



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

FOURTH SECTION

CASE OF NURAY ŞEN v. TURKEY (No. 2)

(Application no. 25354/94)

JUDGMENT

STRASBOURG

30 March 2004

FINAL

30/06/2004

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 Nuray Şen v. Turkey,

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

Mrs V. STRÁŽNICKÁ, *President*,

Mr J. CASADEVALL,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 9 March 2004,

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

PROCEDURE

1. The case originated in an application (no. 25354/94) 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 of Kurdish origin, Mrs Nuray Şen ("the applicant"), on 4 April 1994.

2. The applicant, who had been granted legal aid, was represented by Professors F. Hampson and K. Boyle of Essex University, England, succeeded by Mr T. Fisher, a solicitor practising in Colchester, assisted by Ms A. Reidy. Mr Fisher was also assisted by Mr M. Şakar, Mr O. Baydemir, Mr R. Yalçındağ, Mr C. Aydın and Mr K. Sidar, lawyers practising in Diyarbakır, and various lawyers who had worked with the Kurdish Human Rights Project in London. The Turkish Government ("the Government") were represented by various Agents, in particular Mr B. Çağlar and Mr M. Özmen.

3. The applicant alleged that her husband had been abducted and murdered by State officials in 1994, and invoked Articles 2, 3, 6, 13 and 14 of the Convention.

4. The application was declared admissible by the Commission on 5 March 1996. Delegates of the Commission then took oral evidence at a hearing in Ankara between 16 and 18 June 1998. The case was transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Fourth 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 for 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 F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

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

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1951 and, at the time of lodging her application, lived in Nizip, Gaziantep, Turkey. She now lives in Paris, having apparently been granted asylum in France. The applicant stated that she made the application not only on her own behalf but also on behalf of her daughter and deceased husband. The case concerns the applicant's allegations that her husband, Mehmet Şen, was abducted, tortured and killed by members of the security forces.

9. The facts surrounding the death of Mehmet Şen, are in dispute between the parties.

10. The facts as presented by the applicant are set out in Part A below. The facts presented by the Government are contained in Part B. The witness evidence taken by Delegates of the Commission at a hearing in Ankara is summarised in Part C. The summary of the other evidence submitted by the parties, in documentary form, which the Court considers relevant is to be found in Part D.

A. The applicant's original submissions on the facts

11. The applicant's husband, Mehmet Şen, was a Turkish national of Kurdish origin. He was an active member of the Democracy Party (the "DEP" Party) in Turkey until it withdrew from local elections. He had been the Party's candidate for the post of the Mayor of Ayran (Birecik, Şanlı Urfa) in the 1994 local elections.

12. Throughout his involvement with the DEP, Mehmet Şen was followed and threatened by plain-clothed police and this continued after the withdrawal of his candidacy. On 25 March 1994 Mehmet Şen informed the

applicant that he was not being followed by the usual plain-clothed policemen but by other people whom he said might be “hit-men”.

13. On 26 March 1994 at approximately 5 p.m., two plain-clothed policemen had a drink at the Çağdaş café in Birecik, which was owned by Mehmet Şen and Rasim Ağpak. At approximately 7 p.m., a Doğan SLX car (registration number 34 PLT 30) blocked the door of the café. Three plain-clothed persons entered, leaving the car engine running with a fourth person remaining in the vehicle. One of the three persons asked Rasim Ağpak whether he was Mehmet Şen. When he answered negatively, the person approached Mehmet Şen, who confirmed his identity and showed his identity card. Before the nine people in the café, the abductors stated that they were plain-clothed police who were there to take Mehmet Şen to the Security Directorate. Mehmet Şen was grabbed by the arms and taken away in the waiting car. It was later ascertained that a second car with four persons inside had left with the Doğan SLX vehicle.

14. Upon hearing the news of the abduction, the applicant contacted, *inter alia*:

(a) the Nizip Anti-Terrorism Department, who denied holding Mehmet Şen or any knowledge of the abduction;

(b) the Gaziantep Security Directorate who also denied all knowledge; and

(c) the Gaziantep Branch of the Human Rights Association, with a request that they look into the matter.

15. Other persons also contacted the Gaziantep Security Directorate on the applicant’s behalf, but were told that Mehmet Şen was not in custody.

16. On 28 March 1994 the applicant applied to the Nizip Prosecution by way of petition, reporting that Mehmet Şen had been abducted.

17. On 30 March 1994 an unknown person telephoned the “Özgür Gündem” newspaper and the Gaziantep Branch of the DEP, saying that Mehmet Şen’s body was at the Gaziantep State Hospital. The applicant went to the hospital and, on examining the corpse, concluded that her husband had been killed under torture. She saw the body with the right eye gouged out, the right side of the head crushed to pieces, a broken right arm, broken fingers, marks of blows to the body, and a bullet wound to the head and one to the neck, with no traces of blood, implying that the shots had been fired after death.

18. An autopsy report concluded that there was a bullet wound to the left side of the chest, a bullet wound above the right eyebrow, fired at almost point blank range, exiting the body from the back of the head, a bullet wound to the left cheek, fired at a distance of 95 cm, which had travelled through the body and lodged in the rib cage, that there were no other wounds, blows to the body or head, and that death had been caused by the bullet to the head.

19. On 31 March 1994 the applicant and the DEP Member of Parliament for Siirt, Naif Güneş, met the representative of the Governor of Gaziantep. The Gaziantep Security Director and the Provincial Gendarmes Commander were also present. The Gendarmes Commander said that the body of Mehmet Şen had been found by a shepherd near the village of Karpuzkaya in the Şehit Kamil District of Gaziantep, and that the gendarmes had collected the body. The State Prosecutor, Naci Ayaz, gave the applicant the same information. He also stated that the body had had no identity card on it, and therefore the autopsy report was headed “unidentified body”.

20. However, the applicant was informed that a person at the hospital had witnessed four plain-clothed policemen take Mehmet Şen’s body to the hospital morgue on the night of 29 March 1994.

21. On 13 April 1994 the Gaziantep Branch of the Human Rights Association, on behalf of the applicant, made an application to the Governor of Gaziantep and the State Prosecution. On 22 April 1994, the Governor replied that it had not been possible to determine any suspect or suspects but that the inquiries were continuing. The State Prosecution also indicated that the inquiry into the death was continuing.

22. The applicant was not satisfied with the inquiries and the answers she had been given. The official information she had received was allegedly inconsistent with her own. She therefore continued contacting the State for answers. She was informed on 26 May 1994 by the State Prosecutor that there had been no developments.

B. The Government’s original submissions on the facts

23. According to the statements of Osman Özer, Durmuş Kaplan, Maksut Yıldırım, Rasim Ağpak and Abit Şahin, who had been present when Mr Şen was abducted on 26 March 1994, three people entered the café where Mehmet Şen was playing cards. One of them asked where he could find Mr Şen. When Mehmet Şen presented himself, he was asked to show his identity card. Then the person in question came closer to Mr Şen and showed him a card, the details of which the witnesses could not see. Osman Özer and Maksut Yıldırım also stated that the persons who came into the café had not openly presented themselves as plain-clothed policemen, so they could not say for certain that they were. Rasim Ağpak stated that Mehmet Şen had not asked any questions or resisted the abductors. It was as if he had known them.

24. On 29 March 1994 Mehmet Şen’s body was found near the quarry of Karpuzkaya on the Kahramanmaraş-Gaziantep highway construction site. On the same day an autopsy was carried out. The autopsy report concluded that death had resulted from a fractured skull, the destruction of the cellular tissues of the brain and an internal haemorrhage due to a bullet wound. There were no signs of assault or torture.

25. The Nizip Public Prosecutor started an investigation into the killing of Mehmet Şen. On 18 May 1994 a decision of non-jurisdiction was issued and the file was sent to the Gaziantep Public Prosecutor. According to the preliminary findings, Mehmet Şen had not been taken into custody by the security forces. The car in which he was driven away carried a false registration number. The investigation was still pending in June 1996.

C. The oral evidence

26. The facts of the case being in dispute between the parties, three Delegates of the Commission took evidence in Ankara between 16 and 18 June 1998. The applicant appeared before the Delegates, as did ten other witnesses for one or other party. Certain other witnesses had been summoned but failed to appear. The evidence of those who attended the hearing may be summarised as follows:

1. Nuray Şen

27. Mrs Şen was born in 1951 and had been married to Mehmet Şen since 1971. She had been a teacher and he ran the Çağdaş coffee house in Nizip, owned by his brother. He had had no personal enemies or debts. Nor had he been involved in any vendetta.

28. Mr Şen became politically active around 1991, helping to create the HEP Party and the DEP Party in 1992. The DEP withdrew from the 1994 local elections due to the intimidation of its members (threats, detention and murders).

29. Her husband had been a leading member of DEP and, when he stood as a candidate for the post of the Mayor of Ayran in early 1994, he was threatened by the Gendarmes Station Commander of that constituency (who may have been called Sergeant-Major Orhan), and regularly picked up by the police for questioning. He was so intimidated that he resorted to carrying a licensed gun and rarely went out alone. He was taken to the police station many times and harassed. He sold the gun eventually as he was detained several times at night with a view to ascertaining whether the gun had been involved in incidents. However, this was just part of the harassment to which he was subjected.

30. Two days before he was abducted, Mr Şen told his wife that he was being followed by hit-men, men who were not his previous surveillance officers. He had been alerted to this possibility by an acquaintance who had been detained and interrogated about Mr Şen, and about whom the interrogators had said that Mr Şen would be “done away with”. Some seven people had been killed in the recent past by unknown perpetrators because of their DEP affiliation and/or membership of the Kurdistan National Assembly. These hit men were not recognised by Mr Şen, who had known

most of the local policemen. They were of medium height and able-bodied, carrying radios and guns. Mrs Şen had understood her husband to mean that they were contra-guerrillas operating under State authority, as confirmed in the later Susurluk report¹.

