



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

SECOND SECTION

CASE OF YAVUZ v. TURKEY

(Application no. 67137/01)

JUDGMENT

STRASBOURG

10 January 2006

FINAL

10/04/2006

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 Yavuz 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 Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 6 December 2005,

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

PROCEDURE

1. The case originated in an application (no. 67137/01) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Ms Türkan Yavuz (“the applicant”), on 8 February 2001.

2. The applicant was represented by Mr M. A. Kırdök and Ms M. Kırdök, lawyers practising in İstanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 27 November 2001 the Court decided to communicate the application.

4. 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).

5. In a letter of 17 March 2005, the Court informed the parties that in accordance with Article 29 §§ 1 and 3 of the Convention it would decide on both the admissibility and merits of the application.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1973 and lives in İstanbul.

A. The detention in police custody and the medical certificate concerning the alleged ill-treatment of the applicant

8. On 17 May 1997 five police officers from the Anti-terror branch of the İstanbul Security Directorate searched the flat of the applicant. She and her husband were arrested and taken into custody on suspicion of their membership of an illegal organisation, namely the TKP/ML¹. According to the search protocol drafted on the same day by the police officers and signed by the applicant, the police found a number of documents, guns, ammunition and dynamite. The report mentioned that the applicant and her husband resisted arrest².

9. On the same day, the police officers from the Anti-terror branch of İstanbul Security Directorate arrested other suspects, including Mr E.Y., on the same grounds as the applicant.

10. On 19 May 1997 the applicant was interrogated by two police officers. The applicant submitted that she was not involved with the TKP/ML and that she was not aware of the existence of the materials found during the search. She stated that she did not know when her husband had brought and hid those materials. The applicant signed her deposition.

11. On 21 May 1997 the applicant was examined by a doctor from the Forensic Medicine Department of the İstanbul State Security Court who noted the presence of a 2x8 cm hyperaemia³ below the applicant's right shoulder blade, a swelling of 3 cm in the neck area and subjective pain in the neck. The report drafted by the doctor concluded that, apart from these findings, there were no other signs of injury attributable to ill-treatment.

B. Investigation instigated into the alleged ill-treatment and the criminal proceedings against police officers

12. On 21 May 1997 the applicant was brought before the public prosecutor at the İstanbul State Security Court. She acknowledged the

1. Turkish Communist Party/ Marxist-Leninist.

2. The copies of the search protocol submitted by the parties are only partially legible. However, the applicant acknowledged that the arrest protocol mentioned that she and her husband had resisted arrest.

3. Hyperaemia is the increase in organ blood flow.

contents of her police deposition. However, she stated that during her custody, four or five police officers had sexually harassed her by touching her breasts and buttocks. She claimed that she was also punched. She affirmed that she would be able to recognise them if she were to meet them again.

13. On the same day, the applicant was released and no criminal proceedings were brought against her.

14. On 22 May 1997 the public prosecutor at the İstanbul State Security Court considered that it lacked competence to examine the allegations of ill-treatment brought by the applicant and Mr E.Y., and transferred the investigation file to the Fatih public prosecutor's office.

15. On 30 May and 3 July 1997 the Fatih public prosecutor requested the Kartal and Tuzla Security Directorate to secure the applicant's presence before him. On 21 August 1997 the Tuzla Security Directorate informed the prosecutor that the applicant had not been at the address indicated by the prosecutor and that they had discovered that the applicant was working at the SSK Hospital in the district of Kartal. On 27 August 1997 the public prosecutor reiterated his request to the Kartal Security Directorate. The applicant's address was stated as the hospital where she was working.

16. Upon the request of the Fatih public prosecutor dated 30 May 1997, the İstanbul Security Directorate submitted, on 8 July 1997, documents pertaining to the arrest and detention of the applicant and Mr E.Y. and informed him of the identities of the police officers that had interrogated Mr E.Y. and the applicant.

17. In her testimony, on 26 September 1997, given to the Fatih public prosecutor, the applicant submitted, in particular, that when she was taken to the police station, she was separated from her husband and blindfolded. She claimed that she was attacked by police officers who pulled her hair and hit her, particularly between her shoulders. She maintained that they stripped her naked in front of her husband and that she was molested and sexually harassed. She claimed that, during her interrogation, one of the police officers threatened her with rape, while all the officers insulted her verbally and also threatened to accuse her of murder if she refused to co-operate. She maintained that she was also beaten following her appearance before the press. The applicant stated that it was impossible for her to provide witnesses since she was in custody, incommunicado, away from all eyewitnesses.

18. Mr E.Y.'s testimony was taken by the Fatih public prosecutor on 27 October 1997.

19. Between 23 July 1997 and 9 September 1997 the Fatih public prosecutor took the statements of the police officers Mr H.İ., Mr E.A., Mr A.K. and Mr Z.K. They all refuted the accusations against them, claiming that both the applicant and Mr E.Y. had resisted arrest and that, as a result, they could have sustained some injuries.

