



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

SECOND SECTION

CASE OF CEMAL YILMAZ v. TURKEY

(Application no. 31298/05)

JUDGMENT

STRASBOURG

7 February 2012

FINAL

07/05/2012

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

In the case of Cemal Yılmaz v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Isabelle Berro-Lefèvre,

András Sajó,

Işıl Karakaş,

Guido Raimondi, *judges*,

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

Having deliberated in private on 10 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 31298/05) 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 Cemal Yılmaz (“the applicant”), on 11 August 2005.

2. The applicant was represented by Mr Alp Tekin Ocak, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. Relying on Article 3 of the Convention the applicant alleged that he had been subjected to ill-treatment by a number of police officers.

4. On 12 June 2009 the application was communicated 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

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Ordu.

6. On 1 January 2004 the applicant was driving a van in Istanbul, accompanied by his friend Mr V.S., when police officers travelling in a police vehicle saw them and suspected that the van might have been stolen. The police officers then indicated to the applicant to pull over.

7. According to the applicant, he stopped the van and he and his friend got out and the police officers caught him after a chase. Despite having thus been apprehended and despite the lack of any further resistance on his part, the police officers slammed his face on the ground before proceeding to hit him and kick him. He and his friend were then taken to a police station where the police officers handcuffed him and blindfolded him before continuing to beat him up.

8. According to a report drawn up by three police officers who arrested the applicant and his friend, by contrast, the applicant ignored the police officers' warnings to stop and continued to drive. When he and his friend eventually stopped the vehicle and got out, they started running. The police officers caught up with the applicant and his friend, and had to use force in order to handcuff the applicant. In the course of that use of force the applicant's chin and various other parts of his body were injured.

9. The same day the applicant was taken to Şişli Etfal Hospital where he was examined by a doctor. Subsequently he was placed in a cell in the police station.

10. According to the report drawn up at the hospital, the doctor observed a bleeding wound, measuring 5x5 centimetres, on the applicant's chin. A plastic surgeon stitched the wound, and a neurosurgeon carried out a further examination of the applicant's head.

11. At the end of his police custody on 4 January 2004 the applicant was examined by another doctor at the Şişli Etfal Hospital. The one sentence in the doctor's report reads that there were "no signs of ill-treatment" on the applicant's body.

12. On the same date the applicant was brought before a prosecutor. A letter of referral drawn up by a police chief and addressed to the prosecutor states that force had to be used to arrest the applicant on 1 January 2004. The same day the applicant was brought before the judge at the Bakırköy Magistrates' Court who ordered the applicant's remand in prison.

13. On 12 January 2004 the applicant and his friend V.S. lodged an official complaint with the Istanbul prosecutor ("the prosecutor"), accusing the police officers of ill-treatment during their arrest as well as in police custody. In the complaint the applicant gave details of the alleged ill-treatment, and requested to be examined, *inter alia*, by the Third Specialist Commission of the Forensic Medicine Institute so that the physical signs of ill-treatment could be properly established.

14. On 11 February 2004 the applicant was examined by a doctor at the Bakırköy Forensic Medicine Institute. The applicant informed the doctor about his complaints of ill-treatment which, he alleged, had caused deterioration in his eye-sight. The doctor recorded in a report the presence of the stitched wound on the applicant's chin, and asked the prosecutor for

previous medical reports to be forwarded to her with a view to preparing a “definitive medical report”.

15. On 10 March 2004 the prosecutor questioned the three police officers who had arrested the applicant. In the three identical statements the police officers were quoted as having denied the allegations of ill-treatment, and as having told the prosecutor that while running away from them the applicant had fallen to the ground, thereby injuring himself.

16. On 29 December 2004 the prosecutor decided not to prosecute the police officers. The prosecutor considered that the injury on the applicant’s chin which had been noted in the medical reports, as well as the other injuries which had been noted in the arrest report of 1 January 2004, had been the result of the lawful force which had been used when arresting him. The prosecutor considered that the fact that the applicant had not mentioned his complaints of ill-treatment when he had been brought before the prosecutor or before the Magistrates’ Court on 4 January 2004, was further proof to show that his injuries had been caused as a result of the lawful use of force.

17. The applicant lodged an objection against the prosecutor’s decision and repeated his allegations of ill-treatment. He argued that the prosecutor had not collected all the available evidence and had not heard any eye-witnesses.