31. On 16 March 1994 Mrs Şen was informed of her husband's abduction 5 minutes after its occurrence by Osman Özer, one of the café's employees. Mr Özer told her that two strangers had been in the café for tea. They seemed tense, made a telephone call and left. Then a Doğan SLX car (registration number 34 PLT 30) stopped in front of the café, blocking the door. Of the four unknown people in the vehicle, one stayed in the driver's seat with the engine running, another, carrying a gun and a radio, waited at the door. That man was well dressed and middle-aged. Two others, casually dressed, strong looking and with apparent special training, walked towards Rasim Ağpak, who looked rather like Mr Şen, and then moved on to Mr Şen, who identified himself. The two flashed identity cards at the people in the café. The armed man at the door spoke into his radio, "OK, Sir, we've got him", and then said to Mr Şen, "You're coming with us to police headquarters. We have business with you." Mr Şen tried to ask questions but was dragged towards the door by the two men, holding him under his armpits. He was put in the back of the car, which drove off immediately. Despite the shock and panic of the people in the café, they managed to note down the registration number of the car.

32. These matters were discussed over and over again in the following days with Osman Özer, Rasim Ağpak, Maksut Yıldırım and Durmuş Kaplan because Mrs Şen wanted to learn as much as possible about the details of the incident. It was during such discussions with others that she learnt that another car, with four other plain-clothed people in it, drove off behind the first. She had not talked to Abit Şahin, who had also witnessed the events, as she did not know him.

33. The people in the café had said that the abductors had been policemen because of the gun, the radio, the identity cards they had shown everyone and what they had said. However, the café witnesses were taken from their homes in the ensuing days, at 2 o'clock in the morning, for interrogation, and statements were demanded of them. This had intimidated them.

34. Immediately after Mr Özer's call, Mrs Şen called the Nizip Police Headquarters and the Anti-Terrorism Department. They said that they had not taken him into custody and had no information about him. They confirmed that they would investigate. She tried contacting the Mayor, a

¹ "The Susurluk report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK ..." at the material time (*Kılıç v. Turkey*, no. 22492/93, § 68, judgment of 28 March 2000, ECHR 2000-III).

Member of Parliament, a delegation from Switzerland and DEP members, for them to make inquiries about her husband's fate.

35. Mrs Şen's inquiries with the Urfa, Gaziantep and Birecik Police proved fruitless. Travelling had been difficult at the time because of roadblocks and identity checks, through which only the security forces could pass easily. She nevertheless went to Adana after she had been told by a lawyer called Çağatay Özaslan that the car number plate was a forged one used by the Adana Police. The Public Prosecutor there was not helpful. He referred to a DEP Member of Parliament who had been killed and added, "What can I tell you? What can I do?" She was advised to go home and wait.

36. She then met a DEP member called Müskün Kurucu who told her that the Gaziantep branch of the DEP had telephoned to say that she should return home immediately. On her arrival, she was told that the body of her husband was in the morgue at the State hospital. The Gaziantep DEP and the newspaper "Özgür Gündem" had been telephoned by a well-spoken Turkish lady who had provided this information. Mr Şen's relatives were called and Mrs Şen met her sister-in-law and father-in-law at the hospital, where a crowd had gathered, cordoned off by the police.

37. Mrs Şen was not informed of the circumstances surrounding the recovery of the body. Subsequently, the Public Prosecutor of Gaziantep, Mr Naci Ayaz, informed her that the body had been found by the gendarmerie in the rural area of Karpuzkaya, in the Şehit Kamil District of Gaziantep. The body was unidentifiable, as it had no personal belongings or identity card on it, until the inner pocket of the suit, which the corpse was wearing, was ripped open to disclose Mr Şen's name, written by his tailor on the lining. However, Mrs Şen said that the suit had not been tailor-made, but had been a ready-to-wear purchase from a shop. She did not recall the gendarmes mentioning this matter to her. She therefore insisted on further information as to how her husband's body had been identified. She was told that her husband's belongings were to be kept for the investigation. A ring and watch were returned to her father-in-law in the autumn of that year.

38. The sight of her husband's body was horrible: the right side of his head had been smashed; his right eye was not in place; his right hand fingers and arm appeared broken, and there was a hole through his throat with no blood around it. She saw only one bullet wound. She insisted on having a copy of the autopsy report, which she was not given until long after the burial, and which did not correspond to her observations (such as its description of two other bullet wounds to the face).

39. Mrs Şen told the Public Prosecutor that her husband had been tortured, and insisted that a murder investigation be conducted. However, the Public Prosecutor would not listen to her and no statement or information was sought from her. As she persisted in visiting the Prosecutor regularly, a statement was taken from her a month later on 26 April 1994.

However, no progress whatsoever was made in the investigation, even years later.

40. After her husband had been killed, her house was put under constant surveillance, all visitors being recorded, and many asked by the policemen on duty why they were visiting such terrorists. Her 12-year-old daughter had been stopped as she was leaving school and asked by plain-clothed policemen whether her mother used her as a courier and what kind of papers she was carrying. She was so scared by this and the idea that she might be killed like her father, that she stopped attending school.

41. Mrs Şen received threatening telephone calls at that time. The caller said that he was a contra-guerrilla and that she would be killed too. She changed the locks on the doors to her home as her husband had had his house keys on him when he had been abducted. She and her daughter were away on 28 May 1994 when special policemen unsuccessfully tried to enter the house, according to the employees of the bakery situated on the ground floor of her building. The police then went to the house of Mrs Şen's friends where her daughter was staying and asked why they had taken in a terrorist's daughter. The father of that family was placed in custody for four or five days and interrogated about his relationship with the Şen family.

42. Mrs Şen was warned not to go home as there was a purple civilian car waiting at the corner of the street and that she would be taken away. Since then she has not returned home even to recuperate her belongings or souvenirs of her husband. Out of the same concerns, she was living separately from her daughter.

43. She was taken into custody on 10 November 1995 in Diyarbakır and interrogated for 11 days about her alleged membership of the PKK (the Kurdistan Workers' Party) (see her other application to the Convention organs – *Nuray Şen v. Turkey*, no. 41478/98, judgment of 17 June 2003).

2. Necip Şen

44. Mr Şen was an elderly gentleman, born in 1916. He was the father of the deceased Mehmet Şen. His son had not told him of his fears for his life prior to his abduction, nor of the difficulties he had faced as a politician. He had had no enemies whatsoever. Everyone liked him.

45. Mr Şen was informed the morning after the event that his son had been seized by policemen the evening before. He intuitively knew that he was dead. He went to Nizip. His daughter-in-law had gone to Adana in search of her husband. In Nizip he heard from Gaziantep that his son had been killed.

46. Mr Şen went to the Gaziantep Hospital to identify the body. He did not meet Nuray Şen there. He could not bear to look at his son's tortured corpse, but noticed that an eye was missing, apparently caused by a bullet wound, and that he had a fractured finger. His son's clothing was

bloodstained. Apparently he had been killed by the police, perhaps because of his candidacy for Mayor.

47. The police ordered him to remove the body, but he did not do so until the following day. A great crowd gathered. They took the body back to the village and buried it. There were police and gendarmes everywhere on alert, who behaved disrespectfully. Nuray Şen was at the funeral.

48. One or two months later he was called to appear before the Prosecutor and Judge to receive his son's personal possessions. He took the watch and ring but not the clothes which were soaked in blood. The only inquiry made later was by the Gendarmes Station Commander, Sergeant-Major Orhan, about Nuray Şen's stay with him for 9 or 10 days, which dates the gendarmes deliberately recorded wrongly.

3. Yusuf Şen

49. Mr Şen was born in 1970. He was no relation to the deceased Mehmet Şen and did not know him.

50. In May 1994 the witness was stopped at a police roadblock at the exit from Nizip, where everyone's identity was checked. One could not leave Nizip without going through this checkpoint. He was also given a body search and asked why he was carrying a copy of the newspaper "Özgür Ülke". He alleged that, because of his surname and the possession of the newspaper, he was taken into a field by three officers and tortured with beatings for two or three hours. In view of this experience, he could understand how Mehmet Şen had died.

4. Zekâi Aktaran

51. Mr Aktaran was born in 1958 and was a Public Prosecutor at Gaziantep a year after the events, from February to August 1995.

52. The investigation into the death of Mehmet Şen was opened by the Gaziantep Chief Prosecutor, Naci Ayaz. The file was subsequently transferred to him. It contained witness statements taken by the police, Mrs Şen's statement to the Prosecutor and the autopsy report, but provided no serious leads as to the perpetrator of the crime. There was no ballistic expertise of the bullet found in Mr Şen's body or of the empty cartridge found near his corpse. No evidence had been taken from police witnesses because none had been identified as being implicated in the death. The suggestion that Mr Şen had been involved in vendettas was not taken up as it had no serious basis.

53. On receiving the file, the witness found lacking an inquiry into the registration number of the car in which Mr Şen had been abducted – a honey-coloured vehicle with a registration containing the letters PLT, PUC or PUD. This inquiry revealed that either the car had had false number

plates or that the witnesses had been mistaken about the registration number. He did not seek other information following the evidence of the eyewitness Osman Özer as to a green car with the number 34 PVC 30 or 34 PVD 30. He was unaware of any significant discrepancies in the overall evidence on this or other points.

54. Mr Aktaran considered that he and his colleague had conducted a satisfactory investigation in the circumstances. Prosecutors do not need to take further evidence from people whose statements have already been taken by the police. At the outset he had been open-minded about the applicant's allegation that the security forces might have been involved in the incident. However, there had been nothing in the various statements taken to suggest that an inquiry into any particular officers was required. He placed a permanent search warrant on the file, so that the investigation would remain open for another 20-25 years should new evidence appear.

5. İsmail Kelleci

55. Mr Kelleci was born in 1973 and at the material time was working as a reporter for the Gaziantep office of the "Özgür Gündem" newspaper. He had been acquainted with Mr Şen.

56. In a general operation against the "Özgür Gündem" newspaper on 11 December 1993, the witness was taken into custody and held for some six days. On the fourth day of his interrogation, the name of Mehmet Şen was mentioned with a threat "to finish him off" or "do him in" along with two other named persons. Mr Şen's name was cursed. The witness thought that the remarks were intended to be passed on to Mr Şen. He later informed Mr Şen of this threat and advised him to take care.

57. The next time he saw Mr Şen was at the morgue. His newspaper had been telephoned with the news by a well-spoken Turkish lady. He had taken the call himself. When he saw the corpse, of which he took photographs, he remarked the strange position of the wrists, which looked fractured. He did not see the injured side of the face which was turned parallel to the table. No autopsy had been performed on the body at that stage.

