



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

SECOND SECTION

**CASE OF KİŞMİR v. TURKEY**

*(Application no. 27306/95)*

JUDGMENT

STRASBOURG

31 May 2005

**FINAL**

***31/08/2005***

*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 Kişmir v. Turkey,**

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr K. JUNGWIERT,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 May 2005,

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

**PROCEDURE**

1. The case originated in an application (no. 27306/95) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Hayriye Kişmir (“the applicant”), on 31 March 1995.

2. The applicant was initially represented by Professors Kevin Boyle and Françoise Hampson and subsequently by Mr Mark Muller, all lawyers practising in the United Kingdom. The Turkish Government (“the Government”) did not designate an agent for the purposes of the proceedings before the Court.

3. The applicant alleged, in particular, that her son Aydın Kişmir had been taken into police custody in Diyarbakır where he was tortured and killed. She invoked Articles 2, 3, 6, 13 and 14 of the Convention.

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

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Professor Feyyaz Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 14 December 1999, the Court declared the application admissible.

7. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

8. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Turkish citizen of Kurdish origin, was born in 1948 and lives in Diyarbakır.

#### **A. Introduction**

10. The facts of the case, particularly concerning events which took place between 6 and 12 October 1994, are disputed by the parties.

11. The facts as presented by the applicant are set out in Section B below (paragraphs 12-25). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 26-35). Documentary evidence submitted by the Government and the applicant are summarised in Sections D (paragraphs 36-57) and E (paragraphs 58-62) respectively.

#### **B. The applicant's submissions on the facts**

12. On 6 October 1994 at about 1.30 a.m., seven police officers from the Diyarbakır Police Headquarters came to the applicant's house in Diyarbakır and questioned the applicant about her son Aydın's whereabouts. Aydın had previously been taken into police custody on 26 August 1993, placed in detention on remand on 8 September 1993 and released on 10 November 1993. As he was afraid to find himself in the hands of the police once again, he was hiding at his relative Barış Kalkan's house in Diyarbakır. Aware of her son's fears, the applicant told the police officers that Aydın had gone to Istanbul.

13. The police officers also questioned the applicant's two other sons, İrfan and Turan, who, like the applicant, stated that their brother Aydın had gone to İstanbul. The officers conducted a search of the house and took a certain amount of German marks. Five of the police officers left, taking İrfan and Turan with them. The remaining two police officers stayed in the applicant's house and continued questioning the applicant and her daughter, Saniye, until the following morning.

14. In the morning the applicant's husband Mersin returned home. The police stayed for two days and two nights, changing shifts at 8 a.m. and 8 p.m. each day. After the second day, the police forced the applicant's husband to sign a document.

15. The police officers took İrfan and Turan to the Police Headquarters where they were questioned about Aydın for an hour and a half. Thereafter, İrfan and Turan were taken to the Diyarbakır State Hospital to be examined by a doctor. From the hospital they were taken back to the Police Headquarters and again interrogated about Aydın.

16. The police asked İrfan about his relative Barış. İrfan informed them that he knew Barış, who was both a childhood friend of Aydın's and a relative, and gave the police his address. The police officers then went to Barış's house, taking İrfan with them.

17. On the morning of 6 October 1994, Barış's mother saw a number of police vehicles in front of her building and warned Aydın. Aydın and Barış tried to run away but were caught by police officers while they were going up onto the roof. As the police were taking Aydın, Barış and Barış's brother Yılmaz downstairs, Aydın made another attempt at escape. Yılmaz and Barış heard one of the police officers say that he was going to kill Aydın, but the other officers said that they needed Aydın for interrogation. Aydın was caught in the doorway and made to lie face down. He was handcuffed and a gun was held to his head. According to İrfan, Aydın was beaten up; he saw that Aydın's head was bleeding and heard him screaming.

18. The police officers put Barış and Yılmaz in one vehicle and Aydın in another. They were then taken to the Police Headquarters. After ten minutes, they were taken to the State Hospital for a medical check. They were then put back into the vehicles. Yılmaz and Barış were in the back seat. Yılmaz heard the two policemen sitting in the front say, "Aydın told the doctors at the hospital that he had been tortured and that he was going to be killed. Let him come to the 'camp'. We'll show him that death will not be that easy." Yılmaz, Barış and Aydın entered the Police Headquarters together. İrfan was also brought back to the Police Headquarters. Later, he realised that Aydın had also been brought there. According to İrfan, as soon as the police officers brought Aydın to the Police Headquarters they began torturing him. İrfan heard Aydın screaming and saying that "his arm was going to break off and that he could neither clap his hands nor was he able to walk". The rest of the time Aydın was constantly screaming and saying that he was innocent.

19. Barış and Yılmaz were put into different cells. Yılmaz was in cell no. 13, from where he could hear Aydın screaming. Yılmaz was later moved into cell no. 8, from where he could hear most of the conversations between the police officers and Aydın. He heard the police officers threaten Aydın by telling him that death would not be easy. Aydın was saying that he was innocent, and that he could neither walk nor clap his hands. The torture

lasted about one hour. Yılmaz, looking through the grill in the door, saw that Aydın was being taken away by the policemen, who were holding him from his arms and dragging him along the floor.

20. On 7 October 1994 Yılmaz was taken to the interrogation room. He was asked if Aydın was a member of the “organisation” (that is the PKK - the Kurdistan Workers’ Party). He was further questioned about Barış’s relationship with Aydın and the reason why Barış’s family let Aydın stay in their house.

21. On 8 October 1994 Yılmaz signed a statement of 7 pages, which the police had drawn up. He did not know what was recorded in the statement. He was then taken to the Diyarbakır State Hospital and was forced to tell the doctor that he had not been tortured. He was released after the medical examination. İrfan was also released on 8 October 1994, following a medical examination.

22. When İrfan and Yılmaz returned home they told the applicant that Aydın was in custody and that he was being very badly tortured. The applicant went to the Diyarbakır branch of the Human Rights Association for help. In the meantime, the applicant had already submitted a petition to the Prosecutor at the Diyarbakır State Security Court (hereinafter “the Diyarbakır Court”) on 7 October 1994 and asked for information about her son. On 10 October 1994 the Prosecutor wrote on the same petition that the applicant’s son had been taken into detention at the Diyarbakır Police Headquarters.

23. On 11 October 1994 at about 6 p.m., police came to the applicant’s house and then went to Barış’s house. They told the neighbours that Barış was in a coma and that the applicant should go and pick up the body of Aydın.

