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

SECOND SECTION

CASE OF TOĞCU v. TURKEY

(Application no. 27601/95)

JUDGMENT
(Striking Out)

(This version has been rectified under Rule 81 of the Rules of Court on 31 January 2003)

STRASBOURG

9 April 2002

In the case of Toğcu v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE, *judges*[1],
Mr F. GÖLCÜKLÜ, *ad hoc judge,*

and Mrs S. DOLLÉ, *Section Registrar*,

[1. **Rectified on 31 January 2003**.
The text originally read :
"Mr M. Ugrekhelidze,
Mrs A. Mularoni, *judges,"*.]

Having deliberated in private on 12 March 2002,

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

PROCEDURE

1. The case originated in an application (no. 27601/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Hüseyin Toğcu ("the applicant"), on 25 May 1995.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr Philip Leach, a lawyer attached to the Kurdish Human Rights Project, a non-governmental organisation based in London. The Turkish Government ("the Government") did not appoint an Agent for the purposes of the Convention proceedings.

3. The applicant alleged in particular that, in violation of Articles 2, 5 and 13 of the Convention, his son Önder had disappeared after having been taken into unacknowledged detention on or about 29 November 1994, and that the Turkish authorities had failed to carry out an adequate investigation into the alleged police involvement in the disappearance of his son, or any form of adequate investigation of the case at all. The applicant also relied on Articles 3, 14 and 18 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was initially allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Feyyaz Gölcüklü to sit as an *ad hoc* judge.

6. By a decision of 14 September 1999, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties were invited to submit final written observations of which possibility the applicant availed himself. The parties further considered the possibility of a friendly settlement. No settlement was reached.

8. By letter of 9 October 2001, the Government requested the Court to strike the case out of its list and enclosed the text of a declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Government's request on 17 December 2001.

9. Following the general restructuring of the Court's Sections as from 1 November 2001 (Rule 25 § 1 of the Rules of Court), the application was assigned to the newly composed Second Section of the Court (Rule 52 § 1).

10. On 5 March 2002 the President of the Chamber refused the request of the Aire Centre to intervene in the procedure (Rule 61 § 3).

11. On 12 March 2002 the Chamber rejected the applicant's request that the Chamber relinquish jurisdiction in favour of the Grand Chamber (Rule 72 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Facts submitted by the applicant

12. The applicant's son, Önder Toğcu, lived in the applicant's home and was the manager of the Sento Hotel and the Arzu Club in Diyarbakır. He had no relations with the PKK or other similar organisations. Önder's maternal cousin had been taken into detention in relation to a criminal investigation and, when a photograph of Önder was found on him, he apparently made a statement to the effect that he and Önder were partners in the alleged crime. The cousin was subsequently released without charge.

13. On or about 29 November 1994, Önder's pregnant spouse felt unwell and was taken to the maternity hospital in Diyarbakır. Önder was with his wife at the hospital, but failed to return home and has disappeared since.

14. At about 10.30 p.m. on 29 November 1994, seven or eight plain-clothes police officers came to the applicant's home in Diyarbakır and enquired about Önder's whereabouts. The applicant told them, knowing that this was not the truth, that Önder had left for Kayseri three days earlier. According to the applicant, the police officers then told him that his son was in the hands of the police and that they would hand over his body in three days.

15. The police officers then went to the house of Ali Toğcu, Önder's older brother, where they arrived at about midnight and conducted a search without finding anything. They then brought Ali to the applicant's house, where they told the applicant that there was a firearm in his house and ordered him to hand it over. Both the applicant and Ali denied this. After the police officers had conducted a conversation over the wireless, they told the applicant and Ali that the firearm was in the woodshed of the applicant's house. The police officers did in fact find a firearm in the woodshed and then left.