58. On returning home from the morgue, he received an anonymous telephone call also threatening him with death.

59. Mr Kelleci accompanied Mrs Şen and a delegation to the Governor's office on 31 March 1994. Afterwards, the witness saw the Gaziantep Gendarmes Commander, Chief of Police Hüseyin Çapkın and the Deputy Governor. They stated that Mr Şen's death was possibly linked to gambling debts and had not been perpetrated by the State. He told them of the death threat he had personally received but it was not taken seriously. They persisted with the gambling debt theory and assured him that Mr Şen's murderer would be found.

6. Halil Alan

60. Mr Alan was born in 1958 and was a tailor by profession in Gaziantep, as well as the Chairman and District Leader of the DEP Party at the material time. He knew Mehmet Şen from their common political activities. In those days there had been many killings by unknown perpetrators which, together with the bombing of the Party's headquarters in Ankara, led to their withdrawal from the imminent elections.

61. Mr Şen came to his shop four days before his abduction and offered to repair his car. When driving it away, the witness noticed that Mr Şen was being followed by a white police car, a Renault Toros. This had happened to him too. The occupants were obviously plain-clothed policemen, whom he could identify if he saw them again. All Party members were under great pressure at that time. Even after the Party's withdrawal from the elections, it continued: he was taken into custody at midnight on 29 March 1994, four days after Mr Şen's abduction, and challenged about disseminating propaganda for the Welfare Party instead.

62. On the drive into custody, he was told that Mr Şen had "changed worlds", and that he would be "sent to the place where he is". He had understood the remarks to mean that Mr Şen was dead and that he would be killed too. (He had not heard of the recovery of Mr Şen's corpse at that stage, so he was not too sure.) Panicking, the witness claimed to have made certain telephone calls before he had been taken from his house, including a call to the normal police. He was then punched and, before the car left town, it turned round and deposited him at the police anti-terrorism department, some 220 meters from his house.

63. Mr Alan was held in police custody for 16 days. The custody records indicating a shorter period were incorrect. He was interrogated under torture. Mr Şen was not mentioned but Mr Alan was told that his Party was "finished in Nizip". He was subsequently remanded in custody for three months, accused of being, *inter alia*, a member of, and aiding and abetting, the PKK. On release, these charges were dropped and a remaining charge of possessing a gun without a licence was still pending.¹

¹ The Government averred, in a letter dated 23 September 1998 to the Commission, that there were no criminal proceedings concerning this witness before the State Security Court. However, in a subsequent letter dated 12 February 1999, the Government acknowledged that Mr Alan had been held in custody from 30 March to 18 May 1994. On 29 December 1998 Mr Alan had been sentenced by an assize court to one year's imprisonment and a fine of 2,600,000 Turkish lire for breaching Law No. 6136 on firearms and keeping false Turkish bank notes.

7. Doctor Zerrin Erkol

64. Dr Erkol was born in 1962. She had worked as an expert in forensic medicine and as a lecturer at the Medical Faculty of Gaziantep University since 1990.

65. Dr Erkol performed the autopsy on Mehmet Şen, whose identity was unknown at that time, as was that of his killer. Given the frequent blood feuds in the area, she suspected that the murder was another of that kind. She was struck by the fact that the victim had been blindfolded. Dr Ahmet Aslan, an unspecialised physician, assisted her at the autopsy. The Public Prosecutor, Naci Ayaz, whom the witness described as a meticulous and responsible professional, attended the procedure.

66. The body, fully clothed, was inspected on site and photographed by Dr Aslan and the Prosecutor. It was then taken to the hospital for examination. The bloodstains on the victim's jacket indicated that he had been shot whilst clothed and still alive. The clothes were removed at the morgue. Dr Erkol had been told prior to the autopsy, and then saw herself, that the name of Mehmet Şen had been written in biro on the inside pocket of the jacket, but that was insufficient evidence of identity. She did not follow the local news, so had not heard about Mr Şen's abduction. It was not her responsibility to identify the corpse.

67. The body was X-rayed to verify the placement of any bullets still lodged in it. The X-rays were not kept. There were two bullet wounds to the head, one bullet having remained lodged in the chest. They had caused extensive fracturing, brain damage and haemorrhaging, resulting in death, some 36 hours to four days before the autopsy. It would appear that Mr Şen had been killed two or three hours after his last meal. It was not possible to be more precise about the time of death given the limited facilities available in Gaziantep. The bullet which had entered and exited the skull had torn the victim's eye out. Neither the arms nor fingers had been fractured, but their distorted position would have been due to the onset of *rigor mortis*.

68. The remaining bullet would have been kept. It was probably of a wide calibre – 9 mm – fired from a short-barrelled gun, within a 95 cm range of the body. A ballistic analysis could prove valuable only if linked to a suspect weapon and a comparative study.

69. The body showed no trace of ill-treatment. In the absence of any obvious external signs or allegations of torture, no examination of the internal organs was conducted. However, the body had begun to decompose, presenting signs of post-mortem discolouring, distortion through *rigor mortis*, and, with the bullet injuries and autopsy incisions, was a very ugly sight. An untrained person might understandably misconstrue these elements as evidence of ill-treatment. Moreover, the body was not washed down after the autopsy, so it may have looked even bloodier. Washing was for the *hoca*, a religious leader on duty at the morgue, or the

family to perform. The hole in the throat seen by Mrs Şen would have been an autopsy incision.

70. People cannot enter the morgue without the Prosecutor's authorisation, other than perhaps a very close relative who might be allowed to view the body by the *hoca*. She could not tell from the poor photocopy of the photograph taken by the journalist, Mr Kelleci, purportedly of Mr Şen's corpse in the morgue, whether that photograph had been taken before or after the autopsy. However, judging by the position of one of the hands in the photograph, it was probable it had been taken before the autopsy had been conducted.

71. It transpired that the photographs provided by the Government at this point in the hearing, and in respect of which the witness noted several contradictions with the autopsy findings, were not of Mr Şen's corpse.

8. *Ökkeş Güdül*

72. Mr Güdül was born in 1947 and was the official chauffeur for the law courts. He also accompanied the Prosecutor at autopsies.

73. In the present case he had driven the Prosecutor to where the body had been found. It was on the road construction site but accessible by car, albeit very dusty because of the nearby sand quarries and frequent heavy lorry traffic. There were gendarmes at the scene, as well as a finger print expert, a clerk and a doctor. The Prosecutor made a record which included the position of the body. This procedure took about an hour. The body was lying on its back, clothed. There was a yellow, car-polishing cloth over its eyes. There was blood on the ground which had come from the back of the head. The body was transported by ambulance to the Gaziantep State Hospital morgue as an on-site autopsy was not possible. There had been no discussion as to its identity.

74. He was sure that no one saw the corpse at the morgue other than the officials concerned. He described the same X-ray, medical procedures and findings as Dr Erkol, having been present throughout. He did not recall the name of Mr Şen being inscribed inside his jacket. He had had no idea who the individual was. That was a police matter. For him it was just an ordinary incident. He did not recall being present when Mr Şen's father arrived at the morgue to identify the corpse, although his signature had been on the relevant document. The circumstances had been very distressing at the time.

9. *Selahattin Pekbalcı*

75. Mr Pekbalcı was born in 1956 and was a farmer by profession. He had been working on the road construction site, obtaining materials from the quarry using explosives. He had had a fright after one particular detonation when he spotted a corpse about 10 m away from him, which, without

approaching it, he reported to the Gendarmes Station of Aktoprak. He signed a statement to that effect at the station. The place where the body was found was accessible by car but was frequented mostly by lorries. He had been working with İbrahim Kilit at the time.

10. Mehmet Sünbül

76. Mr Sünbül was born in 1970 and was a Gendarmes Non-commissioned Officer. At the material time he was Station Commander at the Şehitarif Sub-station which was attached to the Central District Station in Gaziantep. His superior was Hüseyin Kanat, the District Gendarmes Commander.

77. Mr Sünbül had been at his station when MM Pekbalcı and Kilit reported the presence of a corpse on the Tekfen highway construction site. He took statements from them and then went with a unit of his men to the location. There they found the clothed body of a man, some 45-50 years old, lying on his back, with firearm wounds to his head and face. He checked the throat artery, confirming death, cordoned off the area and notified his superiors. Although there appeared to be two bullet wounds, only one cartridge was found, despite a thorough search of the immediate vicinity. He had no idea of the time of death or how long the body had been there. The person in charge of the criminal laboratory at the Provincial Gendarmes Headquarters took photographs. These would still be in the gendarmes' files if they had not been sent to the Public Prosecutor.

78. The next day he typed up a report from his notes about the corpse, which had not been identified as no identity papers had been found, although Mr Şen's name had been written on the jacket. The Prosecutor must have been shown that. He had not been aware of Mrs Şen's missing person report the day before. His station had not been informed of that. The abduction had taken place in Nizip and his station would not have been informed unless directly asked to make inquiries. He presumed that his superiors had conducted the necessary inquiries after he had told them about the name in the jacket.

79. Mr Sünbül sent the empty cartridge case, together with the person's ring and watch and the documents he had prepared, to the Public Prosecutor that day. The blindfold was also transmitted. It had the name and number of a petrol station on it, about which inquiries were made by his superior officer. No analysis was carried out of the soil near the corpse for the fibres of other clothes or the like. He could not recall whether casts were made of the footprints near the body.

80. The body's location had been accessible by car. The area consisted of compacted earth on which there were footprints. Only the site workers frequented the area and the body had been well hidden from view. There were no vehicle tracks within an 8 to 10 m perimeter of the corpse.

81. He did not recall whether there had been checkpoints in place on the day the body was found. Subsequently, he interviewed local villagers and site workers in an unsuccessful effort to gather information about the incident. It would have been possible to have transported Mr Şen to the site using secondary roads and thus avoiding the road-blocks on the main route. If he had been informed of Mr Şen's abduction, he would have instructed the checkpoints under his control to look out for him. At the checkpoint, people's identity cards would be checked manually against a list of wanted persons. The officers could also search vehicles and persons who were suspect.

11. Hüseyin Kanat

82. Mr Kanat was born in 1969 and he was the Şehit Kamil District Gendarmes Commander at the material time, with six stations under his command, including a large central station. The workload was very heavy.

83. After being notified of the incident by the Station Commander, he in turn notified the Provincial Gendarmes Commander and the regiment's operations centre. He accompanied the Public Prosecutor to the scene, which had already been secured on his instructions by the Station Commander. The regiment's team of crime specialists arrived in separate vehicles and carried out a systematic and detailed investigation. The photographs which they had taken should have been retained at the Gaziantep Central Gendarmerie. They would have been sent to the Public Prosecutor if requested. They were kept principally to assist in identifying the body and showing them to people assisting with the inquiries.

