



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

SECOND SECTION

CASE OF KÜLAH AND KOYUNCU v. TURKEY

(Application no. 24827/05)

JUDGMENT

STRASBOURG

23 April 2013

FINAL

23/07/2013

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

In the case of Külah and Koyuncu v. Turkey,

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

Guido Raimondi, *President*,

Danutė Jočienė,

Peer Lorenzen,

András Sajó,

Işıl Karakaş,

Nebojša Vučinić,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 26 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 24827/05) 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 two Turkish nationals, Mr İbrahim Külah and Ms Naile Koyuncu on 7 June 2005.

2. The applicants, who had been granted legal aid, were represented by Mr Nihat Osmanoglu, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged, in particular, that the killing of their son by a police officer had been in breach of Article 2 of the Convention.

4. On 22 March 2010 the President of the Second Section decided to give notice of the application. 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 applicants were born in 1957 and 1958 respectively and live in İzmir.

6. The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

7. On 2 July 2001 at about 10 p.m. the applicants’ 19-year-old son Ali Külah was sitting in a park in İzmir with two friends when a police van

stopped nearby and police officers asked them to show their identity cards. The three men gave their identity cards to police officer Ö.A., who passed them on to a civilian sitting in the police van. When the applicants' son Ali protested and said that the civilian had no business checking his identity card, a uniformed police officer told him to shut up, before proceeding to slap him in the face.

8. When Ali fell to the ground from the force of the slap, other police officers jumped on him and started beating him up. When Ali managed to free himself from the melee and started running away, police officer Ö.A. gave chase and caught up with him a few blocks away. Officer Ö.A. then kicked Ali and he fell to the ground once again. A gunshot was then heard and officer Ö.A. was seen holding a pistol in his hand and standing next to Ali. Ali was taken to hospital where his condition was deemed to be life-threatening.

9. The following day police officers and a prosecutor took two statements from Ali while he was in the intensive care unit of the hospital. Ali confirmed the version of the events set out above, and asked for the officer to be prosecuted.

10. On 6 July 2001 Ali died in the hospital. According to the post-mortem report, the cause of death was a bullet which had entered his neck and exited through his back. A number of injuries observed on his body were also recorded in the report.

11. In the meantime, according to two police reports drawn up on 3 July 2001, officer Ö.A. was not arrested after the incident. He was released without "having been placed in police custody" and "without having been brought before a doctor". According to the reports, the officer was transferred to the prosecutor's office for questioning.

12. A medical report drawn up on 2 July 2001 notes, however, various cuts and bruised areas on the officer's body.

13. On 13 July 2001 the first applicant, Mr Külah, made an official complaint against the police officer responsible for killing his son.

A. Criminal proceedings against officer Ö.A.

14. On 16 November 2001 the İzmir prosecutor filed an indictment with the İzmir Assize Court (hereinafter "the trial court") and charged officer Ö.A. with the offence of manslaughter.

15. In the course of the trial, officer Ö.A. told the trial court that during the scuffle Ali had attempted to take his pistol. When the pistol had fired, both of them had been holding it, but the officer did not remember which end of the pistol he had been holding.

16. When the applicants' legal representative asked the trial court to obtain copies of the ballistic examination reports of the officer's pistol, it

became apparent that the pistol had not been examined for finger prints; it had simply been returned to him by his colleagues after the incident.

17. In the course of the trial the applicants submitted a number of petitions to the trial court and complained about various defects in the investigation. They argued, in particular, that the report in respect of officer Ö.A.'s medical examination was dubious because it was dated 2 July 2001. In this connection they pointed to the above-mentioned police reports of 3 July 2001 according to which officer Ö.A. had not been medically examined. The applicants brought an official complaint against the persons responsible for drafting the report but the complaint was rejected by the prosecutor and the prosecutor's decision was upheld by the Karşıyaka Assize Court on 13 April 2005.

18. On 30 December 2003 the trial court found that officer Ö.A. had shot the applicants' son Ali with a view to neutralising his resistance to being arrested. It concluded, however, that officer Ö.A. had committed the offence of manslaughter because he had exceeded the limits of his powers in resorting to force which had caused Ali Külah's death. He was sentenced to eight years' imprisonment but the trial court reduced the sentence to one year, four months and three days because the officer had committed the offence in the exercise of his duties. Observing that the officer had behaved well during the hearings, it further reduced the sentence to one year, one month and ten days. The execution of the sentence was suspended because the officer had no previous criminal record and because the trial court considered that he was not likely to commit any offences in the future.

19. The applicants appealed against the judgment and repeated their submissions concerning the defects in the investigation. Referring to the Court's judgments in cases against Turkey, the applicants argued, *inter alia*, that the investigation and the trial had been in breach of various provisions of the European Convention on Human Rights, including the right to life.

