CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

**CASE OF ÜLKE v. TURKEY**

*(Application no. 39437/98)*

JUDGMENT

STRASBOURG

24 January 2006

**FINAL**

*24/04/2006*

*This judgment is final but it may be subject to editorial revision.*

**In the case of Ülke 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. TÜRMEN,
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 15 November 2005 and 5 January 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 39437/98) 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 Osman Murat Ülke ("the applicant"), on 22 January 1997.

2. The applicant was represented by Mr K. Boyle, Professor at Essex University, and by Mr T. Fisher, a lawyer practising in Essex. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that a series of proceedings against him, resulting in a number of convictions, on account of his having claimed the status of conscientious objector, had breached Articles 3, 5, 8 and 9 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 Court's Second Section (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 1 June 2004 the Chamber declared the application admissible.

7. The applicant and the Government each filed written 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 1970 and lives in İzmir.

10. Until 1985 he lived in Germany, where he completed part of his schooling. He subsequently moved to Turkey, where he continued his education, eventually going on to university.

11. In 1993 he became an active member of the Association of Opponents of War (*Savaş Karşıtları Derneği* – "the SKD"), founded in 1992. Until late 1993 he represented the SKD at various international conferences in different countries. After the SKD was dissolved in November 1993 the İzmir Association of Opponents of War (*İzmir Savaş Karşıtları Derneği* – "the ISKD") was founded and the applicant served as its chairman from 1994 to 1998.

12. In August 1995 the applicant was called up. Invoking his pacifist convictions, he refused to perform military service and publicly burned his call-up papers at a press conference in İzmir on 1 September 1995.

13. On 8 October 1996 he was arrested. On 18 October 1996 he was indicted by the military prosecutor attached to the Ankara Military Court of the General Staff ("the General Staff Court"), under Article 155 of the Criminal Code and Article 58 of the Military Penal Code, on a charge of inciting conscripts to evade military service.

14. In a judgment of 28 January 1997 the Ankara General Staff Court sentenced the applicant, on the basis of the indictment of 18 October 1996, to six months' imprisonment and to a fine. The court also found that the applicant was a deserter and made an order requesting the military prosecutor attached to that court to enlist him.

15. On 3 March 1997 the applicant lodged an appeal on points of law. In his grounds of appeal he relied on, among other provisions, Articles 9 and 10 of the Convention, claiming that he was a conscientious objector.

16. In a judgment of 3 July 1997 the Military Court of Cassation upheld the first-instance judgment.

17. In the meantime, on 22 November 1996, the applicant was transferred to the 9th Regiment, attached to the Bilecik gendarmerie command. He refused to wear military uniform or carry out the orders of the

regiment's commanding officer. He was detained in the regimental prison, where he refused to wear prison uniform.

18. On 26 November 1996 the military prosecutor at the Court of the Eskişehir Tactical Air Forces Command ("the Command Court") indicted the applicant on a charge of "persistent disobedience" and sought his conviction under Article 87 of the Military Penal Code.

19. Ruling on the applicant's refusal to wear prison uniform, the Command Court, in a judgment of 2 December 1996 after urgent proceedings, restricted his right to receive visitors for fifteen days, as a disciplinary measure.

20. Ultimately, in a judgment of 6 March 1997, the Command Court sentenced him to five months' imprisonment for persistent disobedience.

21. On 4 July 1997 the Military Court of Cassation upheld the judgment of 6 March 1997.

22. In the meantime, the applicant had failed to rejoin his regiment after being released on 27 December 1996. He was arrested and remanded in custody.

23. He was indicted on 7 March 1997 by the military prosecutor at the Command Court, on charges of desertion and "persistent disobedience".

24. In a judgment of 23 October 1997 the Command Court sentenced the applicant to ten months' imprisonment and to a fine.

25. In the meantime, on 29 May 1997, he had been released on the condition that he rejoined his regiment on 31 May to perform his military service. As he failed to do so he was arrested on 9 October 1997 and transferred to Eskişehir prison to serve the sentence imposed by the Command Court on 6 March 1997.

26. In an indictment of 16 October 1997 the military prosecutor at the Command Court called for the applicant's conviction for desertion between 31 May 1997 and 9 October 1997.