84. Mr Kanat confirmed Mr Sünbül's description of the corpse, the bullet wounds, the empty cartridge and the name written inside the jacket. The body seemed to have been in place for some time – perhaps 15 or 16 hours. He thought that a ballistic test had been made at a later date. The results would be in the Prosecutor's file. The blindfold was marked with the name of a service station called *Petrol Ofisi*, from which it was thought that the victim could have been from Nizip. However, he had not heard of the abduction of Mr Şen beforehand. The area was searched for footprints or other leads. Footprints were found near the body which could have been those of the people who had discovered it. However, they were not recent enough for casts to be made.

85. On the instructions of the Prosecutor, they searched the body and found a small piece of paper in the inner pocket of the jacket with the name Mehmet Şen written on it. It could also have been the case that the name had been written in very small letters on the pocket lining. Perhaps a dry cleaner had done this. They took the blindfold and notified the regiment's operations' centre to confirm the person's identity. This was not confirmed

until the witness returned to the main station in Gaziantep. He was not present at the autopsy but did attend the funeral.

86. After establishing that the deceased person was Mehmet Şen, Mr Kanat went to Nizip where he started his inquiries. According to the statements of witnesses, the victim was last seen playing cards at the coffee shop. Three people entered the café and then left with him by car. The vehicle bore the registration number 35 PLT (or PLV) 30 which, following inquiries by the provincial police headquarters, proved to be false. Other similar numbers were searched unsuccessfully. He rejected any suggestion that the security forces in the area had been operating in vehicles with false number plates. All their vehicles had official plates. Inquiries were also made as to the identity of a woman who worked in a nightclub, and who was mentioned in the statements taken, but a check on all the nightclubs proved fruitless. Nothing suspicious was reported by the local stations or the check-points on the main road. In any event, it would not have been possible for them to check every passing vehicle as traffic was heavy. Besides, the killer could have taken the secondary roads with no roadblocks.

87. At first he did not consider the possibility that the death had been perpetrated by officials. He thought that this was a settling of scores within the “organisation”, particularly as the victim had been a candidate in local elections, and such unpleasant incidents frequently occurred at the time. Later however he did make unofficial background inquiries into Mrs Şen’s allegation of official involvement, particularly concerning police employees, but he found no evidence to support her claims. He thus rejected this theory. He made no contact himself with Mrs Şen, the café employees or any DEP Party members. Statements were taken by his subordinates about the murder. The police also took statements, possibly because of the abduction offence which had occurred within their jurisdiction. No records were drawn up of inquiries which proved fruitless. So, for example, if someone had gone to the aforementioned petrol station but inquiries there had revealed nothing pertinent, no record of that visit would have been made.

88. More than ten people had been murdered by firearms during the three years he was stationed in the area. Most of the perpetrators of those crimes had been found. The killer of an unknown person, whose head had been crushed beyond recognition, was not found, like the murderer of Mr Şen. These two incidents were unusual. He had heard that seven members of the DEP Party had been murdered, but did not know if it had occurred at the material time. He had not heard of groups of contra-guerrillas employed unofficially to eliminate political opponents or activists, other than what he had read in newspapers.

12. The non-appearance of other witnesses

89. Certain key witnesses failed to appear before the Delegates of the Commission: the eyewitnesses to the abduction of Mr Şen from the coffee shop, namely Osman Özer, Rasim Ağpak, Maksut Yıldırım, Durmuş Kaplan and Abit Şahin, who were to have been summonsed through the applicant's representatives, and the principal Public Prosecutor in the case, Naci Ayaz, summonsed through the Government Agent. Mr Ayaz refused to attend the hearing because of a heavy workload.

D. Other relevant evidence

1. The applicant's complaint of 28 March 1994 to the Office of the Nizip Public Prosecutor and the latter's ensuing investigative instructions

90. The applicant declared that her husband had been abducted from his place of work by plain-clothed policemen on 26 March 1993 around 7 p.m. and that she had had no news of him since. There had been seven eyewitnesses to the event. The applicant also lodged a formal criminal complaint. The Prosecutor immediately ordered the Nizip Security Directorate, urgently, to make the necessary inquiries and take the pertinent statements. On 30 March 1994 the Prosecutor issued a similar instruction to the Gaziantep Population Service. That day, he also issued the burial certificate and authorisation. On 18 April 1994, the Prosecutor requested an urgent reply to his instructions from the Nizip Security Directorate.

2. The instructions dated 30 March 1994 of the Gaziantep Public Prosecutor to the Gendarmerie

91. The Prosecutor, Naci Ayaz, instructed the Gaziantep Gendarmerie to make an in-depth, discreet investigation into the murder, to identify the assassins, and to respect their defence rights on arrest, to take the evidence of eyewitnesses and to transmit the results to him.

3. The statements dated 29 March 1994 of İbrahim Kilit and Selahattin Pekbalcı to the gendarmerie

92. Mr Kilit described how his colleague, Selahattin Pekbalcı, had found the corpse of Mehmet Şen while working nearby on 29 March 1994, and he had driven over with his lorry to see it and immediately notified the gendarmes. He did not get out of the lorry to examine the corpse more closely. Mr Pekbalcı stated that he had been recuperating cables for explosives work and, while walking down the highway, he had spotted the

corpse. He then informed Mr Kilit and accompanied him to the gendarmerie.

4. An information record dated 29 March 1994 concerning Selahattin Pekbalcı

93. Mr Mehmet Sünbül, a Gendarmes Sergeant, recorded that Mr Pekbalcı had said to him that he had spotted the corpse on the highway construction site but had been too scared to go over to it. Mr Sünbül had made a sketch of the site and the placement of the corpse. That record also contained details of the few personal effects found on the deceased, which effects included a ring and watch.

5. The incident sketch plan and minutes of the gendarmerie on-site inspection, both documents dated 29 March 1994

94. Mr Sünbül had made a sketch of the site and the placement of the corpse. He recorded that the body of an unidentified person had been found. The deceased was Mehmet Şen, killed by a bullet to the head. The crime had probably been committed some 24 to 36 hours before the body was discovered. The identity and number of the assassins were unknown. The minutes described, *inter alia*, how the gendarmes had been informed of the incident and the state of the corpse (see also paragraph 95 below).

6. Minutes of the Prosecutor's on-site inspection dated 29 March 1994

95. The Gendarmes Command had informed the Prosecutor's Office by telephone that the body of an unidentified man had been found, shot, 2 km from the village of Karpuzkaya. Prosecutor Naci Ayaz and other officials went to the scene of the incident at the highway construction site. The area had been cordoned off. The state of the body was described and the evidence of Mehmet Sünbül was taken. He said that around 2 p.m. that day two construction workers had come to the Gendarmes Station and reported the body. He went with his team and the two workers to the scene. He found the body of a man of around 40 years of age, and gave other details about the corpse. An empty cartridge had been found a metre away. He noted that the name Mehmet Şen had been written in biro on the lining of the inside pocket of the deceased's jacket. Photographs were taken of the body and the scene. The doctor present said that an autopsy could not be conducted there and then as night was falling, so the body was taken to the State Hospital.

7. Autopsy report dated 29 March 1994, 9 p.m.

96. The state of the corpse and its clothing were described. The cause of death was found to have been a bullet wound to the skull, causing major brain damage and haemorrhaging, some 36 hours to 4 days before the examination.

8. Gendarmes crime report dated 30 March 1994

97. The report, written by Mr Hüseyin Kanat, described the finding of the body of an unknown person who had been murdered with a 9 mm calibre pistol. The deceased's clothes and personal effects were depicted. On 29 March 1994 around 2 p.m. a telephone call was received at the gendarmerie from someone calling himself Mehmet Şen (sic), reporting the finding of a male corpse. The Chief Prosecutor was immediately informed. After an investigation, it was established that the person had been killed on 28 March 1994.

9. Gendarmes report dated 31 March 1994 to the Prosecutor

98. The report, also written by Mr Hüseyin Kanat, gave the identity of the victim, his wife and their address. It mentioned the abduction on 26 March 1994 and that inquiries were continuing.

10. An identity report and minutes dated 30 March 1994

99. The Prosecutor, Naci Ayaz, described the finding of an unidentified corpse near the Karpuzkaya village on 29 March 1994 and the subsequent identification of the body by Necip Şen, the father of the victim, the next day.

11. Property ledger dated 30 March 1994

100. The property found on or near the deceased was listed. It included a 9 mm empty cartridge, cigarettes and a lighter, and a windscreen cloth from the Bucak petrol station.

12. The statement dated 31 March 1994 of Durmuş Kaplan to the gendarmerie

101. Mr Kaplan stated that he had known Mehmet Şen for some 5 to 10 years. Mr Şen had been his associate in running the Çağdaş Café. On 26 March 1994 around 4 or 5 p.m., Mr Şen had been playing cards in the

café with others. Mr Kaplan had been at another table. Three unknown men came into the café. Two stayed at the door and the third approached Mr Şen. While asking to see his identity, the man showed him his. The latter had had his back to Mr Kaplan and was carrying a walkie-talkie. One of the men at the door told him to hurry up, whereupon Mr Kaplan looked at him. He described that individual. Mr Şen left the café with them, quite normally, in a car with a registration number beginning with the numbers “34”. Before meeting Mr Şen, Mr Kaplan had known that he had been a heavily indebted gambler. Mr Şen’s brother in Germany paid his debts. Mr Şen knew a certain İnci Doğan, a hostess at the night club in Gaziantep. Mr Kaplan had previously discussed with Mr Şen the latter’s DEP Party candidature for the post of the Mayor of Ayran.

13. Further statement dated 14 April 1994 of Durmuş Kaplan to the gendarmerie

102. Mr Kaplan confirmed his statement above (paragraph 101) and added that he had not seen whether an actual identity card had been shown to Mr Şen by the stranger who had approached him; nor did he hear the reason why Mr Şen was being taken away. Mr Şen had not seemed perturbed, however. Because of gambling debts amounting to 50-100 million Turkish lira, Mr Şen had sold two bakeries which he had owned, and his home and café were mortgaged.