24. On the morning of 12 October 1994 the neighbours informed the applicant and she went to the hospital. The police first denied any knowledge about the matter. Her brother-in-law Ahmet then arrived at the hospital and told her that the police had informed him that Aydın’s body was at the morgue. The police at the hospital continued to deny that they had Aydın’s body. Two hours later they acknowledged that Aydın’s body was indeed in the morgue. They refused the applicant permission to see her son. The Prosecutor at the hospital told Ahmet that Aydın had thrown himself from a window on the seventh floor and asked Ahmet whether he wanted to file a complaint against anyone. Ahmet told the Prosecutor that there was no use in filing a complaint as Aydın had been killed by the police who then tried to cover up his death by saying that he had thrown himself from a window.

25. Aydın’s burial certificate stated that he had died on 12 October 1994. The necessary forensic and medical examination of the body and the autopsy were performed on 12 October 1994. When the applicant requested

a copy of the autopsy report, she was told that all the documents had been sent to Ankara. On 13 October 1994 Aydın was buried.

### **C. The Government's submissions on the facts**

26. On 6 October 1994 Aydın Kişmir was arrested in Diyarbakır together with Barış Kalkan, Mehmet Şirin Demir, Turan Kişmir, Behçet Ekinci, İrfan Kişmir and Yılmaz Kalkan on suspicion of having collaborated with the PKK.

27. When the policemen entered Barış Kalkan's flat to arrest Aydın, he tried to escape but lost his balance and fell, hitting a wall in the process. He was arrested at the entrance to the building. A false identity card was found on him. This version of events was confirmed by Barış Kalkan in a statement given by him to the Prosecutor at the Diyarbakır Court on 13 October 1994.

28. Immediately after his arrest, Aydın was taken to the Diyarbakır State Hospital at 6 a.m. to have his wounds treated. According to the medical report drawn up by Dr Kinyas Öztürk, the duty doctor at the hospital, Aydın had suffered two wounds, one above the right eye and another on the big toe of his right foot, which were not serious.

29. Later in the day Aydın Kişmir was again taken to the Diyarbakır State Hospital for treatment of a bleeding wound in the head, a 6 cm. long laceration in the occipital area. According to Dr Zafer Özdağ, who stitched the wound, Aydın did not require hospitalisation but he was prescribed medication. Both Dr Öztürk and Dr Özdağ were subsequently questioned by the Prosecutor at the Diyarbakır Court in relation to the report prepared by Dr Öztürk in which the injury to the head had not been recorded. Dr Öztürk stated that Aydın had not mentioned to him any injury other than the two which had been recorded in his report.

30. After having his head wound stitched, Aydın Kişmir was again taken to the Police Headquarters and put in a cell, without having been interrogated. According to the statement of Ramazan Kutlu, a detainee who was in the same cell as Aydın Kişmir, the police gave Aydın his medication regularly. In the early hours of 11 October 1994, Aydın Kişmir's condition deteriorated. Aydın Kişmir died during the efforts to take him to hospital.

31. On 12 October 1994 an autopsy was conducted in Diyarbakır. The autopsy report stated that Aydın Kişmir's death had occurred due to asphyxia. As the cause of asphyxia could not be identified, certain dissected body parts were sent to the Forensic Medicine Directorate in İstanbul for further forensic examinations to be carried out. According to the report of the chemical analysis section of the Forensic Medicine Directorate, which was drawn up on 7 December 1994, no toxicological evidence was detected in any of the sample tissues.

32. On 12 December 1994 a second report was prepared by the histology laboratory, in which it was stated that no abnormalities had been detected in any of the body parts.

33. On 25 January 1995, a final report was issued by the First Committee of Experts of the Forensic Medicine Directorate. According to this report, the findings clearly pointed to a natural death which might have been due to Aydın Kışmır's previous health problems.

34. On 7 November 1995 the Prosecutor at the Diyarbakır Court took a decision not to prosecute as he concluded at the end of his investigation that there had been no ill-treatment or torture, and that the death had occurred due to natural causes.

35. On 19 December 1996 the Diyarbakır Prosecutor issued another decision not to prosecute. This decision was served on the applicant on 27 January 1997 and became final on 13 February 1997 as no appeal had been lodged against it.

#### **D. Documentary evidence submitted by the Government**

##### *1. The body examination and autopsy report*

36. This was a verbatim record, drawn up by Ahmet Başaran, the Prosecutor at the Diyarbakır Court, and Dr Lokman Eğilmez, the director of the Diyarbakır Branch of the Forensic Medicine Directorate, during the autopsy which they carried out on the body of Aydın Kışmır at the Diyarbakır State Hospital on 12 October 1994. The report stated that Dr Kinyas Öztürk, the last doctor to examine Aydın Kışmır, was on leave and therefore could not be present during the autopsy.

37. The report began by stating that Aydın Kışmır had lost his life at the detention facility of the Diyarbakır Police Headquarters at 5 a.m. on 12 October 1994. His body had then been transferred to the morgue at the Diyarbakır State Hospital.

38. The report described the deceased as being 175 cm tall and weighing 70-75 kgs. Rigor mortis and post mortem hypostasis had set in. The Prosecutor and the doctor observed the following injuries: a 2 cm sutured wound on the top of the head; a 1 cm wound over the right eyebrow; purple bruising around the right eye; purple bruising on the outer surface of the right hand between the thumb and the wrist; a scabbed wound, measuring 2 x 2 cm, over the coccyx; purple bruising on the outside of the right arm measuring 2x 2 cm and finally a graze, measuring 2 x 2 cm, on the big toe of the right foot.

39. Other external findings noted were a slight deformation on the right side of the chest. The nailbeds, lips and ears were described as being cyanosed. There was widespread bleeding under the skin of the back. The

external genitalia were normal. The epidermis was described as separating from the dermis.

40. The body was photographed both before and during the internal examination of the body.

41. The internal examination found that there was bruising and haematoma under the sutured injury. The skull was intact. There was no bleeding on either the outside or the inside of the brain membranes. The brain was described as being slightly oedematous. The sections taken of the brain and the cerebellum were normal. The bones of the skull base were not fractured.

42. The mouth, throat and neck structures were described as being normal. The chest deformation was noted to be structural and not due to trauma. There were several bleeding spots on the lung surfaces. The lungs were extensively oedematous and congested. The heart was described as being normal on external examination. Sectioning revealed a thick, narrow, mitral valve.

43. Stress ulcers seen in the stomach were associated with a little bleeding. The other organs in the abdomen were normal.

44. During the autopsy the Prosecutor and the doctor had regard to a medical report which had been drawn up at the Diyarbakır State Hospital on 6 October 1994. This report, which was numbered 4381, was not made available to the Commission or to the Court. According to a summary of this report reproduced in the autopsy report, a wound measuring 1 x 3 cm featured above Aydın Kişmir's right eye. There was also a slight wound on the big toe of the right foot. Neither of these two wounds was life threatening.