27. In a judgment of 22 January 1998 the Command Court sentenced the applicant to ten months' imprisonment on the basis of the charges in the bill of indictment.

28. In a judgment of 30 September 1998 the Military Court of Cassation upheld the judgment of 22 January 1998.

29. On 26 January 1998 the applicant was escorted to his regiment at Bilecik. He was arrested for refusing to wear military uniform.

30. In a judgment of 11 June 1998 the Command Court sentenced him to seven months and fifteen days' imprisonment on account of incidents that had occurred on 28 January 1998.

31. On 7 October 1998 the Military Court of Cassation upheld the judgment of 11 June 1998.

32. After being escorted back to his regiment on 20 March 1998, the applicant was arrested on 21 March 1998 for refusing to wear his military uniform.

33. In a judgment of 4 May 1998 the Command Court sentenced him to seven months and fifteen days' imprisonment for "persistent disobedience" on 20 and 21 March 1998.

34. In a judgment of 7 October 1998 the Military Court of Cassation upheld the judgment of 4 May 1998.

35. In the meantime, on 4 May 1998, the applicant was sent back to his regiment, where he refused to wear military uniform.

36. In a judgment of 11 June 1998 the Command Court sentenced him to seven months and fifteen days' imprisonment on account of the incidents of 4 May 1998.

37. In a judgment of 7 October 1998 the Military Court of Cassation upheld the first-instance judgment of 11 June 1998.

38. The applicant was released on 24 November 1998 and transferred to his regiment, but once again refused to wear military uniform.

39. He was prosecuted and arrested on account of the incidents of 24 November 1998, and on 26 November 1998 the Command Court sentenced him to seven months and fifteen days' imprisonment.

40. In a judgment of 22 September 1999 the military Court of Cassation upheld the judgment of 26 November 1998.

41. The applicant served a total of 701 days in prison as a result of the above sentences, with the exception of the prison sentence imposed after his last conviction. He is wanted by the security forces for the execution of his sentence and is currently in hiding. He is no longer active in the association or in any other political activity. He has no official address and has broken off all contact with the authorities. He has been accommodated by his fiancée's family. He has been unable to marry her legally or to recognise the son born to them.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

42. Article 72 of the Constitution provides:

> "Patriotic service is a right and a duty for every Turkish citizen. The conditions in which that service shall be performed or deemed to have been performed in the armed forces or civil service shall be laid down by law."

43. The legal provisions currently in force govern only the performance of national service in the armed forces. No alternative civil service is provided for by law.

44. Section 1 of the Military Service Act (Law no. 1111 of 17 July 1927) reads:

> "... every man of Turkish nationality shall be obliged to perform military service."

45. Under section 10(2) of the Military Service Act, when the number of conscripts exceeds the requirements of the armed forces, they may be allowed, after carrying out basic military training, to perform military

service for a shorter period in return for the payment of a tax, or to finish their service in the public sector.

46. The Military Penal Code stipulates that once they have been placed on the muster rolls for military service, conscripts are required to report to the designated military unit, failing which they will be regarded as unlawfully absent and liable to a criminal penalty under Article 63 of the Military Penal Code. Any additional act of disobedience is regarded as "persistent disobedience" and falls under Article 87/1 of the Military Penal Code.

47. The relevant passage from Article 155 of the Criminal Code reads as follows:

> "... Incitement to evade military service.
>
> It shall be an offence punishable by imprisonment of two months to two years and a fine ... – except in the cases provided for in the preceding Articles – to incite ... conscripts to evade military service ..."

# THE LAW

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

48. The applicant complained that he had been prosecuted and convicted on account of his beliefs as a pacifist and conscientious objector. In this connection he relied on Articles 3, 5, 8 and 9 of the Convention.

### A. The parties' submissions

49. The applicant observed that every time he had refused to wear military uniform he had been convicted and imprisoned. After each release he had been escorted back to his regiment and then once again convicted and imprisoned for refusing to wear uniform. He submitted that the series of proceedings and convictions that he had had to face as a result of his beliefs amounted to a continuous situation. For the applicant, that interminable series of prosecutions and convictions constituted interference contrary to Article 9 and was not proportionate to the aims pursued by the national authorities.