14. The statement dated 1 April 1994 of Osman Özer to the gendarmerie

103. Mr Özer declared that he had known Mehmet Şen for 2 or 3 years. He was one of his associates in the running of the Çağdaş Café. On 26 March 1994 around 4 or 5 p.m., they had been playing cards with two others when three unknown men came into the café. Mr Özer described two of them. One man came over to the card table and asked for Mehmet Şen, who identified himself. On request, Mr Şen showed his identity card, which the man kept, and then showed his, asking Mr Şen to follow him, which he did without protest. The man said to them, “It’s not serious.” The four left in a metal green coloured Doğan SLX, registration number 34 PVC (or PVD) 30. He immediately notified Mrs Şen, but was unable to tell her who the men were. He added that he had read in the newspapers that Mr Şen had been a DEP Party candidate for the post of the Mayor of Ayran.

15. Further statement dated 11 April 1994 of Osman Özer to the gendarmerie

104. Mr Özer essentially confirmed his statement of 1 April 1994 (paragraph 103 above), whilst amending the car registration number to 34 PLT (or PVT) 30, and adding that Mr Şen had had gambling debts and had been involved in a long-standing vendetta.

16. The statement dated 7 April 1994 of Abit Şahin to the gendarmerie

105. Mr Şahin said that he had been a waiter at the Çağdaş Café. On 26 March 1994 Mehmet Şen had been playing cards with others there. All Mr Şahin had seen, around 7 p.m., was Mr Şen leaving with two other people, whose backs were turned to him and whom he was incapable of recognising or identifying. He had heard it said that these people had presented themselves as policemen.

17. The statement dated 11 April 1994 of Maksut Yıldırım to the gendarmerie

106. Mr Yıldırım had been playing cards with Mehmet Şen at the Çağdaş Café on 26 March 1994 when, around 5.15 p.m., a man had entered the café and asked Rasim Ağpak if he were Mr Şen, whereupon the latter identified himself. The individual showed Mr Şen a document enclosed in an identity wallet, and told him that he had to accompany him, which he did. Mr Yıldırım had not taken note of the individual or his appearance as he had had his back half-turned away from the man. Before leaving, Mr Şen asked Mr Özer for some money, but Mr Yıldırım had not looked at him at that point in order to avoid any embarrassment. He had not been worried by any of this as he had been absorbed by the excitement of the card game. After drinking some tea, Mr Yıldırım went home. He knew that Mr Şen had been involved in a vendetta for years and that he liked going to nightclubs and gambling, thereby spending the money he made from the bakery which his brother had given him.

18. The statement dated 11 April 1994 of Rasim Ağpak to the gendarmerie

107. Mr Ağpak said that on 26 March 1994, around 5.15 p.m., someone came up behind him while he was playing cards at the Çağdaş Café, asking whether he was Mehmet Şen. Before Mr Ağpak could turn round to see who was speaking to him, Mr Şen identified himself. Within a few seconds, Mr Şen had left the café. Mr Ağpak could not remember what the stranger

had looked like or whether he had shown an identity card. He had continued playing cards as the matter did not concern him.

19. The sketch of the Çağdaş Café made by the gendarmerie on 15 April 1994

108. On the basis of the statements made by the eyewitnesses, MM Kaplan, Özer, Yıldırım and Ağpak, a sketch was made of the inside of the Çağdaş Café where they had all been sitting when Mr Şen was taken away, the streets outside and the placement of the abduction vehicle, registration number 34 PLT 320 or 34 PVT 30.

20. Minutes dated 1 and 2 April 1994 of investigations by the gendarmerie

109. It was recorded that the investigations, including a car registration check, had so far not disclosed the identity of the killers of Mehmet Şen, but that inquiries were continuing.

21. Gendarmes report dated 5 April 1994 to the Gaziantep Prosecutors' Service

110. The report recounted that on 29 March 1994 the body of an unknown man was found 2 km from the village of Karpuzkaya. The autopsy revealed that he had been killed on 28 March 1994 by a gunshot wound to the head. Investigations discovered that the victim had been Mehmet Şen who, on 26 March 1994, had been abducted from a night club by three people in a car bearing the false registration number 34 PLT 30. Since then there had been no news of him.

22. Probate court papers dated 6 and 7 April 1994

111. It was noted that the gold wedding ring and wristwatch belonging to Mehmet Şen were to be handed to his heirs.

23. The applicant's other statements

a) on 4 April 1994 to the Gaziantep Human Rights Association

112. The applicant stated that her husband had been abducted from his café on 26 March 1994 around 7 p.m. by three people claiming to be plain-clothed policemen, in a honey-coloured Doğan SL car, registration number 34 PTL 30. Her enquiries of the local authorities revealed nothing. She later

learnt of and saw his tortured body at the morgue of the Gaziantep State Hospital. The applicant recounted her husband's fears on 25 March 1994 about two men who had been following him, and the eyewitness accounts of two strangers being in the café drinking coffee on the afternoon of the abduction. She suspected that her husband had been abducted, tortured and killed by contra-guerillas.

b) on 25 April 1994 to the Diyarbakır Human Rights Association

113. This statement essentially contained the applicant's original allegations described above (see paragraphs 11-22 and 27-39). She added that she was now convinced that her husband had been abducted, tortured and killed by contra-guerillas because of his political beliefs and activities for the DEP Party.

c) on 26 April 1994 to Prosecutor Naci Ayaz

114. This statement essentially contained the applicant's original allegations described above (see paragraphs 11-22 and 27-39). She claimed that four people had abducted her husband (rather than the three previously mentioned, paragraph 112 above). She could conceive that her husband had been murdered because of his political affiliations and ambitions, but was now of the view that it had been the work of contra-guerrillas. Seven DEP Party members had been abducted and murdered to date. She confirmed her criminal complaint and asked that her husband's killers be brought to justice.

d) on 13 May 1995 to the Kurdistan Human Rights Project, London

115. The applicant recounted how her father-in-law, Necip Şen, had been called to the office of the Birecik State Prosecutor and handed his son's ring and watch. He was informed that no progress had been made in the identification of his son's murderers. However, on the many occasions on which the applicant had gone to the Gaziantep Prosecutor's Office for a progress report, she had been told that no personal possessions had been found on her husband's corpse. She therefore deduced that the Turkish State knew of her husband's murder / murderers, and demanded to be told, *inter alia*, how the State had obtained the ring and watch, from whom, and for how long they had kept them, as well as the identity of the murderers and her husband's last words.

- e) again on 13 May 1995 to the Kurdistan Human Rights Project, London

116. Mrs Şen alleged that her father-in-law had been mentally tortured by the Urfa Anti-terrorist Department in January 1995 to give information about her current whereabouts and activities. Her relatives in Nizip and Gaziantep were being put under similar pressure. So she could no longer go home or work. Since giving an interview to Amnesty International, she had been denounced as a PKK member at a press conference given by a Turkish Government spokesman, relayed in the press and on television. Her death warrant had thereby been signed by the State and she requested international support. (The applicant later made other statements to the Convention organs, alleging her ill-treatment, which statements were dealt with separately in application no. 41478/98, decision of 30 April 2002.)

24. The undated statement of Arif Dirik to the Gaziantep Human Rights Association

117. Mr Dirik was recorded as saying that people had knocked on his door at 3.30 a.m. on the same day as Mehmet Şen's abduction, 26 March 1994. İsmail Kelleci, a journalist at the "Özgür Gündem" newspaper, had been told by the Gaziantep Security Directorate in December 1993 that they knew what Arif Dirik and Mr Şen had been doing, that their patience had run out and that they were going to kill the two of them. Mr Dirik declared that he could no longer go home and that, if any action was taken against him, it would be the responsibility of Hüseyin Çapkın and the Gaziantep Security Directorate.

25. The letter dated 22 April 1994 from the Gaziantep Provincial Gendarmes Command, on behalf of the Governor, to the Gaziantep Human Rights Association

118. In response to their inquiries, the Association was informed that it had not been possible to determine the identity of the offenders, but that the investigation was being pursued in many directions in order to cast light on the incident.

26. The letter dated 15 May 1994 from the Nizip Security Directorate to the Prosecutor

119. The letter enclosed the latest statements (three), records (four) and a rough sketch that had been drawn up for the investigation file.

27. The letter dated 18 May 1994 from the Nizip Prosecutor to the Gaziantep Prosecutor

120. The Nizip Prosecutor stated that he had no geographical jurisdiction in the matter of the murder of Mehmet Şen. Accordingly, he referred the file to the Gaziantep Prosecution.

28. The letter dated 20 February 1995 from the Provincial Governor to the Ministry of Foreign affairs

121. In response to a request for information, the Governor explained that Mrs Şen had filed a petition with the Nizip Prosecutor on 28 March 1994 concerning the abduction of her husband. A body was found on 29 March 1994. The autopsy established that the victim had been shot, and inquiries revealed that the deceased was Mehmet Şen. The security forces denied any involvement in the matter. Any allegation to the contrary was an absolute, slanderous lie. Allegations by Mrs Şen that she had been ill-treated were also untrue. An investigation into the registration number, 34 PLT 30, of the car in which Mr Şen had been taken away, revealed false plates.

29. The instructions dated 21 February and 21 March 1995 of the Gaziantep Public Prosecutor to the gendarmerie

122. The Prosecutor, Zekâi Aktaran, instructed the gendarmerie to make an in-depth, discreet investigation into the murder, to identify the assassins, and to respect their defence rights on arrest, to take the evidence of eyewitnesses and to transmit the results to him.

30. Gendarmes progress reports dated 6 and 31 March 1995

123. The gendarmes recorded that little progress had been made in the investigation concerning the murder of Mehmet Şen. No new clues had been revealed by their inquiries, which were continuing.

31. Gendarmes progress report dated 6 March 1995

124. Lieutenant Hüseyin Kanat reported to the Gaziantep Prosecutor that no progress had been made in the identification of the corpse found shot on 29 March 1994. Moreover, no information had been gleaned concerning the murderer(s). The gendarmes had no clues or evidence which could throw any light on the case. The investigation would continue.

32. Prosecution request dated 21 March 1995 to the Istanbul road traffic directorate and the reply

125. Prosecutor Zekâi Aktaran requested the directorate to run a search on a metallic green Doğan SLX car, registration number 34 PUC (PUD) 30, or a honey-coloured Doğan SLX car, registration number 34 PTL 30. The directorate replied on 18 April 1995 that these registration numbers belonged to other vehicles of different makes and colours.