16. On 30 November 1994, Ali was apprehended by the police in a café in Diyarbakır and taken to the Security Directorate. He was subsequently taken to the detention facilities of the Diyarbakır Rapid Reaction Force (*Cevik Kuvvet*), where he was interrogated and ill-treated. He was questioned about Önder's whereabouts. When he told the police officers that he did not know where his brother was, he was told that Önder had been apprehended and that a price-list of walkie-talkies and batteries had been found on him. He was also asked where Önder's rifle was. During his interrogation Ali could hear the screams of his brother Önder, although he was being told that Önder had "gone to the mountains"[1]. After having been interrogated for about four to five hours and believing that he was dead, the police officers left Ali on a dump in Ergani, about 50 kms from Diyarbakır.

17. After his release, Ali Toğcu made inquiries about Önder at the Çarşı Police Station, where he was told that his brother was being held by the police and that he would be released after interrogation.

18. On an unspecified date, Ali Toğcu made further inquiries about Önder with the Chief Commissioner at the Homicide Department, taking with him a photograph of his brother, a photocopy of his brother's identity card and the applicant's home telephone number. These inquiries remained without any results.

19. On an unspecified date, the applicant and Ali Toğcu were apprehended and detained. The police accused them of helping and meeting

[1] A phrase generally used for indicating that a person has joined PKK forces hiding in the mountainous areas in south-east Turkey.

Önder, whom they alleged to be in the mountains. They were both released after six days without having been brought before a court.

20. Another time, Ali Toğcu was approached by police officers who asked him for money in exchange for which Önder would not be killed. One police officer asked Ali for 1,000 million Turkish Lira to be given to a third person. In return, Önder would be released.

21. The applicant and his family claim to have filed many petitions with the State of Emergency Governor, the City Governor and other authorities. None of these petitions were accepted. On 6 April 1995, the applicant's wife filed a petition with the Public Prosecutor to the Diyarbakır State Security Court. On 7 April 1995, she was informed by the authorities that the name of Önder Toğcu was not in their records.

22. The applicant was heard by the Public Prosecutor for the first time on 19 July 1996. On 6 November 1996 the Diyarbakır Chief Public Prosecutor, on the basis of information provided by the Diyarbakır Anti-Terror Department of the Security Directorate to the effect that Önder Toğcu had not been detained by them on 29 November 1994, issued a decision not to take any proceedings (*Takipsizlik Kararı*).

23. The investigation was apparently reopened in October 1999. The applicant gave a second statement to the Diyarbakır Public Prosecutor, and it was for the first time that a statement was taken from the applicant's spouse and Önder's spouse. As the applicant and his wife do not speak any Turkish, their grandson Mehmet, who does speak Turkish, was present when their statements were taken. According to Mehmet, the official court interpreter distorted the statements given by the applicant and his wife. After he had objected to this, Mehmet was removed from the Public Prosecutor's office and he was not allowed to read the recorded statements.

B. Facts submitted by the Government

24. On 30 November 1994, at about 12.30 a.m., the houses of the applicant and his son Ali Toğcu were searched on the basis of a request sent on 29 November 1994 by the Commander of the Diyarbakır Gendarmerie to the Diyarbakır Security Directorate. Its aim was to find Önder Toğcu, who was suspected of being involved with the PKK. Although Önder Toğcu was not found, the search did result in the finding of a firearm and a charger with bullets in the applicant's house. As the applicant had stated that it belonged to his nephew Mehmet Kartal, the police officers left the applicant's home without detaining anyone.

25. The Government deny that Ali and Önder Toğcu were taken into detention on 29 or 30 November 1994. If this would have been the case, their names would have been recorded in reports, investigation documents or custody registers. According to such records, the applicant and Ali Toğcu were detained on 4 July 1995. In the absence of any evidence of

involvement with illegal organisations, they were both released on 8 July 1995. Ali Toğcu was once more apprehended by the police on 7 August 1997 and, after having given a statement, released on 8 August 1997.

26. Apart from the petition filed by the applicant's wife, no petitions in relation to the disappearance of Önder have been filed with the public prosecution authorities. An investigation was conducted by the Diyarbakır Public Prosecutor, who verified the custody records of the detention facilities in Diyarbakır and its districts. This investigation resulted in a decision of 6 November 1996 not to take any proceedings.

