



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

SECOND SECTION

CASE OF DURMUŞ KURT AND OTHERS v. TURKEY

(Application no. 12101/03)

This version was rectified on 8 November 2007
Under Rule 81 of the Rules of Court

JUDGMENT

STRASBOURG

31 May 2007

FINAL

31/08/2007

*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 Durmuş Kurt and Others v. Turkey,

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

Mrs F. TULKENS, *President*,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŖ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Ms D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs F. ELENŞ-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 10 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 12101/03) 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 Turkish nationals, Mr Durmuş Kurt, Mr Nurettin Kılıçaslan¹, and Mrs Zübeyde Kayar (“the applicants”), on 10 March 2003.

2. They are represented before the Court by Mr M.A. Kırdök and Mrs M. Kırdök, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. The applicants alleged, in particular, that they had been subjected to ill-treatment whilst in police custody and that there had been no adequate or effective remedy in respect of their complaints. They invoked Articles 3, 6 and 13 of the Convention.

4. On 23 May 2006 the Court declared the application partly inadmissible and decided to communicate the remaining complaints to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

¹ Rectified on 8 November 2007: The applicant’s surname read “Kılıçaslan” in the former version of the judgment.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1958, 1972 and 1970 respectively. At the time of the introduction of the application, they were living in Istanbul. They currently live in Germany and Switzerland.

6. On 15, 16 and 17 June 1995, as part of a police operation against an illegal organisation, the TKP-ML/TIKKO¹, the applicants were arrested and taken into custody at the anti-terrorist branch of the Istanbul Security Directorate.

7. On 28 June 1995 the applicants were brought before the public prosecutor at the Istanbul State Security Court, where they maintained that they had been interrogated under duress and ill-treated by the police during their ten days in custody. They contended that they had been beaten, punched, hosed, subjected to Palestinian hanging, deprived of sleep, threatened with death and sexually harassed. They added that, whilst being hung, electric shocks were administered to them through cables attached to their genitals.

8. On the same day the applicants were examined by a doctor at the Forensic Medicine Institute who noted the following marks on their bodies:

- Durmuş Kurt: one yellow and one green lesion of 2 x 2 cm on the right shoulder, a lesion of 3 x 0,5 cm on the inner part of the upper arm. The doctor certified him unfit for work for three days.
- Nurettin Kılıçaslan²: four scab-covered lesions of 5 x 0.5 cm which are positioned parallel to each other in the right armpit and a graze of 5 x 1 cm on the right thigh. The doctor certified him unfit for work for three days.
- Zübeyde Kayar: three scab-covered lesions measuring 4 x 0.5 cm which are positioned parallel to each other in the left armpit. The doctor noted that she had complained of pain and numbness in both arms and hands. He further noted impaired movement in both arms. However, he considered that a final report could only be drawn up once she had been examined by a hospital neurology service. It appears from the case file, however, that the additional examination was never carried out.

9. On 21 July 1995 the Istanbul public prosecutor decided that he did not have jurisdiction over the case and transmitted the case file to the Fatih public prosecutor for investigation.

1. Turkish Communist Party-Marxist-Leninist/Turkish Workers and Peasants' Liberation Army.

² Rectified on 8 November 2007: The applicant's surname read "Kılıçaslan" in the former version of the judgment.

10. On 15 November 1995 the Fatih public prosecutor decided not to prosecute the on-duty police officers who had allegedly ill-treated the applicants whilst in custody, for lack of evidence.

11. On 27 November 1996 the International Law and Foreign Relations Directorate of the Ministry of Justice notified the Istanbul public prosecutor that one of the applicants' co-detainees had filed an application with the European Court of Human Rights¹ concerning the allegations of torture during the same custody period. The letter stated that the decision of non-prosecution of 15 November 1995 issued by the Fatih public prosecutor lacked sufficient reasoning, and that a more comprehensive investigation had to be conducted into the allegations of ill-treatment.

12. On 16 July 1997 the Fatih public prosecutor sent a report to the Istanbul public prosecutor, summarising the facts and the applicants' complaints that they had been tortured whilst in custody between 15 and 28 June 1995 by officers working at the anti-terrorist branch of the Istanbul Security Directorate. The Fatih public prosecutor requested the Istanbul public prosecutor to file a bill of indictment with the Istanbul Assize Court, charging five police officers with torture, pursuant to Article 243 § 1 of the Criminal Code.