The applicant further argued that recent developments in Europe showed that the right to refuse to perform military service and to opt for conscientious objection had now become an established right. The new member States of the Council of Europe had, in principle, all recognised such a right. The European Union's Charter of Fundamental Rights had also

recognised the right to conscientious objection. He alleged that Turkey was the only country, among the twenty-six States in the Council of Europe which had enacted a special law on military service, not to have recognised that right.

50. The Government submitted that Article 9 was not applicable in the present case. They argued that, according to the settled case-law of the Convention organs, the Convention did not afford a right to conscientious objection *per se*.

51. As to the merits, the Government pointed out that in domestic law, the obligation to perform military service applied to all men of Turkish nationality and did not permit any exception on grounds of conscience. They noted that the applicant had been found guilty of military insubordination for having breached the rules on military discipline. For the Government, the offence with which the applicant had been charged was likely to cause conscripts some disquiet, or even disruption, and could legitimately justify a criminal penalty. The Government, referring to the cases of *Heudens v. Belgium* (no. 24630/94, Commission decision of 22 May 1995) and *Autio v. Finland* (no. 17086/90, Commission decision of 6 December 1991), further argued that Article 9 of the Convention should be interpreted in the light of Article 4 and that the right of conscientious objection was not recognised as such by the Convention.

### B. The Court's assessment

52. In its decision on the admissibility of the application, the Court decided to deal with the applicability of Article 9 at the same time as the merits. However, it considers that the present case should be examined under Article 3 of the Convention, for the following reasons.

53. The Court points out that, in its *Thlimmenos v. Greece* judgment ([GC], no. 34369/97, § 43, ECHR 2000-IV), it did not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 § 1. In particular, the Court acknowledged that it did not have to address, in that case, the question whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service might in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1.

54. The same applies in the present case. As the case raises serious questions under Article 3 of the Convention, the Court does not find it necessary to pursue its examination of the applicability of Article 9.

55. Article 3 of the Convention reads as follows:

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

56. This provision enshrines one of the most fundamental values of democratic society (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 34, § 88) and makes no provision for exceptions. No derogation from it is permissible, even under Article 15 of the Convention in time of war or other national emergency (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1855, § 79).

57. 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 depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). Moreover, in assessing the evidence before it to decide whether or not there has been treatment in breach of Article 3, the Court adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (ibid., p. 65, § 161).

58. Treatment will be considered to be "inhuman" within the meaning of Article 3 because, *inter alia*, it was premeditated, was applied over a long period of time and caused intense physical or mental suffering (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). Furthermore, in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person in question and whether, as far as the consequences are concerned, it has adversely affected his or her personality in a manner incompatible with Article 3 (see *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, p. 13, § 22). In order for an arrest or detention in connection with court proceedings to be degrading within the meaning of Article 3, the humiliation or debasement to which it gives rise must be of a special level and in any event different from the usual degree of humiliation inherent in every arrest or detention (see, *mutatis mutandis*, *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22, § 55). When assessing the effects of the conditions of detention on the applicant, account also has to be taken of the cumulative effects of those conditions (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II).

59. In the light of the above, the Court considers that, in the present case, the applicant's successive convictions, and the continuing liability to prosecution that he faces for refusing to wear uniform on account of his philosophical beliefs, have certainly placed him in a situation of humiliation or debasement. The Court has to address the question whether that situation

is different from the usual degree of humiliation inherent in criminal conviction or detention.

60. The Court notes in the present case that, despite the large number of times the applicant has been prosecuted and convicted, the punishment has not exempted him from the obligation to perform his military service. He has already been sentenced eight times to terms of imprisonment for refusing to wear uniform. Upon each release from prison after serving his sentence, he has been escorted back to his regiment, where, upon his refusal to perform military service or put on uniform, he has once again been convicted and transferred to prison. Moreover, he has to live the rest of his life with the risk of repeatedly being sent to prison if he persists in refusing to perform compulsory military service.