20. On 3 November 1997 the Fatih public prosecutor submitted a report to the İstanbul public prosecutor's office in which he considered that criminal proceedings should be initiated against these police officers.

21. By an indictment dated 19 November 1997, the İstanbul public prosecutor instituted criminal proceedings in the İstanbul Assize Court against the officers, pursuant to Article 243 § 1 of the Criminal Code which prohibits ill-treatment.

22. On 25 November 1997 the criminal proceedings against the police officers commenced before the İstanbul Assize Court.

23. Between 25 November 1997 and 1 June 1999, the court held eight hearings. The court heard the applicant, her husband, Mr E.Y. and the accused police officers. The applicant's request, to intervene as a third party, on 13 February 1998 was accepted by the court. In the hearing held on 13 October 1998 the applicant's representative informed the court that they waived their right to have the applicant's witness Mr Ş.T. heard. Accordingly, the court decided not to hear him.

24. During the proceedings before the Assize Court, the applicant repeated her allegations against the police officers. She further stated that two of the four police officers who had sexually harassed her, namely Mr H.İ and Mr Z.K., were present before the court. She further admitted that a struggle had taken place during her arrest.

25. At the hearing held on 1 December 1998, the applicant's husband testified in favour of the applicant. He submitted that they were all subjected to systematic torture whilst in police custody. In this regard, he claimed that their clothes were ripped, their feet were squeezed, they were hosed with pressurised water and that their heads were pushed into a pool of water. He asserted that he was also shown his wife as she lay naked on the ground.

26. On 1 June 1999 the İstanbul Assize Court acquitted the police officers of the charges against them. The court concluded that, apart from the findings in the medical reports, there were no other signs of injury and that those mentioned in these reports could have been sustained during the arrest of the complainants. The court considered the testimony of the applicant's husband unreliable on the ground that he was her husband, that he had been arrested and detained on same grounds and that his version did not match the events. The court therefore found that the evidence before it did not suffice to convict the accused police officers.

27. On 4 October 2000 the Court of Cassation upheld the judgment of the Assize Court.

II. THE RELEVANT DOMESTIC LAW AND PRACTICE

28. A description of the relevant domestic law at the material time can be found in *Bati and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-100, ECHR 2004-... (extracts)).

THE LAW

I. ADMISSIBILITY

29. In their additional observations dated 6 June 2005, the Government asked the Court to dismiss the application as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. They argued that the applicant could have sought reparation for the harm she allegedly suffered by instituting an action in the civil or administrative courts. In this regard, they stated that the Court had been previously provided with judgments rendered by these courts proving the effectiveness of these remedies.

30. The applicant argued that since the Government had not raised an objection of non-exhaustion in their observations dated 23 April 2002, they were estopped from doing so at this stage of the proceedings.

31. The Court reiterates that, according to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). The Court considers that the Government have fulfilled this requirement as they have raised their objection concerning non-exhaustion of domestic remedies in their additional observations pertaining to the admissibility and merits of the application prior to the Court's decision on the admissibility of the present application. Accordingly, the Court concludes that the Government could not be considered estopped from raising their objection of non-exhaustion at this stage of the proceedings.

32. However, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Karayigit v. Turkey* (dec.), no. 63181/00, 5 October 2004). The Court finds no particular circumstances in the instance case, which would require it to depart from its findings in the above-mentioned application.

33. In these circumstances, the Court rejects the Government's preliminary objection.

34. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicant complained that the treatment to which she was subjected while she was held in police custody amounted to torture and inhuman treatment, in violation of Article 3 of the Convention, which reads as follows:

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

36. The Government contested the applicant’s allegation. They submitted that the applicant’s allegations were not supported by appropriate evidence. In this regard, the Government stated that the applicant’s allegations of ill-treatment did not match the findings of the medical report. The Government argued that if the applicant had been treated the way she alleged there would be some injuries to her face and body. They further pointed out that the applicant and her husband had acknowledged that they had resisted arrest.

37. The applicant maintained her allegations. She submitted, in particular, that she was hit on her back, stripped naked and sexually harassed, both verbally and physically.

38. The Court reiterates that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim’s allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 62, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111, and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

39. In the instant case, the medical report drawn up by the doctor showed that the applicant presented injuries at the end of her stay in police custody. The findings of the medical report, in the Court’s opinion, match at least the applicant’s allegations of having been hit on the back. The Court does not find it necessary to assess whether the other allegations of sexual or psychological abuse are true, particularly in view of the difficulty of proving such treatment.

40. The Court observes that the parties did not dispute the findings of the medical report of 21 May 1997. However, they put forward different versions as to how the applicant had actually sustained them. The Court notes that the applicant was not examined medically following her arrest which, in the Court’s view, would have been the appropriate step to take by police officers who had to resort to using force during arrest. Moreover, no mention was made in the arrest protocol as to the nature of the force used

against her and the medical report of Mr R.Y, the applicant's husband, reveals no findings of ill-treatment despite the fact that they were arrested together.