33. The permanent search warrant dated 15 May 1995

126. The warrant stated that the search for the guilty person(s) had continued but their identity had not been established. The search would be kept open until time-barred on 30 March 2014, in accordance with Article 102 (1) of the Criminal Code. A letter of inquiry would be addressed to the gendarmerie every three months in the meantime.

34. Gendarmes progress reports dated 2 December 1995, and 17 January, 6 February and 1 April 1996

127. The reports recorded that on-site inspections of the scene of the crime had been made but no new elements had been discovered. The local villagers had been unable to shed light on the facts of the case and inquiries would continue.

35. Destruction reports dated 23 January 1996 and 1 January 1998

128. The destruction of the respective 1995 and 1997 monthly progress reports concerning attempts to identify the perpetrators of the murder on 28 March 1994, in the region of the Karpuzkaya village, was noted.

36. Gendarmes progress reports dated 1 January, 2 March, 1 April, 1 May, 1 June and 1 July 1998

129. The reports recorded that the investigation into the murder of Mehmet Şen had been concluded without the perpetrators being found, but that efforts to do so would continue. Some of these reports mentioned the patrol visits to the village of Karpuzkaya, 2.5 km from where the body of Mr Şen had been found. The villagers recalled the incident, but had not known the deceased and could not provide any further information, other than the idea that the incident could have been caused by passers-by on the inter-city road.

37. Patrol reports dated 1 January, 3 June 1998

130. The reports repeated the preceding gendarmes progress reports.

38. The statement dated 10 June 1998 to the applicant's representatives of Bayram Oruç

131. Mr Oruç submitted a similar statement to that of Mr Yusuf Şen (paragraph 50 above) and Halil Alan (paragraphs 60-63 above): He had been taken into custody (authority unspecified) on 30 March 1995, on suspicion of being active for the PKK. He alleged that he was asked whether he knew Mehmet Şen who, because of his illegal activities, they had killed. He was then warned that, if he failed to confess, he would suffer the same fate. (He had not appeared before the Delegates to testify to this, as had been proposed at one stage by the applicant's representatives.)

39. The statement dated 14 August 1998 of Vildan Dirik to the applicant's representatives

132. Mrs Dirik said that Mehmet Şen had been a family friend. He had telephoned her one or two days before his kidnapping in an anxious state. He had wished to speak to her husband who was not in. After his abduction, her husband went with Nuray Şen to Adana to inquire whether Mehmet Şen was in police custody there. While he was away, around 2 to 3 a.m. at night, her doorbell rang and there was a loud banging on her door. Peering through the curtains, she saw two men and a taxi. She made a couple of telephone calls and was advised not to open the door. She thought it could have been the police, as her husband would have used his key and he had previously been threatened and taken into custody because of his political and trade union activities. Eventually the strangers left. The next morning she saw that the doorbell had been broken. At the Human Rights Association the following day, she heard that the tortured corpse of Mehmet Şen had been found. On being informed of this, her husband never returned to Gaziantep.

40. The statement dated 14 August 1998 of Arif Dirik to the applicant's representatives

133. Mr Dirik confirmed his wife's statement above (paragraph 132 above). Prior to the events in question, on 10 December 1993 İsmail Kelleci had been detained in an operation against the "Özgür Gündem" newspaper. Mr Kelleci had told Mr Dirik that the police had asked whether he knew him and Mehmet Şen, to which Mr Kelleci replied that he knew the latter. The police allegedly stated that Mr Dirik would soon be killed. Mr Dirik had been taken into custody several times, fortunately with others;

otherwise he feared he might have disappeared too. He had been a refugee in Germany since Mr Şen's death.

41. Extracts of the Report dated February 1995 of Amnesty International, entitled "TURKEY a policy of denial", submitted by the applicant

134. The Amnesty Report alleged gross violations of human rights being inflicted on civilians in south-east Turkey in the context of the 10 year old conflict between Turkish Government forces and the PKK. It reported disappearances, extrajudicial executions and torture in police and gendarmes stations.

42. Information submitted on 16 June 1996 by the Turkish Government

135. The Government informed the Commission that, on 10 November 1995, the applicant had been taken into custody on suspicion of being a member of the PKK, and was the subject of a criminal investigation by the Prosecution Service of the Diyarbakır State Security Court.

43. Information submitted on 16 June 1996 by the Turkish Government

136. The Government informed the Commission, *inter alia*, that the investigation into the death of Mehmet Şen, under file no. 1994/3941, by the Gaziantep Prosecution Service was still pending, the perpetrators of the crime not yet having been identified.

44. Information submitted on 10 April 1997 by the Turkish Government

137. The Government informed the Commission that an investigation had been carried out by the Public Prosecutor, under file no. 1996/4823, into the applicant's allegations to the Commission on 25 April 1995 that she had been tortured during her detention between 10 and 21 November 1995. The medical examinations which had been conducted at the time, on her arrest and release, showed no evidence of any violence to her person and, therefore, the Prosecutor had closed the investigation.

45. Ballistic reports dated 13 and 20 October 1997

138. The reports stated that the bullet examined was of the SPB make, 9x19 mm calibre, which could not be traced to any other previous incident involving unknown perpetrators. The report was accompanied by a covering letter dated November 1997 (actual day illegible), from the Gaziantep

Central Gendarmes Command, explaining that an empty cartridge marked “Parabellum SPB”, found at the scene where the body of Mehmet Şen had been discovered, had been sent for an expert examination.

II. RELEVANT DOMESTIC LAW AND PRACTICE

139. The relevant domestic law and practice are set out in the judgment of *Tepe v. Turkey* of 9 May 2003 (no. 27244/95, former Second Section).

THE LAW

I. THE COURT’S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. *The applicant*

140. The applicant argued that she had provided sufficient evidence to prove that her husband, Mehmet Şen, had been abducted, tortured and killed by security forces. She requested the Court to find that the death of her husband and the authorities’ failure to carry out an effective investigation were in violation of Articles 2, 3, 6, 13 and 14 of the Convention.

2. *The Government*

141. The Government denied that the applicant’s husband had been in the hands of any security forces at the material time. The murderers of Mr Şen were still unknown. They maintained that the investigation carried out by the authorities met Convention requirements, and was still pending.

B. General principles

142. The Court recalls that, in assessing evidence, it adopts the standard of proof “beyond reasonable doubt” (see *Orhan v. Turkey*, no. 25656/94, § 264, ECHR 2002). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, the *McKerr v. the United Kingdom*

decision, no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic authorities and, as a general rule, it is for those authorities to assess the evidence before them (see *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, § 29). Though the Court is not bound by the latter's findings, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact they have reached (*ibid.*, p. 18, § 30).

C. The Court's evaluation of the facts

1. The Court's assessment of the parties' submissions and of the evidence

143. The applicant alleged that State security forces had abducted, tortured and killed her husband. She claimed that there was substantial, cumulative evidence to support her allegations, including the background context of threats and intimidation to DEP Party members, and her husband in particular, the oral testimony of MM Alan and Kelleci, the clear hearsay evidence of her conversations with Mr Özer, an eyewitness, and her cogent testimony to the Delegates. Reliance could not be placed on the eyewitnesses' written statements taken by possible colleagues of the very gendarmes whom she had denounced to the Public Prosecutor in March and April 1994 (paragraphs 101-107 above), as those statements were not credible, consistent or complete.

144. The applicant was of the view that the absence of any evidence in custody records of her husband's detention was not determinant, in view of the known inaccuracy of such records, as had been established by the Commission in several cases. She had been unable to ensure the appearance of eyewitnesses before the Commission Delegates because they had been fearful, some if not all of them having been threatened beforehand.

145. The applicant contended that the evidence of the Government witnesses to the Commission Delegates had been of little value and inconsistent (e.g. the evidence of MM Sünbül and Kanat about the biro inscription of Mr Şen's name on the inside pocket of his jacket, paragraphs 78 and 85 above).

146. It was clear from her own observation of the state of her husband's corpse at the morgue that he had been severely tortured and ill-treated before his death. The applicant alleged that she and her daughter had also suffered a violation of Article 3 because of their mental suffering caused by the uncertainty, doubt and apprehension arising from the ineffective investigation into Mr Şen's abduction and death, the authorities' complacency in the matter, the way in which she had been informed of the death, the lack of information provided before seeing the corpse, the attitude

of the authorities at the morgue and the funeral, and the subsequent intimidation and harassment of both of them.

147. The Government denied the applicant's allegations. They submitted, *inter alia*, that there was no evidence that Mehmet Şen had been kidnapped. It seemed rather that he had followed the people concerned voluntarily. Moreover, there was no plausible evidence that these persons had been members of any security force in civilian clothing, the applicant's explanations on this point being ambiguous. Her husband had not given any description of the people whom he had said had been following him before the incident. Furthermore, the people who called at the café had not known who he was and had had to ask the café's clients. If they had been police officers, they would not have had to disguise their identity by wearing civilian clothing, or created doubts as to their function or purpose. If Mr Şen had been detained by the police, it would have been registered in the appropriate custody records.

148. The applicant had claimed that a police identity card had been shown to the café occupants by one of the people concerned. However, the eyewitnesses themselves had not been sure whether it had been an identity card, even less a police identity card. It is significant that the applicant was unable to obtain the attendance of any of these witnesses before the Commission Delegates.

149. The autopsy report clearly showed that Mr Şen had not been tortured before being killed, contrary to the applicant's claim. This was confirmed by the testimony of the forensic expert, Dr Erkol.

150. The Government pointed out that the original of the wholly unauthorised photograph, purportedly taken by the journalist, İsmail Kelleci, had not been submitted by the applicant to the Delegates.

151. Mr Yusuf Şen had claimed to have been tortured because of his possession of the "Özgür Ülke" newspaper and his Şen surname (paragraph 50 above). However, he never made any such claim to the domestic authorities, although he apparently felt free to make such declarations to the Delegates.

152. It was also not established that the people who had "kidnapped" Mr Şen would have had to have passed through road block security checks. There was sufficient evidence that another itinerary could have been used.

153. The various witnesses before the Delegates on behalf of the applicant recounted incredible stories with a view to incriminating the authorities, but without the slightest plausible evidence as to the State's liability in the matter. One such witness was Halil Alan, who claimed to have been put before the Diyarbakır State Security Court and detained for three months (paragraph 63 above). In fact he was detained on 30 March 1994 by the police on suspicion of terrorist offences. On 8 April 1994 he was remanded in custody by a criminal court and released on 18 May 1994. On 29 December 1998 he was convicted of the unauthorised possession of a

firearm, and sentenced to a year's imprisonment and a fine of 2,600,000 Turkish liras.

