



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

SECOND SECTION

CASE OF KAYA AND OTHERS v. TURKEY

(Application no. 4451/02)

JUDGMENT

STRASBOURG

24 October 2006

FINAL

24/01/2007

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 Kaya and Others 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 M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Mrs D. JOČIENĚ, *judges*,

and Mrs S. DOLLĚ, *Section Registrar*,

Having deliberated in private on 4 October 2005 and 3 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 4451/02) 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 nine Turkish nationals, Ms Gülistan Kaya, Mr Efendi Kaya, Ms Aylene Kaya, Mr Mehmet Kaya, Mr Mustafa Kaya, Mr Hakkı Kaya, Ms Çiçek Kaya, Ms Vesile Kaya and Mr Savaş Kaya (“the applicants”), on 27 July 2001.

2. The applicants were represented by Mr M. N. Yalçı, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants alleged that their relative, Hakkı Kaya, had been abducted and killed by agents of the State and that the national authorities had failed to conduct an adequate and effective investigation. They invoked Articles 2, 5, 6 and 13 of the Convention.

4. The application was allocated to the Second 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.

5. 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).

6. By a decision of 4 October 2005, the Court declared the application admissible.

7. The applicants and the Government each filed further written observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Facts as submitted by the parties

8. The applicants were born in 1950, 1966, 1972, 1981, 1982, 1984, 1986, 1990 and 1993, respectively, and live in Diyarbakır. The first applicant is the wife and the remainder of the applicants are the children of Hakkı Kaya, who has been missing since 16 November 1996.

9. On 16 November 1996 at about 3 p.m. Hakkı Kaya and his two friends Mr Ahmet Yaşar and a certain Mehmet (full name unknown) were walking in the city centre in Diyarbakır. While they were in front of the Forest Directorate building, a white Renault estate car, with the registration number 06 EKN 22, approached them. Three men dressed in civilian clothes and carrying walkie-talkies introduced themselves as police officers and carried out an identity check. They then forced Mr Kaya into the vehicle, stating that he had to go to the police station to make a statement.

10. On 28 November 1996 the second applicant filed a complaint with the Diyarbakır State Security Court Public Prosecutor's office and requested the Prosecutor to investigate Hakkı Kaya's disappearance. On the same day, Hakkı Kaya's brother, Mr Şefik Kaya, petitioned the Diyarbakır Public Prosecutor's office and requested information about his brother's whereabouts.

11. On 4 December 1996 the police took a statement from Mr Ahmet Yaşar, an eye-witness to Hakkı Kaya's abduction. In his statement, Mr Yaşar explained that on the day of the incident, while he and his two friends were walking in front of the Diyarbakır Forest Directorate Building, a white Toros estate car with the registration number 06 EKN 22 had approached them. The men in the car carried out an identity check and told Mr Yaşar that he could leave. Mr Yaşar explained that, as everything had happened very quickly, he was unable to give a precise description of these men. He recalled however that one of them was blond, and another had curly hair. He had no idea for whom they were working.

12. On 5 January 1997 the Diyarbakır Gendarmerie Commander informed the Diyarbakır State Security Court Public Prosecutor that Hakkı Kaya had not been taken into custody.

13. On 17 March 1997 the Diyarbakır State Security Court Public Prosecutor declared a lack of jurisdiction and transferred the case to the Diyarbakır Chief Public Prosecutor's office. The latter commenced an investigation into Mr Kaya's disappearance and requested the Diyarbakır Security Directorate to search for him. Since that date, the Security

Directorate has been sending regular reports to the Prosecutor and checking the customs' records to see whether Hakkı Kaya has left the country.

14. On 27 March 1997 the Human Rights Investigation Committee at the Turkish Grand National Assembly informed the applicants that Hakkı Kaya was not in detention. The Committee further informed the applicants that the car with the registration number 06 EKN 22 was a Fiat Şahin, and not a white Toros estate car as alleged, and it belonged to a certain Y.C., who resided in Ankara.

15. On 7 September 1998 the police took Efendi Kaya's statement. In his statement, Efendi Kaya explained that his father had been missing since November 1996 and that he had not received any news from him since.

16. On 28 January 2000 the applicants filed a further complaint with the Public Prosecutor. On 12 June 2000 the police once again took a statement from Efendi Kaya, who repeated his statement of 7 September 1998.

17. On 13 June 2000 the police took a statement from Mr Recep Girçek, a neighbour of the Kaya family. In his statement, Mr Girçek explained that Hakkı Kaya had been missing since November 1996; however he had no information about his disappearance or his whereabouts.

18. On 22 March 2001 the authorities took another statement from Efendi Kaya, who repeated his previous statements.

19. On 11 March 2004 an interview with Mr Abdulkadir Aygan, a former member of the PKK and allegedly a member of JITEM (the Gendarmerie Intelligence Service), was published in the *Ülkede Özgür Gündem* newspaper. In this interview, Mr Aygan stated that Hakkı Kaya was one of the persons who had been killed by JITEM. He explained that Mr Kaya's body had been buried at the Diyarbakır–Silvan motorway, between the villages of Karacali and Han. The applicants submitted a copy of this newspaper article to the Public Prosecutor for further investigation.

20. On 6 April 2004 the Diyarbakır Security Department informed the Diyarbakır Public Prosecutor that Abdülkadir Aygan had been sentenced to 15 years' imprisonment for being a member of a terrorist organisation in 1986. However, as he had benefited from the repentance law of 1985, he had been released from prison and his whereabouts were unknown. The Public Prosecutor continued searching for Abdülkadir Aygan but was not able to locate him.

21. On 8 June 2004 the second applicant filed a complaint against Abdülkadir Aygan for killing Hakkı Kaya.

B. Documents submitted by the parties

22. The parties submitted various documents with a view to substantiating their claims. These documents, in so far as they are relevant, may be listed as follows.

- i. The petition of Efendi Kaya to the Diyarbakır State Security Court Public Prosecutor, dated 28 November 1996, requesting the authorities to carry out an investigation into his father's disappearance.
- ii. The petition of Şefik Kaya to the Diyarbakır Public Prosecutor, dated 28 November 1996, requesting information about his brother's whereabouts.
- iii. The police statement of Ahmet Yaşar, dated 4 December 1996.
- iv. The letter of the Diyarbakır Gendarmerie Commander to the Diyarbakır State Security Court Public Prosecutor, dated 5 January 1997, stating that Hakkı Kaya had not been taken into custody.
- v. The decision of the Diyarbakır State Security Court Public Prosecutor, dated 17 March 1997, declaring a lack of jurisdiction and transferring the file to the Chief Public Prosecutor's Office.
- vi. The letter of the Human Rights Commission of the Turkish Grand National Assembly, dated 27 March 1997.
- vii. The police statement of Efendi Kaya, dated 7 September 1998.
- viii. The petition of Efendi Kaya to the Diyarbakır Public Prosecutor's office, dated 28 January 2000, requesting information as to Hakkı Kaya's whereabouts.
- ix. The police statement of Efendi Kaya, dated 12 June 2000.
- x. The police statement of Recep Girçek, dated 13 June 2000.
- xi. The periodic follow-up reports from the Diyarbakır Security Directorate to the Diyarbakır Public Prosecutor's Office between 15 June 2000 and 12 December 2003 (8 in all).
- xii. The police statement of Efendi Kaya dated 22 March 2001.
- xiii. A copy of the *Ülkede Özgür Gündem* newspaper dated 11 March 2004, including the interview with Abdülkadir Aygan.

II. RELEVANT DOMESTIC LAW

23. A description of the relevant domestic law at the material time can be found in the judgment of *Tekdağ v. Turkey* (no. 27699/95, §§ 40-51, 15 January 2004).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

24. The Government argued that the applicants have failed to exhaust the domestic remedies available to them, within the meaning of Article 35 § 1 of the Convention. In this connection, they maintained that the investigation concerning Hakkı Kaya's disappearance was still pending.

25. The Court reiterates that, in its decision of 4 October 2005, it considered that whether the criminal investigation at issue could be regarded as effective under the Convention was so closely linked to the substance of the applicants' complaints that it should be joined to the merits. Consequently, it maintains that decision and joins the Government's preliminary objection concerning the effectiveness of the criminal investigation to the merits of the applicants' complaint under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

26. The applicants alleged that the circumstances surrounding the abduction and disappearance of Hakkı Kaya gave rise to a violation of Article 2 of the Convention. They further maintained that the authorities failed to carry out an effective and adequate investigation into his disappearance. They relied on Article 2 § 1 of the Convention, which provides:

“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.”

27. The applicants alleged that it was established beyond reasonable doubt that the State security forces had detained Hakkı Kaya, who had met his death at the hands of the State security forces or their agents. They maintained that the respondent Government had failed to conduct an independent, effective and thorough investigation into his disappearance and probable death in suspicious circumstances.

28. The Government disputed these allegations. They argued that the applicants had not substantiated their allegations. Accordingly, they contended that no issue could arise under Article 2 of the Convention. The Government further contended that the investigation into the disappearance of Hakkı Kaya had met the requirements of the Convention.

A. The disappearance of Hakkı Kaya

29. The Court recalls that Article 2, which safeguards the right to life and sets out the circumstances when a deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which a deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147). To this end, the provision has been interpreted in the Court's case-law to include disappearances, where, as time goes by without any news, it becomes increasingly likely that the individual has died (*Tahsin Acar v. Turkey* [GC], no. 26307/95, § 226, ECHR 2004-III).

30. In the light of the importance of the protection afforded by Article 2, the Court must subject loss of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002).

31. The Court will examine the issues that arise in the light of the documentary evidence put forward in the present case, as well as the parties' written observations. In this connection, the Court recalls that the required evidentiary standard of proof for the purposes of the Convention is that of "beyond reasonable doubt", and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

32. The Court observes that the applicants' allegation that the abduction of Hakkı Kaya was carried out by agents of the State is not supported by any convincing evidence. In this respect, the Court notes that the applicants' claims rest on the eye-witness account of Ahmet Yaşar (see paragraph 11 above). As to the interview given by Mr Aygan to the *Ülkede Özgür Gündem* newspaper, in which he implicated JITEM in certain extra-judicial killings and named Hakkı Kaya as one of the victims, the Court notes that it cannot attach any decisive importance to this statement as it is untested and, on the present state of the file, at best circumstantial (*Nesibe Haran v. Turkey*, no. 28299/95, § 67, 6 October 2005; *Issa and Others v. Turkey*, no. 31821/96, § 79, 16 November 2004). The Court further notes from the case file that Hakkı Kaya had no previous criminal record and there is nothing to suggest that he was threatened by the security forces. Furthermore, the applicants do not submit any convincing argument showing why the

domestic authorities might have been involved in the alleged abduction of Hakkı Kaya.

33. In the light of the above, the Court considers that the actual circumstances in which the applicants' relative disappeared remain a matter for speculation and supposition and that, accordingly, there is an insufficient evidentiary basis on which to conclude that Hakkı Kaya was, beyond reasonable doubt, abducted and subsequently killed by State agents as alleged by the applicants.

34. Accordingly, there has been no substantive violation of Article 2 of the Convention.

B. Alleged inadequacy of the domestic investigation

35. The Court recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have disappeared, allegedly having been killed, in dubious circumstances. This obligation is not confined to cases where it has been established that the disappearance was perpetrated by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged formal complaints with the competent investigation authority. The mere fact that the authorities were informed of an unexplained disappearance gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the matter. The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see the aforementioned *Tahsin Acar* case, §§ 220-225; *Türkoğlu v. Turkey*, no. 34506/97, § 119, 17 March 2005).

36. There is also a requirement of promptness and reasonable expedition implicit in this context, although it must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a disappearance may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see the aforementioned *Türkoğlu* case, § 120).

37. The Court notes that there is no proof that Hakkı Kaya has been killed. However, as said above (paragraph 29), the procedural obligations of Article 2 are not confined to cases which concern intentional killings resulting from the use of force by agents of the State. These obligations also

apply to cases where a person has disappeared in circumstances which may be regarded as life-threatening and time passes without any news.

38. In the present case, an investigation was indeed carried out into the disappearance and alleged death of the applicants' relative. It also appears from the case file that official inquiries concerning the disappearance of Hakkı Kaya continue. However, although nearly ten years have elapsed, the investigation does not appear to have produced any tangible results and, for the reasons set out below, the Court finds that there are important shortcomings in the conduct of this investigation.

39. The Court notes in the first place that, following the disappearance of Hakkı Kaya, the applicants petitioned the domestic judicial and administrative authorities on several occasions to establish his whereabouts (see paragraphs 10 and 16 above). However, despite the seriousness of the allegations, the responses given by the authorities were limited to denials that Hakkı Kaya had ever been taken into custody. The investigation made by the Diyarbakır State Security Court Public Prosecutor, and subsequently by the Diyarbakır Chief Public Prosecutor's office, did not go beyond checking the police custody and customs' records to verify whether Hakkı Kaya had been detained or had left Turkey. The Court observes that the Public Prosecutors took no steps on their own initiative to identify possible witnesses. No attempt was made to obtain evidence in the area where Hakkı Kaya had been abducted, despite the fact that Ahmet Yaşar, who was an eye-witness to the event, gave precise details about the abduction. It also appears from the case file that the Prosecutors did not take statements from the police officers who were on duty on the date of the incident. Nor did they attempt to identify or contact the other eye-witness to the incident, "Mehmet" (paragraph 9 above). Furthermore, subsequent to the interview published in the *Ülkede Özgür Gündem* newspaper, the Public Prosecutor initiated a search to locate Mr Abdülkadir Aygan, who had alleged that JITEM was implicated in the killing of Hakkı Kaya (paragraphs 19 and 20 above). It is however observed that the search was unsuccessful and therefore, the evidence of Mr Aygan, who was a very important witness for the pending investigation, could not be taken.

40. The Court considers that the deficiencies described above are sufficient to conclude that the national authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the disappearance of Hakkı Kaya. There has therefore been a breach of the State's procedural obligation under Article 2 to protect the right to life.

41. The Court accordingly dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies and concludes that there has been a violation of Article 2 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

42. Invoking Article 5 of the Convention, the applicants alleged that Hakkı Kaya had been detained in complete disregard of the safeguards contained in paragraphs one to five of this provision, which guarantees the right to liberty and security.

43. Beyond denying that Hakkı Kaya had been detained by the police, the Government did not specifically address this complaint.

44. The Court reiterates that it has been unable to make a finding as to who might have been responsible for the disappearance of Hakkı Kaya (see paragraphs 33-34 above). There is thus no factual basis to substantiate the applicants' allegation.

45. Consequently, the Court finds no violation of Article 5 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

46. The applicants maintained that the investigation conducted by the authorities was insufficient to meet the standards of Articles 6 § 1 and 13 of the Convention, which provide, in so far as relevant as follows:

Article 6 § 1

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

Article 13

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

47. The Government contended that the disappearance of Hakkı Kaya had been adequately investigated.

A. Article 6 § 1 of the Convention

48. The Court observes that the applicants' grievance under Article 6 § 1 of the Convention is inextricably bound up with their more general complaint concerning the manner in which the investigating authorities treated their complaints concerning Hakkı Kaya's disappearance and the repercussions which this had on their access to effective remedies. It accordingly finds it appropriate to examine this complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of violations of the Convention (see amongst other

authorities, *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105).

49. The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1.

B. Article 13 of the Convention

50. The Court reiterates that Article 13 of the Convention guarantees the availability, at the national level, of a remedy to enforce the substance of 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 its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Tekdağ*, cited above, § 95).

51. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for a deprivation of life, including effective access for the complainant to the investigation procedure (see *Tekdağ*, cited above, § 96).

52. The Court reiterates that it has not found it proved beyond reasonable doubt that agents of the State carried out, or were otherwise implicated in, the disappearance of Hakkı Kaya. However, according to its established case-law, that does not preclude the complaint in relation to Article 2 from being “arguable” for the purposes of Article 13 (see *Orhan*, cited above, § 386; *Tekdağ*, cited above, § 97).

53. The authorities thus had an obligation to carry out an effective investigation into the circumstances surrounding the disappearance of the applicants’ relative. For the reasons set out above (see paragraphs 38 to 40 above), no effective investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see *Orhan*, cited above, § 387; *Tanrıkulu v. Turkey*, [GC], no. 23763/94, § 119, ECHR 1999-IV; *Tekdağ*, cited above, § 98).

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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.”

56. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part”.

57. In the instant case, on 6 October 2005 the Court invited the applicants to submit their claims for just satisfaction by 5 December 2005. As the applicants requested an extension of time, the Court renewed the deadline until 5 March 2006. However, they did not submit any such claims within the specified time-limit nor did they request a further extension. The Court received the applicants’ just satisfaction claims on 7 July 2006, four months after the expiry of the time-limit. In these circumstances, the Court considers that the applicants failed to comply with the time-limits or to display due diligence in submitting their just satisfaction claims. Accordingly, the Court makes no award under Article 41 of the Convention (see *Ormancı and Others v. Turkey*, no. 43647/98, §§ 48-51, 21 December 2004; *Şirin v. Turkey*, no. 47328/99, § 29, 15 March 2005; *Yayan v. Turkey*, no. 66848/01, § 25, 2 February 2006).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government’s preliminary objection concerning the exhaustion of domestic remedies and *dismisses* it;
2. *Holds* that there has been no substantive violation of Article 2 of the Convention in respect of the disappearance of the applicants’ relative;
3. *Holds* that there has been a violation of Article 2 of the Convention on account of the failure of the respondent State to conduct an effective investigation into the circumstances of the disappearance of the applicants’ relative;
4. *Holds* that there has been no violation of Article 5 of the Convention;
5. *Holds* that it is not necessary to consider the applicants’ complaints under Article 6 § 1 of the Convention;

6. *Holds* that there has been a violation of Article 13 of the Convention;
7. *Dismisses* the applicants' claim for just satisfaction.

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

S. DOLLÉ
Registrar

J.-P. COSTA
President