



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

SECOND SECTION

CASE OF FERHAT KAYA v. TURKEY

(Application no. 12673/05)

JUDGMENT

STRASBOURG

25 September 2012

FINAL

25/12/2012

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

In the case of Ferhat Kaya v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

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

Having deliberated in private on 4 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 12673/05) 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 Ferhat Kaya (“the applicant”), on 30 March 2005.

2. The applicant was represented by lawyers of the Kurdish Human Rights Project (KHRP) in London. The Turkish Government (“the Government”) were represented by their Agent.

3. On 18 September 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1974 and lives in Ardahan.

5. At the time of the events the applicant was a shopkeeper and the chairman of the Ardahan Branch of the Democratic People’s Party (DEHAP). He was also involved in a local campaign to highlight the social and environmental impact of an oil pipeline to be built by a State company.

A. The alleged ill-treatment

6. On 5 May 2004, while the applicant was passing by the Ardahan police station, a policeman asked him whether he was Ferhat Kaya. He was then taken into the station, where he was told that a warrant had been issued for his appearance at a court hearing the following day and was asked for his ID documents. The applicant then called a friend, Mr B.A., and informed him that he was at the police station. Subsequently, he was taken for a medical examination. At 6.30 p.m. the applicant was examined by a doctor at Ardahan State Hospital, who noted no signs of ill-treatment on his body.

7. After his return, the applicant was allegedly subjected to insults, and was told that he supported the PKK and that he was a traitor. According to the applicant, he lost consciousness when was taken to a meeting room and he could not recall how a glass door had shattered. He was allegedly pushed by a police officer and fell on the broken glass and was beaten and kicked by five or six police officers as he was lying on the floor. According to him, one of the police officers pointed a rifle at him and said that he was going to shoot him. During the incident, the applicant's friend, Mr B.A., was also present at the police station. According to his statement taken by the police on the same day at 7.30 p.m., Mr B.A. had brought a packet of cigarettes to the applicant. He then heard a policewoman ordering the applicant to hand over his personal belongings and to sign a document. He heard the applicant refuse. The applicant was then dragged into another room by several police officers and during the scuffle the applicant fell down. Mr B.A. heard the glass door shatter but did not see how it happened.

8. At 7.30 p.m. the same day, the applicant was taken for another medical examination and was re-examined by the same doctor at the Ardahan State Hospital, who found the following injuries: a cut measuring 0.5 cm on the inside of the right wrist, a superficial cut on the outside of the wrist, a small graze on the third and fourth fingers of the right hand, redness around the left wrist, 10 cm x 2 cm of redness on the right side of the back (scapula region), redness on the right shoulder and a number of small patches of redness around the right side of the back. It was also reported that the applicant was unfit to work for three days. During the medical examination, the police officers remained in the room.

9. According to a report drafted at 8 p.m. and signed by thirteen police officers, the applicant was invited to the police station, while he was passing by, in order to establish his work and home address in accordance with the instructions of the Erzurum Enforcement Court dated 4 March 2004. He refused and started shouting that they could not do anything to him and that he was the chairman of the DEHAP. The police officers called the public prosecutor, who ordered the applicant's arrest. As a result the applicant was taken for a medical examination. Upon his return, the applicant, when asked

to put his personal belongings on the table, became aggressive and started to shout and threaten the officers and to throw his clothes about. The applicant punched the glass door, causing it to shatter, started hitting his head on a table and tried to hurt himself with broken glass. In order to prevent him from hurting himself, he was handcuffed and was later on taken for a medical examination.

10. On the same day, the police officers drafted official documents regarding the incident. A number of them gave written statements complaining about the applicant's behaviour.

11. On 6 May 2004, at 9.30 a.m., the applicant was examined by a doctor, who noted a superficial graze below his right wrist.

B. The criminal proceedings against the applicant

12. On 6 May 2004 the applicant was brought before the Ardahan Magistrates' Court. He denied the accusations against him and reiterated the submissions he had made to the prosecutor. The court remanded him in detention. Subsequent requests by the applicant for release were refused on 7 and 11 May 2004 respectively.

13. On 14 May 2004 criminal proceedings were instigated against the applicant for defamation, using physical violence against police officers in the course of their duties and destroying State property.

14. On 23 May 2004 the applicant was released pending trial.

15. On 7 May 2007 the Ardahan Criminal Court found the applicant guilty of defamation of a police officer under Article 258 of the Criminal Code and sentenced him to 10 months' imprisonment. The court further found the applicant guilty under Article 516 of the Criminal Code of destroying State property and sentenced him to 3 months and 10 days' imprisonment.

16. On 5 June 2008 the Court of Cassation quashed the judgment of the first-instance court for a reconsideration of whether the pronouncement of the judgment could have been suspended for a period of five years pursuant to Article 231 of the new Code of Criminal Procedure.

