 26 January 1999 the criminal proceedings against the accused police officers commenced before the Eyüp Assize Court. The applicant joined the proceedings as a civil party.

25. On 23 March 1999 the court heard evidence from the applicant who submitted that he had been blindfolded, hit on the head and abdomen and that afterwards they had opened his eyes and thrown water over his head.

26. On 15 September 1999, upon the request of the first-instance court, the 2nd Specialised Commission of the Forensic Medicine Institute examined the applicant's medical reports. They considered that the wound to the head was the result of a blunt object trauma and that the redness noted in the medical reports could have been the result of either a blunt object trauma or a metabolic reaction and that it was impossible to distinguish medically between them.

27. In the hearing held on 2 March 2000, upon the request of the applicant's lawyer, the court issued arrest warrants against the accused police officers, who had not attended any of the hearings.

28. On 21 April 2000 accused police officer Mr Z.A. was heard by a rogatory court in Diyarbakır where he denied the accusations against him.

29. On 15 June 2000 accused police officer Mr G.S. was brought before the court and, although it was not the date of the hearing, the latter decided to hear him. The police officer denied the accusations against him.

30. On 12 July 2000 accused police officer H.Y.A. was heard by the court where he denied the accusations against him. The applicant and his lawyer were not present at the hearing.

31. On 5 March 2002 accused police officer Mr M.H.S. was heard by a rogatory court in Tavşanlı where he denied the accusations against him.

32. On 26 November 2002 the first-instance court acquitted the accused police officers of the offence of ill-treatment and decided, pursuant to Law no. 4616, to suspend the proceedings for the offence of abuse of office. In its decision the court noted that the applicant's statements were contradictory and that the medical evidence in the case file was insufficient to convict the accused as charged.

33. On 15 January 2003 the applicant appealed.

34. On 24 October 2003 the principal public prosecutor at the Court of Cassation submitted his written opinion to the latter where he considered that the case should be quashed on account of insufficient investigation.

35. On 28 November 2005 the Court of Cassation upheld the judgment in respect of the acquittal of one of the police officers and quashed it in respect of the others on the ground that the five year statutory time-limit for

prosecuting them had expired. It therefore decided to drop the public action brought against them. This decision was signed by the principal public prosecutor at the Court of Cassation on 31 January 2006, arrived at the registry of the first-instance court on 6 March 2006 and was recorded in the log held by the Registry of the Eyüp Assize Court on 10 March 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. A description of the relevant domestic law at the material time can be found in *Bati and Others v. Turkey* (nos. 33097/96 and 57834/00, ECHR 2004-IV), and *Zeynep Özcan v. Turkey* (no. 45906/99, 20 February 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 6 AND 13 OF THE CONVENTION

37. The applicant complained under Articles 3, 6 and 13 of the Convention about the treatment to which he had been subjected while he was held in police custody and about the manner in which the investigation and the ensuing criminal proceedings concerning his allegations had been conducted by the authorities, resulting in impunity.

38. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

39. The Government asked the Court to dismiss the application as being inadmissible for failure to comply with the six-month rule (Article 35 § 1 of the Convention) because the applicant had failed to lodge his application within six months of the date on which the Court of Cassation had rendered its decision.

40. The applicant contested the Government's arguments.

41. The Court reaffirms its practice, in cases where the domestic law does not provide for the service of a written copy of a final domestic decision, that the six-month period laid down in Article 35 § 1 begins to run from the date when the decision was finalised, namely when the parties were definitely able to be informed of its contents (see, among many others,

Seher Karataş v. Turkey, no. 33179/96, § 27, 9 July 2002, and *Karatepe v. Turkey* (dec.), no. 43924/98, 3 April 2003). In a number of cases where, as in the present case, the domestic law did not provide for service, the Court has considered it appropriate to take the date on which the final domestic decision was deposited with the registry of the first-instance court as the starting point of the six-month period (see, among others, *Aydın and Şengül v. Turkey*, no. 75845/01, § 14, 3 May 2007 and the cases cited therein). In the instant case the “final decision” within the meaning of Article 35 § 1 of the Convention was the judgment of the Court of Cassation on 28 November 2005. This decision was at the disposal of the applicant and his lawyer as of 6 March 2006 when the judgment arrived at the registry of the first-instance court. The application was lodged with the Court on 20 June 2006. In view of the above, the Court considers that the application was introduced within the six-month time-limit provided in Article 35 § 1 of the Convention. It therefore rejects the Government's objection.

42. Moreover, the Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

43. The Government, referring to the reasoning of the first-instance court and the various actions undertaken by the domestic authorities, submitted that the investigation and the ensuing criminal proceedings had been adequate.

44. The applicant maintained his allegations.

45. The Court reiterates the basic principles laid down in its judgments concerning a State's obligations under Article 3 of the Convention (see, in particular, *Erdoğan Yağız v. Turkey*, no. 27473/02, §§ 35-37, ECHR 2007-... (extracts); *Hacı Özen v. Turkey*, no. 46286/99, §§ 44-45, 12 April 2007; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). It further reiterates that, where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V, and *Ribitsch v. Austria*, § 34, 4 December 1995, Series A no. 336).

46. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001). Such proof may, however, follow from the coexistence

of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Yananer v. Turkey*, no. 6291/05, § 35, 16 July 2009).

