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

THIRD SECTION

CASE OF SADIK ÖNDER v. TURKEY

(Application no. 28520/95)

JUDGMENT

STRASBOURG

8 January 2004

FINAL

08/04/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sadık Önder v. Turkey,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 4 December 2003,

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

PROCEDURE

1. The case originated in an application (no. 28520/95) 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, Mr Sadık Önder ("the applicant"), on 28 August 1995.

2. The applicant was represented by Mr M.S. Okçuoğlu, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Convention institutions.

3. The applicant alleged that he was subjected to ill-treatment in police custody in breach of Article 3 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 allocated to the Third 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. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr M. F.Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 29 June 1999, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is born in 1969 and lives in Istanbul.

A. Treatment in police custody

10. On 9 July 1994 the applicant with fourteen other people was taken into police custody by the Anti-Terror branch of the Istanbul Security Directorate on suspicion of being a member of the PKK.

11. The applicant alleges that he was ill-treated and tortured in the police car on the way to the Istanbul Security Directorate and during his detention there. He claims that during his interrogation, he was blindfolded and stripped naked. He was strung up by his arms in the form of torture known as "Palestinian hanging". His head was hit against the wall and he was held parallel to the ground on his hands and feet. He was also electrocuted, threatened and insulted.

12. The applicant further claims that he was coerced into signing a statement in which it was stated that he had worked for and had been involved in the terrorist activities of the PKK. After having signed the statement prepared by the police, he was allegedly kept in custody for one more week so that the signs of the ill-treatment to which he had been subjected would disappear. During that week, he claims that a police officer came to his cell at regular intervals and applied a medicine on his wounds in order to cover up the signs of ill-treatment. He claims that due to this medicine his scars healed very quickly.

13. The Government submit that the applicant was questioned by the police on 15 July 1994. They have produced a copy of a statement signed by the applicant on this occasion.

14. On 22 July 1994 the applicant together with 14 other detainees was examined by Dr T. Taner Apaydın at the Istanbul Forensic Medical Department. According to the medical report prepared by Dr Apaydın, the applicant showed no signs of ill-treatment.

15. On 23 July 1994 the applicant was brought before the Public Prosecutor at the Istanbul State Security Court. According to the records of this hearing, the applicant admitted that he had been involved with PKK

related activities in the past and had been convicted on that account by the Erzincan State Security Court in 1989. He denied having any current relation with the PKK. He stated that the police invented the statement taken in custody.

16. The applicant alleges that he was brought to the Public Prosecutor at the Istanbul State Security Court together with the other detainees on 22 July 1994 but that the Public Prosecutor did not take his statement because he had complained to the prosecutor that he had been tortured in police custody. He further stated that because he told to the prosecutor that he was subjected to torture, he was once again tortured by the police. The Government contested this argument and stated that the applicant was brought for the first time before the Public Prosecutor on 23 July 1994.

17. The applicant alleges that he told the prosecutor on 23 July 1994 of his subjection to torture but that his statement was not taken into consideration by the Public Prosecutor and was not written down on the hearing records.

18. The applicant further stated that he was not seen by a doctor before being questioned by the Prosecutor on 23 July 1994 and consequently he does not have any medical evidence concerning the torture he was subjected to on 22 July 1994.

19. On 23 July 1994 the applicant was also brought before the Judge at the State Security Court. He denied the allegations against him and stated that he was not a member of the PKK. He further declared that the statement he gave to the Public Prosecutor was true. The Judge ordered his detention on remand.

20. The applicant claims that he told the State Security Court Judge that he had been tortured in police custody and that he had explained this to the Public Prosecutor at the State Security Court. However the case files show that the applicant did not claim to have being subjected to ill-treatment neither before the Public Prosecutor nor the State Security Court.

21. While the applicant was held in detention in prison, he requested to see a doctor. The prison doctor prepared a provisional report for the applicant and he was sent to the Eyüp Forensic Medical Department for a medical examination.

22. On 22 August 1994 the medical report prepared by the institution and signed by the medical expert stated that the applicant complained of widespread pain on his back, right arm and on both of his legs but that he could not find any signs of traumatic lesions. The medical report further stated that the complaints were not life threatening but accorded him one day's sick leave.

23. On 15 June 1995 the Chamber of Medicine of Istanbul (*Istanbul Tabib Odası*), in the context of disciplinary proceedings following complaints, found that Dr T. Taner Apaydın had concealed signs of torture in the medical examinations conducted on several persons between

3 February and 7 October 1994 and he was, therefore, prohibited from practising as a doctor for six months.

B. Criminal proceedings against the applicant

24. On 12 December 1994 the Public Prosecutor at the Istanbul State Security Court filed an indictment with the court, requesting that the court to apply Articles 168 §§ 1 and 2 and 169 of the Criminal Code and Section 5 of the Prevention of Terrorism Act.