2. The Court's findings of fact and conclusion

154. The Court observes that the applicant's oral testimony (paragraphs 27-39 above) broadly reiterated written statements she had given both to the national authorities and to the Convention institutions. However, she was not an eyewitness to the events leading to her husband's death.

155. The evidence of the key eyewitnesses, Osman Özer, Rasim Ağpak, Maksut Yıldırım and Durmuş Kaplan, to Mr Şen's abduction from the Çağdaş Café, was contradictory. On the one hand, the applicant recounted what they had told her on the day her husband disappeared, which implicated gendarmes or police officers, or persons holding themselves out as such officials. On the other hand, their recorded statements to the gendarmerie revealed no evidence that Mr Şen had been arrested or taken away by members of the State security forces (paragraphs 101-104 and 106-107 above). Moreover, these people failed to appear to give evidence before the Commission Delegates so that this essential matter could be clarified. Another eyewitness, Abit Şahin, was also unable to shed light on the true identity of the kidnappers (paragraph 105 above).

156. All the evidence presented by the Government, in particular that of the Prosecutor Zekâi Aktaran (paragraphs 51-54), denied any involvement by State officials in the death of Mehmet Şen, and also shed no light on the true identity of the murderers. The Court expresses its strong disapproval of the fact that the main Prosecutor in the case, Mr Naci Ayaz, who inspected the scene of the crime, participated in the autopsy and was responsible for the initial criminal investigation during its first year, refused to appear before the Commission Delegates (paragraph 89 above; cf. the *Tekin v. Turkey* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 40-42, and the Commission's opinion annexed thereto, § 171 (i)).

157. The Court is dubious about the cogency of certain details in the evidence of the gendarmes, as was the applicant (paragraph 145 above). Nevertheless, on the whole their testimony did not reveal glaring inconsistencies from which inferences could be drawn in support of the applicant's allegations.

158. The testimony of İsmail Kelleci and Halil Alan left the impression that the case was not a random killing, but had political connotations. However, their evidence provided no direct information about the killers of Mr Şen, although it contributed pertinent background information.

159. The Court is persuaded, however, that Mr Şen was not tortured before being killed. The Court finds convincing the evidence of the forensic specialist, Dr Zerrin Erkol (paragraphs 65-69 above), who performed the

autopsy. Dr Erkol affirmed that there were no traces of torture on the corpse, but that an untrained person might understandably, albeit mistakenly, deduce from the ugly state of the decomposing body, by the time it was seen at the morgue, that ill-treatment had been inflicted prior to death.

160. Having regard to the testimonies of the witnesses heard by the Commission's Delegates (paragraphs 27-88 above) and the documentary evidence submitted to it by the parties (paragraphs 90-138 above), the Court is unable to make a finding as to who might have been responsible for the death of Mehmet Şen. It notes that the only evidence that State officials could have been involved is the hearsay testimony of the applicant. Nor can it be said, other than by conjecture or speculation, that there was any connivance by State authorities in Mr Şen's death through contra-guerillas. Accordingly, the Court concludes that he was abducted and murdered by unknown persons.

161. The Court will now proceed to examine the applicant's complaints under the various Articles of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

162. The applicant alleged that her husband had been tortured and killed, following his abduction by agents of the State, and that the authorities had failed to carry out an effective and adequate investigation into his killing. She made these claims on behalf of her late husband and, as indirect victims, on behalf of herself and her daughter. She relied on Article 2 of the Convention, which provides, in so far as relevant, as follows:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

A. Submissions of the parties

1. The applicant

163. The applicant alleged that her husband had been deliberately killed for no justifiable reason envisaged by Article 2, or the Government had failed to provide him with adequate protection of his right to life in domestic law, or to conduct a satisfactory investigation into, and initiate legal proceedings against, the perpetrators of the killing.

164. In her view the former had occurred, given the available evidence. Moreover, the investigation into the crime had been inadequate. The applicant claimed that the Public Prosecutor, Mr Ayaz, had been reluctant to

hear her complaints and had only agreed under pressure to take her statement a month after her husband's abduction. The other Prosecutor in the case, Mr Aktaran, had accepted that he had made an inquiry into the wrong licence number of the vehicle in which Mr Şen had been abducted, due to a typing error, but had not taken the matter further. No inquiry had been made based on the colour of that car. Neither Prosecutor had considered it necessary to hear witnesses themselves in order to verify the witness statements taken by gendarmes, clarify inconsistencies or pursue the witnesses' belief that gendarmes had been involved in the matter, even though Mr Aktaran had stated that he had been open-minded about that possibility (paragraph 54 above). The investigation file submitted to the Commission by the Government in September 1998 was more telling in what had been omitted rather than what it had contained (e.g. reports as to the destruction of documents which had been on the file and the fact that no individual statements had been taken after April 1994). The ballistic inquiries were only commenced in 1997, well after the case had been communicated to the Government by the Commission in December 1994.

165. According to the applicant, the investigation had been deficient in other respects: no forensic examination was made at the site where Mr Şen's body was found, e.g. no casts were taken of the footprints which were found near the body; no search was made for the second cartridge case or the bullet that had exited the corpse; and no fingerprints were taken from the body.

2. The Government

166. The Government refuted the applicant's claims. They submitted that none of the witnesses produced by the applicant had been credible. No one had submitted evidence which could identify the murderer of Mr Şen. Their aim was merely to discredit the authorities, given their prejudices against, and hate of, the Turkish State. It was in this light that their evidence should be assessed.

167. The Government maintained that the investigation into the murder of Mr Şen had been diligent: The prosecutor had immediately visited the scene of the crime; an autopsy had been performed; witness statements were taken, sometimes twice; and an investigation was made as to the owner of the vehicle in which Mr Şen had left the café. It had not been possible to initiate a prosecution as no suspect had been identified. However, the investigation remained open.

168. In conclusion, the Government invited the Court to find the application manifestly ill-founded and to declare it inadmissible, pursuant to Article 35 § 4 *in fine* of the Convention.

B. The Court's assessment

1. The alleged failure to protect the right to life

169. Article 2, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

170. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see, among other authorities, the *Tepe v. Turkey* judgment of 9 May 2003, no. 27244/95, § 172).

171. The Court draws attention to its previous findings in similar Turkish cases to the effect that in 1993 and 1994, as a result of the conflict in south-east Turkey, there were rumours that contra-guerrilla elements were involved in targeting persons suspected of supporting the PKK. It is undisputed that there were a significant number of killings which became known as the “unknown perpetrator killing” phenomenon, and which included prominent Kurdish figures (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 89, ECHR 2000-III; *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI; the aforementioned *Tepe v. Turkey* judgment). In this respect, the Court considers that the circumstances in which Mehmet Şen met his death, his membership of the DEP Party (allegedly subjected to intimidation, threats and criminal attack), and his political ambitions, might have militated in favour of the applicant's allegations.

172. However, for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of “beyond reasonable doubt”. Accordingly, the Court refers to its finding above (paragraph 160) to the effect that the applicant's allegations have not been sufficiently proved. It appears from the evidence that no eyewitnesses could identify the people who had abducted and killed the applicant's husband. In particular, it has not been established that any State official was involved in these incidents. The witnesses relied on by the applicant gave inconclusive statements to the gendarmerie and failed to give evidence before the Commission's Delegates (paragraph 89 above). The only evidence available was the hearsay statements of the applicant herself (paragraphs 11-22 and 27-39).

173. In view of the above, the Court considers that the material in the case file does not enable it to conclude beyond all reasonable doubt that the applicant's husband was abducted and killed by any State agent or person acting on behalf of the State authorities. It follows that there has been no violation of Article 2 on that account.

2. The alleged inadequacy of the investigation

174. The Court reiterates that the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann and Others v. the United Kingdom* judgment cited above, p. 49, § 161). This obligation extends to, but is not confined to, cases which concern intentional killing resulting from the use of force by agents of the State.

175. The Court also points out that the positive obligation imposed on the Contracting States by Article 2 requires that the right to life be protected by law. This implies that, as a minimum, a State is under an obligation to provide a framework of law which generally prohibits the taking of life and to ensure the necessary structures to enforce these prohibitions, including the provision of a police force with responsibility for investigating and suppressing infringements (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115). That positive obligation, however, does not go so far as imposing a requirement that a State must necessarily succeed in locating and prosecuting the perpetrators of fatal attacks.

176. Turning to the particular circumstances of the case, the Court notes that an investigation was indeed carried out into the abduction and ultimate death of Mehmet Şen. However, there were striking omissions in the conduct of that investigation. In this connection, the Court would observe that there was no real coordination between the different gendarmes authorities within the jurisdiction of the Nizip and Gaziantep. An example of this is that the Gaziantep gendarmes knew nothing about Mr Şen's disappearance which had been reported to the Nizip authorities (paragraph 78 above), thus wasting valuable time in the identification of the corpse at the outset of the investigation. Moreover, no records were kept of inquiries made which bore no result (paragraph 87 above), giving rise to a possible unnecessary duplication of work by those gendarmes who were unaware of the previous steps which had been taken.

177. The Court also notes that no casts were made of the footprints which were clearly visible in the vicinity where the corpse had been found.

It is not convinced by the remark, without more, of Mr Kanat (paragraph 84 above) that “they were not recent enough ... to be made”. No forensic examination was made of Mr Şen’s body or clothes for traces of someone else’s clothing, hair, blood, etc. No search was made for the second bullet that had exited the body. No statements were taken by Prosecutor Naci Ayaz from the eyewitnesses to the abduction, even though serious allegations had been made by the applicant against the very gendarmes who were left to gather that evidence. At least the inconsistencies in the various statements which had previously been made to the gendarmes, and by Mrs Şen, ought to have led the Prosecutor to take further statements in clarification. No ballistic examination of the empty cartridge found near the body was ordered for over a year, until Prosecutor Zekâi Aktaran took over the case on his arrival in Gaziantep. Moreover, that search was limited to a comparative study with evidence in other “unknown perpetrator killings”, but no match was attempted with any weaponry which was recorded as being in the possession of the gendarmerie. No inquiry was made concerning the registration number of the abduction vehicle until Mr Aktaran arrived, and even then the inquiry was incomplete due to a typing error as to the possible number. No inquiries were made at the road checkpoints through which Mehmet Şen may have passed with his kidnappers, and his identity requested and recorded. In fact, no inquiry was made as to how the body could have been transported from Nizip to where it was found, so far away.