20. On 14 November 2005 the Court of Cassation dismissed the appeal in so far as it concerned the trial court's conclusion concerning the finding of guilt, but quashed it and sent it back to the trial court so that the case could be examined in the light of the provisions of the new Criminal Code which had entered into force in the meantime.

21. On 31 March 2006 the trial court noted that the provisions of the former Criminal Code under which the officer had been found guilty and sentenced were more favourable to him, and reiterated the conclusions it had reached on 30 December 2003.

22. The appeal lodged by the applicants was dismissed by the Court of Cassation on 21 May 2007.

B. Criminal proceedings for the destruction of the evidence

23. The applicants also made an official complaint against the police and a prosecutor for failing to ensure a fingerprint analysis of the pistol. A police officer, A.Y., was held by the İzmir Criminal Court of First Instance to have failed to take the necessary steps at the crime scene. He was also found to be at fault by handing back officer Ö.A.'s pistol before ballistic examinations had been carried out. On 30 October 2008 he was sentenced to the payment of a fine of 861 Turkish liras (TRY) (approximately 480 euros (EUR) at the time).

24. Both the applicants and officer A.Y. lodged an appeal against the judgment. On 11 November 2010 the Court of Cassation noted that the statute of limitations had expired, and decided to discontinue the criminal proceedings against officer A.Y.

C. Civil and administrative proceedings

25. In the meantime, the applicants brought a civil claim against officer Ö.A. and the Ministry of the Interior. On 8 June 2009 the İzmir Civil Court of First Instance ordered officer Ö.A. to pay the applicants TRY 13,875 (approximately EUR 5,550 at the time). The claim made against the Ministry was rejected on the ground that no such claim could be brought against the Ministry before a civil court.

26. The applicants also unsuccessfully brought a claim against the Ministry of Justice before the Ankara Administrative Court, and argued that the Ministry had been responsible for the defects in the investigation. In that connection the applicants alleged, *inter alia*, that their son had been deprived of his right to life as a result of the actions of the police officer and that the judicial authorities had breached their obligations under Articles 2, 3, 6 and 13 of the Convention by failing to conduct an effective investigation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2, 6 AND 13 OF THE CONVENTION

27. The applicants complained under Articles 2, 6 and 13 of the Convention that their son's right to life had been violated and that the national authorities had failed to conduct an effective investigation into the killing.

28. The Court considers that the essence of the applicants' complaints concerns the deprivation of their son's right to life and the effectiveness of the investigation into the killing. The Court thus considers it appropriate to examine all of the above complaints solely from the standpoint of Article 2 of the Convention, which reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

29. The Government contested that argument.

A. Admissibility

30. The Government were of the opinion that the applicants had not complied with the obligation to exhaust domestic remedies because they had not raised the substance of their complaints before the administrative courts. They also submitted that the applicants had applied to the Court while the criminal proceedings were still continuing.

31. Finally, the Government considered that the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention because an effective investigation had been carried out by the authorities and the applicants had applied for and received compensation for the death of their son.

32. The Court observes that the applicants did raise the substance of their complaints before the Ankara Administrative Court and referred expressly to their rights under the Convention (see paragraph 26 above). It also notes that the applicants exhausted all criminal remedies in relation to the killing of their son (see paragraph 22 above). It therefore rejects the first element of the Government's objection.

33. Concerning the Government's objection to the applicants' victim status the Court reiterates that a decision or measure favourable to an applicant is not, in principle, sufficient to deprive that individual of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of

the Convention (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 49, 20 December 2007, and the case cited therein).

34. As for the Government's objection based on the issue of compensation, the Court reiterates that it has already examined and rejected similar preliminary objections made in similar cases (see *Özcan and Others v. Turkey*, no. 18893/05, § 54, 20 April 2010; *Peker v. Turkey (no. 2)*, no. 42136/06, §§ 44 and 46, 12 April 2011). It finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's objection in so far as it concerns the issue of compensation.

35. As for the Government's objection to the applicants' victim status based on the investigation which, in the opinion of the Government, had been effective, the Court observes that that objection raises issues which are closely linked to the question of redress. The Court thus considers it appropriate to address this point in its examination of the merits of the applicants' complaint under Article 2 of the Convention, and joins it to the merits (see paragraph 44 below). Noting that no other obstacle to its admissibility exist, the Court declares the complaint admissible.

B. Merits

36. The applicants maintained that their son had been killed in circumstances which were in breach of Article 2 of the Convention. The authorities had both failed to collect the vital evidence and had destroyed it, which meant that the officer responsible for the killing was given a lenient sentence.

