



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

SECOND SECTION

CASE OF GÜMÜŞSOY v. TURKEY

(Application no. 51143/07)

JUDGMENT

STRASBOURG

11 October 2011

FINAL

11/01/2012

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

In the case of Gümüşsoy v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

David Thór Björgvinsson,

Dragoljub Popović,

Giorgio Malinverni,

Işıl Karakaş,

Paulo Pinto de Albuquerque, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 51143/07) 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 Şafak Gümüşsoy (“the applicant”), on 9 November 2007.

2. The applicant was represented by Ms G. Tuncer, a lawyer practising in İstanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 18 June 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1968 and lives in İstanbul.

5. The applicant is the editor and owner of *Devrimci Mücadele Birliği* (Revolutionary Struggle Union), a monthly political magazine. At about 12.30 p.m. on 29 November 2001, with a search warrant issued by the Istanbul State Security Court, police officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters conducted a search of the journal’s office. An identity check was carried out and the police arrested four

persons, including the applicant, who were present in the office at the time. According to the search and arrest report signed by seven police officers, the applicant resisted the officers. He was subsequently handcuffed and put in a minibus to be taken to the Security Headquarters building. The applicant alleged that he had been beaten and insulted in the car by three police officers. In particular, he stated that one officer, A.Ç., had head-butted him and broken his nose.

6. At 7 p.m. the same day the applicant was taken to Haseki Hospital where he was examined by a doctor. In his report, the doctor noted bruises under the applicant's eyes and swelling on the bridge of his nose. The applicant was transferred to the Ear, Nose and Throat Service for consultation. The doctor examined the applicant at 9 p.m. the same day, noted the injury to the applicant's nose and requested an X-ray.

7. On 30 November 2001 the X-ray of the applicant's nose revealed that it was broken.

8. On 3 December 2001 the applicant was examined once again at the State Security Court branch of the Forensic Medicine Institute. The doctor who examined him explained in his report that the applicant had complained that he had been subjected to ill-treatment in police custody. It was reported that the applicant had stated that he was beaten up in the minibus while he was being taken to the Security Headquarters, and that he had been under psychological pressure while he was in police custody. Referring to the X-ray of 30 November 2001, which showed that the applicant's nose had been broken, the doctor concluded that he was unfit to work for ten days.

9. On the same day the applicant was released by order of the public prosecutor.

10. On an unspecified date, the applicant lodged a criminal complaint with the Beyoğlu Public Prosecutor, alleging that he had been ill-treated while in police custody.

11. On 5 December 2001 the applicant was examined once again at the Beyoğlu branch of the Forensic Medicine Institute. It was noted that he had bruising under his eyes and swelling on his nose. In a final report of 14 December 2001, the Beyoğlu branch of the Forensic Medicine Institute, with reference to the X-ray of 30 November 2001, concluded that the applicant's nose had been broken, and stated that he was unfit to work for fifteen days.

12. On 21 December 2001 the Beyoğlu Public Prosecutor declared lack of jurisdiction and transferred the case file to the Fatih Public Prosecutor's Office. The Fatih Public Prosecutor conducted two separate investigations into the applicant's complaints. In file no. 2001/28563, an investigation was commenced in respect of two police officers who had been on duty at the Anti-Terrorist Branch of the Istanbul Security Headquarters on the day of the applicant's arrest. In connection with this investigation, the public

prosecutor gave a decision on 17 January 2002 that he would not prosecute these two officers, for lack of evidence.

13. In file no. 2002/1953, the Fatih Public Prosecutor conducted an investigation into the events which took place during the applicant's arrest and his transfer to the Security Headquarters building. On 17 January 2002 the Fatih Public Prosecutor decided to transfer the case back to the Beyoğlu Public Prosecutor's Office. Accordingly, on 15 February 2002, the Beyoğlu Public Prosecutor filed an indictment with the Beyoğlu Criminal Court against seven police officers, accusing them of ill-treating the applicant under Article 245 of the former Criminal Code. The applicant joined the proceedings as a civil party.

14. During the proceedings, the applicant lodged an objection, stating that the case should be dealt with by the Beyoğlu Assize Court, as the police officers' actions had amounted to torture. On 17 March 2002 the Beyoğlu Criminal Court declared that it did not have jurisdiction and transferred the case to the Beyoğlu Assize Court. In a hearing held on 17 September 2002, the applicant identified police officer A.Ç. as the person who had broken his nose.