178. In a serious murder case like the present, the Court considers that the Prosecutors, particularly Mr Ayaz, should have shown greater initiative, and it is significant that the latter failed to appear before the Commission Delegates.

179. In the light of the foregoing, the Court finds that the national authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the death of the applicant’s husband. It concludes therefore that there has been a violation of Article 2 of the Convention in its procedural limb.

3. Individual protective measures

180. The Court has also considered the extent of the State’s obligation to implement protective measures in certain individual cases when the circumstances may require them (cf. the aforementioned *Kılıç v. Turkey* judgment, §§ 62-77). However, the Court notes that Mehmet Şen did not report his fears about being followed by possible “hit-men” prior to his abduction, and did not seek protection from the competent authorities. Accordingly, despite the context in south-east Turkey at the material time of unknown perpetrator killings, with the involvement of contra-guerillas implicating the State (the Susurluk report, paragraph 30 above), the Court

does not find it necessary to examine this aspect of the complaint further, having regard to its earlier finding that the authorities were in breach of Article 2 of the Convention on account of their failure to carry out an effective investigation into the killing of the applicant's husband (cf. the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, §§ 93-95).

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

181. The applicant complained that her husband had been tortured before his death, contrary to Article 3 of the Convention, which provides that, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

182. The Government contended that the autopsy report, elaborated by the oral testimony of Dr Erkol to the Commission Delegates, clearly disproved the applicant's allegation (paragraphs 69 and 96 above).

183. The Court refers to its above finding (paragraph 159), in the light of the convincing evidence of Dr Erkol, that Mr Şen had not been tortured before being killed. There is thus no factual basis for the applicant's allegations.

184. Accordingly, the Court concludes that there has been no violation of Article 3 of the Convention in the present case.

185. In so far as the applicant and her daughter obviously suffered acute anguish because of the tragic events of the present case, the Court considers that this is a matter more appropriately dealt with under Article 41 of the Convention below, to the extent that the Government have been found to have violated the Convention (paragraph 205).

IV. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

186. The applicant claimed that the State's failure to initiate criminal proceedings against those responsible for her husband's death discriminatorily deprived her of effective domestic remedies in breach of Articles 6 and 13 of the Convention. The outcome of criminal proceedings would have effectively determined, and was a prerequisite to enforcing, her and her husband's civil right to compensation. Articles 6 and 13 of the Convention, in so far as relevant, provide as follows:

Article 6

"1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

187. The Court notes that the applicant’s complaint is entirely directed against the Public Prosecutors’ decisions in her husband’s case, and that she did not attempt to bring any civil proceedings herself. The Court considers that it is appropriate, therefore, to examine this complaint under Article 13 of the Convention alone (cf. the *Aydın v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, §§ 99-108).

188. The applicant submitted that the authorities had failed to carry out an effective investigation in relation to her complaints concerning the disappearance and murder of her husband. She argued that a full investigation had been necessary and that, at the material time, there had been a practice of ineffective remedies in south-east Turkey in relation to complaints of this nature by Kurdish people (cf. the *Kurt v. Turkey* judgment of 25 May 1998, *Reports* 1998-III; the aforementioned *Yaşa* judgment; the Commission Report of 12 March 1998 in *Çakıcı v. Turkey*, no. 23657/94, § 286).

189. The Government rejected the applicant’s submissions and argued that the authorities had carried out a meticulous and effective investigation into the applicant’s complaints.

190. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; and the aforementioned *Aydın* judgment, § 103).

191. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. This includes effective access for the complainant to the investigation procedure (see *Kaya v. Turkey*, cited above, § 107).

192. The Court reiterates that it has not found it proved beyond reasonable doubt that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's husband. However, according to its established case-law, that does not preclude the complaint in relation to Article 2 from being "arguable" for the purposes of the Article 13 (see the following judgments: *Orhan v. Turkey*, no. 25656/94 of 18 June 2002, § 386; *Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131, § 52; *Kaya*, cited above, § 107, and *Yaşa*, cited above, § 113).

193. The authorities thus had an obligation to carry out an effective investigation into the circumstances surrounding the death of Mehmet Şen. For the reasons set out above (see paragraphs 174-179), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see *Orhan*, cited above, § 387, and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 119).

194. The Court therefore concludes that there has been a violation of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

195. The applicant alleged discrimination, contrary to Article 14 of the Convention combined with Article 2, due to her husband's origins, as only Turkish citizens of Kurdish origin regularly suffered unlawful killings. She averred that there was an administrative, discriminatory practice on grounds of race in the failure to investigate fully or prosecute the unlawful acts of the security forces, contrary to Article 14.

196. Article 14 of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

197. The Government did not address these issues beyond denying the factual basis of the substantive complaints.

198. The Court has examined the applicant's allegations in the light of the evidence submitted to it, but considers them unsubstantiated. There has therefore been no violation under this head.

VI. ALLEGED VIOLATION OF FORMER ARTICLE 25 OF THE CONVENTION

199. In her final observations on the merits submitted on 19 January 1999, the applicant alleged an interference with her right of petition to the Convention organs under former Article 25 of the Convention (now

replaced by Article 34), in so far as she had been arrested in 1995 and allegedly assaulted when asked about the present application. In this respect she also relied on the evidence of harassment against her father-in-law. Article 25 read as follows:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.”

200. However, the Court notes that this complaint was not specified or elaborated early enough to allow an exchange of observations between the parties on the subject. It considers that, in the circumstances of the case, it is not necessary to examine the matter separately at this stage in the proceedings.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

201. 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

202. The applicant claimed, in respect of the abduction and killing of her husband, his treatment by State agents, their responsibility for his death and the lack of an adequate investigation into his death, 50,000 pounds sterling (“GBP”) for herself and GBP 20,000 for her daughter, in non-pecuniary or moral damages. In respect of her husband’s loss of income, given his untimely death at the age of 48 and the “Ogden actuarial method”, the applicant claimed GBP 36,630 in pecuniary damages. The applicant requested that any award be paid in pounds sterling, to be converted into Turkish lira on the date of payment, with a British default interest rate in the event of delays.

203. The Government contended, *inter alia*, that the case was wholly unfounded and, therefore, there was no place to award just satisfaction. In any event, the claims were excessive, given the standard of living in Turkey of a teacher, like the applicant, and the Court’s eventual award should not lead to unjust enrichment. They submitted that no award could be made in

respect of the daughter as she had not been an applicant in the case. They relied on the Court's judgement in *McCann and Others v. the United Kingdom* (cited above), in which no award of just satisfaction was made despite the finding of a violation of Article 2 of the Convention.

204. The Government considered that there had been no causal link between the material damage alleged and the circumstances of the case. Moreover, the claim for loss of income was purely hypothetical and speculative, being based on a British actuarial table of no relevance to Turkish socio-economic conditions, without any proof of what had been the income of Mehmet Şen. The Court has rarely granted pecuniary damages except where they can be clearly proved and assessed. The Government were also of the view that any award made should be in Turkish lira, with Turkish default interest rates.

205. The Court reiterates that it has found that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant's husband, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In the light of its established case-law in similar cases (see *Ülkü Ekinçi v. Turkey*, no. 27602/95, § 171, 16 July 2002,) and having regard to the circumstances of the case, the Court awards 14,500 euros (EUR) for non-pecuniary damage. The Court concurs with the Government that there is no causal link between the matter held to constitute a violation of the Convention – the absence of an effective investigation – and the pecuniary damage alleged by the applicant, such as her husband's loss of income.

B. Costs and expenses

206. The applicant estimated her legal costs and expenses at GBP 49,204.46, for which a breakdown was provided. This discloses legal fees of over GBP 20,200 for the principal lawyer in the case, Mr Fisher, plus fees of over GBP 3,400 for five Turkish lawyers dealing with the applicant and witnesses, especially in preparation of the hearing before the Commission Delegates. Over GBP 22,400 was billed for the Kurdish Human Rights Project in London, which provided assistance, *inter alia*, in the organisation of the case materials, legal advice, funds for the applicant's representation and witnesses at the hearing in Ankara, and translations.

207. The Government acknowledged that the applicant was free to contract with whichever lawyer she wished to present her case to the Court. However, that contract cannot bind the Government, particularly in respect of translation and other high costs incurred because foreign rather than Turkish lawyers were hired. Any award in this respect should therefore be based on the Turkish legal fee scale for bringing a case before the Convention organs, not the British rates.

208. The Court recalls that the applicant has only partly succeeded in respect of her complaints under the Convention. However, it notes that the present case involved complex issues of fact and law requiring detailed examination, including the taking of evidence from witnesses in Ankara. It reiterates in this connection that only legal costs and expenses necessarily and actually incurred can be reimbursed under Article 41 of the Convention. The Court is not satisfied that in the instant case all the costs and expenses were necessarily and reasonably incurred. For instance, it considers excessive the number of lawyers working on the case and the number of hours of work they claimed. However, as regards the translations and other administrative costs, the Court is of the view that they may be regarded as necessarily and actually incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, it awards her the sum of EUR 36,000 for costs and expenses, exclusive of any value-added tax that may be chargeable, less EUR 3,966 received by way of legal aid from the Council of Europe.

C. Default interest

209. 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 no violation of Article 2 of the Convention as regards the applicant's allegation that her husband was abducted and killed by State agents or persons acting on behalf of the State authorities;
2. *Holds* that there has been a violation of Article 2 of the Convention on account of the national authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the death of the applicant's husband;
3. *Holds* that there has been no violation of Article 3 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;
5. *Holds* that there has been no violation of Article 14 of the Convention;
6. *Holds* that it is not necessary to examine separately whether there has been a violation of former Article 25 of the Convention;

7. *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, the following amounts:
 - (i) EUR 14,500 (fourteen thousand five hundred euros) in respect of non-pecuniary damage;
 - (ii) EUR 36,000 (thirty-six thousand euros) in respect of costs and expenses, less EUR 3,966 (three thousand nine hundred and sixty-six euros) received by way of legal aid from the Council of Europe;
 - (iii) any tax that may be chargeable on these 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;

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

Done in English, and notified in writing on 30 March 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Viera STRÁŽNICKÁ
President