61. The Court notes in that connection that there is no specific provision in Turkish law governing penalties for those who refuse to wear uniform on grounds of conscience or religion. It seems that the relevant applicable rules are provisions of the Military Penal Code which classify as an offence any refusal to obey the orders of a superior officer. That legal framework is evidently not sufficient to provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one's beliefs. Because of the unsuitable nature of the general legislation applied to his situation the applicant ran, and still runs, the risk of an interminable series of prosecutions and criminal convictions.

62. The Court points out that, in the *Thlimmenos* case, after noting that the applicant had already served a prison sentence for his refusal to wear uniform, it found that his exclusion from the profession of chartered accountant, as a second sanction, was disproportionate (see *Thlimmenos*, cited above, § 47). In the present case, the numerous criminal proceedings brought against the applicant, the cumulative effects of the ensuing criminal convictions and the constant alternation between prosecution and imprisonment, together with the possibility that he would face prosecution for the rest of his life, are disproportionate to the aim of ensuring that he performs his military service. They are aimed more at repressing the applicant's intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. The clandestine life, amounting almost to "civil death", which the applicant has been compelled to adopt is incompatible with the punishment regime of a democratic society.

63. Under these circumstances, the Court considers that, taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant has caused him severe pain and suffering which goes beyond the normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constitute degrading treatment within the meaning of Article 3 of the Convention.

64. In the light of the above, the Court holds that there has been a violation of Article 3 of the Convention.

## II. OTHER COMPLAINTS

65. On the basis of the same facts, the applicant further alleged that there had been a violation of Articles 5, 8 and 9 of the Convention.

66. Reiterating the arguments that they had submitted in connection with the complaints set out above, the Government considered that these complaints too should be dismissed.

67. The applicant maintained these complaints.

68. After examining the complaints, the Court notes that the facts which the applicant complained of are practically the same as those which underlay the complaints it examined in the previous parts of the judgment.

It accordingly takes the view that it is not necessary to give a separate ruling on the complaints under Articles 5, 8 and 9 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant submitted that, if the Court found that there had been a violation of Article 9, the Government should be requested to enact legislation governing conscientious objection, in accordance with Recommendation no. R (87) 8 of the Committee of Ministers and Recommendation no. 1518 (2001) of the Parliamentary Assembly, to set aside his convictions and to discontinue proceedings against him.

71. The applicant claimed the sum of 20,000 euros (EUR) for the non-pecuniary damage that he claimed to have sustained on account of the anguish caused by the nine criminal prosecutions that had all resulted in convictions, together with his 701 days of imprisonment and the risk of being arrested at any time as a deserter.

72. The Government considered that the amount claimed by the applicant was excessive and that the finding of a violation, if that were the Court's decision, would be sufficient to make good the damage.

73. As to the specific measures requested by the applicant, the Court reiterates that its judgments are essentially declaratory in nature and that, in

general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

74. Moreover, having regard to all the circumstances of the case, the Court acknowledges that the applicant has sustained non-pecuniary damage that the finding of a violation would not be sufficient to make good. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of that damage.

### B. Costs and expenses

75. The applicant claimed 5,250 pounds sterling (GBP), equivalent to EUR 7,525.37, explaining that that sum was broken down into GBP 4,000 for his lawyers' fees, GBP 750 for research costs and GBP 500 for sundry expenses.

76. The Government submitted that those claims were manifestly excessive. They pointed out that no documents had been submitted to justify the amounts charged by the applicant's lawyers.

77. The Court firstly observes that the applicant has not submitted full details of the number of hours' work completed by his lawyer or any bill of costs or fees. In accordance with Rule 60 § 2 of the Rules of Court, it cannot therefore allow the claim in full. It is nevertheless true that the applicant must have incurred some costs in respect of the work completed by his lawyers for purposes of his representation in this case, which is a somewhat complex one.

Accordingly, the Court considers it reasonable to award the applicant the sum of EUR 1,000.

### C. Default interest

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

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention;

2. *Holds* that it is not necessary to examine separately the applicant's other complaints under Articles 5, 8 and 9 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, to be converted into New Turkish liras at the rate applicable on the day of settlement;

(ii) EUR 1,000 (one thousand euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the day of settlement;

(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;

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

Done in French, and notified in writing on 24 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President