



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

SECOND SECTION

CASE OF HAKİM AKA v. TURKEY

(Application no. 62077/08)

JUDGMENT

STRASBOURG

6 November 2018

FINAL

06/02/2019

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

In the case of Hakim Aka v. Turkey,

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

Robert Spano, *President*,
Ledi Bianku,
İşıl Karakaş,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Ivana Jelić, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 9 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 62077/08) 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 Hakim Aka (“the applicant”), on 5 December 2008.

2. The applicant was represented by Ms E. Keskin, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant complained under Articles 6 and 13 of the Convention of the ineffectiveness of the criminal investigation conducted into the death of his sons.

4. On 9 May 2017 the Government was informed of the application.

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

5. The applicant was born in 1970 and lives in Istanbul.

6. On 19 November 2007 the applicant’s sons, Aykut and Aykan, born in 1991 and 1992 respectively, left home in their school uniforms with their rucksacks to go to their secondary school. When they did not return home at the usual time in the evening, their mother called the applicant, who in turn enquired about his sons’ whereabouts from friends and family. When his

enquiries did not yield any results, the applicant informed the police that his sons were missing.

7. In his statement taken at the Samandıra police station on 20 November 2007 the applicant told the police that his sons had apparently not gone to school after leaving home the previous day, and that they had left their mobile telephones at home. He also informed the police that they had not had any disagreements or fights which could have prompted their disappearance.

8. On the same day, the police informed the Kartal public prosecutor of the disappearance of the applicant's sons. The public prosecutor instructed the police to take the statements of those who could have information as to the two children's whereabouts, and to keep him informed of developments.

9. On 22 November 2007 the police took the applicant's wife's statement. She told the police that on the morning in question her sons had left home on foot, whereas they had normally taken a minibus to go to school. She had noticed that Aykan had looked somewhat anxious before leaving home, and that he had forgotten to wear his school tie and socks. She had had no idea where Aykut and Aykan could have gone, and none of their friends, relatives or school teachers had had any information on the two children's whereabouts either. Although her son Aykut had had a mobile telephone, he had left the telephone at home that day. She added that she had no reason to suspect anyone with regard to her children's disappearance.

10. Based on the information obtained from the applicant and his wife, the police registered Aykut and Aykan as missing persons.

11. Still on 22 November 2007, the Kartal district gendarmerie asked the Kartal public prosecutor's office to authorise access to Aykut Aka's mobile phone records for the past six months.

12. On 27 November 2007 the Kartal public prosecutor's office asked the Turkish Telecommunication Institution to provide a record of the individuals who had called Aykut Aka's mobile telephone in the past three months, together with their complete identity information and addresses.

13. In the meantime, on 23 November 2007 three fishermen, T.G., K.S. and A.D., had contacted the coast guard as they had spotted a corpse at the bottom of the sea off the Emirgan coast. The male corpse recovered by the divers deployed to the incident site was fully dressed in a school uniform and wearing a rucksack. While removing the rucksack from the body, they noted that the rucksack was filled with heavy stones. The student identity card subsequently discovered in the victim's pocket suggested that the body was that of the applicant's son, Aykan Aka. The body was subsequently taken to the morgue of the İstinye State Hospital, where the applicant confirmed the identity of his son.

14. On the same day, a post mortem examination was conducted on the body in the presence of the Kartal public prosecutor. An initial examination

revealed no sign of violence on the body. It was decided to transfer the body to the Forensic Medicine Institute for a full autopsy, without which the definite cause of death could not be established.

15. On the same day, officers from the Sarıyer Security Directorate prepared an incident scene report. After reiterating the aforementioned information, the report verified that stones weighing three to four kilograms had been found in the victim's rucksack.

16. Still on the same day, the police took another statement from the applicant. After reiterating the statement he had made on 20 November 2007 (see paragraph 7 above), he provided the following additional information.

- On 21 November 2007, two days after their disappearance, his son Aykut's mobile telephone had rung. When he had picked up the telephone, a woman unknown to him had asked why he had answered that telephone, and then had hung up. When the applicant had called the number back, someone else had answered and hung up, after shouting at him for calling.

- His son Aykut had received a text message in Arabic on the occasion of the *bayram*¹, one month prior to his disappearance. Following his request, the Samandıra gendarmerie command had managed to locate the owner of the number from which the message had been sent (M.Y.), but M.Y. had denied any involvement with the message.

- After his sons' disappearance, the applicant had found a handwritten note by Aykan in their room, which read:

"I, Aykan Aka, will die and become a martyr on December 13th at 2.25 a.m. Place of [death]: Istanbul Samandıra/Kavaklık. I will be waiting for all of you. Words: Aykan Aka Written by: Aykan Aka [and signature]. I am giving my life to his holiness Azrael, this is wonderful".