17. The case was accordingly remitted before the first-instance court, which on 20 November 2008 decided that Article 231 of the Criminal Procedure Code could not be applicable in the applicant's case as he had a previous criminal record. It accordingly repeated its previous judgment and found the applicant guilty as charged.

18. On 19 December 2011 the Court of Cassation upheld the applicant's conviction in respect of destroying State property. However, in respect of the offence of defamation of a police officer, the appeal court found that the statutory time-limit had expired. It accordingly dismissed the case in that respect.

C. The criminal proceedings against the accused police officers

19. On 10 May 2004 the applicant filed an official complaint with the Ardahan public prosecutor, complaining of ill-treatment in police custody on 5 May 2004, and requested the identification and prosecution of the police officers responsible.

20. On 11 May 2004 the Ardahan public prosecutor heard evidence from the applicant. The latter also identified six police officers from photographs.

21. Between 12 and 15 May 2004 the Ardahan public prosecutor heard evidence from the accused police officers, who denied the accusations against them.

22. On 13 May 2004 the Ardahan public prosecutor heard evidence from Mr B.A.. In his statement, Mr B.A. explained that he had seen the applicant being beaten and that he himself had been threatened, sworn at and hassled when he had gone to take cigarettes to the applicant at the police station. He explained that when the applicant refused to sign the list of his personal belongings, a policeman started shouting and swearing at him. The applicant resisted and shouted as well. When a police officer pushed the applicant, he fell down and several police officers started hitting the applicant in his stomach and back. Mr. B.A. explained that he had not seen how the glass door had been broken. He stated that he also wished to file a complaint against the police officers who had sworn at him.

23. On 17 May 2004 the Ardahan Public Prosecutor filed an indictment with the Ardahan Criminal Court against eleven police officers from the Ardahan Security Directorate, accusing them of ill-treating the applicant and Mr B.A. The applicant did not join the criminal proceedings as a civil party. On 7 July 2004 Mr B.A. informed the court that he wished to withdraw his complaint against the police officers.

24. Throughout the trial, the police officers denied the accusations. They stated that when the applicant had been asked to hand over his personal belongings, he had become angry and started shouting at them. According to the accused police officers, when the applicant tried hitting a policewoman, he was taken to the meeting room. There, the applicant continued his threats, shouting that he would kill them all once he was out. He also broke the glass door, and said he would accuse all of them with ill-treatment.

25. On 22 September 2004 the Ardahan Criminal Court acquitted the police officers of the charges against them on the ground of lack of evidence. In its decision the court held that the injuries noted in the second medical report dated 5 May 2004 had been sustained when the applicant had resisted the police officers. The court therefore held that the evidence in the case file did not suffice to convict the accused officers. This judgment, which was delivered in the applicant's presence, became final on 30 September 2004 as no one appealed against it. The applicant, having

failed to intervene in the proceedings as a civil party, did not have the right to appeal according to the Criminal Procedure Code.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

26. The applicant alleged that he had been subjected to ill-treatment while in police custody. In respect of his complaints, the applicant relied on Articles 3 and 13 of the Convention.

27. 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.”

28. The Government contested the allegations.

A. Admissibility

29. The Government argued that this part of the application should be rejected for non-exhaustion of domestic remedies. In this connection, they stated that the applicant should have intervened in the criminal proceedings initiated against the accused police officers.

30. The Court notes that it has already examined and rejected the Government’s similar preliminary objections in previous cases (see *Uyan v. Turkey* (no. 2), no. 15750/02, § 48, 21 October 2008, and *Keçeci v. Turkey* (dec.), no. 38588/97, 17 October 2000). It finds no particular circumstances in the instant case which would require it to depart from its previous findings. Accordingly, it rejects the Government’s preliminary objection.

31. The Court further 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

1. *The substantive aspect of Article 3*

32. The Government argued that the applicant’s allegations of ill-treatment were unsubstantiated. They stated that the injuries observed on

the applicant's body had been caused as a result of his own actions. In this connection, they referred to the applicant's contention that he did not recall how he had sustained the injuries on his hand.

33. The Court reiterates that where an individual is taken into custody in good health but is found to be injured at 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 (*Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

34. In the instant case, after his arrest the applicant was examined by a medical expert on 5 May 2004 at 6.30 p.m. and no signs of ill-treatment were noted on his body. However, when the applicant was examined at 7.30 p.m. the same day, the doctor who examined him found that there was a cut measuring 0.5 cm on the inside of the right wrist, a superficial cut on the outside of the wrist, a small graze on the third and fourth fingers of the right hand, redness around the left wrist, 10 cm x 2 cm of redness on the right side of the back (scapula region), redness on the right shoulder and a number of small patches of redness around the right side of the back. It was also reported that the applicant was unfit to work for three days.