27. A second investigation was conducted at a later stage, in the course of which statements were taken from the applicant, the applicant's wife, Önder's wife, and the police officers who were involved in the search. This second investigation is still ongoing. However, although both the gendarme and police forces have a procedure for registering and searching for persons who are reported missing, Önder Toğcu's name was not included in the forms used under these procedures.

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. The relevant provisions of criminal, civil and administrative law are set out in the Court's judgment in the case of *Şarlı v. Turkey* (no. 23657/94, 22.5.2001).

THE LAW

29. By letter dated 9 October 2001, the Deputy Permanent Representative of Turkey to the Council of Europe informed the Court as follows:

> "... j'ai l'honneur de vous faire parvenir ci-joint la déclaration signée unilatéralement, afin de mettre fin à l'examen de la requête susmentionnée.
>
> Le Gouvernement prie la Cour de bien vouloir décider qu'il ne se justifie plus de poursuivre l'examen de la requête et de la rayer du rôle en application de l'article 37 de la Convention."

30. The text of the declaration reads as follows:

> "1. I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to the applicant, Mr Hüseyin Toğcu, the amount of 70,000 pounds sterling [...] [in respect of] the application registered under no. 27601/95.
>
> This sum, which covers any pecuniary and non-pecuniary damage as well as costs, shall be paid in pounds sterling, free of any taxes that may be applicable and to an account named by the applicant. The sum shall be payable within three months from the date of delivery of the judgment by the Court pursuant to the Article 39 of the

European Convention on Human Rights. This payment will constitute the final resolution of the case.

The Government regret the occurrence of the actions which have led to the bringing of the present application, in particular the disappearance of the applicant's son Mr Önder Toğcu and the anguish caused to his family.

It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention. The Government undertake to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention.

The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context. To this end, necessary co-operation in this process will continue to take place. ..."

31. The applicant, in his written reply, requested the Court to reject the Government's initiative. He argued, *inter alia,* that the terms of the declaration are unsatisfactory in that the case does not merely concern a failure to record a deprivation of liberty but also the disappearance of Önder Toğcu as a result of State action, whereas the declaration only contains a vague general undertaking instead of a commitment to carry out urgent and concrete investigations in the applicant's case. The applicant further pointed out that the declaration makes no reference to either Article 34 or 38 of the Convention or to the Government's failure to disclose certain documents requested by the Court, which might be decisive for the establishment of the facts and thus the Court's determination of the merits of the case. Given the fundamental nature of the rights at stake, the applicant urged the Court to continue with its examination of the merits of the case.

32. The Court observes at the outset that no agreement was reached between the parties as to a friendly settlement of the case (see paragraph 7 above). It recalls that, according to Article 38 § 2 of the Convention, friendly settlement negotiations are confidential. Rule 62 § 2 of the Rules of Court further stipulates in this connection that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.

The Court will therefore proceed on the basis of the declaration made outside the framework of the friendly settlement negotiations by the respondent Government on 9 October 2001.

33. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of that Article.

34. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if :

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application."

35. Article 37 § 1 *in fine* states :

> "However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires."

36. The Court has examined carefully the terms of the respondent Government's declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).

37. Moreover, the Court is satisfied that respect for human rights as defined in the Convention and the protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*). The Court notes in this regard that it has specified the nature and extent of the obligations which arise under the Convention for the respondent Government in cases of alleged disappearances (cf. Kurt v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV, *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V, *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI, *Taş v. Turkey*, no. 24396/94, 14.11.2000, *Çiçek v. Turkey*, no. 25704/94, 27.2.2001, *Şarlı v. Turkey* no. 23657/94, 22.5.2001, and *Akdeniz and Others v. Turkey*, no. 23954/94, 31.5.2001).

38. Accordingly, the application should be struck out of the list.

FOR THESE REASONS, THE COURT

1. *Takes note* of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein (Rule 44 § 2 of the Rules of Court);

2. *Decides*, by six votes to one, to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention.

Done in English, and notified in writing on 9 April 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Mr Costa;
(b) Dissenting opinion of Mr Loucaides.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

In this case the Court applied Article 37 § 1 (c) of the Convention, which enables it to consider that "for any other reason established by the Court, it is no longer justified to continue the examination of the application."

It accordingly struck the application out of its list of cases, but not because the applicant did not intend to pursue his application (Article 37 § 1 (a)) or because the matter had been resolved (Article 37 § 1 (b)) or, lastly, because a friendly settlement had been reached (Article 39).

The majority based their decision on the following reasoning: the terms of the Turkish Government's unilateral declaration, which the Court carefully examined, enabled it to reach that conclusion on the basis of the nature of the admissions contained in the declaration and the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed. Moreover, since the declaration specified the nature and extent of the obligations incumbent on the respondent Government in the event of violations such as those which have been alleged, the Court was satisfied that respect for the human rights guaranteed by the Convention and its Protocols does not require it to continue the examination of the applications under Article 37 § 1 *in fine*.

I come close to sharing the views expressed by my colleague, Judge Loucaides, in his dissenting opinion. In my view, striking out applications "for any other reason" is similar to what is sometimes called, in French administrative proceedings, discontinuation for the sake of expediency or convenience (*non-lieu expédient ou de commodité*). It must not therefore be abused. The Court usually has recourse to it in narrowly defined cases, such as where the applicant dies and the proceedings are not continued by his heirs (see *Gladkowski v. Poland*, judgment of 14 March 2000) or where proceedings are taken over by a legal entity which does not, in that particular case, have a legitimate interest allowing it to pursue the proceedings (see *S.G. v. France*, judgment of 18 September 2001). However, in the circumstances of the present case, and without calling into question the good faith and sincerity of the respondent State, I am very concerned by the unilateral nature of its undertakings. I also have some difficulty in fully reconciling the precedent thus established with that relating to loss of victim status which presupposes that the State acknowledges the violations and then fully compensates them (see, for example, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238).

I have, however, voted with my colleagues in the majority in order to avoid breaking ranks. These two cases are identical to those arising out of the *Akman v. Turkey* and *Aydın v. Turkey* applications, which were dealt with in an identical fashion. The judgments, voted unanimously, are dated 26 June and 10 July 2001. I wished to express a number of reservations, however, which are of a general rather than a specific nature.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the decision of the majority to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention.

The decision of the majority was based on the declaration by the respondent Government, the terms of which are set out verbatim in paragraphs 29 and 30 of the judgment. Through that declaration, the respondent Government offer to pay "*ex gratia* to the applicant Mr Toğcu the amount of 70,000 pounds sterling [...] [in respect of] the application registered under no. 27601/95." According to the same declaration this amount will be payable within three months from the date of delivery of the judgment by the Court and will constitute the final resolution of the case. The Government declare that "it is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention". However, the Government do not accept any responsibility for the violation complained of and do not undertake to carry out any investigation in respect of the disappearance of the applicant's son, which was the subject-matter of the application. Instead, the Government undertake in the declaration generally "to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention". However such an "undertaking" does not add anything to the already existing obligation of the respondent Government under the Convention. The Government conclude with the following perplexing sentence:

> "The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context."

This sentence is perplexing, in my opinion, because it seems to imply that the Government consider the Committee of Ministers as a more appropriate mechanism for ensuring improvements in cases like the one in respect of which the declaration is made ("in this and similar cases") than an examination of "this and similar" cases by the Court. The sentence signifies a preference for a political organ rather than a judicial one. In this respect it may be useful to point out that this political organ has until now been showing a noticeable leniency towards breaches of the Convention by the respondent Government. It is sufficient to mention only the fact that a

substantial number of judgments of the Court against the respondent Government, of which the Committee of Ministers are obliged under the Convention to supervise execution, remain unexecuted in circumstances that imply at least a certain tolerance and an ineffective monitoring on the part of the Committee of Ministers. It is this organ that the respondent Government consider "appropriate" for ensuring improvements in respect of the investigations into alleged disappearances of persons "such as in the present case".

In the circumstances, the applicant's request to the Court, as set out in paragraph 31 of the judgment, to reject the Government's proposals is understandable. We are therefore dealing with a request for striking the case out of the list on the basis of a unilateral declaration of the Government which has been rejected by the applicant for reasons that I personally find reasonable.

The Court examined the matter under Article 37 § 1 (c) and decided to strike the case out of its list on the ground that "it is no longer justified to continue the examination of the application", having found at the same time that respect for human rights does not require the examination of the application. I find it useful to repeat here the main part of the reasoning of the Court (paragraphs 36 and 37 above):

> "The Court has examined carefully the terms of the respondent Government's declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).
>
> Moreover, the Court is satisfied that respect for human rights as defined in the Convention and the protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*). The Court notes in this regard that it has specified the nature and extent of the obligations which arise under the Convention for the respondent Government in cases of alleged disappearances...".

The Court was influenced by

(a) the nature of the admissions contained in the declaration;

(b) the scope and extent of the various undertakings referred to in the declaration; and

(c) the amount of compensation proposed.

As regards (a) it has already been pointed out that the Government do not admit any responsibility.

As regards (b) it has already been pointed out that the Government give no undertaking to investigate the alleged disappearance in this case.

As regards (c) this concerns an offer of compensation which is not accepted by the other side, it was not determined by the Court and, more importantly, it cannot rectify a violation in a situation where the State has not taken reasonable measures to give an effective remedy in respect of the

relevant complaint through an appropriate investigation (cf. Donnelly and six others v. the United Kingdom, DR 4, at p. 78).

It is submitted that, in the circumstances of the case, the Court's conclusion is not convincingly reasoned. On the contrary, I fear that the solution adopted may encourage a practice by States - especially those facing serious or numerous applications - of "buying off" complaints for violations of human rights through the payment of *ex gratia* compensation, without admitting any responsibility and without any adverse publicity, such payments being simply accompanied by a general undertaking to adopt measures for preventing situations like those complained of, from arising in the future on the basis of unilateral declarations which are approved by the Court even though they are unacceptable to the complainants. This practice will inevitably undermine the effectiveness of the judicial system of condemning publicly violations of human rights through legally binding judgments and, as a consequence, it will reduce substantially the required pressure on those Governments that are violating human rights.

It is true that a solution similar to the one applied in the present case was adopted for the first time on 26 June 2001 in the case of Akman v. Turkey and was followed on 10 July 2001 in the case of Aydın v. Turkey. However, I believe that those cases do not constitute an insurmountable obstacle in the form of a well-established precedent of case-law that would prevent a different solution. I base this opinion on the following:

(a) Those cases do not establish any principle of law; they do not even decide the merits of the case; they only concern procedural decisions.

(b) Those cases can be distinguished from the present one. The case of Akman concerned an alleged instantaneous violation, i.e. murder, while the present case concerns an alleged continuing violation, i.e. disappearance of a person. The Aydın case concerned a disappearance of a person in respect of which an investigation was still being pursued at the time of the decision of the Court to strike the case out of the list.

(c) Departure from both decisions is justified for cogent reasons[1], namely to ensure more effective implementation of the obligations of the High Contracting Parties to the Convention through ceasing to strike cases out as a result of approving the method of compensation proposed by the respondent States on the basis of unilateral declarations unacceptable to the latter, like the one in the present case.

[1] In this respect see the article of Mr Luzius Wildhaber, now President of the European Court of Human Rights, "Precedent in the European Court of Human Rights" in the studies in memory of Rolv Ryssdal "Protecting Human Rights: the European Perspective", pp. 1529-1545 at pp. 1530-1531 (2000).