17. On 26 November 2007 the police questioned the principal of the secondary school which the applicants' sons had attended, along with Aykan's school friends, Y.D. and Ö.K. The principal said that Aykut had been talkative and a successful student. Aykan, on the other hand, had not had good marks, and, according to his schoolmates, had not been very sociable. Y.D. stated that he had met Aykan some three months before at the start of the school year. Aykan had been withdrawn, but he had not appeared to have any problems at school or home. He had always studied during the breaks, and had told him to study too so that they could get good marks. He had regularly scribbled notes such as "doomsday signs", "*dajjal*²" or "Christ" in his notebook. He had once made a calculation and said that the doomsday would arrive in fifty two years and two hours, and had then said that it would not matter whether they died then or fifty two years later. Ö.K.'s statement corroborated Y.D.'s.

1. Muslim religious holiday also known as the *eid*.

2. Antichrist.

18. The applicant requested that an underwater search be carried out along the Emirgan coastline to find his other son Aykut's body. This was done on 30 November 2007. A body was located at the sea floor some fifty metres from the coast. Just like Aykan, Aykut was also wearing a rucksack filled with heavy stones. His rucksack was also attached to his body by a rope.

19. The incident scene report prepared on the same day noted no signs of violence on Aykut's body. The post mortem examination conducted subsequently found that the cause of death appeared to be drowning. It was, however, decided to transfer the body to the Forensic Medicine Institute for a full autopsy, without which the definite cause of death could not be established.

20. On 3 December 2007 the Sarıyer public prosecutor's office requested detailed information on incoming and outgoing calls pertaining to four telephone numbers which had been apparently used by the applicant and his sons in the period between 5 and 30 November 2007.

21. The Turkish Telecommunication Institute informed the Sarıyer public prosecutor's office in a letter dated 13 December 2007, that the requested information had been compiled. The call records enclosed with that letter were not submitted to the Court. However, a handwritten note on the letter, by an unknown author, indicates that no significant calls were detected in the records.

22. According to a report prepared by the police on 28 December 2007, the CCTV footage from 19 November 2007 of the place where the bodies were recovered did not reveal any information that could shed light on the circumstances of the applicants' sons' suspicious deaths.

23. The autopsy reports issued by the Forensic Medicine Institute on 14 and 25 January 2008 in regard to Aykan and Aykut respectively noted their cause of death as drowning. The report also indicated that no toxic substances were found in their bodies, nor were any signs of trauma noted.

24. On 1 February 2008 the Sarıyer public prosecutor rendered a decision not to prosecute in connection with the death of Aykan. The decision simply noted that the cause of death had been established as drowning by the Forensic Medicine Institute, and that no evidence of a crime had been found.

25. In a similar decision not to prosecute taken on 15 February 2008 with respect to Aykut, the Sarıyer public prosecutor stated that there was no reason to hold anyone accountable for his death.

26. On 1 April 2008 the applicant objected to the decisions delivered by the Sarıyer public prosecutor. He claimed in particular that the public prosecutor had failed to conduct a comprehensive investigation into the incident. He had not fully investigated his sons' telephone records or CCTV footage that could have revealed information regarding their deaths, nor had he questioned his sons' close friends. The lack of an effective investigation

into the incident had impaired his trust in the justice system, which had compelled him to participate in a live TV show in the hope of gathering information that could shed light on the circumstances of his sons' deaths. A number of viewers had called the studio with possible information on the incident, yet the public prosecutor's office had not sought those individuals out with a view to getting official statements. He also made the following allegations.

- On 7 February 2008 five individuals had attempted to kidnap his younger son Volkan, an incident which had been reported to the police.

- On 22 February 2008 three photos of his son Aykan had been left on his doorstep, which had also been reported to the police.

He claimed that all of these factors, when viewed together, showed that his sons' deaths had not been a simple case of drowning, and that he suspected that they had been killed. He asked the authorities to extend the investigation into the deaths and to question his sons' friends H.B., Y.A., E.İ., F.Ç. and E.Ç., none of whom had yet been questioned.

27. On 10 June 2008 the Bakırkoy Assize Court dismissed the applicant's objection, holding that the Sarıyer public prosecutor's decisions not to prosecute had complied with the procedure and law.

THE LAW

28. The applicant complained under Article 6 § 1 of the Convention that the investigation conducted into the death of his sons had not been effective. He stated that Article 13 of the Convention had also been violated for the same reason.

29. The Court considers that the applicant's complaints fall to be examined under Article 2 of the Convention alone, the relevant part of which reads as follows:

"1. Everyone's right to life shall be protected by law."

A. Admissibility

30. The Court notes that the application 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 parties' arguments*

31. The applicant maintained his allegations on the merits of the case and claimed that his sons had fallen victim to one of the religious cults which were known to target children in Turkey.

32. The Government argued that the public prosecutor had taken all reasonable steps to shed light on the circumstances of the applicant's sons' deaths, including obtaining statements from the victims' friends, reviewing mobile phone records and preparing incident scene reports, and had delivered his decision not to prosecute on the basis of all that evidence. The Government averred in particular that both the public prosecutor and the assize court that had dismissed the applicant's objection to the public prosecutor's decision had been aware of the fact that the victims' rucksacks had been filled with heavy stones. However, they decided not to attach a particular importance to that fact having regard to the findings in the autopsy report and the other evidence available. The Government also argued that the allegations concerning the attempted kidnapping of the applicant's younger son Volkan had been mentioned for the first time at the time of the objection to the public prosecutor's decision. The Government lastly acknowledged that the review of video footage had been limited to that obtained from the CCTV cameras located in the vicinity of the Emirgan coast, where the victims' bodies had been found, and no action had been taken to identify any cameras closer to the victims' house or school. The Government stressed in this connection that the obtaining and assessment of evidence were matters that were exclusively within the discretion of the national authorities.