18. On 9 March 2005 the Beyoğlu Assize Court dismissed the applicant’s objection in its decision which was served on him on 25 March 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. Relying on Article 3 of the Convention the applicant complained that he had been subjected to ill-treatment and that his allegations had not been adequately examined by the national authorities. Article 3 of the Convention reads as follows:

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

20. The Government contested that argument.

A. Admissibility

21. The Government submitted, firstly, that the applicant had not respected the six-month time-limit because he had not lodged his

application with the Court within six months from the date of the incident. They also argued that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention. In this connection, they submitted that the applicant could have brought a civil action against the police and sought reparation for the harm he had allegedly suffered.

22. Concerning the Government's objection to the admissibility of the complaint based on the six-month time-limit, the Court observes that before making his application to the Court the applicant introduced a criminal complaint against the police officers at the national level. The final decision concerning the applicant's complaints of ill-treatment was adopted by the Beyoğlu Assize Court on 9 March 2005. That decision was communicated to the applicant on 25 March 2005 and he lodged his application with the Court on 11 August 2005, that is within the six-month period. The Court thus considers that the Government's objection to the admissibility of the application in this regard cannot be entertained.

23. As for the Government's objection based on the rule of exhaustion of domestic remedies, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, most recently, *Saçılık and Others v. Turkey* (partial just satisfaction), nos. 43044/05 and 45001/05, § 68, 5 July 2011 and the cases cited therein).

24. The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned case. It therefore rejects the Government's preliminary objection based on the rule of exhaustion of domestic remedies.

25. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

26. The applicant maintained that he had been beaten up both during his arrest and subsequently in the police station. Details of some of his injuries, which were sufficiently serious, were provided in the medical reports.

27. He also complained that the relevant international standards had not been complied with by the doctors who had examined him. Thus, the medical reports lacked details and only detailed one of his injuries. The prosecutor, for his part, had failed to forward his previous medical reports to the doctor to enable her to prepare the definitive report.

28. The Government asserted that the applicant had hit his chin when he fell to the ground. Moreover, the applicant had not complained about the alleged ill-treatment to the judge who had ordered his detention or to the judge who had subsequently conducted the criminal proceedings against

him. Thus, the applicant had not substantiated his allegation that he had been ill-treated.

29. The Court observes at the outset that, according to the arrest report signed by the three police officers on 1 January 2004 (see paragraph 8 above), the police chief's letter of referral of 4 January 2004 (see paragraph 12 above), and the prosecutor's decision of 29 December 2004 (see paragraph 16 above), the three police officers had used force against the applicant when arresting him. Having regard to the fact that these three documents drawn up by the national authorities contradict the Government's submissions, the Court cannot accept that the injury on the applicant's chin had been caused by him falling to the ground. The only support for the Government's submissions is to be found in the statements given by the police officers (see paragraph 15 above), which, however, do not appear to have been taken seriously by the prosecutor when he decided to close the investigation.

30. The Court further observes that, according to the above-mentioned report drawn up by the police officers and the prosecutor's decision, the applicant suffered a number of injuries in the course of his arrest (see paragraphs 8 and 16 above).

31. Having regard to the fact that neither the use of force by the police officers nor the applicant's resulting injuries are disputed by the domestic authorities, the Court finds that the respondent Government bear the burden of providing a plausible explanation for those injuries.

32. The Court considers that a plausible explanation for injuries caused by agents of the State in the course of their law enforcement duties can be said to have been provided when it is proved to the Court's satisfaction by the respondent Government that their national authorities have conducted an effective investigation capable of establishing the circumstances and the nature of the force used. In particular, the Court will expect the investigating authorities to have ascertained the actual cause of the injuries and also to have established that the recourse to physical force had been made strictly necessary as a result of the victim's own conduct (*Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336 and the case cited therein) and that it was not excessive (*Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007 and the cases cited therein).

33. The Court will thus examine whether the investigation carried out by the national authorities in the present case was capable of providing a plausible explanation.

34. The Court notes at the outset that, although both the police officers and the prosecutor accepted that the applicant had suffered a number of injuries in the course of the arrest, only the injury on his chin is mentioned in the medical reports (see paragraphs 10 and 14 above). Furthermore, despite the fact that the injury on his chin was observed by two separate doctors who examined the applicant on 1 January and 11 February 2004, the

doctor who conducted the examination on 4 January 2004 stated in his report that there were “no signs of ill-treatment” on the applicant’s body (see paragraph 11 above).