37. The Government argued that the applicants' son had not been killed intentionally; he had been trying to escape from police officers and resisting their attempts to arrest him. The police officers had warned him and asked him to surrender but he had not complied. The applicants' son had died in the course of his fight with the police officer.

38. The Court observes that it has already been established by the İzmir Assize Court that police officer Ö.A. exceeded the limits of his powers and unlawfully caused the death of Ali Külah. For the Court, that conclusion amounts to an acknowledgment in substance that the death of Mr Külah was in breach of Article 2 of the Convention. This conclusion makes it unnecessary for the Court to establish whether the force used by the police officer was absolutely necessary and justified under Article 2 § 2 of the Convention. The Court's examination of the applicants' complaint will therefore be limited to ascertaining whether or not the national authorities afforded appropriate and sufficient redress for the violation (see *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, § 43, 27 May 2010; *Bektaş and Özalp v. Turkey*, no. 10036/03, § 48, 20 April 2010) and whether they have thus complied with their substantive and procedural obligations under

Article 2 of the Convention. In this connection the Court notes that, although officer Ö.A. who killed Mr Külâh was found guilty of the offence of manslaughter, he was given a lenient prison sentence, which, in any event, was suspended.

39. The Court reiterates that the State's positive obligation under Article 2 of the Convention to protect life through the law requires the domestic legal system to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII). In order to examine whether that obligation is satisfied, it is for the Court to review whether and to what extent the national courts, in reaching their conclusions, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined (see *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 62, 8 April 2008).

40. It must be emphasised that, 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 life-endangering offences to go unpunished. This is essential for maintaining public confidence, ensuring adherence to the rule of law and preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004-XII; *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts); and *Türkmen v. Turkey*, no. 43124/98, § 51, 19 December 2006).

41. Although the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed (see *Nikolova and Velichkova v. Bulgaria*, cited above, § 61).

42. In the present case, although the domestic law permitted the trial court to mete out a much higher sentence, the court handed down an extremely lenient sentence for the offence of unlawful killing and then suspended it altogether. By imposing such a disproportionate sentence, the trial court used its power of discretion to lessen the consequences of a serious criminal act rather than to show that such acts could in no way be tolerated (see *Okkalı*, cited above, § 75).

43. In conclusion, the Court considers that the criminal-law system, as applied to the killing of Mr Külâh, proved to be far from rigorous and had little dissuasive effect capable of ensuring the effective prevention of unlawful acts, such as those complained of by the applicants.

44. In light of the foregoing the Court rejects the Government's objection to the applicants' victim status (see paragraph 35 above) and finds that there has been a violation of Article 2 of the Convention both in its substantive and procedural aspects on account of the unlawful killing of the applicants' son Ali Külah by police officer Ö.A. as well as on account of the suspension of the police officer's prison sentence which, in effect, rendered his conviction ineffective (see, *mutatis mutandis*, *Taylan v. Turkey*, no. 32051/09, § 46, 3 July 2012).

II. ALLEGED VIOLATION OF ARTICLES 3 AND 5 OF THE CONVENTION

45. Relying on Article 3 of the Convention the applicants complained that their son had been beaten up by police officers prior to his death. In support of that complaint the applicants referred to the autopsy report, detailing a number of injuries on their son's body. Relying on Article 5 of the Convention, the applicants also complained that their son had been arrested arbitrarily.

46. The Government contested those arguments.

47. The Court considers that these complaints should be declared admissible. However, having regard to the violation found above, the Court does not deem it necessary to examine these complaints separately on the merits.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicants claimed EUR 80,000 in respect of pecuniary damage and EUR 120,000 in respect of non-pecuniary damage.

50. The Government considered the claim for pecuniary damage to be unsubstantiated. The Government also considered that the claim for non-pecuniary damage was excessive and would lead to unjust enrichment.

51. The Court observes that the applicants have not submitted to the Court any documents in support of their claim for pecuniary damage; it therefore rejects this claim. On the other hand, it awards the applicants jointly EUR 65,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicants also claimed EUR 20,000 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

53. The Government noted that the claim for costs and expenses was not supported with any evidence.

54. According to the Court's case-law, an applicant is entitled to 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, the applicants have not substantiated that they actually incurred the costs claimed. In particular, they failed to submit documentary evidence, such as bills, receipts, a contract, a fee agreement or a breakdown of the hours spent by their lawyer on the case. Accordingly, the Court makes no award under this head.

C. Default interest

55. 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. *Joins* to the merits the Government's objection to the applicants' victim status and *dismisses* it;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 2 of the Convention in its substantive and procedural aspects on account of the killing of the applicants' son Ali Külah;
4. *Holds* that there is no need to examine the complaints under Articles 3 and 5 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 65,000 (sixty-five thousand 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;

(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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President