45. The Prosecutor and the doctor had regard to an arrest report drawn up at 6 a.m. on 6 October 1994 in relation to the arrest of Aydın Kişmir. This report was also not made available to either the Commission or to the Court. It appears from the summary of this report, which was reproduced in the autopsy report, that Aydın Kişmir and two other men had been in a flat on the sixth floor of a block of flats. When they were running down the stairs, Aydın Kişmir had fallen down, injuring his right toe and also a spot above his right eye. The Prosecutor asked Dr Eğilmez whether the injuries observed during the autopsy could have been caused in the course of the sequence of events as described in the arrest report. Dr Eğilmez replied that the injuries recorded in report no. 4381 were consistent with the injuries described in the arrest report.

46. A decision was made to send the samples taken from internal organs for histology and toxicology examinations.

47. The doctor concluded that the death was due to asphyxiation and added that it would be possible to establish the cause of the asphyxiation after the examination of the body samples at the Forensic Medicine Directorate in Istanbul.

*2. Report of the Forensic Medicine Directorate, drawn up on 7 December 1994*

48. According to this report, the body samples taken from Aydın Kışmır's body during the autopsy which were subjected to a toxicological examination did not disclose any poisons.

*3. Report of the Forensic Medicine Directorate, drawn up on 26 December 1994*

49. This was a report drawn up and signed by a number of doctors. The report referred to the conclusions set out in the above mentioned autopsy and toxicology reports. In this report there was also a reference to a histology report, which had apparently been drawn up on 12 December 1994 and had concluded that the examination of the samples from the heart, lungs, liver, kidneys and the spleen had revealed the presence of autolysis, but that nothing was seen in the brain or cerebellum. A decision was taken to seek the opinion of the Specialist Council of the Forensic Medicine Directorate.

*4. Report of the Specialist Council of the Forensic Medicine Directorate, drawn up on 25 January 1995*

50. This report was drawn up and signed by eight doctors, each a specialist in different areas of medicine. They based their opinions on the reports referred to above and on the photographs of the body which had been taken during the autopsy (see paragraph 40 above). The doctors also had regard to two statements taken from Ramazan Kutlu and Dr Zafer Özdağ on 13 October 1994. It appears from the summaries of these statements, which are reproduced in the report, that Ramazan Kutlu had been detained in the same place as Aydın Kışmır and that Aydın had allegedly told Mr Kutlu that he had hurt himself while trying to run away from the police during his arrest and, because of that, his right foot was swollen and he was unwell. Mr Kutlu was also said to have added that Aydın Kışmır's condition had worsened during the night of 11 October 1994 and that he had died early in the morning.

51. Dr Zafer Özdağ was reported as having said in his statement of 13 October 1994 that Aydın Kışmır had been brought to him by officials on 6 October 1994 and that, apart from the findings he had previously observed, he had now also observed a wound, measuring 6 x 6 cm, on the top part of the head which did not require hospitalisation.

52. The Specialist Council concluded that death was due to respiratory failure related to lung oedema. The Council commented that, apart from the wounds on the top part of the head, above the right eyebrow and the big toe of the right foot, there were no other symptoms of an assault or traumatic

change, which excluded the possibility of an external trauma being the cause of death.

53. The Specialist Council further commented that, although there was evidence of asphyxiation, no change was observed in the neck area under the skin and there was no evidence of any compression of the chest or abdomen to indicate that death had occurred as the result of mechanical asphyxiation. There was oedema of the lungs and brain, and ulcers in the stomach with bleeding from them, indicating general anoxia and asphyxiation findings related to extreme lung oedema.

*5. Decision not to prosecute, taken on 19 December 1996*

54. This decision was taken by the Prosecutor at the Diyarbakır Court. Birol Yaman, a police officer at the Diyarbakır Police Headquarters, was referred to in the decision as the defendant. The offence in question was recorded as “death in custody on 12 October 1994”.

55. The Prosecutor stated that Aydın Kişmir “who is a member of the terrorist organisation”, had fallen down the stairs in an attempt to avoid arrest by police officers and injured himself. He had then been taken by police officers to the Diyarbakır State Hospital for treatment. The Prosecutor also referred to the medical reports above, and added that the report of 25 January 1995 (see paragraphs 50-53 above) had been submitted to the First Specialist Council of the Forensic Medicine Directorate on 26 February 1996, “to establish the cause of the oedema in the lungs, which had caused the respiratory failure”.

56. A copy of the subsequent report of the First Specialist Council of the Forensic Medicine Directorate (date unknown) was not made available to the Commission or to the Court. However, according to the decision not to prosecute, it was stated in that medical report that there was no evidence to suggest that the oedema in the lungs had been due to a technical or traumatic reason. The First Specialist Council had apparently concluded that the cause of the oedema could not be established because the body samples sent for microscopic examination had become autolysed<sup>1</sup>. The Prosecutor concluded therefore that there was no evidence that the officer had committed the offence in question and he decided not to prosecute the accused.

57. This decision, which was communicated to the applicant on 27 January 1997, became final on 13 February 1997 as no objection had been lodged against it.

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1. Autolysis: Enzymatic self-digestion of cells or tissues after death.

### **E. Documentary evidence submitted by the applicant**

#### *1. The applicant's petition submitted to the Prosecutor's Office at the Diyarbakır Court on 7 October 1994*

58. In her petition the applicant submitted that her two sons, Aydın and Turan, had been arrested in their home by the police on 6 October 1994. She asked the Prosecutor for information about her sons' fate.

59. On 10 October 1994 the Prosecutor wrote on the applicant's petition that "[the applicant's sons] were taken into detention at the Diyarbakır Police Headquarters".

#### *2. Expert report of Dr Christopher Milroy*

60. This report was prepared on behalf of the applicant by Dr Christopher Milroy, a Reader in Forensic Pathology at the University of Sheffield and consultant pathologist to the Home Office in the United Kingdom.

61. The report recounted the findings of the autopsy and of the other reports referred to above. Dr Milroy observed, *inter alia*, the following shortcomings:

(a) no organ weights, in particular the weight of the lungs, were recorded. Furthermore, no description of the presence or absence of petechiae<sup>1</sup> was made, despite the diagnosis of asphyxiation;

(b) the 6 cm laceration described by Dr Zafer Özdağ is not described in any of the autopsy reports, even though a 6 cm wound, or a scar from such wound, should have been noticed. It seems unlikely that a 2 cm wound seen at autopsy could have been mistaken for a 6 cm wound; in any event they were described in different positions;

(c) a 6 cm wound is a large wound to be caused by a fall; this wound appears to have occurred whilst in custody, and not in the fall during the arrest;

(d) there is one area of the original autopsy report which does not appear to have been commented on, and that is the presence of diffuse bleeding under the skin of the back. Diffuse bleeding strongly suggests that blows have been delivered to the back;

(e) the post mortem findings in this case with lung oedema and congestion, some brain oedema and stress ulcers, and the absence of any natural cause of death, raise strong concerns that death has been caused by mechanical asphyxiation. In positional asphyxia, the pinning of the body and restraint may prevent proper breathing. This could, for example, be

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1. Petechia: Petechia are tiny purple or red spots on the skin that are caused by small areas of bleeding under the skin. Physical evidence suggestive of asphyxiation would include the presence of petechial haemorrhages in the eyes, face, lungs and neck area.

caused by the person being laid on the floor and somebody compressing his back. Bleeding into the back would support this scenario.