35. Nevertheless the prosecutor, who had all three reports in his possession at the time of closing the investigation, did not question these crucial discrepancies concerning the actual extent of the applicant’s injuries. Furthermore, as pointed out by the applicant (see paragraph 27 above), the same prosecutor also seems to have failed to forward all medical reports to the Forensic Medicine Institute to enable that Institute to prepare its “definitive report” concerning the applicant’s injuries (see paragraph 14 above).

36. Furthermore, the identical nature of the three statements made by the three police officers before the prosecutor on 10 March 2004 does not allow for an assessment to be made of their respective roles in the applicant’s arrest. Indeed even when the police officers, who had stated in their report that the injuries had been caused as a result of the use of force (see paragraph 8 above), changed their story and told the prosecutor that the applicant’s injuries had been sustained when he had fallen to the ground (see paragraph 15 above), it did not spur this particular prosecutor to ask the police officers any questions.

37. Moreover, the Court cannot agree with the Government that the fact that the applicant did not complain about the ill-treatment when he was brought before the judge on 4 January 2004 showed that he had not been ill-treated. The applicant made an official complaint against the police officers on 12 January 2004, and subsequently filed an objection against the prosecutor’s decision to close the investigation (see paragraphs 13 and 17 above). Thus, the fact that the applicant did not mention the ill-treatment to the judge on 4 January 2004 does not affect the credibility of the applicant’s allegations of ill-treatment.

38. The prosecutor concluded in his decision closing the investigation that the injuries were the result of lawful force that had been used by the police officers when arresting the applicant (see paragraph 16 above). Having regard to the prosecutor’s failure to clarify the important contradictions concerning the extent and the cause of the injuries, and in the absence of any other documents or information showing that any other examination had been carried out by the same prosecutor or by any other national authority of the cause and extent of the force used, the Court is unable to comprehend exactly what evidence or information formed the basis of the prosecutor’s conclusion.

39. Owing to the deficiency in the medical report which was drawn up at the end of the applicant’s police custody, and which failed to mention even the applicant’s existing injury on his chin (see paragraph 11 above), coupled with the prosecutor’s failure to question the police officers who had held the applicant in police custody or the applicant or his friend V.S., the Court

cannot examine whether the applicant was also subjected to ill-treatment whilst in police custody.

40. On account of the defects identified above, the investigation was not capable of establishing the true circumstances surrounding the use of force against the applicant which resulted in various injuries. Thus, the Court considers that the Government have failed to discharge their burden of providing a plausible explanation.

41. There has accordingly been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 2,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage. In support of his claim for pecuniary damage the applicant claimed that as a result of the ill-treatment he had been unable to work for two months.

44. The Government argued that the claim for pecuniary damage had not been supported by adequate evidence. They also asked the Court to dismiss the claim for non-pecuniary damage because in their opinion the “state of evidence was insufficient to substantiate [the] claim”.

45. The Court observes that the applicant did not submit to the Court any evidence in support of his claim for pecuniary damage; it therefore rejects that claim. On the other hand, it awards the applicant EUR 9,000 in respect of non-pecuniary damage.

B. Costs and expenses

46. The applicant also claimed EUR 3,050 for the costs and expenses incurred before the domestic courts and before the Court. In support of his claim the applicant submitted to the Court a time sheet, setting out the hours spent by his legal representative on the case.

47. The Government considered the claim for costs and expenses to be unsubstantiated.

48. 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 considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

C. Default interest

49. 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 application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from 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 at the date of settlement:
 - (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

F.T.
F.E.P.

CONCURRING OPINION OF JUDGE SAJÓ

Whilst I agree with the majority that Article 3 has been violated in the present case, I find that the violation is of a procedural nature: the Turkish authorities did not carry out a proper investigation in a case where the information available was contradictory regarding the origin of the injuries sustained by the applicant while under the control of the police. To quote from the judgment: “The Court considers that a plausible explanation for injuries caused by agents of the State in the course of their law enforcement duties can be said to have been provided when it is proved to the Court’s satisfaction by the respondent Government that their national authorities have conducted an effective investigation capable of establishing the circumstances and the nature of the force used. In particular, the Court will expect the investigating authorities to have ascertained the actual cause of the injuries and also to have established that the recourse to physical force had been made strictly necessary as a result of the victim’s own conduct ...” (see paragraph 32). The very issue for the Court was, therefore, a procedural one and all it could conclude was that there had been no proper investigation. In situations like the present where there is evidence that the applicant resisted arrest and was likely to have sustained injuries after he ran away from the police, the injuries (which he reported to a judge with considerable delay) do not impose a full burden of proof on the Government, as the applicant did not substantiate that the injuries had originated from acts which were independent of his resistance to arrest.