

In the case of Yagiz v. Turkey (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr N. Valticos,
Mr R. Pekkanen,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,
Mr D. Gotchev,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 May and 25 June 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 62/1995/568/654. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 10 July 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 19092/91) against the Republic of Turkey lodged with the Commission under Article 25 (art. 25) by a Turkish national, Mrs Yüksel Yagiz, on 8 October 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 of the Convention (art. 3).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30), to whom the President gave leave to use the Turkish language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio

Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 13 July 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr N. Valticos, Mr R. Pekkanen, Mr A.B. Baka, Mr G. Mifsud Bonnici, Mr D. Gotchev and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 22 March 1996. On 1 April 1996 the Government supplied a copy of a medical report of 12 March 1996, accompanied by observations.

5. On 23 April 1996 the President of the Commission informed Mr Ryssdal that the Commission wished to withdraw its request of 10 July 1995 (see paragraph 1 above). It had noted, in the light of the judgment delivered on 25 March 1996 in the *Mitap and Müftüoğlu v. Turkey* case, that the present case fell outside the Court's jurisdiction *ratione temporis*.

On 9 May 1996 the Government informed the registry that they objected to "unilateral withdrawal" by the Commission. On 20 May the applicant stated that she had no comment to make on the question.

On 14 May 1996 the President had cancelled the hearing due to take place on 21 May.

6. On 23 May the Court decided that the Commission could not withdraw its request instituting proceedings before the Court and that the Court should accordingly proceed with its consideration of the case. It informed the Government, the applicant and the Commission of this decision in a letter of 18 June 1996 signed by the Registrar and worded as follows:

"... since 1959, under the Rules of Court, the power to seek a discontinuance has been reserved to 'parties' which have brought the case before the Court, that is to say High Contracting Parties and, in cases concerning States bound by Protocol No. 9, private parties (Rule 49 para. 1 of Rules of Court A and Rule 51 para. 1 of Rules of Court B).

The Commission is not a 'party' and, even if the Commission were invested with an implicit power similar to that expressly conferred by paragraph 1 of Rule 49 of Rules A, by analogy it is for the Court to approve the discontinuance subject to the agreement of the parties. In the present case the Turkish Government have indicated their disagreement."

Also on 23 May, the Court decided to dispense with a hearing in the case, after noting that the conditions for this derogation from the usual procedure had been met (Rules 26 and 38).

AS TO THE FACTS

I. Circumstances of the case

7. On 4 December 1989 in the maternity ward of Tepecik Social Security Hospital (SSK Hastanesi) in Izmir a baby was abducted shortly after its birth.

8. On 14 December 1989 in the course of the investigation conducted by the Izmir public prosecutor's office in respect of some of the hospital staff, Mrs Yagiz, a nursing auxiliary on the maternity

ward, was questioned for several hours at the local police station.

9. Being suspected of involvement in the abduction of the new-born child, she was arrested on 15 December 1989 and placed in police custody at the Izmir Security Department. During her interrogation in the offices of the "homicide and armed robbery" squad, which went on until the following morning, she was twice taken by the police to a hospital casualty department for treatment.

10. On 16 December 1989, the day of her release, the applicant had to be admitted to hospital on account of the psychological shock she had suffered. The medical examinations carried out on 18 December 1989 by, among others, the internal medicine department, the general surgery department and the gynaecology department did not show that the applicant was suffering from a pathological condition such as might keep her off work, but the psychiatric examination showed that she had suffered a psychological trauma which made it necessary to certify her unfit for work for five days.

11. At the request of Mrs Yagiz's father, a panel of three doctors appointed by the Izmir Medical Association examined the applicant on 20 December 1989. According to their report, of 21 December 1989, Mrs Yagiz was suffering from "acute post-traumatic stress" and bore marks on the soles of her feet. These symptoms proved that she had been subjected to ill-treatment.

12. In the meantime, on 17 December 1989, the applicant had lodged a complaint with the Izmir public prosecutor's office against the officers in whose charge she had been while in police custody, accusing them of torturing her. In her statement to the prosecuting authorities, made on 20 December 1989, she asserted in particular that during the questioning some of the police officers had beaten the soles of her feet with sticks while she was blindfolded, that they had tied a knot in her skirt so that she could not move her legs and that they had placed a heavy object on her shoulders. The police had then made her walk on a wet floor to prevent her feet from swelling up and had sexually harassed her.

13. On 12 April 1990, after hearing the accused police officers and witnesses, the Izmir public prosecutor brought proceedings under Article 245 of the Criminal Code in the Izmir Criminal Court against three police officers, who were accused of ill-treatment.

14. On 12 June 1990 the Izmir Criminal Court ruled that it lacked jurisdiction and referred the case to the Izmir Assize Court.

