



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

FIRST SECTION

CASE OF N.Ö. v. TURKEY

(Application no. 33234/96)

JUDGMENT
(Friendly settlement)

STRASBOURG

17 October 2002

In the case of N.Ö. v. Turkey,

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

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr G. BONELLO,

Mrs N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mrs E. STEINER, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 30 March 2000 and on 26 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 33234/96) 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, N.Ö. (“the applicant”), on 13 September 1996.

2. The applicant, who had been granted legal aid, was represented by Mr Sedat Çınar, a lawyer practising in Diyarbakır. The Turkish Government did not designate an Agent for the purposes of the proceedings before the Court. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant complained under Articles 2 and 3 of the Convention that her husband, M.S.Ö., was tortured by members of the security forces and died in consequence thereof.

4. Following communication of the application to the Government by the Commission, the case was transferred to the Court on 1 November 1998 by virtue of Article 5 § 2 of Protocol No. 11 to the Convention.

5. The application was allocated to the Second Section of the Court (Rule 52 § 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 to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. On 30 March 2000, after obtaining the parties' observations, the Court declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

8. On 4 June 2002, after an exchange of correspondence, the Registrar suggested to the parties that they should attempt to reach a friendly settlement within the meaning of Article 38 § 1 (b) of the Convention. On 20 June and on 13 August 2002 the applicant and the Government respectively submitted formal declarations accepting a friendly settlement of the case.

THE FACTS

9. The applicant was born in 1960 and lives in the village of Altınakar, Diyarbakır, Turkey.

10. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The applicant's version

11. On 21 June 1993 the applicant's husband, M.S.Ö., was arrested in the hamlet of Dikmetaş (“*Kırkat*” in Kurdish) of the Ortaşar village (Çınar) by gendarmes from the Diyarbakır gendarme regiment (“*Alay Komutanlığı*”). Another person, C.G., was also arrested at the same time.

12. The applicant claims that on 21 June 1993 gendarmes searched their house between 4.00 a.m. and 8.30 a.m. Her husband was taken away in a jeep along with C.G. by gendarmes who had arrived by helicopter. The applicant maintains that one of the commanding officers had grey hair, was about 50 years old and was referred to as “Apo” by the gendarmes. Her husband and C.G. were taken to a wooded area outside the village. Her husband was stripped naked and strung up by his arms using the form of torture known as Palestinian hanging. The gendarmes fastened a rope to his genitals and pulled on it. Electric shocks were administered to his body and he was subjected to torture until 5.00 p.m. Her husband's condition deteriorated. He was taken to Çınar Gendarme Station

13. The search of her house ended at 7.30 p.m. She and her children were ill-treated during the time of the search.

14. The arrest record drawn up by the gendarmes, dated 21 June 1993, mentioned that the gendarmes had, in a joint operation involving members of the Diyarbakır Provincial Central Gendarme Command and Çınar District Gendarme Command, surrounded Dikmetaş hamlet following reception of information to the effect that the inhabitants had been providing assistance to and sheltering PKK militants. M.S.Ö. and C.G., despite the

warning issued, had resisted arrest and tried to flee. The report indicated that the security forces had to use force to arrest and take them into custody. According to the report, M.S.Ö. and C.G. had been arrested for questioning and with the aim of bringing them before a judicial authority. The report was signed by M.S.Ö. and C.G. as well as by two team commanders and two operations commanders.

15. On 22 June 1993 M.S.Ö. was taken to the emergency unit of Diyarbakır State Hospital. A medical report dated 22 June 1993 referred to the following marks having been found on M.S.Ö.'s body: three bruises, each 10 cm long, on the back of his arm; bruises on his back; a rash and bruise on the joint of his collarbone. The report was signed by Dr Uğur N. Yüce. M.S.Ö. was put in the urology unit, in the section reserved for detainees.

16. The applicant's husband was released from the hospital and taken to Diyarbakır gendarme regiment headquarters. His questioning continued under medical control. His health deteriorated and he had to be transferred back to the hospital. In a letter dated 4 July 1993 Hakan Polat, a senior officer, requested the Chief Medical Officer of Diyarbakır State Hospital to admit the applicant for treatment.

17. On 5 July 1993 the public prosecutor attached to the Diyarbakır State Security Court went to the detainees' unit in the Diyarbakır State Hospital. A report drawn up on the same day referred to the fact that M.S.Ö. could not speak and that he had traces of blood around his mouth. The public prosecutor's report indicated that no statement could be taken from M.S.Ö.

18. On 5 July 1993 M.S.Ö. died at Dicle University Hospital.

19. On 5 July 1993 two doctors carried out an autopsy on M.S.Ö.'s body in the presence of the prosecutor attached to the Diyarbakır State Security Court. The prosecutor drew up a detailed report. The doctors' findings in the report mentioned, among other injuries, fractures with bruising on three of the deceased's ribs. Bruises were also found on his arms and buttocks as well as slight bruising and lesions to his right foot. Blood was found in the deceased's mouth. An examination of the deceased's skull and brain revealed internal bleeding. The doctors requested that an examination of a number of parts of M.S.Ö.'s body including his heart, pancreas, liver and brain be carried out by the İstanbul Forensic Medicine Institute.

20. On 6 or 7 July 1993 the religious leader (“*imam*”) of Ortaşar Village was called to the Çınar Gendarme Station and informed that M.S.Ö. “had become cancerous while in custody like all other P.K.K. sympathisers and had died”. The applicant claims that unknown persons telephoned her around the same time informing her that her husband had died.

21. On 8 July 1993 M.S.Ö.'s brother, Nafiz, submitted a petition to the Public Prosecutor's Office at the Diyarbakır State Security Court, in which he stated that he feared for his brother's life. On the same day the Public

Prosecutor's Office at the Diyarbakır State Security Court arranged for the issue of a burial licence and M. Ö.'s body was given to his family. The family was informed in the burial licence that a full autopsy had been carried out on the deceased.

22. On 22 July 1993 the prosecutor attached to the Diyarbakır State Security Court declared that he lacked jurisdiction to investigate M.S.Ö.'s death and transferred the case file to the Diyarbakır public prosecutor so that the latter could carry out a preliminary investigation.

23. On 8 December 1993, Burhanettin Aykenar, commander of Çınar Gendarmes Station, made a statement in respect of the death of M.S.Ö. He deposed that M.S.Ö. and C.G. had attempted to flee from the security forces and had to be restrained by force. They were brought to Çınar medical unit. Bruises were found on their bodies as a result of the application of force to effect their arrest. He stated that both men had been handed over to the Diyarbakır gendarme regiment following a medical check.

24. On 28 March 1994 the Diyarbakır gendarme regiment informed the Diyarbakır public prosecutor that the two gendarmes who had questioned M.S.Ö. had been killed in a confrontation with terrorists.

25. On 29 April 1994 Ender Köseoğlu, a gendarme officer attached to Çınar gendarme regiment, stated that force had to be used to detain 30 villagers on 21 June 1993. He stated that Sergeant Önder Pala and Corporal Yüksel Bayar had been in the interrogation team. The latter officers had identified three of the detainees as being members of the PKK. Two of the detainees, M.S.Ö. and N.T., were feeling unwell and he was ordered to transfer them to hospital on 22 June 1993. He stated that he handed over the third detainee, C.G., to Sergeant Önder Pala. M.S.Ö. remained in hospital until 26 June 1993.

26. At the conclusion of the preliminary investigation, the Diyarbakır public prosecutor accused the two gendarmes who had taken M.S.Ö. into custody of having caused the death of a third person through professional negligence. The prosecutor based his finding in particular on the report prepared by the Forensic Medical Institute which concluded that: "severe wounds had been found on the deceased's body and that death had resulted from cranial trauma provoking cerebral bleeding". In application of Article 96 of the Penal Code which provides that "the death of a suspect brings an investigation to an end", the public prosecutor, on 6 April 1994, issued a decision not to bring charges against the two gendarmes. The applicant only learned about the decision on 6 February 1996.

27. On 13 February 1996 the applicant challenged the public prosecutor's decision of 6 April 1994 before the President of the Siverek Assize Court. The President, on the basis of the file submitted to him, dismissed the applicant's challenge on 6 March 1996.

B. The Government's version

28. On 21 June 1993 the security forces from the Diyarbakır gendarme regiment carried out “the spring operation” in the Dikmetaş hamlet. The applicant's husband, M.S.Ö., was arrested together with another villager while trying to flee from the security forces. The gendarmes had to use force to apprehend them.

29. After their arrest and their statement concerning, *inter alia*, the discovery of a shelter measuring 4 by 3 metres, a gun and ammunition, M.S.Ö. was taken to the Çınar medical unit and then to the Diyarbakır State Hospital on 22 June 1993. He was put in the wing reserved for detainees. There he was questioned about, *inter alia*, his links with the PKK. The public prosecutor attached to the Diyarbakır State Security Court was informed about the incident.

30. M.S.Ö. was considered well enough to be questioned and was taken back into custody at the Diyarbakır gendarme regiment headquarters. However, his state of health deteriorated and he had to be transferred again to the Diyarbakır State Hospital on 4 July 1993.

31. On 5 July 1993 the prosecutor attached to the Diyarbakır State Security Court was unable to question M.S.Ö. on account of the latter's condition. On 5 July 1993 M.S.Ö. was transferred from the Diyarbakır State Hospital to the Dicle University Hospital, also in Diyarbakır. M.S.Ö. died there a few hours later.

32. On 5 July 1993 an autopsy was carried out on his body. Tissue samples were taken from the body and sent to the İstanbul Forensic Medicine Institute for analysis. In a report dated 17 September 1993, the Forensic Medicine Institute stated that M.S.Ö. had died from brain haemorrhage resulting from a blow on the head.

33. On 22 July 1993 the public prosecutor attached to the Diyarbakır State Security Court issued a supplementary decision of non-jurisdiction and sent the preliminary investigation file to the Diyarbakır Chief Public Prosecutor's Office. He noted that his Office lacked jurisdiction to deal with the matter and that the Diyarbakır Chief Public Prosecutor's Office should determine whether M.S.Ö.'s death had been caused by the gendarmes on duty at the time.

34. In a letter dated 27 November 1993 Arif Ekmen, the Çınar District Gendarme Commander, wrote to the public prosecutor informing him that he had identified two of the gendarmes who arrested M.S.Ö. on 21 June 1993, namely Hakan Polat, a senior officer and Burhanettin Aykenar, a sergeant. He stated that the names of other gendarmes involved could be obtained through the Provincial Central Regiment Command. Arif Ekmen confirmed that on 22 June 1993, M.S.Ö. was sent to the Provincial gendarme regiment headquarters, in Diyarbakır, for interrogation.

35. On 8 December 1993 Burhanettin Aykenar deposed that he and other gendarmes under the command of Hakan Polat went to Dikmetaş hamlet on 21 June 1993 at around five past midnight. He stated that he was the Central Station Commander of Ortaşar village (Çınar). When they entered Dikmetaş hamlet, two individuals began to flee and they gave chase. They had to be forcibly apprehended using a rifle butt. The arrestees showed them two shelters, where guns and documents were discovered. M.S.Ö. was brought to Çınar medical unit. A medical report noted bruising on M.S.Ö.'s body. The bruises had occurred as a result of the arrest of the accused. M.S.Ö. was held in Çınar gendarme regiment headquarters. A request was made to question M.S.Ö. about his involvement in PKK activities. M.S.Ö. was taken to the Provincial Regiment headquarters at Diyarbakır for questioning on 22 June 1993. It was later learned that M.Ö had died in Diyarbakır State Hospital. Burhanettin Aykenar denied that M.S.Ö. had been tortured at the time of his arrest. Force had been applied since M.S.Ö. had resisted arrest. Burhanettin Aykenar signed the arrest record as a unit commander.

36. Following a request for information made by the Office of the Public Prosecutor of Diyarbakır on 20 January 1994 and 8 March 1994 regarding the circumstances surrounding the death of M.Ö, Colonel Eşref Hatipoğlu replied in writing on 28 March 1994 stating that M.S.Ö. had been questioned by Sergeant Önder Pala and Corporal Yüksel Bayar of the Diyarbakır gendarme regiment. He affirmed that M.S.Ö. was brought to the hospital by Ender Köseoğlu. Colonel Eşref Hatipoğlu stated that Sergeant Önder Pala and Corporal Yüksel Bayar were killed in clashes with the PKK.