*3. Statements taken from eyewitnesses*

62. The applicant submitted to the Commission and to the Court a number of statements taken by lawyers at the Diyarbakır branch of the Human Rights Association from witnesses who had either witnessed the arrest of the applicant's son or who had been detained with the applicant's son. These statements formed the basis of the applicant's submissions above (see paragraphs 12-25).

## II. RELEVANT DOMESTIC LAW AND PRACTICE

63. A full description of the relevant domestic law and practice, as well as relevant international reports, may be found in *Salman v. Turkey* ([GC], no. 21986/93, §§ 59-74, ECHR 2000-VII).

## THE LAW

### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

64. The Government, not having submitted any observations on the merits (see paragraph 7 above), have not made any preliminary objections as such. However, in their observations which were submitted to the Commission prior to the application being declared admissible, the Government argued that the applicant had failed to file an objection against the Prosecutor's decision not to prosecute (see paragraph 57 above). The Government further referred to Article 165 of the Code of Criminal Procedure, pursuant to which such an objection must be accompanied by proof and facts which justify the institution of a prosecution.

65. In its decision on admissibility of 14 December 1999 the Court, observing that the Government's preliminary objection raised issues that were closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention, decided to join the objection to the merits.

66. The Court considers it appropriate to address this point in its examination of the substance of the applicant's complaint under Article 2 of the Convention below.

## II. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

### A. Arguments of the parties

#### 1. *The applicant*

67. The applicant alleged that her son had been killed in custody in circumstances suggesting that he had died under, or as a result of, torture.

68. The applicant submitted that, according to the well-established case-law of the Court, there is a positive obligation on a respondent State plausibly to account for injuries caused to detainees who were taken into custody in good health. In support of her submission, the applicant referred to the judgments in the cases of *Tomasi v. France* (judgment of 27 August 1992, Series A no. 241-A), *Ribitsch v. Austria* (judgment of 4 December 1995, Series A no. 336), *Selmouni v. France*, ([GC], no. 25803/94, ECHR 1999-V) and, finally, *Tanlı v. Turkey* (no. 26129/95, ECHR 2001-III (extracts)).

69. Furthermore, the applicant, referring to the judgment in the above mentioned *Salman* case, submitted that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

70. Referring to the shortcomings in the autopsy identified by Dr Milroy (see paragraph 61 above), the applicant argued that the circumstances of the death of her son were never established by the authorities.

#### 2. *The Government*

71. The Government have not submitted observations on the merits and the following submissions are taken from the observations they submitted to the Commission on 14 February 1996, i.e. prior to the admissibility of the application.

72. The Government claimed that the applicant's son was already in a poor condition when he was placed in his cell due to the injuries which he had sustained during his efforts to escape from the police. It was clear from the statement of Ramazan Kutlu that, when Aydın was placed in his cell, he was receiving treatment for his wounds. Contrary to what was claimed by the applicant, Aydın had not been questioned by the authorities since there was already sufficient evidence to charge him with terrorist-related offences.

73. Aydın's health started to deteriorate very fast. The personnel at the detention facility informed their superiors and it was decided that Aydın be taken to the hospital but he died on the way there.

74. The Government stressed that the medical history of the deceased was unknown. Several factors might have contributed to his death, such as childhood illnesses, malfunctioning of the lungs, etc.

75. The Government further emphasised that a highly specialised forensic organisation had found no evidence of any external factors, such as ill-treatment or torture, being the cause of death.

76. According to the Government, the illegal PKK organisation used young and able militants until they became ill. The sick and disabled militants were kept without any medication for recovery and continued to be used in terrorist activity. Militants, living in unhygienic places such as caves, under extreme weather conditions and constantly moving from one place to the next, were bound to fall ill. Most of the sick militants lost their lives due to the complications of long-lasting illnesses. The Government put forward that this was what might have happened to Aydın as well.

#### **B. Article 38 § 1 (a) and consequent inferences drawn by the Court**

77. Before proceeding to assess the evidence, the Court would stress, as it has done previously, that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. The failure by a Government to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of the facts in a case.

78. In this context, the Court has noted with concern a number of matters regarding the Government's response to the Court's requests for documents. Thus the Government were requested on 10 January 2000 to submit to the Court a copy of the complete investigation file concerning the death of the applicant's son. The Government, despite having requested and having been granted two extensions of the time limit to send that file, failed

to submit it. Furthermore, on 24 February 2000 the Court invited the Government to send the photographs of the body of the applicant's son taken during the autopsy (see paragraph 40 above). The Government have not responded to this request.

79. The Court further observes that a number of documents which were submitted by the Government make reference to other, potentially important documents pertaining to the investigation. These documents however, have not been made available to the Convention institutions. They include:

- (a) the arrest report of 6 October 1994 (see paragraph 45 above);
- (b) the report, drawn up by Dr Kinyas Öztürk on 6 October 1994, pertaining to the medical examination of the applicant's son shortly after his arrest (see paragraph 28 above);
- (c) the report, drawn up by Dr Zafer Özdağ on 6 October 1994, pertaining to the second medical examination of the applicant's son (see paragraph 29 above);
- (d) the custody records of the applicant's son;
- (e) the statement taken from Ramazan Kutlu who was allegedly detained in the same cell as the applicant's son (see paragraph 30 above);
- (f) the statement taken from Dr Zafer Özdağ (see paragraph 29 above);
- (g) the statement taken from Dr Kinyas Öztürk (see paragraph 29 above);
- (h) the statement taken from Barış Kalkan on 13 October 1994 (see paragraph 27 above);
- (i) the decision not to prosecute taken on 7 November 1995 by the Prosecutor at the Diyarbakır Court (see paragraph 34 above);
- (j) the histology report of 12 December 1994 (see paragraphs 32 and 49 above); and, finally,
- (k) the report of the First Specialist Council of the Forensic Medicine Directorate, which was drawn up at some stage between 26 February 1996 and 19 December 1996 (see paragraph 56 above).