47. In the instant case, the Court considers, in the absence of prima facie evidence to the contrary, that the applicant was detained in police custody for two days. It notes that the ill-treatment complained of in general terms by the applicant, a minor, consisted of being blindfolded, punched, kicked, hit with a truncheon, isolated, threatened, starved and sworn at. In this connection, it considers that the applicant's version of events, although very general, has been consistent, save for minor details, both before the Court and the domestic authorities.

48. As regards the applicant's head injury, as noted in the medical reports of 11 July 1998 and 13 July 1998, the Court, in view of the amount of circumstantial, concurring evidence in the case file, considers it highly plausible that it was the result of the applicant hitting his head against wardrobes during his arrest.

49. However, even noting the findings of the 2nd Specialised Commission of the Forensic Medicine Institute, the Court observes that the Government failed to provide any plausible explanation as to the manner in which the redness noted on various parts of the applicant's back and legs had been acquired. In this connection the Court attaches decisive importance to the fact that these injuries were not mentioned in the medical report of 11 July 1998, which rules out in principle, the possibility that they occurred during the applicant's arrest and to the very particular location and apparent widespread nature of the applicant's back injuries, making it unlikely to be self-inflicted. Considering the circumstances of the case as a whole, and the absence of a credible explanation from the Government as to the cause of these injuries to the applicant, a minor, who was throughout this whole time under the control of the State authorities, the Court finds that it was the result of treatment for which the Government bore responsibility.

50. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005). The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary

diligence and promptness (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004). Moreover, when the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and moral integrity to go unpunished (see *Okkılı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)).

51. In this connection, the Court reaffirms that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible (see *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, § 56, 14 October 2008). It further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and dismissed if convicted (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

52. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by the applicant. An effective investigation was therefore required (see *Orhan Kur v. Turkey*, no. 32577/02, § 47, 3 June 2008).

53. In the instant case, the Court observes that an investigation into the applicant's allegations was initiated promptly by the public prosecutor's office. This investigation led to the committal for trial of four police officers identified by the public prosecutor as those who were on duty during the applicant's detention. Moreover, the applicant was able to participate effectively in these criminal proceedings which resulted in the acquittal of one police officer and the dropping of the charges in respect of others as the statutory time-limit had elapsed.

54. Nonetheless, the Court observes that there were striking shortcomings in the way the investigation was conducted by the domestic authorities, which had repercussions on its effectiveness. Firstly, evidence obtained during forensic examinations plays a crucial role during investigations into detainees' allegations of ill-treatment (see *Salmanoğlu and Polattaş v. Turkey*, no. 15828/03, § 79, 17 March 2009). In this connection, the Court cannot but note that the medical reports established during the applicant's detention in police custody were drafted in a cursory manner, for example without any mention as regards size, colour or possible relationship between the physical findings and the applicant's statements, and fall significantly short of the standards recommended by both the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which are regularly taken into

account by the Court in its examination of cases concerning ill-treatment (see, *inter alia*, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X), and the guidelines set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “the Istanbul Protocol”, submitted to the United Nations High Commissioner for Human Rights (see *Bati and Others*, § 100, cited above). Moreover, although the Assize Court sought to obtain additional medical evidence, the time which elapsed during that time adversely affected, in the Court's view, the possibility of the 2nd Specialised Commission of the Forensic Medicine Institute establishing the origins of the applicant's back and leg injuries, particularly since their examination was limited to the applicant's previous medical reports.

55. Secondly, the Court notes that the applicant was never requested to formally identify the alleged perpetrators, either at the preliminary investigation stage (by way of checking police photographs or by an identification parade) or during the criminal proceedings. Nor was he ever asked to give a detailed statement as regards their respective roles in the alleged ill-treatment. Thirdly, both the prosecutor and the first-instance court failed to secure the testimonies of potential eyewitnesses, such as the persons arrested together with the applicant, others present at the police station or in detention on the day of the events or the receptionist of the hotel.

56. Finally, the Turkish criminal-law system as applied in the instant case, namely the discontinuation of the prosecution of three police officers as time-barred following lengthy proceedings, during which time none of the accused police officers was suspended from duty, has proved to be far from rigorous and would have had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant (see, amongst others, *Terzi and Erkmen v. Turkey*, no. 31300/05, § 34, 28 July 2009).

57. In the light of the foregoing, the Court finds that the criminal investigation and the ensuing criminal proceedings concerning the applicant's allegations of ill-treatment failed to meet the requirements of thoroughness and effectiveness under Article 3 of the Convention.

58. There has therefore been both a substantive and a procedural violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage, costs and expenses

60. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage. He further claimed, in total, EUR 17,000 for costs and expenses incurred both before the domestic courts and before the Court. The applicant submitted some documentation for his expenses before the Court such as the contract for fees concluded between him and his lawyer.

61. The Government contested the amounts.

62. Having regard to the nature of the violation found in the present case and ruling on an equitable basis, the Court awards the applicant EUR 12,000 in respect of non-pecuniary damage.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 3,000 for the proceedings before the Court.

C. Default interest

64. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been both a substantive and procedural violation of Article 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay to the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros) plus any tax that may be chargeable to him, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President