15. On 6 April 2007, on the basis of medical reports and witness statements, the Beyoğlu Assize Court found it established that Officer A.Ç. had broken the applicant's nose by head-butting him. Considering that the use of force had not been proportionate, the court found the police officer guilty of ill-treating the applicant under Article 245 of the former Criminal Code. Having regard to the duration of the treatment, the court decided that the act did not amount to torture, since it had not been systematic. In conclusion, A.Ç. was sentenced to six months' imprisonment and banned from public service for three months. The court then converted his sentence to a fine, having had regard to the fact that he did not have a criminal record. Furthermore, the court decided to suspend his sentence under Law no. 647, considering that he was unlikely to break the law again. The other six police officers were acquitted of the charges against them.

16. The applicant appealed against this decision.

17. On 24 February 2010 the Court of Cassation, noting that the statutory time-limit for the offence had expired, decided to drop the criminal proceedings against the accused police officer.

II. RELEVANT DOMESTIC LAW

18. A description of the relevant domestic law and practice in force at the material time can be found in *Okkaly v. Turkey* (no. 52067/99, §§ 47-49, ECHR 2006-XII (extracts)), and *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-98, ECHR 2004-IV (extracts)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. The applicant complained under Article 3 of the Convention that he had been subjected to ill-treatment during his arrest and subsequently during his custody at the Security Directorate Building. He also alleged that the domestic authorities had failed to carry out an effective investigation capable of leading to the punishment of those responsible for the treatment. In respect of his complaints, the applicant relied on Articles 3, 6 and 13 of the Convention.

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

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

A. Alleged ill-treatment of the applicant while in custody at the Security Headquarters

21. The applicant complained that while he was in police custody at the Security Headquarters he had been subjected to ill-treatment. In this connection, he maintained that he was kept in a dirty and unventilated place, deprived of sleep, made to listen to loud music, sworn at and threatened.

22. The Government did not make any comments on this part of the application.

23. The Court observes at the outset that the applicant's allegations regarding his ill-treatment at the Security Headquarters were examined by the Fatih Public Prosecutor and subsequently a decision not to prosecute was delivered on 17 January 2002, on account of lack of evidence. It is not clear from the documents submitted by the parties whether the applicant lodged an appeal against this decision. Nevertheless, even assuming that the applicant has exhausted domestic remedies and complied with the six-month time-limit, the Court notes that this part of the application is in any case inadmissible for the following reasons.

24. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see *Talat Tepe v. Turkey*, no. 31247/96, § 48, 21 December 2004). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

25. In the instant case, however, the Court notes that the applicant's allegations are of a general nature and he has not laid the basis of an arguable claim regarding his complaints.

26. Consequently, this part of the application should be declared inadmissible as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

B. Alleged ill-treatment of the applicant during his arrest

1. Admissibility

27. The Government firstly stated that as the domestic proceedings were still pending before the domestic courts when the application was introduced, the application should be rejected for non-compliance with the six-month time-limit. They further argued that the application should be rejected for non-exhaustion of domestic remedies. In this connection, they stated that the applicant should have brought compensation proceedings against the Ministry of the Interior before the administrative courts.

28. As regards the Government's objection relating to the six-month time-limit, the Court observes that the proceedings against the accused police officers were terminated on 24 February 2010 by the decision of the Court of Cassation. Since the application was introduced on 9 November 2007, the Government's objection regarding the six-month time-limit cannot be upheld.

29. As regards the objection regarding the exhaustion of domestic remedies, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Fazıl Ahmet Tamer and Others v. Turkey*, no. 19028/02, §§ 71-76, 24 July 2007). It finds no particular circumstances in the instant case which would require it to depart from its previous findings. Accordingly, the Court also rejects this preliminary objection.

30. The Court notes that this part of 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.

2. Merits

31. The applicant alleged that the police officers had ill-treated him during his arrest. In particular, he stated that one of the police officers had head-butted him in the police car and broken his nose. He also complained about the manner in which the investigation and the criminal proceedings had been conducted by the authorities, resulting in impunity because of the imposition of the time-limit.

32. The Government maintained that the treatment that the applicant complained of had not attained the level of severity proscribed by Article 3 of the Convention. Furthermore, as the applicant had resisted the police officers during the arrest, the force used had been justified. As to the procedural limb of Article 3, the Government contended that no responsibility could be attributed to the domestic authorities.