2. *The Court's assessment*

33. There is no dispute between the parties that the applicant's sons lost their lives in suspicious circumstances. The Court reiterates that where there is reason to believe that death occurred in suspicious circumstances, the State authorities have an obligation to carry out some form of effective official investigation, which must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible (see *Mustafa Tunç and Fecire Tunç v. Turkey* ([GC], no. 24014/05, §§ 171 and 172, 14 April 2015). What lies at the heart of the present case is the question whether the State authorities have duly discharged the aforementioned obligation to conduct an effective investigation into the deaths of the applicant's sons.

34. The Court refers in this connection to the recapitulation of its case-law on this matter by the Grand Chamber in the case of *Mustafa Tunç and Fecire Tunç v. Turkey* (cited above, §§ 169-82). It reiterates in

particular that the obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (*ibid.*, § 173). The investigation's conclusions must be based on a thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and, where appropriate, the identity of those responsible (see *Kolevi v. Bulgaria*, no. 1108/02, § 201, 5 November 2009, and *Mustafa Tunç and Fecire Tunç*, cited above, § 175). The question of whether an investigation has been sufficiently effective must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Mustafa Tunç and Fecire Tunç*, cited above, § 181).

35. The Court notes in the present case that upon being notified of the applicant's sons' disappearance, the authorities took some initial measures to identify their whereabouts, measures which were intensified upon the recovery of their bodies. The authorities accordingly conducted a full autopsy on the victims' bodies to identify the exact cause of death, questioned the principal of their school as well as a couple of their friends, examined their telephone records and reviewed the CCTV footage of the location where their bodies were found. On the basis of the evidence collected, the public prosecutor discontinued the investigation as an ordinary case of drowning. However, having regard to the suspicious circumstances in which the bodies were found, with stone-filled bags on their backs, and the applicant's allegations as to certain events that his family experienced following his sons' disappearance, the Court is not convinced that the authorities took all the reasonable steps that they could have to secure the evidence concerning the deaths.

36. The Court firstly notes in this connection that according to the information in the case file, the records of the telephone used by the applicant's son Aykut, as well as other telephone lines owned by the applicant were reviewed by the authorities. The limited information in the case file suggests that those records revealed no suspicious communication. While the Court has no reason to doubt the thoroughness of the review conducted by the authorities, it cannot but note that no special effort was made to identify the person who had called Aykut a few days after his disappearance, in rather peculiar circumstances. Furthermore, although the authorities questioned M.Y. – the person who had sent Aykut a message in Arabic prior to his death (see paragraph 16 above) – there is no information in the case file to suggest that they took any measures to verify the accuracy of his statement, in which he had denied ever having contacted Aykut. The Court also notes in this connection that it is not clear whether – besides reviewing the victims' telephone records – the authorities carefully went

through their personal items, such as books, journals and computers, to identify any suspicious activity.

37. The Court secondly notes that the authorities conducted a review of the CCTV footage from the location where the applicant's sons' bodies were recovered from the sea. They did not, however, extend their search to other areas where the two children could have been sighted on that day, such as in the vicinity of their home or school, which could have served to shed some light on the circumstances of their deaths.

38. The Court thirdly notes that although the police questioned two of the victims' schoolmates, the four friends whose names had been shared by the applicant with the authorities were never questioned.

39. The Court fourthly notes that although the applicant informed the police regarding the attempted kidnapping of his younger son Volkan a few months after the death of his brothers, the investigating authorities appear to have taken no steps to explore whether that attempt could have had any connection to the deaths of Aykut and Aykan.

40. The Court lastly notes that while it is obvious that any allegations made in a television show by unverified sources must be approached with extreme caution, there is no information in the file to indicate that the investigating authorities took any steps to contact those sources for possible leads.

41. In the Court's opinion, the aforementioned elements are sufficient to find that the investigating authorities have not taken all the reasonable steps to secure evidence relating to the suspicious deaths of the applicant's sons. Given the particular vulnerability of the victims due to their young age, which rendered them vulnerable to abuse and manipulation, the authorities would have been expected to demonstrate a heightened diligence to uncover the circumstances which led to their deaths. The Court reiterates in this connection that any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness imposed by Article 2 (see, *mutatis mutandis*, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 321 and 324, ECHR 2007-II).

42. The Court concludes in the light of the foregoing that there has been a violation of Article 2 of the Convention in its procedural aspect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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.”

44. The applicant claimed a total of 40,000 euros (EUR) in respect of non-pecuniary damage.

45. The Government argued that the applicant’s claim was excessive.

46. Having regard to the violation found and to equitable considerations, the Court awards the applicant the amount requested in respect of non-pecuniary damage.

47. 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 2 of the Convention in its procedural aspect;
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, EUR 40,000 (forty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the 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.

Done in English, and notified in writing on 6 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President