80. The Government have not advanced any explanation to account for their failure to submit the documents referred to above or to respond to the

Court's request for the photographs. Accordingly, the Court finds that it can draw inferences from the Government's conduct in this respect. Furthermore, the Court, referring to the importance of a respondent Government's cooperation in Convention proceedings as outlined above (see paragraph 77 above), finds that in the present case the respondent State fell short of its obligation under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts.

### **C. The Court's evaluation of the facts**

81. According to the applicant, her son Aydın Kişmir was tortured and killed while in the custody of police on 12 October 1994. The Government denied this.

82. The Court notes that it is not in dispute between the parties that Aydın Kişmir was arrested and placed in detention on 6 October 1994 and that he died while in the custody of the police on 12 October 1994. What is disputed is whether Mr Kişmir was killed intentionally as alleged by the applicant.

83. In support of her allegations the applicant submitted to the Convention bodies written statements provided to her by a number of persons – who had either witnessed the arrest of her son or who had themselves been detained together with her son – according to whom the applicant's son had been subjected to ill-treatment.

84. The Court is of the opinion that the injury on Aydın's head must have been caused while Aydın was in the custody of the police. The explanation put forward by the Government, namely that the applicant's son had not informed Dr Kinyas Öztürk about the injury on his head during his first medical examination (see paragraph 28 above) strikes the Court as extremely unlikely. Such an injury – measuring 6 centimetres and requiring stitches (see paragraph 29 above) – must have been readily apparent to a trained person like a doctor. However, in the absence of medical evidence linking this head injury to Aydın Kişmir's death, and having regard to the fact that the Court did not have first-hand access to the medical report in which this injury was described (see paragraph 79 above), it cannot conclude that the head injury contributed to Aydın Kişmir's death.

85. As regards the autopsy carried out on the body of Aydın Kişmir, the Court agrees with the shortcomings identified by Dr Milroy. It finds, in particular, that the description of the 6 centimetre long sutured injury on the top of the head as a 2 centimetre long sutured injury (see paragraph 38 above) illustrates that due care was not accorded by the doctor who carried out the autopsy. To the extent that it could be argued that the injury had been 2 centimetres long but had been wrongly described in Dr Öztürk's report as 6 centimetres, the Court notes that the Dr Eğilmez, who carried out

the autopsy on Aydın's body, stated that the injuries recorded in report no. 4381 were consistent with the injuries described in the arrest report.

86. Furthermore, the Court is struck by the Forensic Medicine Directorate's failure to comment on the widespread bleeding under the skin on the back of Aydın's body (see paragraph 39 above).

87. The Court finally observes that a certain Birol Yaman, apparently a police officer at the Diyarbakır Police Headquarters, was referred to as the defendant in the decision not to prosecute taken on 19 December 1996 (see paragraph 54 above). No information has been provided by the Government as regards the reasons why this particular police officer was referred to as the defendant and neither is the Court aware of any statements taken from this person. More importantly, the Court finds that charging a police officer with the offence of "the death in police custody on 12 October 1994" of Aydın Kışmır (see paragraph 54 above) sits ill with the Government's submission that the death of the applicant's son was due to natural causes or a childhood illness (see paragraphs 74 above and 92 below).

88. In the light of the foregoing, the Court observes that there is circumstantial evidence supporting the applicant's allegation that her son was deliberately killed in custody. However, the Court finds that that evidence is insufficient to reach the conclusion suggested by the applicant.

89. The Court is unable, due to the Government's failure to submit the documents referred to above, to establish the circumstances relating to the death of the applicant's son. This inability does not, however, mean that the respondent State are absolved from their responsibility for Aydın Kışmır's death which occurred while he was in the custody of the police. In this connection the Court reiterates that persons in custody are in a vulnerable position and the authorities are under a duty to protect them. It has previously held that, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni*, cited above, § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (see, *Salman*, cited above, § 99).

90. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be

regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman*, cited above, § 100).

91. The Government submitted that, when he was placed in his cell, the applicant's son was already in a poor state due to his attempts to escape from the police (see paragraph 72 above). They further submitted that the medical history of the applicant's son was not known and that a number of factors, such as a childhood illness or a malfunction of the lungs, could have contributed to his death.

92. Furthermore, according to the Government, the medical report of 25 January 1995 clearly stated that death was due to natural causes.

93. Finally, the Government submitted that Aydın Kişmir's health could have been damaged due to his activities within the PKK (see paragraph 76 above).

94. Concerning this latter submission, the Court would stress that the Government have not submitted any evidence to indicate that Aydın was a member of the PKK. In any event, in the absence of a domestic court decision on which such an allegation could be based, the Court deems it wholly inappropriate, as well as incompatible with the respect for the rule of law, to attach any value to this submission. It therefore disregards this submission in its entirety.

95. Furthermore, although the Government submitted that Aydın's death could have been due to a childhood illness, the Court observes that they failed, once more, to submit any evidence in support of their submission. There is no indication in the documents submitted by the Government that Aydın had any previous health problems.

96. As regards the Government's submission that the medical report of 25 January 1995 "clearly stated that death was due to natural causes", the Court observes that the report in question makes no such reference. Instead, it concludes that death was due to respiratory failure related to lung oedema (see paragraph 52 above).

97. Finally, concerning the cause of the oedema in the lungs, the Court observes at the outset that the Government have not specifically dealt with this issue in their observations. However, the Court notes that it was stated in the decision not to prosecute, taken on 19 December 1996, that the report of 25 January 1995 (see paragraph 55 above) had been submitted to the First Specialist Council of the Forensic Medicine Directorate on 26 February 1996 "to establish how the oedema in the lungs, which had caused the respiratory failure, had been caused". It was then stated in that decision that the cause of the oedema could not be established because the body samples which were sent to be microscopically examined had become autolysed.

98. The Court finds, therefore, that the Government have not adequately accounted for the death of Aydın Kişmir during his detention at the Diyarbakır Police Headquarters and that the respondent State's responsibility for his death is engaged.

### III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

99. Article 2 of the Convention provides 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.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

#### A. The death of Aydın Kışmir

##### *1. Submissions of the parties*

100. The applicant submitted that her son had been killed by agents of the State, in violation of Article 2 of the Convention.

101. The Government denied the factual basis of the applicant’s allegations and maintained that Aydın Kışmir had died of natural causes.

##### *2. The Court’s assessment*

102. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, of which no derogation is permitted. Together with Article 3, it also 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).

103. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of

one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (*ibid.*, p. 46, §§ 148-149).

104. 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. The use of force by State agents in pursuit of one of the aims delineated in paragraph 2 of Article 2 may be justified where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken (*ibid.*, pp. 58-59, § 200).

105. Turning to the circumstances of the present case, the Court has already established that the Government have failed to account for the death of Aydın Kışmır while he was in the custody of police officers (see paragraph 98 above). It follows that there has been a violation of Article 2 of the Convention in respect of the death of Aydın Kışmır.

#### **B. Alleged failure to protect the right to life of Aydın Kışmır**

106. The applicant submitted that the respondent Government were under an obligation to protect the life of her son, who was in their custody, and had failed to do so. Had Aydın required medical treatment, it was their responsibility to provide it. According to the applicant, the Government had not afforded her son such protection, in violation of their obligation to protect an individual from a real and specific threat.

107. The Government did not address this issue specifically.

108. The Court, having regard to its above finding of a violation of Article 2 of the Convention, does not find it necessary in the circumstances of this case to reach any separate finding on this issue.

#### **C. Alleged inadequacy of the investigation**

109. The applicant asked the Court to find a violation of Article 2 of the Convention on the ground that the investigation into the death of her son had not been effective.

110. The Government maintained that the Prosecutor at the Diyarbakır Court had acted immediately after the suspicious death of the applicant’s son and had made every possible effort. An autopsy was conducted and necessary measures were taken in order to facilitate further investigations by the Forensic Medicine Directorate.

111. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, p. 49, § 161, and the *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). In that connection, the Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman*, cited above, § 105).

112. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (*Güleç v. Turkey* judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (see for example, *Kaya*, cited above, § 87) and to the identification and punishment of those responsible (*Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony (*Tanrıkulu*, cited above, § 109). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

113. There is also a requirement of promptness and reasonable expedition implicit in this context (*Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-IV, § 102-104, *Çakıcı v. Turkey*, judgment of 8 July 1999, *Reports* 1999-IV, §§ 80, 87, 106, and *Tanrıkulu*, cited above, § 109). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (*McKerr v. the United Kingdom*, no. 28883/95, §§ 108-115, ECHR 2001-III, and *Avşar v. Turkey*, no. 25657/94, §§ 390-395, ECHR-2001).

114. Turning to the particular circumstances of the case, the Court reiterates that a large number of important documents pertaining to the investigation into the death of the applicant's son were not made available to the Convention bodies (see paragraphs 78-79 above). Although it appears

from the documents submitted by the Government that a number of steps were taken at the domestic level, the Court is unable to assess from these documents the effectiveness of those steps. For example, and as already pointed out above (see paragraph 87 above), although a police officer was referred to as the defendant in the decision not to prosecute (see paragraph 54 above), no information was provided by the Government showing the connection of that police officer to Aydın's death. Furthermore, no information was provided by the Government showing that this particular defendant had been questioned.

115. As regards the requirement to question eye-witnesses, the Court finds it incomprehensible that there is no information to suggest that the police officers, who were on duty at the time of Aydın's arrest and detention and also at the time of his subsequent death, have ever been questioned by the domestic authorities. Finally, the Government have not submitted any information to indicate that family members of Aydın were questioned.

116. As regards the promptness of the investigation, the Court observes that the investigating Prosecutor waited for more than a year before forwarding, on 26 February 1996, the report of 25 January 1995 (see paragraph 55 above) to the First Specialist Council of the Forensic Medicine Directorate, asking it to establish the cause of the oedema in the lungs. The Court is of the opinion that the Prosecutor's failure to act promptly must have contributed to the body samples becoming autolysed. This failure to preserve crucial evidence has effectively prevented the establishment of the cause of death. In this connection the Court also refers to its earlier findings relating to the shortcomings in the autopsy (see paragraphs 85-86 above).

117. Furthermore, in the absence of any information showing that steps were taken between the first decision not to prosecute, allegedly taken on 7 November 1995 (see paragraph 34 above), and the second decision taken on 19 December 1996 (see paragraphs 35 and 54 above), the Court concludes that the authorities failed to comply with the requirement of promptness. In this connection, the Court would also stress that it has not been provided with information as to why two decisions not to prosecute were necessary.

118. The Court reiterates that for an investigation into a death to be regarded as effective within the meaning of the case-law of the Court, it is imperative that the next-of-kin of the victim be involved in the procedure to the extent necessary to safeguard their legitimate interests (*Güleç*, cited above, § 82, *Oğur*, cited above, § 92, and, finally, *Gül v. Turkey*, 22676/93, § 89, 14 December 2000).

119. In this connection the Court notes that the Government have not submitted any information to show that the family of Aydın Kışmır have ever been informed of the developments in the investigation. Neither is there any information in the case file to suggest that the documents concerning the investigation have been made available to the applicant. The

Court finds that these failures effectively prevented the applicant from being involved in the procedure to safeguards her legitimate interests. In these circumstances, and having particular regard to the Government's own submission that an objection must be supported by proof and facts which justify the opening of a prosecution (see paragraph 64 above), the Court finds that a possible objection by the applicant against the decision not to prosecute, without first having regard to the documents in the investigation file, would have had no chance of success.

120. The Court rejects, therefore, the Government's preliminary objection based on exhaustion of domestic remedies (see paragraphs 64-66 above) and concludes that the authorities have failed to carry out an effective investigation into the death of the applicant's son as required by Article 2 of the Convention.

121. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

#### IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

122. The applicant submitted that her son was subjected to treatment which amounted to torture.

123. The Government denied that the applicant's son had been ill-treated in custody and submitted that, according to the medical reports prepared by the Forensic Medicine Directorate, there was no evidence of ill-treatment or torture on the body of the applicant's son. The Government added that, contrary to the applicant's claims, her son had never been questioned as there was already sufficient evidence in the hands of the police to charge him with terrorist-related charges.

124. The Court reiterates that, according to its well-established case-law, the burden to provide a plausible explanation for the injuries found on an individual, who was taken into police custody in good health, falls to the Government (see, among other authorities, *Selmouni*, cited above, § 87).

125. According to the autopsy report of 12 October 1994, Aydın's body bore a number of marks (see paragraphs 38-39 above). These included an injury on his head; a 1 centimetre wound over the right eyebrow; purple bruising around the right eye; purple bruising on the outer surface of the right hand between the thumb and the wrist; a scabbed wound, measuring 2 x 2 cm, over the coccyx; purple bruising on the outside of the right arm measuring 2x 2 cm; a graze, measuring 2 x 2 cm, on the big toe of the right foot; deformation on the right side of the chest and, finally, widespread bleeding under the skin on the back of the body.

126. The Court notes that the injury over the right eyebrow and the injury on the big toe of the right foot were caused during his attempts to escape and were allegedly recorded in the medical report prepared by Dr Öztürk (see paragraph 28 above). The Court also notes that it has already

found that the injury on Aydın's head had been caused while he was in custody (see paragraph 84 above).

127. No information has been submitted by the Government to explain other injuries on Aydın's body. In this context, the Court observes the Government's reference to the First Specialist Council's medical report of 25 January 1995 in which it was stated that "apart from the wounds on the top part of the head, above the right eyebrow and the big toe, there were no other symptoms of an assault or traumatic change which meant that an external trauma could not be the cause of death" (see paragraph 52 above). However, the Court finds that the Specialist Council have failed to take note of a number of other injuries detailed in the autopsy report of 12 October 1994. In particular, as pointed out by Dr Milroy (see paragraph 61 above), the First Council did not comment on the "widespread bleeding under the skin on the back of the body" (see paragraph 39 above).

128. In the light of the above, the Court concludes that the Government have failed to account for the injuries found on Aydın's body.

129. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it was the intention that the Convention should attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, cited above, pp. 66-67, § 167). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *Salman*, cited above, at § 114).

130. The Court cannot exclude that the injuries on Aydın's body were the result of ill-treatment to which he was subjected in order to extract information from him. In this connection the Court, noting that no explanation has been given by the Government to justify the detention of Aydın from 6 October 1994 until his death on 12 October 1994, is not convinced by the Government's submission that it was not necessary to question Aydın since there was already sufficient evidence to link him and his friends to terrorism.

131. Having regard to its findings above, the Court concludes that the injuries on Aydın's body were caused by ill-treatment which could, at least, be qualified as inhuman, within the meaning of Article 3 of the Convention.

132. The Court finds, therefore, that there has been a breach of Article 3 of the Convention on account of the inhuman treatment to which the applicant's son was subjected prior to his death.

## V. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

133. The applicant submitted that the absence of a prosecution of those responsible for the death of her son prevented her from initiating civil proceedings. She relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

134. The applicant further complained of a lack of any independent national authority before which her complaints could have been brought with any prospect of success. In respect of this complaint she relied on Article 13 of the Convention, which provides:

“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.”

135. The Government reaffirmed that effective domestic remedies were available to the applicant but that she had chosen not to avail herself of them.

136. As regards the applicant’s complaint under Article 6 of the Convention, the Court notes that the applicant did not bring an action before the civil courts. It is therefore impossible to determine whether the national courts would have been able to adjudicate on the applicant’s claims had she initiated proceedings. In the Court’s view, however, the applicant’s complaints pertain mainly to the lack of an effective investigation into the death of her son which would have enabled her to resort to compensation-based remedies. It will therefore examine this complaint from the standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention (see *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, *Reports* 1998-II, § 92).

137. 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*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and *Kaya*, cited above, § 106).

138. 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, including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, § 107).

139. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Articles 2 and 3 of the Convention for the death of the applicant's son and also for the inhuman treatment suffered by him beforehand. The applicant's complaint in this regard is therefore "arguable" for the purposes of Article 13 (see *Salman*, cited above, § 122, and the authorities cited therein).

140. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's son and the inhuman treatment inflicted on him. For the reasons set out above (see paragraphs 114-121), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the inhuman treatment and death of her son, and has thereby been denied access to any other available remedies at her disposal, including a claim for compensation.

141. Consequently, there has been a violation of Article 13 of the Convention.

#### VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 2 AND 13

142. The applicant claimed that the rights of her son under Article 2 and 13 were violated, in conjunction with Article 14, on grounds of ethnic origin. Article 14 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."

143. The Government have not specifically dealt with this complaint.

144. The Court recalls its findings of a violation of Articles 2 and 13 of the Convention and does not consider that it is necessary also to consider these complaints in conjunction with Article 14 of the Convention.

## VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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. Pecuniary damage

146. The applicant submitted that her son had been born in 1970 and was 24 years old at the time of his death. He was not married and did not have any children. At the time of his death, Aydın had been accepted at the Faculty of Education to study physical education and teacher training. Had Aydın been able to continue in this career, he was expected to have graduated in 1998 and to have started teaching that year. The average annual salary for a teacher was approximately 2000 pounds sterling (GBP).

147. The applicant further submitted that she and her husband lived on a very limited income as her husband had already retired before the death of Aydın Kişmir. Consequently, when Aydın would have started working as a teacher, he would have supported his parents with his teaching salary. In December 2000 her husband had died, since when she has had very little income. Consequently the applicant would have been dependent upon her son to supplement her income.

148. Taking into account the average life expectancy in Turkey in that period and having regard to actuarial tables, the applicant calculated the estimated loss of earnings of her son as GBP 45,151.28.

149. The applicant alleged that at the time Aydın was arrested, she and her husband had sold their house and half the proceeds of the sale, 30,000 German marks (DM), were kept in the house. The security forces who came to arrest Aydın took this money. She converted the sum of DM 30,000 into GBP 14,922.48.

150. She asked the Court to award her the sums of GBP 45,151.28 in respect of the estimated loss of her son's earnings as well as GBP 14,922.48, in respect of the money allegedly taken from her house by the security forces.

151. The Government pointed to the applicant's failure to submit to the Court documents showing that her son had indeed been accepted at the university. They further submitted that, even assuming that the applicant's son had had a university place, there was no guarantee that he would have graduated and then financially provided for his family. They finally disputed the applicability of the actuarial tables used by the applicant and submitted that this method of calculation was speculative and highly susceptible to abuse by those who seek unjust enrichment.

152. As regards the applicant's claim concerning the DM 30,000, the Government pointed to the applicant's failure to submit any evidence in support of her allegation. They submitted that the taking of the money – if true – irrespective of the identity of the perpetrator, would amount to the offence of theft, and that the applicant should have brought a criminal case at the domestic level rather than claiming that amount before the Court.

153. As regards the applicant's claim concerning the alleged removal of DM 30,000 the Court, like the Government, observes that the applicant has failed to support her allegation with adequate evidence. It also observes that the applicant has not brought that allegation to the attention of the domestic authorities. In these circumstances the Court rejects the applicant's claim.

154. Concerning the applicant's claim for the alleged loss of earnings of her deceased son, the Court, like the Government, notes the applicant's failure to submit to the Court adequate evidence. However, the Court is of the opinion that the applicant's deceased son – regardless of his future career as a teacher or otherwise – would have provided financial assistance to his parents who were living on a limited income. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss suffered by Aydın Kişmir's family of the financial support to be provided by him. The Court, on an equitable basis, awards the applicant 16,500 euros (EUR) for pecuniary damage.

## **B. Non-pecuniary damage**

155. The applicant claimed compensation on her own behalf for the pain and suffering that she continued to suffer as a result of the knowledge that her son had been tortured and that he had died as a result. She also claimed that the death of her husband was brought on by the stress, pain and suffering caused by the death of Aydın. Furthermore, the applicant's other son Turan, who had been taken into custody and tortured at the same time as Aydın, continued to suffer psychologically. Turan had been able to hear his brother being tortured and had seen his brother lying unconscious as a result.

156. The applicant invited the Court to take into account the severity of the violations of the Convention in this case and asked the Court to award her the sum of GBP 15,000 by way of non-pecuniary damages for herself.

157. She also claimed the sum of GBP 25,000 on behalf of her deceased son Aydın Kişmir. In this connection the applicant referred to the awards made by the Court in the cases of *Tanlı* and *Avşar* (both cited above) in which the Court had awarded the applicants GBP 20,000 for non-pecuniary damage to be held by them for the widows and the children of their deceased relatives and also the sums of GBP 10,000 and GBP 2,500 respectively for non-pecuniary damage suffered by the applicants in their personal capacities.

158. The Government submitted that the amounts claimed by the applicant were excessive and clearly showed that the applicant was seeking to make a profit through the Convention organs.

159. The Court considers that there are two separate branches to the possible award of non-pecuniary damage: one award to the deceased victim, and the other award to the applicant who has sought to discover the truth about the fate of her son. As the probable heir to her unmarried son, the applicant would be the holder and beneficiary of both awards.

160. The Court observes that it has found that the authorities were accountable for the death of the applicant's son and the ill-treatment to which he was subjected prior to his death. In addition to the violation of Articles 2 and 3 in this respect, it has further found that the authorities failed to provide an effective investigation or remedy for those violations, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, it considers that an award of compensation should be made in favour of Aydın Kışmir, given the gravity of the breaches in question. Having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the deceased the sum of EUR 30,000 for non-pecuniary damage, to be held by the applicant on behalf of the beneficiaries of the estate of Aydın Kışmir.

161. Furthermore, the distress and anguish suffered by the applicant on account of the disappearance of her son and the manner in which the authorities dealt with her complaints has been found to constitute a violation of Article 13 in respect of the applicant. In this connection, the Court considers that an award of compensation in her favour is also justified. Accordingly, it awards the applicant the sum of EUR 3,500 in her personal capacity.

### **C. Costs and expenses**

162. The applicant claimed a total of GBP 17,471.27 for the fees and costs incurred in bringing the application. Her claim comprised:

- (a) GBP 3,967.91 for the fees of her current lawyers working for the Kurdish Human Rights Project (KHRP) in the United Kingdom;
- (b) GBP 2,840 for the fees of her previous lawyer Professor Françoise Hampson;
- (c) GBP 5,909.36 for the fees of her lawyers based in Turkey;
- (d) GBP 965 for the administrative costs incurred by the United Kingdom-based lawyers; and
- (e) GBP 3,789 for the administrative costs incurred by the lawyers based in Turkey.

163. In support of her claims for the fees of her lawyers, the applicant submitted a detailed schedule of costs.

164. The Government submitted that only expenses which have been actually incurred could be reimbursed, and that the applicant and her representatives should have documented all their costs and expenses, but failed to do so. The Government also invited the Court not to award the KHRP any compensation in respect of the costs and expenses incurred it.

165. The Court observes that the fees claimed by the applicant for her lawyers based in the United Kingdom and the costs incurred by them appear to be reasonable. However, the sum claimed by the lawyers based in Turkey in respect of their fees, costs and expenses appears to be excessive.

166. Making its own assessment based on the information available, the Court awards the applicant EUR 15,000 in respect of costs and expenses – exclusive of any value-added tax that may be chargeable – less EUR 880 already received in legal aid from the Council of Europe, the net award to be paid in pounds sterling into her representatives' bank account in the United Kingdom, as identified and requested by the applicant.

#### **D. Default interest**

167. 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**

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* unanimously that the respondent State has failed to fulfil its obligation under Article 38 of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts
3. *Holds* unanimously that the Government are liable for the death of the applicant's son in violation of Article 2 of the Convention;
4. *Holds* unanimously that it is unnecessary to determine whether there has been a violation of Article 2 of the Convention on account of the alleged failure to protect the life of the applicant's son;
5. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the killing of the applicant's son;

6. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the treatment to which the applicant's son was subjected prior to his death;
7. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
8. *Holds* by six votes to one that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2 and 13 of the Convention;
9. *Holds*
  - (a) by six votes to one, 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 sum of EUR 16,500 (sixteen thousand five hundred euros) in respect of pecuniary damage, to be converted into new Turkish liras at the rate applicable at the date of settlement, plus any tax that may be chargeable;
  - (b) unanimously, that the respondent State is to pay the applicant, within the same three month period, the following sums to be converted into new Turkish liras at the rate applicable at the date of settlement, plus any tax that may be chargeable:
    - (i) EUR 30,000 (thirty thousand euros) in respect of non-pecuniary damage, to be held by the applicant for the beneficiaries of the estate of Aydın Kişmir;
    - (ii) EUR 3,500 (three thousand five hundred euros) in respect of the applicant's personal, non-pecuniary damage;
  - (c) that the respondent State is to pay the applicant, within the same three month period, and into the bank account identified by her in the United Kingdom, EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, less EUR 880 (eight hundred and eighty euros) granted as legal aid, to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;
  - (d) 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;
10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President

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

- (a) partly dissenting opinion of Mrs Mularoni;
- (b) partly dissenting opinion of Mr Gölcüklü.

J.-P.C.  
S.D.

## PARTLY DISSENTING OPINION OF JUDGE MULARONI

Unlike the majority, I believe that it is necessary for the Court to examine separately the applicant's complaint under Article 14 of the Convention.

After examining tens and tens of similar applications, all lodged, without exception, by Turkish citizens of Kurdish origin, and very often concluding that there was a violation of Articles 2 and 3 of the Convention, the Court should, to my mind, at least consider that there could be a serious problem under Article 14 of the Convention as well.

This does not mean, of course, that in the end the Court will invariably find that there has been a violation of Article 14. However, I cannot agree with the majority approach, which to me is tantamount to considering that the prohibition on discrimination in this type of case is not an important issue.

## PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

*(Translation)*

To my great regret, I cannot agree with the majority's opinion and, consequently, its conclusion with regard to the application of Article 41, especially the award of compensation for pecuniary damage (point 9 of the operative provisions).

The applicant claims that her son had been offered a place at university. Thus, had he lived, he would have completed his studies; he would have had a profession or trade, would have received a salary and, subsequently, would have supported his mother, who did not have sufficient income of her own. All this places the "loss of earnings" in a hypothetical future (see paragraphs 146–147 of the judgment).

It goes without saying that compensation for pecuniary damage (loss of earnings) must be assessed in the light of the real factual situation at the material time, and not on the basis of supposition and speculation. It is for that reason that I cannot share the Court's conclusion on this point.