C. Criminal proceedings against the policemen

25. On 13 September 1994 the applicant filed a complaint with the Istanbul Public Prosecutor's Office. He alleged that he had been ill-treated while in police custody and requested that proceedings be instituted against the police officers. He submitted the medical report of 22 August 1994 as proof of his ill-treatment.

26. On 11 January 1995 the Istanbul Public Prosecutor, referring to the medical report of the Eyüp Forensic Medical Department, gave a decision of non-prosecution on account of lack of evidence.

27. On 8 February 1995 the applicant filed an objection with the Beyoglu Assize Court against the Public Prosecutor's decision.

28. On 7 March 1995 the Beyoğlu Assize Court dismissed the applicant's objections.

II. RELEVANT DOMESTIC LAW

29. The Court refers to the overview of the domestic law derived from previous submissions in other cases, in particular *Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000, *Tepe v. Turkey* (dec.), no. 31247/96, 22 January 2002, and *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant alleges that he was ill-treated in police custody in breach of Article 3 of the Convention which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Alleged ill-treatment of the applicant in police custody

31. The applicant alleges that he was subjected to torture while in police custody. He claims that during his interrogation, he was blindfolded and stripped naked. He was strung up by his arms in the form of torture known as "Palestinian hanging". His head was hit against the wall and he was held parallel to the ground on his hands and feet. He was also electrocuted, threatened and insulted.

32. He further alleges that he was also subjected to torture on 22 July 1994 after returning from the Public Prosecutor's Office.

33. The Government claims that the allegations of torture and ill-treatment are unfounded.

34. The Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

35. The Court asserts that the allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161 *in fine*).

36. In the instant case a number of facts raise doubts as to whether the applicant, as he maintained, suffered treatment prohibited by Article 3.

37. The Court notes that the applicant did not invoke the ill-treatment he was subjected before the State Security Court and the Public Prosecutor. Although the applicant claims that he had complained of ill-treatment he had allegedly suffered before these instances, the case file does not disclose any evidence supporting his allegations.

38. The Court further notes that the medical report dated 22 August 1994 does not contain evidence of ill-treatment apart from the subjective complaints of the applicant. The Court further notes that the applicant was brought before the doctor for a medical examination after he had requested it and that the applicant filed a petition with the Public Prosecutor complaining of ill-treatment for the first time on 13 September 1994.

39. As for the findings of the first medical report, the Court considers in light of the developments concerning the doctor who prepared the report, it cannot be taken into consideration as credible evidence concerning the applicant's health at that time. However the Court notes that the applicant did not question the reliability of the report before the authorities nor demanded to see another doctor to examine him.

40. In conclusion, since the evidence before it does not enable the Court to find beyond all reasonable doubt that the applicant was subjected to treatment that attained a sufficient level of severity to come within the scope of Article 3, the Court considers that there is insufficient evidence for it to conclude that there has been a violation of Article 3 on account of the alleged torture.

B. Alleged inadequacy of the investigation

41. The Court considers that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation.

42. As in the case of Article 2, such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita*, cited above, § 119). Otherwise, the general legal prohibition of torture and inhuman and degrading treatment or punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131).

43. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.

44. The Court notes that the Public Prosecutor started an investigation as soon as the applicant alleged that he was subjected to ill-treatment in police custody. However it appears from the case file that the Public Prosecutor relied only on the medical report of 22 August 1994 to conclude that the applicant was not subjected to ill-treatment in police custody. Taking into consideration that the applicant was in custody for fifteen days and that the medical report was dated nearly one month after the applicant was taken into custody, the Public Prosecutor could not be considered to have conducted an effective investigation into the allegations of the applicant making sure that the latter had the opportunity to participate in the process. The case file does not reveal whether the Public Prosecutor took the testimony of the applicant, the policemen nor any other possible witnesses.

45. In the light of the above, the Court concludes that the applicant's claim that he was ill-treated in police custody was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

46. The Court therefore considers that there has been a violation of Article 3 on this regard.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed a total of 10,523,520,000 Turkish Liras (TRL) of pecuniary damage and 500,000 French Francs of non-pecuniary damage, equivalent to 6,219 and 76,224,31 euros (EUR) respectively.

49. The Government did not submit any observations on these claims.

50. The Court considers that the applicant's claims in respect of pecuniary damage are unsubstantiated.

The Court accepts that the applicant suffered non-pecuniary damage, such as distress and frustration resulting from the inadequacy of the investigations concerning his alleged ill-treatment. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

51. The applicant claimed a total of 10,000 German Marks equivalent to EUR 5,112,92 for fees and costs in the preparation and presentation of his case before the Convention institutions.

52. The Government did not submit any observations on this claim either.

53. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (see, as a recent authority, *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002

54. Making its own estimate based on the information available, the Court awards the applicant in respect of costs and expenses EUR 2,500.

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. *Holds* that there has been a violation of Article 3 of the Convention in that no effective official investigation into the allegations of ill-treatment was held;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention,
      (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 January 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Registrar	Georg RESS President