(a) The substantive aspect of Article 3

33. At the outset, the Court reiterates the basic principles laid down in its judgments concerning Article 3 (see, amongst many others, *Diri v. Turkey*, no. 68351/01, §§ 35-39, 31 July 2007; *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 30, 8 January 2004; and *Çamdereli v. Turkey*, no. 28433/02, §§ 35-37, 17 July 2008). It will examine the present cases in the light of these principles.

34. The Court also observes that Article 3 does not prohibit the use of force in certain well-defined circumstances, such as to effect an arrest. However, such force may be used only if indispensable and must not be excessive (see *Rehbock v. Slovenia*, no. 29462/95, §§ 66-78, ECHR 2000-XII). In the instant case, the applicant alleged that he had been ill-treated during his arrest. In particular, he complained that a police officer, Mr A.Ç., had headbutted him in the police car, breaking his nose. Subsequent medical reports further confirmed that the applicant's nose had been broken. The Court finds that this injury is sufficient to bring it within the scope of Article 3. It also observes that after acquainting itself with the evidence in the case file, in its decision the Beyoğlu Assize Court also found it established that Officer A.Ç. had broken the applicant's nose by head-butting him. Considering that the use of force had been disproportionate, the domestic court found the police officer guilty of ill-treating the applicant under Article 245 of the former Criminal Code. Although the criminal proceedings were subsequently dropped as time-barred, in the instant case no cogent evidence has been provided to lead the Court to depart from the findings of the first-instance court in this respect.

35. In the light of the above, the Court concludes that the force used against the applicant was excessive and that the State is responsible under Article 3 of the Convention because the applicant's injury was caused by a police officer who was acting in the course of his duty. It follows that there has been a substantive violation of Article 3 of the Convention on account of the inhuman and degrading treatment to which the applicant was subjected.

(b) The procedural aspect of Article 3

36. The Court reiterates that, in a number of similar cases where prosecutions have been time-barred following lengthy proceedings, it has

noted that the criminal law system has proved to be far from rigorous and lacking in the dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicants (see *Karagöz and Others v. Turkey*, nos. 14352/05, 38484/05 and 38513/05, §§ 53-55, 13 July 2010, and *Fazıl Ahmet Tamer and Others v. Turkey*, cited above, §§ 91-100).

37. In the present case, the Court observes that the public prosecutor initiated a prompt investigation after the incident and the applicant identified Officer A.Ç. on 17 September 2002 as the person who had broken his nose. However, the first-instance court and the Court of Cassation delivered their decisions in 2007 and 2010 respectively. Due to this delay, the criminal proceedings against the accused police officers were dropped as time-barred.

38. In view of the above, the Court concludes that, far from being rigorous, the criminal justice system as applied in this case was not sufficiently dissuasive to effectively prevent illegal acts of the type complained of by the applicant.

39. Accordingly, there has been a procedural violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. The applicant requested 80,000 euros (EUR) in compensation for non-pecuniary damage. As regards legal fees, the applicant's representative claimed EUR 7,330 covering fifty-three hours' legal work spent in the domestic proceedings and the presentation of the present case before the Court. She also claimed EUR 160 for expenses, without submitting any invoices.

41. The Government contested the claims.

42. The Court finds that the applicant must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violation found and ruling on an equitable basis, it awards the applicant EUR 11,700 in respect of non-pecuniary damage.

43. As regards costs and expenses, the Court may make an award in so far as they were actually and necessarily incurred and are reasonable as to quantum (see *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, and ruling on an equitable basis, the Court awards the applicant EUR 4,000 in this respect.

44. The Court considers it appropriate that the default interest rate 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 complaint concerning the alleged ill-treatment of the applicant during his arrest and the failure of the authorities to conduct an effective investigation into this claim admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a substantive violation of Article 3 of the Convention on account of the inhuman and degrading treatment to which the applicant was subjected during his arrest;
3. *Holds* that there has been a procedural violation of Article 3 of the Convention on account of the failure of the authorities to conduct an effective investigation into the applicant's allegations that he was ill-treated by the police during his arrest;
4. *Holds*
 - (a) that the respondent State is to pay 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 11,700 (eleven thousand seven hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 4,000 (four 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President