13. By an indictment filed on 2 September 1997, the public prosecutor instituted criminal proceedings in the Istanbul Assize Court against five police officers for having tortured the applicants and for professional misconduct.

14. On 27 October 1997 the Istanbul Assize Court heard four of these officers. They denied having ill-treated the applicants. The applicants maintained that they had been subjected to ill-treatment. On the same day, the applicants filed a petition with the court for permission to intervene in the proceedings as civil parties.

15. On 29 December 1997 the fifth police officer's statement was taken by the Tunceli Assize Court and sent to the Istanbul Assize Court.

16. On 9 October 1998 the court heard witnesses who confirmed that the applicants had been subjected to torture, and the applicants identified two of the defendant police officers who had allegedly ill-treated them.

17. In hearings on 30 October 1998 and 9 November 2000, the applicants identified other defendant police officers who had allegedly participated in the acts of torture.

18. On 19 November 2002, the Istanbul Assize Court decided to discontinue the proceedings against four police officers as the prosecution of the offences had become time-barred. The Assize Court acquitted the fifth police officer for insufficient evidence.

19. On 23 January 2003 the applicants appealed to the Court of Cassation against this judgment. On 20 October 2004 the Court of Cassation upheld the judgment of the Istanbul Assize Court.

1. See the *Cangöz v. Turkey* judgment (no. 28039/95, 4 October 2005)

II. THE RELEVANT DOMESTIC LAW

20. A full description of the domestic law may be found in the judgment of *Bati and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 95-98, ECHR 2004-IV).

THE LAW

I. ADMISSIBILITY

21. The Government argued that the applicants had 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 applicants could have sought redress from the Ankara Administrative Court by bringing a full remedy suit against the Ministry of Interior in respect of their allegations of ill-treatment. However, they failed to do so.

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

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

24. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

25. The applicants complained under Article 3 of the Convention that they had been subjected to various forms of ill-treatment while in police custody and that the authorities had not conducted an effective investigation into their allegations of ill-treatment. Article 3 of the Convention reads as follows:

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

26. The Government contested these allegations. They maintained that the applicants had sustained the injuries described in the medical reports during a dispute between them and the police officers in which the latter had used force in order to ensure a lawful arrest. The Government added, however, that the force used had not been excessive.

27. The applicants maintained their allegations. They submitted, in particular, that they had been stripped naked, beaten, hosed with pressurised water, suspended by the arms and that electric shocks were administered to their bodies. They further alleged that they were sexually harassed, both verbally and physically.

28. 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; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

29. In the instant case, the medical reports drawn up by a doctor on 28 June 1995, at the end of the applicants' police custody, show that they had sustained injuries. The findings in these reports, in the Court's opinion, match the applicants' allegations of having been subjected to Palestinian hanging. The Court observes that the parties did not dispute the medical findings, but put forward different versions as to the cause of injury. However, the Court notes that the applicants were not examined medically upon their arrest which, in the Court's view, would have been the appropriate step to take by the police officers who, the Government assert, had to resort to using force during the arrest. In these circumstances, the Court is not satisfied with the Government's explanations as to the manner in which the injuries found at the end of the detention period were sustained by the applicants (see *Yavuz v. Turkey*, no. 67137/01, § 41, 10 January 2006).

30. The Court also considers it probable that the ill-treatment of the applicants was intentionally inflicted by the police with the aim of extracting from them a confession or information about the offences which they were suspected of having committed.

31. In these circumstances, the Court finds that, considered as a whole and having regard to their purpose and duration, the acts of violence to which the applicants were subjected were particularly serious and cruel and capable of causing severe pain and suffering. They therefore amounted to torture within the meaning of Article 3 of the Convention.

32. Accordingly, there has been a substantive violation of Article 3 of the Convention.

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

33. The applicants complained that the authorities failed to conduct a thorough, effective and timely investigation into their complaints of ill-treatment and that the criminal proceedings against the police officers had been discontinued by virtue of statutory time limitations. They submitted that the investigation and the ensuing criminal proceedings had neither offered any prospect of identifying those responsible, nor provided access to a court for a future claim for compensation. They relied on Articles 6 and 13 of the Convention.