41. In view of the above, the Court is not satisfied with the Government's explanations as to the manner in which the injuries found at the end of detention were sustained by the applicant.

42. Reiterating the authorities' obligation to account for injuries caused to persons within their control in custody, the Court considers that the acquittal of the police officers cannot absolve the State of its responsibility under the Convention (see, *mutatis mutandis*, *Berktaş v. Turkey*, no. 22493/93, § 168, 1 March 2001, and *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 168, 8 January 2004).

43. Considering the circumstances of the case as a whole, and the absence of a plausible explanation from the Government as to the cause of the injuries sustained by the applicant while she was held in custody, the Court finds that these injuries were the result of treatment for which the Government bore responsibility.

44. It follows that there has been a violation of Article 3 of the Convention.

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

45. The applicant complained that her right to a fair hearing by an independent and impartial court was breached in that the national courts acted in order to acquit the accused officers despite the evidence in the case file and without conducting any further investigation. She further complained that she did not have an effective remedy in respect of her complaints of torture and ill-treatment. The applicant relied on Articles 6 and 13 of the Convention.

46. The Court considers that these complaints should be examined from the standpoint of Article 13 alone, 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.”

47. The Government submitted that, upon the applicant's statement concerning her allegation of ill-treatment, an investigation was immediately initiated by the public prosecutor. They stated that the police officers who were involved in the applicant's arrest and interrogation were identified, the statements of the applicant and the accused police officers were taken and the applicant's husband was heard as a witness. The Government stated that the applicant's failure to appear before the court had necessitated several written requests in order to secure her testimony. They contended that the

court ordered the acquittal of the accused police officers on account of lack of sufficient evidence to convict them.

48. The applicant maintained that the preliminary investigation and criminal proceedings fell short of the international standards as regards allegations of torture and ill-treatment. She complained about the inadequacy of the medical reports and the absence of efforts to obtain further evidence. The applicant pointed out that whilst the domestic court tolerated the fact that the police officers did not take her for a medical examination following her arrest, it found her husband's testimony one-sided and did not take hers into account.

49. On the basis of the evidence provided in the present case, the Court has found that the respondent State is responsible under Article 3 of the Convention for the ill-treatment suffered by the applicant in police custody. The applicant's complaint in this regard is therefore "arguable" for the purposes of Article 13 in connection with Article 3 of the Convention. The authorities were therefore under an obligation to conduct an effective investigation fulfilling the requirements of this provision (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 64, ECHR 2003-V, and *Bati and Others*, cited above, §§ 133-138).

50. In the instant case, the Court observes that an investigation into the allegations of the applicant was initiated promptly by the public prosecutor's office. This investigation led to the committal for trial of two police officers identified by the public prosecutor as those who took part in both the arrest and interrogation of the applicant. Moreover, the applicant was able to effectively participate in these criminal proceedings which resulted in the acquittal of the police officers for lack of evidence.

51. Nonetheless, the Court observes that there were shortcomings in the way the investigation and the trial were conducted by the authorities. The Court observes that the applicant was never requested to identify the alleged perpetrators of the ill-treatment prior to the opening of the prosecution and, as a result, the other police officers complained of by the applicant were not identified and committed for trial. In this connection, the authorities failed to secure the testimonies of the other police officers involved in the arrest of the applicant or that of potential eye-witnesses of her arrest. Moreover, at no stage of the proceedings was the veracity of the applicant's allegations of sexual harassment scrutinized by the authorities despite the fact that the applicant was detained incommunicado for three and a half days and interrogated by police officers who were all men.

52. In view of the above, the Court concludes that both the investigation and the criminal proceedings did not provide the thorough, effective remedy required by Article 13 of the Convention. There has accordingly been a violation of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

54. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

55. The Government contested the amount requested by the applicant, considering it exorbitant.

56. The Court finds that the applicant must have suffered pain and distress which cannot be compensated solely by the Court’s finding of a violation. Having regard to the nature of the violation found in the present case and ruling on an equitable basis, the Court awards the applicant EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

57. The applicant claimed a total of 10,640 new Turkish liras (YTL) (approximately EUR 5,982) in legal costs, covering representation fees and administrative costs and expenses incurred both before the domestic courts and the Court. In support of her claims, the applicant submitted a schedule of costs prepared by her representatives and the İstanbul Bar Association’s recommended fees list for 2005. However, she did not submit any receipts.

58. The Government contested the amounts. They submitted that the applicant failed to provide any document or receipt in respect of her claims.

59. The Court may make an award in respect of costs and expenses in so far that they were actually and necessarily incurred and were reasonable as to quantum (see *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, the Court awards the sum of EUR 2,500 to cover all costs and expenses.

C. Default interest

60. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President