



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

THIRD SECTION

CASE OF FEYZİ YILDIRIM v. TURKEY

(Application no. 40074/98)

JUDGMENT

STRASBOURG

19 July 2007

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

In the case of Feyzi Yıldırım v. Turkey,

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

Boštjan M. Zupančič, *President*,

Corneliu Bîrsan,

Rıza Türmen,

Alvina Gyulumyan,

Egbert Myjer,

David Thór Björgvinsson,

Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 28 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 40074/98) against the Republic of Turkey lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Feyzi Yıldırım (“the applicant”), on 7 October 1997.

2. The applicant, acting in his own name and on behalf of the late Mr Emin Yıldırım, was represented by Mr M. Özer, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not appoint an Agent for the purposes of the proceedings.

3. The applicant alleged a twofold violation of Article 2 of the Convention, taken alone or in conjunction with Article 13, submitting that his father had died as a result of blows inflicted by a Turkish army officer.

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. By a decision of 30 March 2006 the Chamber declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1965 and lives in Istanbul. He is the son of Mr Emin Yıldırım, a draper by trade, who died on 7 February 1996 after suffering a brain haemorrhage.

A. The death of Emin Yıldırım

8. On 7 January 1996, at about 11 p.m., shots were fired in the direction of the local gendarmerie post in the Çermik district (Diyarbakır). Two non-commissioned officers (NCOs) serving at the post, A.B. and F.Ö., went out on patrol under the command of Officer Akgün. They noticed Mr Emin Yıldırım's drapery shop, with three customers inside, Ö.Y., H.Y. and B.N.

9. According to the Government, Officer Akgün agitatedly asked the customers whether they had heard the shots being fired and hurled abuse at the 67-year-old Emin Yıldırım for having his shop open so late. Two police officers, A.Ö. and Ö.Ş., alerted by the din, witnessed the incident.

According to the applicant, Officer Akgün not only agitatedly questioned those present in the drapery shop but also violently beat Emin Yıldırım.

10. The following day, Emin Yıldırım went to see E.T., the Çermik district governor, handing him a complaint against Officer Akgün which he had had typed (see paragraph 15 below).

However, the district governor, being anxious for the protagonists to settle their differences, allegedly kept hold of the complaint.

11. On 9 January 1996 E.T. summoned Emin Yıldırım and Officer Akgün to his office. Emin Yıldırım was accompanied at the meeting by H.A., the mayor of Çermik. It appears that during the conversation Emin Yıldırım complained of a headache. For his part, Officer Akgün is said to have apologised, explaining that he had been drunk on the night of the incident; Emin Yıldırım then forgave him and withdrew his complaint. At that point, E.T. allegedly tore up the letter of complaint he had kept.

12. On 3 February 1996 Emin Yıldırım was admitted to Diyarbakır General Hospital in a coma. A computed tomography brain scan revealed a severe haemorrhage in the left frontoparietal region.

An explanatory note attached to the back of the scan image referred to the haemorrhage as “chronic”, in other words resulting from bleeding over a prolonged period.

A life-threatening clinical presentation emerged from subsequent examinations. Two days later, Emin Yıldırım underwent an operation to drain a haematoma, performed by a neurologist, Ö.H.

On 7 February 1996 he was transferred to Dicle University Hospital, where he died the same day.

13. Later on 7 February 1996 an autopsy was carried out by a single forensic medical examiner, L.E., under the authority of the Diyarbakır public prosecutor. Dr L.E. subsequently drew up a report, which began by referring to the content of the medical records kept at Diyarbakır General Hospital.

According to the report, a superficial examination of the skull revealed a haematoma and an ecchymosis slightly below the surgical scar in the left frontal lobe; in the same area, there was a hole where the skull had been opened up. An intracranial examination revealed a subdural haematoma in the left frontoparietal lobe, multiple areas of brain-tissue degeneration at the base of the left hemisphere, severe cerebral oedema and a swollen cerebellum.

According to the forensic medical examiner, a blow sustained “about a month earlier” could well have been the cause of death.

14. According to the mayor of Çermik, H.A., the complaint that Emin Yıldırım had handed to the district governor (see paragraph 10 above) was found in the deceased's pockets. On 8 February 1996 H.A. submitted the document in question to the public prosecutor and gave the following summary of what had happened in the district governor E.T.'s office:

“... Accompanied by Mr Emin Yıldırım, I went into the district governor's office; he was there together with Officer Akgün. The officer spoke to Mr Emin Yıldırım and apologised, saying: *'I beat you up last night and displayed an attitude incompatible with my rank as an officer; I am sorry.'* Mr Emin Yıldırım replied: *'OK, Captain, but I want you to know that you hit me for no reason and my head [still] hurts'*; the district governor then said to him: *'I'll send you to see a doctor ...'* The written, unsigned complaint I have with me was found in the deceased's pocket; Mr Emin Yıldırım had had it drawn up [by someone else] but had not handed it to its addressee (the Çermik district governor's office).”

15. The complaint in question, of which the Government produced a copy, is dated 8 January 1996 and is not signed. It is likely that it was typed by another person with some knowledge of procedural matters. The complaint is addressed to the “authority of the Çermik district governor's office” and accuses Officer Akgün of “assault and insults”. In it the events are summarised as follows:

“1- On the evening of 7 January 1996, at about 11 o'clock, R.Y., Ö.Y. and H.Y., from the village of Diktol in Çermik, came to my home; the witness Ö.Y. asked me for a shroud of 1.8 m in order to take his deceased father back to the village ...;

2- Together with those persons, I went to open up my drapery shop in Siverek Street. While I was measuring the fabric ..., the accused Sezai Akgün came into my shop, accompanied by two or three gendarmes and two police officers.

3- Captain Akgün said to me: 'Some shots have been fired; did you hear them?'; I replied: 'Yes, but I don't know where they came from.' I explained that I had opened

up the shop to provide the persons present, whose father had died, with fabric for a shroud.

4- Officer ... then punched me, shouting: 'You're lying, you son of a ...' While I was asking him what I had done wrong, the officer carried on hitting me, as though drunk.

5- The incident took place in front of the gendarmes ..., the two police officers and the customers ...

6- I am lodging a complaint against the captain. I have bruises on my body, my head hurts from the blows I received and my left ear is torn.

7- I demand the opening of an administrative investigation in respect of the accused and my referral to a doctor for a report, and I ask your office to notify the relevant authorities about the accused ...”

B. The proceedings against Mr Akgün

16. On 9 February 1996 the applicant and his mother lodged a formal complaint against Officer Akgün with the Çermik public prosecutor (“the public prosecutor”).

17. Later that day, the public prosecutor interviewed the eyewitnesses Ö.Y., H.Y. and B.N. (see paragraph 8 above). They stated that on the evening of the incident Mr Emin Yıldırım had been violently punched and kicked, in particular in the head, by Officer Akgün. Ö.Y. added that he himself had also been punched twice on the chin when he had exclaimed: “What's wrong with buying a shroud?”

On 12 February 1996 police officers A.Ö. and Ö.Ş. and a local gendarmerie NCO were interviewed. The police officers explained that they had heard Officer Akgün hurling abuse at people inside the shop, but that they had not seen him hit them.

18. On an unspecified date the applicant's lawyer contacted the public prosecutor's office at the Diyarbakır 7th Army Corps Command Military Court, seeking to have Officer Akgün placed under arrest in order to prevent him from putting pressure on witnesses and disposing of incriminating evidence.

On 27 February 1996 the military prosecutor's office indicated that it was not empowered to take the action requested, as offences committed by members of the armed forces against civilians came under the jurisdiction of the ordinary criminal courts.

19. On 13 March 1996 the public prosecutor interviewed NCOs A.B. and F.Ö.

A.B. explained that their commanding officer had been annoyed to see customers in a shop open at night and had asked them to leave the premises immediately. He stated that the victim and some young people had been in the shop, and added:

“It must nevertheless be admitted that when we went to the scene we were stressed because of the shooting; under pressure, we could certainly have hit someone, even without really intending to; however, if it had come to that, we would have gone for the young men as they are more dynamic and likely to commit offences.”

F.Ö. stated that on the day of the incident he had not gone into the shop and had consequently not seen what had happened there.

20. On 14 March 1996 the public prosecutor sent a summary report on his inquiry to the Ministry of Justice and asked for permission to place Officer Akgün under investigation under the Prosecution of Civil Servants Act. Permission was granted on 16 May 1996.

21. On 12 July 1996 the public prosecutor questioned Officer Akgün, who denied that he had beaten the applicant's father, claiming that he was the victim of a plot hatched by members of terrorist organisations or other underground groups to hinder the gendarmerie's work in fighting terrorism. According to Officer Akgün, Emin Yıldırım had complained to the district governor that he had been verbally abused; as a result, he had gone to the district governor's office himself to meet Emin Yıldırım and had apologised for having lost his temper. Emin Yıldırım had accepted his apology without ever claiming that he had been beaten. Officer Akgün was dismayed that anyone might think that an officer of his rank who had served his homeland for more than 15 years could have gratuitously set about an elderly man and gone so far as to beat him up.

He further challenged the competence of the forensic medical examiner who had conducted the autopsy of the body in the absence of a pathologist. He noted that in any event the autopsy had not found any possible traces of the alleged acts of violence. In addition, he invited the public prosecutor to consider how a person claiming to have been so severely beaten could have omitted to contact a doctor and the prosecuting authorities.

Officer Akgün asserted that the complaint lodged on 9 February 1996 had been entirely fabricated by Emin Yıldırım's relatives, as had the unsigned letter of complaint allegedly found in the deceased's pockets, and explained that after the meeting in the district governor's office the original complaint had been torn up.

22. On 9, 20 and 25 September 1996 the public prosecutor took initial statements from S.Ç., A.Y., H.S. and M.A., who had been seen near the shop on the evening of the incident. They stated that they had not seen Officer Akgün assault Emin Yıldırım.

Next, the eyewitnesses Ö.Y., H.Y. and B.N. were questioned again. They retracted their previous statements, asserting that Officer Akgün had not beaten Emin Yıldırım and that they had been forced to state otherwise following threats by two unknown persons who had not been seen since.

On 8 and 9 October 1996 the public prosecutor summoned two other potential witnesses, M.As. and Y.A., whose statements did not bring any new evidence to light.

23. On 15 October 1996 the public prosecutor sent the Ministry of Justice a second summary report on the investigation, asking whether he should institute criminal proceedings.

On 14 November 1996 the Ministry replied in the affirmative.

In the meantime Officer Akgün had been promoted from the rank of captain to major.

24. On 20 November 1996 the Siverek public prosecutor, to whom the case had been assigned, indicted Officer Akgün in the Diyarbakır Assize Court (“the Assize Court”) for unintentional homicide under Article 452 of the Criminal Code and asked the President of the Siverek Assize Court to order his detention pending trial.

On 6 December the President refused the request on the ground that the suspect had a fixed abode and there was no risk of his evading trial or concealing evidence.

25. On 20 January 1997 the mayor H.A. tendered his resignation on the ground that no action had been taken on his request for Officer Akgün to be transferred to another town in view of the events in which he was implicated.

It appears that both H.A. and Ö.Y. were subsequently called up for military service.

26. The trial opened in the Assize Court on 20 March 1997. The applicant and his mother applied to join the proceedings as intervening parties, reserving the right to claim compensation.

Several witnesses appeared on 20 March 1997, including the applicant's mother. She stated that on returning home after the incident, her husband had had visible injuries to his face and that subsequently his health had rapidly deteriorated.