35. The Court notes that at the end of the criminal proceedings against the police officers, in a brief judgment the first instance court stated that the injuries noted on the applicant's body had been caused during the scuffle between the applicant and the police at the police station. The Court observes that the injuries observed on the applicant's hand could indeed be the result of him breaking the glass door. However, according to the medical report, the applicant had also 10 cm x 2 cm of redness on the right side of the back (scapula region), redness on the right shoulder and a number of small patches of redness around the right side of the back. The domestic court decision failed to shed any light on the origin of these injuries noted on the applicant's back, which matched at least the applicant's allegation of having been beaten and kicked as he was lying on the floor.

36. Reiterating the authorities' obligation to account for injuries caused to persons within their control in custody, the Court considers in the present case that the respondent Government have failed to provide an explanation for the injuries, which were undoubtedly sustained by the applicant while he was under the complete control of the State authorities.

37. In the circumstances of the present case, and considering the absence of a plausible explanation from the Government as to the cause of the injuries sustained by the applicant, the Court finds that these injuries were the result of ill-treatment for which the Government bore responsibility.

38. 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.

2. *The procedural aspect of Article 3*

39. The applicant complained about the ineffectiveness of the investigation into his allegations of ill-treatment. He alleged in particular that Mr B.A.'s statements had not been taken into account and stated that the police officers had not left the examination room during his medical examination by the doctor.

40. The Government contested the arguments.

41. The Court recalls that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

42. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by this applicant. An effective investigation was therefore required.

43. The Court firstly notes that upon the applicant's allegation of ill-treatment, criminal proceedings were promptly initiated against the accused police officers. In this connection, it must be stressed that the obligation to investigate "is not an obligation of result but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Saçılık and Others v. Turkey* (final on the merits and partial just satisfaction), nos. 43044/05 and 45001/05, § 90, 5 July 2011). The Court will therefore examine whether the criminal proceedings in the present case were capable of establishing the true facts surrounding the applicant's injuries and whether the Government have thus satisfactorily discharged their burden of explaining them (see *Özcan and Others v. Turkey*, no. 18893/05, § 73, 20 April 2010; *Saçılık and Others*, cited above, § 91).

44. The Court observes that in the acquittal decision dated 22 September 2004, the Ardahan Criminal Court accepted the accused police officers' version of the events and held that the injuries observed on the applicant's body had been caused when he resisted the police officers. In its brief reasoning, the court did not make any assessment of the statement of Mr B.A., who testified that he had seen the applicant being beaten by the police officers. There is also no explanation as to why the police officers' statements were considered more credible than the statements of the applicant and Mr B.A. Furthermore, the domestic court decision did not

provide any clarification as to how the applicant had sustained the injuries observed in his back. In this connection, the Court also takes note of the applicant's allegation that during his medical examination the police officers were present in the examination room. The Court reiterates that the CPT (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) has underlined the importance of proper medical examinations as an essential safeguard against ill-treatment of persons in custody¹. Such examinations must be carried out by a properly qualified doctor, without any police officer being present. Practices such as in the present case undermine the effectiveness and reliability of medical examinations (see, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X.; *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 642, 13 November 2003).

45. The foregoing considerations are sufficient to enable the Court to conclude that the domestic proceedings in the instant case fell short of the requirements of Article 3 of the Convention.

46. There has accordingly been a violation of Article 3 under its procedural limb.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

47. The applicant complained under Article 5 §§ 1 and 2 of the Convention that he had been unlawfully and arbitrarily arrested and placed in detention on remand. Relying on Articles 10 and 11 of the Convention, the applicant further complained that he had been arrested on account of his political activities. Finally, under Article 14 of the Convention the applicant alleged that he had been discriminated against due to his Kurdish origin and political opinions.

48. However, an examination by the Court of the material submitted to it does not disclose any appearance of a violation of these provisions. It follows that this part of the application is manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

49. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

1. See the CPT Standards concerning health care services in prisons (document no. CPT/Inf/E (2002) 1- Rev. 2006, pages 31 and 34).

50. The Government contested this claim.

51. 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 9,750 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed a total of 7,715 pounds sterling (GBP) (equivalent to approximately EUR 9,400) in respect of legal fees and for expenses.

53. The Government contested the claims.

54. 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. The Court notes at the outset that no invoice has been submitted to substantiate the costs and expenses. As regards the lawyers' fees, in view of the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 4,000 to be paid in pounds sterling to his representatives' bank account in the United Kingdom.

C. Default interest

55. 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 Article 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive and procedural aspects;
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:

(i) EUR 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into his representatives' bank account in the United Kingdom;

(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 25 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President