15. In a judgment of 16 November 1990 the Izmir Second Assize Court acquitted the three police officers. It held that it had been established in the light of the medical reports, particularly the report of 21 December 1989, that the applicant had suffered "duress" (zora koyma) at the Izmir Security Department, but that the identity of those responsible could not be determined, as the applicant had not been able to identify them and the witness evidence had not produced any further information on that point.

16. On 19 June 1991 the Court of Cassation upheld the Assize Court's judgment.

17. As a result of the police investigation into the child's abduction, the real offenders were arrested and prosecuted. The proceedings against Mrs Yagiz and her four co-defendants were halted by a discontinuation order on 28 December 1989.

II. Relevant provisions of the Criminal Code

18. Article 243 provides:

"A President or member of a court or official body or any other public official who, in order to extract a confession of guilt in respect of a criminal offence, tortures or ill-treats any person, or engages in inhuman conduct or violates human dignity, shall be punished by up to five years' imprisonment and disqualified from holding public office temporarily or for life.

The sentence incurred under Article 452, where such conduct causes death, or under Article 456 in other cases, shall be increased by between one-third and one half."

19. Article 245 provides:

"Civil servants charged with forcible execution of an order, police officers and any other officials charged with enforcement who enforce the order concerned, either of their own accord or on the orders of their superiors, in an unlawful manner or who, in doing so, ill-treat, strike or cause bodily injury to another shall be punished by between one and three years' imprisonment and temporarily disqualified from holding public office."

III. Turkish declaration of 22 January 1990 under Article 46 of the Convention (art. 46)

20. On 22 January 1990 the Turkish Minister for Foreign Affairs deposited the following declaration with the Secretary General of the Council of Europe pursuant to Article 46 of the Convention (art. 46):

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory ipso facto and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention (art. 1), performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of three years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

This declaration was renewed on 22 January 1993 for a period of three years and again on 22 January 1996, in slightly different terms, for two years.

PROCEEDINGS BEFORE THE COMMISSION

21. Mrs Yagiz applied to the Commission on 8 October 1991. Relying on Article 3 of the Convention (art. 3), she complained of the ill-treatment she had suffered while in police custody.

22. The Commission declared the application (no. 19092/91)

admissible on 11 October 1993. In its report of 16 May 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 3 (art. 3). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

23. In their memorial, the Government asked the Court, in chief, to rule that it lacked jurisdiction *ratione temporis* on account of the Turkish declaration recognising its compulsory jurisdiction (Article 46) (art. 46); in the alternative, to hold that domestic remedies had not been exhausted in the case; and in the very subsidiary alternative, to hold that there had been no violation of the Convention.

AS TO THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTIONS

24. The Government raised two preliminary objections of inadmissibility relating to lack of jurisdiction *ratione temporis* and failure to exhaust domestic remedies.

25. They maintained that "Turkey first recognised the Court's compulsory jurisdiction on 22 January 1990 with regard to matters raised in respect of facts, including judgments based on such facts, which had occurred subsequent to" that date. As "the facts alleged by the applicant" had taken place on 15 and 16 December 1989, the case fell outside the Court's jurisdiction *ratione temporis*.

26. According to Mrs Yagiz, on the contrary, the date on which the Turkish declaration under Article 46 of the Convention (art. 46) took effect was not the date on which it was notified to the Secretary General of the Council of Europe but the date of publication in the Turkish Official Gazette, on 27 September 1989, of the Ministerial decision of 25 September of the same year recognising the Court's compulsory jurisdiction.

27. The Court does not accept that argument. Notification to the Secretary General is not a mere formality, as the applicant seems to believe, but is indeed the moment at which recognition of the Court's compulsory jurisdiction takes effect. The very terms of the declaration made under Article 46 of the Convention (art. 46) preclude all argument: "This Declaration ... is valid for a period of three years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration" (see paragraph 20 above; the *Loizidou v. Turkey* (preliminary objections) judgment of 23 March 1995, Series A no. 310, p. 33, para. 102; the *Yagci and Sargin v. Turkey* and *Mansur v. Turkey* judgments of 8 June 1995, Series A nos. 319-A and 319-B, p. 16, para. 40, and p. 48, para. 44; and the *Mitap and Müftüoğlu v. Turkey* judgment of 25 March 1996, Reports of Judgments and Decisions 1996-II, pp. 410-11, paras. 26-28).

28. Having regard to that wording, the Court considers that it cannot deal with the merits of the case, as the detention in police custody during which Mrs Yagiz allegedly suffered ill-treatment took place on 15 and 16 December 1989, more than a month before Turkey's

recognition of the Court's compulsory jurisdiction.

29. That conclusion makes it unnecessary to consider the Government's other objection.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that it cannot deal with the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 August 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar