



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

SECOND SECTION

CASE OF DİZMAN v. TURKEY

(Application no. 27309/95)

JUDGMENT

STRASBOURG

20 September 2005

FINAL

20/12/2005

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 Dizman 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 R. TÜRMEŒ,

Mr K. JUNGWIERT,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 27309/95) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ahmet Dizman (“the applicant”), on 31 March 1995.

2. The applicant, who had been granted legal aid, was represented by Dr Anke Stock, a lawyer practising in London. 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 on 5 October 1994 he had been taken to an isolated place by four plain-clothes police officers and subjected to inhuman and degrading treatment. He invoked Articles 2, 3, 5, 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.

6. By a decision of 18 January 2000, the Court declared the application admissible. In its decision the Court considered it more appropriate to examine the applicant’s complaint under Article 6 of the Convention in relation to the more general obligations on States under Article 13.

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 was born in 1969 and lives in the town of Seyhan, within the administrative jurisdiction of the province of Adana.

A. Introduction

10. The facts surrounding the events of 5 October 1994 are disputed by the parties.

11. The facts as presented by the applicant are set out in Part B below (see paragraphs 12-21). The Government's submissions concerning the facts are summarised in Part C below (see paragraphs 22-23). Documentary evidence submitted by the applicant and the Government is summarised in Part D (see paragraphs 24-27 below) and Part E (see paragraphs 28-52 below) respectively.

B. The applicant's submissions on the facts

12. On 3 October 1994 Rehib Çabuk and Sefer Cerf were killed in Adana. They were, respectively, district leader and administrative board member of HADEP (*Halkın Demokrasi Partisi, People's Democracy Party*), a pro-Kurdish political party. The applicant witnessed the killing and attended the funeral on 4 October 1994.

13. On 5 October 1994, at about 11 a.m., while the applicant was sitting in the Erzurumlular Café in the Mutlu neighbourhood in Adana, two persons, who later identified themselves as policemen, entered the café. Both were from the anti-terrorism branch of the police and both were armed with pistols. They told the applicant to come out of the café. On leaving the café the applicant was put in a white Renault car, with the registration number 01 HC 644.

14. There were two other police officers inside the car, both armed with MP-5 automatic weapons. The applicant's elder brother Suphi Dizman, who was also in the café, asked the police officers why they were taking his

brother away. The police told him that they wanted to ask his brother a number of questions and they would then return him to the café.

15. The car drove in the direction of Kabaktepe and stopped in a deserted field. The applicant was taken out of the car. As soon as he got out, the police officers started to punch and kick him and to beat him with the butts of their guns. The police officers told the applicant that they had seen him at the funeral of Sefer Cerf and Rehib Çabuk the day before. They threatened him and told him that if he continued to be involved in such activities, his end would be like those of the dead HADEP members.

16. The police officers questioned the applicant about a number of local people. The applicant was also forced to report the activities of local shopkeepers, who were allegedly selling the newspaper *Özgür Ülke*, a pro-Kurdish newspaper, and who were collecting money, presumably for the Kurdistan Workers' Party (hereinafter "the PKK"). The applicant was threatened that if he did not report the political activities of these shopkeepers regularly, he would be killed.

17. The applicant denied that he was involved in such activities and protested that they had no reason to treat him like a criminal. He was then put into the car and driven towards the town. Before releasing him, the officers gave the applicant an address and ordered him to be there on the following Friday evening.

18. When the applicant got home, his relatives took him to the hospital where it was established that his jaw bone had been broken and required surgery.

19. The applicant, with the assistance of a lawyer, submitted a petition to the Adana Prosecutor's office on 7 October 1994 and requested the Prosecutor to initiate criminal proceedings against the police officers who had ill-treated him. He gave a detailed account of the incident and described the physical features of the police officers in question. The applicant asked the Prosecutor to send him to the Forensic Medicine Directorate to obtain a medical report which could be used as evidence in the criminal proceedings.

20. The report was obtained from the Adana Forensic Medicine Directorate on 7 October 1994 (for content see paragraph 27 below).

21. The applicant received no replies from the Prosecutor.

C. The Government's submissions on the facts

22. A medical report was issued by the Forensic Medicine Directorate on 7 October 1994 according to which the applicant was unable to work for a period of 25 days.

23. The applicant made an application to the Adana Public Prosecutor on 7 October 1994. On 10 October 1994 the Adana Public Prosecutor commenced an investigation into the applicant's allegations of ill-treatment under file no. 1994/29324.

D. Documentary evidence submitted by the applicant

24. The following information appears from the documents submitted by the applicant.

25. On 6 October 1994 the applicant submitted a petition to the Prosecutor's office in Adana. The contents of this petition formed the basis of his submissions under Part B above (see paragraphs 12-20). He also informed the Prosecutor that he had been taken to hospital after having been released by the police. It had been established at the hospital that his jaw had been broken and required surgery. The applicant submitted the x-rays to the Prosecutor and told him that he wanted to press charges against the police officers. He finally asked the Prosecutor to be sent to the Forensic Medicine Directorate.

26. On 7 October 1994 the applicant submitted another petition to the Prosecutor's office in Adana and repeated the contents of his previous petition. He also described the physical features of the police officers in this petition.

27. According to a medical report prepared by the Forensic Medicine Directorate in Adana, the applicant's left jawbone had been broken. The report was based on an examination of the applicant as well as of x-rays. The report concluded that the fracture did not constitute a danger to life but would prevent the applicant from working for 25 days.

E. Documentary evidence submitted by the Government

28. The following information appears from the documents submitted by the Government.

29. It appears from this decision that the Adana Prosecutor, after having received the applicant's petitions, had decided on an unspecified date that he lacked jurisdiction to prosecute the police officers and had forwarded the investigation file to the Adana Administrative Council in order to obtain an authorisation to prosecute the police officers.

30. On 24 November 1994 the Adana Administrative Council, which was presided over by the deputy Governor of Adana and consisted of six civil servants, found that there was insufficient evidence to open an investigation and decided to decline authorisation for the prosecution of Yaşar Soyyiğit, Hacı Kara, Mustafa Duman and Kadri Dursun, police officers who worked for the anti-terrorism branch of the Adana Police who had allegedly intimidated and ill-treated the applicant on 5 October 1994.

31. The Administrative Council based its decision on the fact that the applicant, who claimed to have been ill-treated on 5 October 1994, had not asked for his transfer to the Forensic Medicine Directorate until 7 October 1994. It appears from this decision that the investigation file had been forwarded to the Administrative Council by the Legal Affairs Department of

the Adana Police Headquarters, together with a letter drawn up by that department on 18 November 1994.

32. On 7 December 1994 the Disciplinary Board of the Adana Police decided not to impose any disciplinary measures on the police officers due to a lack of evidence establishing that they had committed the acts complained of. In this decision the applicant was reported as having stated that he had been beaten up by the police officers and that he had been given a medical report showing that he was unable to work for 25 days. The applicant had no complaints against anyone. The applicant's brother apparently told the Disciplinary Board that his brother had been taken away from the café by the four officers but that he also did not have any complaints against anyone.

33. In the decision of the disciplinary board, Yaşar Soyyiğit, one of the four police officers, was reported as having stated that he and his colleagues had carried out an identity check in the café during which they were suspicious about the applicant. They had asked him a number of questions in the café and left. They had not beaten him up. The remaining three police officers apparently confirmed the statement given by Yaşar Soyyiğit.

34. On 31 May 1996 the Council of State quashed the Adana Administrative Council's decision declining authorisation for the prosecution of the four police officers in so far as it concerned the offence of ill-treatment and upheld the decision not to grant authorisation to prosecute them for the allegation of intimidation. The Council of State further held that the four police officers should be tried before the Adana Criminal Court of First Instance. According to the Council of State, the medical report proved that the applicant had been ill-treated by the four police officers as alleged.

35. The decision of the Council of State was forwarded to the Adana Prosecutor's office on 7 August 1996. On 8 August 1996 the Adana Prosecutor forwarded the decision to the Adana Criminal Court of First Instance and asked that court to take the necessary action.

36. On 11 August 1996 a preliminary hearing was held before the Ninth Chamber of the Adana Criminal Court of First Instance (hereinafter "the trial court"). The court decided to summons the defendants for the next hearing on 14 November 1996 and further decided to obtain the defendants' identity cards and documents showing their criminal records.

37. On 12 August 1996 the Adana Prosecutor sent a letter to the Ministry of Justice's International Law and Foreign Relations Directorate (hereinafter "the Directorate") and informed the Directorate of the decisions referred to above. The Prosecutor added that the criminal proceedings were pending before the trial court under case-file no. 1996/818 and that a hearing was scheduled for 14 November 1996. In this letter the Prosecutor referred to a letter sent by the Directorate to his office on 7 June 1996 and a reply sent by his office on 13 June 1996.

38. On 21 August 1996 the trial court asked the Adana Prosecutor to obtain the defendants' identity cards before the hearing on 14 November 1996.

39. On 27 August 1996 the Directorate sent a letter to the Ministry of Foreign Affairs and referred to the application lodged by the applicant with the Commission. The Directorate informed the Ministry of the decisions referred to above and added that the criminal proceedings were pending before the trial court under case-file no. 1996/818. The Directorate also referred to a letter sent by the Ministry on 31 May 1996 and their reply of 26 June 1996.

40. On 5 September 1996 the anti-terrorist branch forwarded to the trial court the identity document of one of the defendants, Yaşar Soyyiğit.

41. On 14 November 1996 the hearing resumed before the trial court. Only two of the defendants, namely Yaşar Soyyiğit and Hacı Kara, were present in the court room. According to postal receipts, the remaining two defendants had also been summonsed.

42. Both Mr Soyyiğit and Mr Kara told the trial court that they had gone to the café on the day in question and checked the identity card of the applicant. When they had established that he was not wanted by the authorities for any offence, they had returned the identity card to the applicant. They had not beaten him up. The defendants confirmed the accuracy of the statements they had made during the preliminary investigation.

43. The trial court, noting that all defendants except Yaşar Soyyiğit had since been posted elsewhere, decided to send letters rogatory to the courts in whose jurisdiction the two absent defendants were living and asked those courts to take statements from them. The trial court also decided to send letters to the Registry Office for Births, Marriages and Deaths to ask for the birth registry records of the defendants. The trial court, noting that the applicant had "inadvertently not been summonsed", decided to summons him for the next hearing on 29 January 1997.

44. On 9 December 1996 the Karakoçan Criminal Court of First Instance, acting on the letter rogatory from the trial court, took a statement from Mustafa Duman, one of the two defendants who had failed to attend the hearing before the trial court on 14 November 1996. Mr Duman told the court that neither he nor any of his colleagues had ill-treated the applicant. According to Mr Duman, the applicant had been a PKK member and it was for this reason that he had made the allegations of ill-treatment against the police.

45. On 25 December 1996 the Akçakale Criminal Court of First Instance, also acting on the letter rogatory from the trial court, took a statement from Kadri Dursun, the fourth defendant. Mr Dursun told the court that he did not remember the incident which, in any event, was just an allegation. He did not even know the applicant.

46. During the hearing that was held before the trial court on 29 January 1997, the applicant confirmed the accuracy of the contents of his statement taken at the Police Headquarters previously. He further informed the trial court that he wanted to press charges against the defendants. The applicant's brother Suphi Dizman also confirmed the accuracy of the contents of his statement taken at the Police Headquarters previously and added that the four police officers had beaten up his brother and broken his jaw as a result.

47. The trial court adjourned the hearing until 27 March 1997 on account of the failure of the Akcakale court to forward Kadri Dursun's statement in time.

48. The hearings on 27 March, 4 June and 15 September 1997 had to be postponed on account of the failure of the authorities to submit to the trial court the identity card of Kadri Dursun and the criminal records of Mustafa Duman.

49. At the hearing on 17 November 1997 the prosecutor was given additional time until 29 December 1997 to submit his observations.

50. A final hearing took place on 29 December 1997. The defendants did not attend this hearing. The Prosecutor argued that, other than the applicant's statement, there was no evidence to prove the allegation of ill-treatment. Furthermore, the applicant had obtained the medical report two days after the alleged event. The Prosecutor recommended to the trial court that the defendants be acquitted.

51. The trial court, noting that the defendants had "vehemently denied the allegations" against them and taking into account the "fact that the medical report was issued two days after the alleged events", concluded on 29 December 1997 that there was insufficient evidence to prove that the applicant's injury had been caused by the defendants, and acquitted them.

52. According to postal receipts submitted by the Government, the decision of the trial court was communicated to the defendants in March 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

53. The relevant domestic law and practice are set out in the judgment of *İlhan v. Turkey* ([GC], no. 22277/93, §§ 35-46, ECHR 2000-VII).

THE LAW

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

A. Arguments of the parties

1. The applicant

54. The applicant maintained that he had been abducted by four police officers on 5 October 1994 and taken to a deserted place where he had been subjected to severe ill-treatment, which included beatings with pistol butts as well as being kicked and punched.

55. The applicant drew the Court's attention to the domestic authorities' failure to carry out a proper investigation and also to the Government's failure to produce certain key documents requested by the Court. These failures, in the opinion of the applicant, very clearly supported his allegations.

2. The Government

56. The Government stressed that the applicant had not been able to adduce any evidence to substantiate his allegations. They submitted that the medical report, issued on 7 October 1994, mentioned only the fracture of the applicant's left jawbone. The fact that there was no mention in the medical report of any other sign of injury or ecchymoses, in the Government's opinion raised suspicions as to the veracity of the applicant's allegations. The Government also found it interesting that the applicant, who had a broken jaw, had gone to see a doctor not on the day of the incident but two days later.

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

57. Before proceeding to assess the evidence, the Court reiterates 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. A failure on a Government's part 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 (see *Orhan v. Turkey*, no. 25656/94, § 266, 18 June 2002).

58. In this context, the Court has noted with concern a number of matters relating to the Government's response to the Commission's and subsequently the Court's requests for documents and information. Apart from individual requests for specific documents, the Government were also requested on a number of occasions to submit the entire investigation file.

59. As regards the Government's failure to submit to the Convention bodies the documents and information requested, the Court observes firstly that on 18 September 1995 the Commission requested the Government to confirm whether an investigation had been carried out into the applicant's allegations by the Adana Prosecutor following the receipt by the latter of the applicant's petition of 7 October 1994 (see paragraph 26 above). The Government informed the Commission on 16 April 1996 that an investigation had been opened by the Prosecutor of Adana on 10 October 1994 under file no. 1994/29324 and was still continuing.

60. However, the Government failed to mention in their letter that the Adana Prosecutor's investigation had already been completed following the decision of non-jurisdiction taken by the Prosecutor and that the case file had been submitted to the Adana Administrative Council (see paragraph 29 above). They further failed to mention that on 24 November 1994 the Adana Administrative Council had also completed its examination of the case (see paragraph 30 above).

61. The Government did not send the decision of the Administrative Council to the Convention institutions until 30 September 1999, i.e. almost five years after that decision had been adopted. On this occasion, however, the Government failed to send to the Court – or even to mention – the decision of the Council of State taken on 31 May 1996 (see paragraph 34 above). That decision was not sent to the Court until 28 March 2001.

62. In the meantime, the Registry of the Court, in its examination of another application in which the applicant's name was mentioned (see *Macır v. Turkey*, no. 29516/95, § 10, 22 April 2003), discovered in 1999 that the Administrative Council's decision of 24 November 1994 had been quashed by the Council of State on 31 May 1996 (see paragraph 34 above). The Registry was further able to find out, by contacting the Adana Criminal Court of First Instance directly, that four police officers had been tried in

relation to the applicant's allegations and that they had been acquitted on 29 December 1997 (see paragraph 51 above).

63. On 27 January 2000 the Court invited the Government to submit, before 16 March 2000, a full copy of the investigation file and copies of the relevant decisions concerning the applicant's allegations of ill-treatment. The Government failed to submit any documents before the time limit expired and, in addition, did not respond to the Court's reminder of 3 July 2000. On 28 March 2001, after having been reminded by the Court once more on 9 March 2001, the Government submitted to the Court, what they claimed to be, "the file of the judicial proceedings initiated following the allegations of ill-treatment made by the applicant against the police officers responsible for his being taken into custody".

64. Following the submission to the Court of the applicant's observations on the documents provided by the Government, the Court invited the Government to submit their comments on those observations. No reply was received from the Government.

65. Other than the above mentioned failures to respond on time, or to respond at all, to the Convention bodies' requests for specific information and documents, and despite their contention to the contrary (see paragraph 63 above), the Government also failed to submit to the Court the complete investigation file. The Court would highlight, in particular, the following, potentially important, documents which were not submitted by the Government. The existence of these documents came to light from references made to them in documents in the Court's possession:

(a) the x-rays, submitted by the applicant to the Adana Prosecutor on 6 October 1994 and examined by the Forensic Medicine Directorate on 7 October 1994 (see paragraph 25 above)

(b) documents drawn up by the Adana Prosecutor when ordering the transfer of the applicant to the Forensic Medicine Directorate (see paragraph 31 above);

(c) the decision of non jurisdiction (see paragraph 29 above) and any statements taken by the Adana Prosecutor from the applicant and from the police officers implicated in the allegations prior to that decision;

(d) the statements taken from the police officers during the preliminary investigation (see paragraph 33 above);

(e) the letter from the Adana Police Headquarters of 18 November 1994 (see paragraph 31 above);

(f) the statements taken from the applicant and his brother at the Police Headquarters (see paragraph 46 above);

(g) the letter from the Ministry of Foreign Affairs of 31 May 1996 (see paragraph 39 above);

(h) the letters from the Directorate of 7 and 26 June 1996 (see paragraphs 37 and 39 above); and, finally,

(i) the letter from the Adana Prosecutor of 13 June 1996 (see paragraph 37 above).

66. The Court concludes that the Government have not advanced any explanation for their delays and omissions in response to the Commission's and Court's requests for relevant documents, information and clarifications. Accordingly, it 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 co-operation in Convention proceedings (see paragraph 57 above), finds that the Government fell short of their obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Commission and the Court in their task of establishing the facts.

C. The Court's evaluation of the facts

67. The applicant alleged that he had been taken to an isolated place by four police officers and ill-treated. As a result of that ill-treatment, his jaw had been broken. The Government, for their part, dismissed the applicant's allegations by stressing that the applicant had not obtained the medical report on the day of the alleged incident.

68. The Court observes at the outset that the Government – despite a number of opportunities to respond to the applicant's comments given to them in the course of the Convention proceedings – have not challenged the applicant's allegation that he was taken to an isolated place by the police officers.

69. Neither have they commented on, or confirmed the accuracy of, the statements given by two of the four police officers during the trial, according to which those officers had not taken the applicant away but had only checked his identity card and had then returned it to him (see paragraph 42 above). In this connection, the Court reiterates that the Government did not even draw the Court's attention to the trial of those police officers; this fact was discovered by the Court *ex proprio motu* (see paragraph 62 above). Furthermore, the Government did not provide the Court with the documents relating to the trial, in spite of numerous requests and reminders, until 28 March 2001 (see paragraph 63 above), i.e. more than three years after the trial had ended.

70. Although the effectiveness of this trial will be examined below (see paragraphs 90-100), the Court would already stress at this juncture that it is struck by the fact that two of the defendants were excused from appearing before the trial court (see paragraphs 43-45 above). As a result, the trial court was deprived of the opportunity to question these two defendants directly. Furthermore, the Court observes that the applicant, who had "inadvertently" not been summonsed by the trial court (see paragraph 43 above) for the first hearing, and who not was even informed of the

subsequent hearings, was not given an adequate opportunity to put forward his allegations during the trial.

71. The Court notes that the denials of the defendants were apparently sufficient for the trial court to acquit them. No weight appears to have been given to the applicant's and his brother's statements, which were given both before the police (see paragraph 46 above) and during the trial (see paragraph 46 above).

72. In its decision of acquittal, the trial court relied heavily on the date of the medical report drawn up by the Forensic Medicine Directorate. It apparently did not occur to either the Prosecutor or the trial court judge to make enquiries with the hospital where, according to the applicant, he had been examined on 5 October 1994 and where x-rays of his jaw had been taken (see paragraph 25 above).

73. In the light of the foregoing, the Court does not find the testimonies of the police officers, given in the course of the trial, to be conclusive evidence, capable of disproving the applicant's allegations.

74. The Court would reiterate once more that it has not been provided with the statements taken from the police officers during the preliminary investigation (see paragraph 33 above) or any other documents which might have been contained in the investigation file when it was brought to the attention of the Council of State. In this connection, the Court observes that the Council of State, which did have in its possession the investigation file, was able to establish in its decision of 31 May 1996 that the applicant had been ill-treated by the four police officers as alleged (see paragraph 34 above). The Court has not been provided with any argument to doubt the accuracy of the conclusion reached by the Council of State.

75. As regards the Government's reliance on the fact that the date of the Forensic Medicine Directorate's report is 7 October 1994 (see paragraph 27 above), the Court observes that that was the date on which the applicant was transferred to that Directorate by the Prosecutor (see paragraph 26 above). In this connection the Court observes that at no stage did the Government dispute the applicant's submission that he had been taken to a hospital by his family members after having been released by the police officers on 5 October 1994 (see paragraphs 25-26 above) or that he had been provided with x-rays at that hospital which were handed over to the Prosecutor by the applicant on 6 October 1994 (see paragraph 25 above). Neither does it appear that the Government, or any other domestic authority, contacted the hospital where the applicant claimed to have been examined, to verify the accuracy of the applicant's statement.

76. In the light of the foregoing, and having particular regard to the Government's failure to submit to the Court the relevant documents and information set out in detail above (see paragraphs 58-65 above), the Court concludes that the applicant was subjected to ill-treatment by police officers on 5 October 1994 and that, as a result of that beating, his jaw was broken.

77. On the basis of this finding, the Court will proceed to examine the applicant's complaints under the various Articles of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

78. The applicant argued that there had been a violation of Article 2 of the Convention on account of the death threats he had received from the police officers on 5 October 1994. Article 2 of the Convention provides, in so far as relevant;

“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.

...”

79. The Government did not deal with this complaint in their observations.

80. The Court is not persuaded that the applicant's allegations are of such a nature or degree as to constitute a breach of Article 2 of the Convention (see *Buldan v. Turkey*, no. 28298/95, § 93, 20 April 2004).

81. Accordingly, the Court concludes that there has been no violation of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

82. The applicant maintained that he had been subjected to ill-treatment which amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

83. The Government submitted that the applicant could not adduce any evidence to substantiate his allegations.

84. The Court's case-law indicates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, amongst other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 52).

85. The Court recalls that it has found it established that the applicant was beaten up by police officers and that as a result of that beating his jaw was broken (see paragraph 76 above). It considers that such treatment reaches the threshold of inhuman and degrading treatment and discloses in that respect a violation of Article 3 of the Convention.

86. It follows therefore that there has been a violation of Article 3 in respect of the treatment to which the applicant was subjected.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

87. The applicant complained that he had been detained in circumstances that could not be justified under any paragraph in Article 5 of the Convention.

88. The Government did not deal with this complaint in their observations.

89. Having regard to its findings under Articles 3 above and 13 below, the Court does not find it necessary, in the circumstances of the present case, to determine whether there has been a breach of Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

90. The applicant complained that the failures in the investigation constituted a violation of Article 13 of the Convention, which provides as follows:

“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.”

91. In support of his argument the applicant referred, in particular, to the following failures of the national authorities in the course of the investigation and the trial of the police officers:

(a) the failure to take detailed statements from the police officers, including the testing of their version of events through questioning them;

(b) the failure to secure the police officers’ weapons and to carry out, *inter alia*, forensic tests on them to establish whether there was evidence that they had come into contact with the applicant;

(c) the failure to investigate the scene of the incident for footprints and tyre marks;

(d) the failure to take a statement from the doctor who drew up the medical report of 7 October 1994, as to his opinion of the full extent and the causes of the injuries to the applicant; were they, for example, consistent with injuries caused by rifle butts;

(e) the failure to locate and take statements from persons in the café, or in the vicinity of the café, who might have witnessed the incident on 5 October 1994; and, finally,

(f) the failure to obtain all relevant police records for the period up to 5 October 1994, as to the duties of the four police officers and as to the use of the car with the registration number 01 HC 644.

92. The applicant further drew the Court's attention to the following shortcomings in the trial of the four police officers:

(a) the proceedings were conducted in a dilatory manner, with frequent adjournments and hearings taking place without the accused being present. In the applicant's opinion it was wholly unacceptable that a relatively simple case should take more than three years from the lodging of the applicant's complaint in October 1994 to the decision of the court in December 1997;

(b) the versions of events presented by the four defendants were not tested in any way, be it by questions from the judge, the Prosecutor, or otherwise;

(c) the "inadvertent" failure to summons him denied the applicant the opportunity of putting questions to the defendants;

(d) the failure of the trial court to question the doctor who had drawn up the medical report of 7 October 1994; and, finally,

(e) the fact that the prosecutor himself recommended acquittal, on the basis of insufficient evidence, effectively gave the trial court little choice but to acquit the defendants. This recommendation should be considered in the light of the defects in the trial process referred to above, which were the primary responsibility of the prosecutor's office.

93. The Government, who had been invited by the Court to comment specifically on the applicant's arguments summarised above, failed to respond to the Court's request (see paragraph 64 above) and therefore did not dispute the accuracy of those arguments.

94. 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; *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 167).

95. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by the State, the notion of "effective remedy" entails, 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, and including effective access for the complainant to the investigation procedure (see *İlhan*, cited above, § 97).

96. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 for ill-treatment of the applicant. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (*ibid.* at § 98 and the cases cited therein).

97. The authorities thus had an obligation to carry out an effective investigation into the circumstances in which the applicant sustained his injuries.

98. The Court agrees with the shortcomings in the investigation into the applicant's allegations and in the criminal trial, as identified by the applicant (see paragraphs 91-92 above). It also notes that the applicant's submissions in this respect have not been disputed by the Government (see paragraph 93 above; see also paragraph 7 above).

99. In the light of the foregoing, no effective criminal investigation can be considered to have been conducted in accordance with Article 13. The Court finds, therefore, that no effective remedy has been provided in respect of the applicant's Convention complaints, and thereby access to any other available remedies, including a claim for compensation, has also been denied.

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

VI. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 2, 3, 5 AND 6 OF THE CONVENTION

101. The applicant maintained that it was because of his Kurdish origin that he had been subjected to police brutality. He argued that this constituted discrimination in breach of Article 14 of the Convention, in conjunction with Articles 2, 3, 5 and 6 of the Convention. 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."

102. The Government did not deal with this complaint in their observations.

103. The Court notes its findings of a violation of Articles 3 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

104. 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

105. The applicant claimed that, after being assaulted by the police officers, he had been given medical treatment in a hospital in Istanbul for a period of 90 days. During that time, and a further period of three months, he had been unable to work. His six months' loss of income amounted to 1,571 pounds sterling (GBP). He had a wife and three children, aged between 6 and 9 years old, for whom he had been financially responsible. He also claimed that his hospital expenses had been GBP 3,492.84.

106. The Government objected to the sum claimed by the applicant, arguing that the applicant had failed to submit any evidence of his pecuniary damage. They asked the Court to award the applicant, if need be, an equitable amount of pecuniary damage without allowing the compensation procedure to be exploited by exaggerated claims lacking any evidence or document.

107. The Court observes that there is a direct causal link between the injuries which it has found were inflicted on the applicant in breach of Article 3 and the medical expenses and a certain loss of earnings. It notes in this connection that the applicant needed an operation and was unable, according to the Forensic Medicine Directorate's report of 7 October 1994, to work for a period of 25 days (see paragraph 27 above). The Court, deciding on an equitable basis in the absence of any hospital bills, awards the applicant the sum of 5,000 euros (EUR) in respect of his pecuniary damage.

B. Non-pecuniary damage

108. The applicant also asked the Court to award him non-pecuniary damage in the amount of GBP 25,000.

109. In the Government's opinion the sum claimed by the applicant was excessive; a finding of a violation would constitute sufficient just satisfaction. They invited the Court not to make any award which would unjustly enrich the applicant.

110. The Court has found that the applicant was subjected to ill-treatment by police officers in violation of Article 3 of the Convention. It also found that there had been a failure to provide an effective remedy in

this respect. Having regard to the circumstances of this case, the Court, deciding on an equitable basis, awards the applicant the sum of EUR 15,000 in respect of non-pecuniary damage.

C. Costs and expenses

111. The applicant claimed a total of GBP 6,333.60 and 1,712,000,000 Turkish liras (TL) for the fees and costs incurred in bringing the application. His claim comprised:

- (a) GBP 5,798.60 for the fees of his United Kingdom-based lawyers;
- (b) 1,625,000,000 TL for the fees of his lawyer based in Turkey (which amounted to approximately GBP 875);
- (c) GBP 375 for translation costs incurred by the United Kingdom-based lawyers;
- (d) GBP 160 for administrative costs incurred by the United Kingdom-based lawyers; and,
- (e) 87,000,000 TL for administrative costs incurred by the lawyers based in Turkey (approximately GBP 46).

112. The Government argued that only expenses that had been actually incurred should be reimbursed. In this connection, the Government considered that no documentary substantiation of the costs allegedly incurred had been provided by the applicant.

113. Making its own estimate based on the information available, the Court awards the applicant EUR 8,000, in respect of costs and expenses – exclusive of any value-added tax that may be chargeable – the net award to be paid in pounds sterling into the bank account of the applicant's representative in the United Kingdom, as was requested and identified by the applicant.

D. Default interest

114. 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. *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;

2. *Holds* unanimously that there has been no violation of Article 2 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected;
4. *Holds* unanimously that it is unnecessary to examine separately the applicant's complaint under Article 5 of the Convention;
5. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
6. *Holds* by six votes to one that it is unnecessary to examine separately the applicant's complaint under Article 14 of the Convention;
7. *Holds* unanimously
 - (a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) and any tax that may be chargeable on this amount, in respect of pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and be paid into the bank account of the applicant;
 - (b) that the respondent State is to pay to the applicant, within the same three months period, EUR 15,000 (fifteen thousand euros) and any tax that may be chargeable on this amount, in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and be paid into the bank account of the applicant;
 - (c) that the respondent State is to pay the applicant, within the same three month period, into the bank account of his representatives in the United Kingdom identified by him, EUR 8,000 (eight thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement to be paid into the bank account of the applicant's representative in the United Kingdom;
 - (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;
8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 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 partly dissenting opinion of Mrs Mularoni is annexed to this judgment.

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 lodged by Turkish citizens of Kurdish origin, and very often concluding that there was a violation of Articles 2 and 3 of the Convention, I felt uncomfortable in not examining such a complaint even before the Grand Chamber judgment of 6 July 2005 in the *Nachova and Others v. Bulgaria* cases (nos. 43577/98 and 43579/98). After such a judgment I feel even more uncomfortable. I am really unable to understand why the Court decided to examine such a complaint in the *Nachova and Others* case and continues to consider that it is unnecessary to do that in cases like the present one.

The examination of the complaint under Article 14 does not mean, of course, that in the end the Court will find that there has been a violation of Article 14. I simply cannot agree with the majority approach, which to me is tantamount to considering that the prohibition of discrimination in this type of cases is not an important issue when the respondent State is Turkey.