34. 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.”

35. The Government submitted that, in the present case, the domestic authorities had carried out an adequate and effective investigation into the applicants' allegations of ill-treatment. They maintained that, upon the applicants' complaints, an investigation had immediately been initiated by the public prosecutor. They further stated that the police officers who had been involved in the applicants' arrest and interrogation had been identified and tried before the domestic court. They maintained that the fact that the case against the police officers had become time-barred did not suggest that the domestic authorities had not shown diligence in the conduct of the investigation. On the contrary, the domestic courts had examined the case properly, had taken into account various factors such as the negative conduct of the applicants during their arrest and their resistance to the police officers, which had given rise to the injuries.

36. The applicants maintained that the preliminary investigation and the criminal proceedings were far from adequate or effective. They submitted that they had taken all necessary steps to ensure that their allegations of torture could be properly and thoroughly investigated by the authorities. In this connection, they stated that, for an investigation to be effective, it needed to be conducted as soon as possible after the allegations had been made. However, the police officers could only be prosecuted within a period of two years after the alleged acts of ill-treatment. They pointed out that the Istanbul Assize Court had been unable to rule on the case for five years, which led to it becoming time-barred.

37. The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim of having been subjected to serious ill-treatment by agents of the State, the notion of an “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, including effective access for the complainant to the investigatory procedure (see *Aksoy*, cited above, § 98).

38. On the basis of the evidence adduced 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 applicants in police custody. The applicants' complaints in this regard are therefore “arguable” for the purposes of Article 13 in connection with Article 3 of the Convention (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 64, 29 April 2003, and *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 112).

39. The Court notes that the applicants complained of ill-treatment to the Fatih public prosecutor. Despite the applicants' serious allegations and their medical reports, the latter failed to bring any criminal charges against the suspected perpetrators. Furthermore, it observes that it was not until a year later, following communication of a similar application based on the same events by the European Commission of Human Rights to the Government, and the order of the Ministry of Justice dated 27 November 1996, that a new investigation was conducted into the applicants' allegations (see paragraph 11 above). It then took the public prosecutor nine months to file a bill of indictment with the Istanbul Assize Court on 2 September 1997. The latter, however, decided to discontinue the criminal proceedings against the police officers on 19 November 2002, almost five years after the initiation of the proceedings and seven years and five months after the acts of ill-treatment complained of.

40. The Court observes that the proceedings in question have not produced any result due to substantial delays, resulting in the application of the statutory limitations in domestic law (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 59, 2 November 2004). It finds that the Turkish authorities cannot be considered to have acted with sufficient promptness or diligence, which created virtual impunity for the main perpetrators of the acts of violence, despite the evidence against them (see *Batı and Others*, cited above, § 147).

41. The Court also finds it regrettable that the additional examination ordered by the doctor who examined Zübeyde Kayar was never carried out and that neither the public prosecutor nor the Istanbul Assize Court made any attempt to remedy this failure (see paragraph 8 above).

42. In the light of the foregoing, the Court does not consider that the above proceedings can be described as thorough and effective so as to meet the requirements of Article 13 of the Convention.

43. There has consequently been a violation of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The first applicant claimed 40,000 euros (EUR), and the second and third applicants claimed EUR 30,000 in respect of non-pecuniary damage.

46. The Government submitted that these claims were excessive and unacceptable.

47. The Court finds that the applicants 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 violations found and ruling on an equitable basis, it awards the applicants EUR 15,000, each, in respect of non-pecuniary damage.

B. Costs and expenses

48. The applicants also claimed 21,300 new Turkish liras (YTL), that is approximately EUR 11,530, in respect of the costs and expenses incurred before the domestic courts and the Court.

49. The Government contested this amount. They contended that the applicants failed to provide any receipts in respect of their claims.

50. 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 applicants EUR 2,500, jointly, to cover costs and expenses.

C. Default interest

51. 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 remainder of 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 applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into new Turkish liras at the rate applicable at the date of the settlement:
 - (i) EUR 15,000 (fifteen thousand euros), each, in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros), jointly, 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELEN-PASSOS
Deputy Registrar

F. TULKENS
President