37. In the light of this information the Diyarbakır public prosecutor, on 6 April 1994, decided not to bring criminal proceedings against Sergeant Önder Pala and Corporal Yüksel Bayar of the Diyarbakır gendarme regiment. In his decision the public prosecutor stated as follows:

“Two PKK members, M.S.Ö. and C.G., were arrested by force by the Diyarbakır Gendarme regiment during the “Spring operations” launched after 20 June 1993. After they had given statements about two shelters where a gun and PKK-related documents were found, it was decided to broaden the investigation and they were brought from Çınar to Diyarbakır by the accused gendarme officers who were assigned to interrogation team. There the accused assaulted M.S.Ö. As a result of the assault M.S.Ö. was twice transferred to hospital and died after the second transfer. An autopsy was carried out on his body. Tissue samples were taken from and sent to the İstanbul Forensic Medicine Institute for analysis. In its report the Forensic Medicine Institute stated that M.S.Ö. had died from a brain haemorrhage as a result of a head injuries. It is understood that the two accused gendarme officers committed the offence.

It has been decided to issue a decision to discontinue the criminal proceedings (*Takipsizlik kararı* - non-prosecution decision) under the provisions of Article 96 of the Criminal Code having regard to the

correspondence of Gendarmerie Commander Office dated 28 March 1994 and numbered 0621-270-94/2418 and additional correspondence dated 30 May 1993 and 20 July 1993 in which the Gendarmerie Commander Office has stated that the accused Önder Pala was wounded in a confrontation with PKK members in the region of Neygöl hill (Diyarbakır-Kulp) on 28 January 1994 and died on 17 February 1994 in Diyarbakır Military Hospital. Furthermore, Yüksel Basar was killed in a confrontation with the PKK in Diyarbakır-Lice on 22 October 1993.”

THE LAW

38. On 13 August 2002 the Court received the following declaration from the Government:

“1. The Government regret the occurrence of individual cases of death resulting from the use of force inflicted in contravention of Article 2 of the Convention as in the circumstances of M.S.Ö.'s death notwithstanding existing Turkish legislation and the resolve of the Government to prevent such actions. It is accepted that the use of such force and/or the failure to protect the lives of the detainees resulting in death such as in the instant case constituted a violation of Article 2 of the Convention. The Government undertake to issue appropriate instructions and adopt all necessary measures to ensure that the right to life - including the obligation to carry out effective investigations - is respected in the future. It is noted in this connection that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of deaths in circumstances similar to those of the instant application as well as more effective investigations.

2. I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to the applicant an all-inclusive amount of EUR 100,000 (one hundred thousand euros). This sum, which also covers legal expenses connected with the case, shall be free of any tax that may be applicable and be paid in euros, to be converted into Turkish liras at the rate applicable at the date of payment, to a bank account named by the applicant and/or his duly authorised representative. This sum shall be payable within three months from the date of the notification of the judgment delivered by the Court pursuant to Article 39 of the European Convention on Human Rights. This payment will constitute the final settlement of the case.

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

5. Finally, the Government undertake not to request the reference of the case to the Grand Chamber pursuant to Article 43 § 1 of the Convention after the delivery of the Court's judgment.”

39. On 20 June the Court received the following declaration by the applicant:

“I note that the Government of Turkey are prepared to pay me *ex gratia* the sum of EUR 100,000 (one hundred thousand euros) with a view to securing a friendly settlement of my application registered under no. 33234/96. This sum, which is to cover any pecuniary and non-pecuniary damage as well as legal costs and expenses connected with the case, shall be paid in euros, to be converted into Turkish liras at the rate applicable at the date of payment, to a bank account named by me. The sum shall be payable, free of any taxes which may be applicable, within three months from the date of the judgment delivered by the Court pursuant to Article 39 of the European Convention on Human Rights.

I accept that offer and consequently waive all other claims against the Republic of Turkey in respect of the matters that were at the origin of the application. I further undertake not to request the reference of the case to the Grand Chamber under Article 43 § 1 of the Convention after the delivery of the Court's judgment.”

40. The Court takes note of the agreement reached between the parties (Article 39 of the Convention). It is satisfied that the settlement is based on respect for human rights as defined in the Convention or its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

41. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to strike the case out of the list;
2. *Takes note* of the parties' undertaking not to request a rehearing of the case before the Grand Chamber.

Done in English, and notified in writing on 17 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

C.L. ROZAKIS
President