27. The eyewitnesses H.Y., B.N. and Ö.Y. retracted their statements a further time and confirmed the truth of their initial accusations against Officer Akgün.

H.Y. explained that he had been forced by Officer Akgün to retract his initial statement if he did not want to end up like Emin Yıldırım. He then confirmed that the accused had indeed started to hit the applicant's father for no reason; he had first banged Emin Yıldırım's head against a table, before kicking him and then banging his head against the shelves. After Emin Yıldırım had collapsed on the ground, Officer Akgün had carried on kicking him in the head.

B.N. maintained that the reason why he had given evidence in favour of Officer Akgün was that he too had been threatened by him. He explained that the officer had in fact kicked Emin Yıldırım in the head and abdomen and had banged his head against the walls until he could no longer stand.

Ö.Y. likewise retracted his second statement, explaining that he had made it out of fear that Officer Akgün might take it out on him during his military service.

28. Police officer Ö.Ş., the gendarmes F.Ö. and A.B. and the mayor H.A. also gave evidence.

H.A. stated that after the victim's death, Officer Akgün had asked him to help secure his reconciliation with the Yıldırım family, to whom he wished to pay a sum of money to make amends for the wrong he had done. He added that during their meeting in the district governor's office, Officer Akgün had also said that he had had too much to drink on the evening of the incident and that he was aware that he had acted wrongly.

Ö.Ş. stated that he had gone to the scene with his colleague after hearing shots being fired. He added that from outside the shop they had heard Officer Akgün reprimanding the victim but had not seen him beat him.

NCO A.B. accused H.A. of having twice attempted to put pressure on him to give evidence against his commanding officer.

29. On 12 May 1997 Officer Akgün produced to the Assize Court a letter dated 12 April containing death threats against him.

30. On 21 May 1997 the gendarmerie general command informed the judges of the trial court that Officer Akgün had been relieved of his duties with effect from 20 May 1997.

31. In a letter of 25 May 1997 Ö.Y., who was performing military service at the time, informed the Assize Court that Officer Akgün had compelled him to retract his original statement and subsequently, shortly before the trial, had offered him free air tickets to travel to the courthouse and testify in his favour. He stated that Officer Akgün had in fact grabbed Emin Yıldırım by the neck and had repeatedly banged his head against the walls. He added that Mr Yıldırım had collapsed to the ground and had hit his head on the floor.

32. On 10 June 1997 Officer Akgün requested that the Istanbul Forensic Medicine Institute ("the Institute") produce a further expert opinion in response to the autopsy report. He again alleged that he had been the victim of a plot, this time orchestrated by H.A., the former mayor of Çermik, on account of the latter's defeat in the elections.

For his part, the district governor E.T. explained that on the day after the incident Mr Emin Yıldırım had indeed come to see him with a written complaint. He stated, however, that the complaint was much briefer than the document allegedly found in the victim's pockets and contained no allegations of assault. The district governor stated that he had summoned the protagonists to his office as the deceased had feared that he might be accused of involvement in the unresolved incident of the shots fired on 7 January 1996. E.T. stated that during the meeting Officer Akgün had apologised for uttering insults and that Emin Yıldırım had never claimed that he had been beaten. He added that after the meeting he had torn up the deceased's complaint, believing that matters had been settled.

33. On 12 September 1997 the applicant's lawyer warned the Institute's forensic experts that Officer Akgün might attempt to intimidate them into producing an opinion that was favourable to him.

34. On 16 September 1997 the Assize Court decided to obtain additional medical evidence concerning the precise circumstances of the death and instructed the Institute to draw up a full report as a matter of urgency.

35. On 21 October 1997 and 27 January and 5 March 1998 the Assize Court refused applications for Officer Akgün to be detained pending trial.

36. At the hearing on 5 March 1998 the Assize Court heard evidence from a colleague of Ö.R., a neurologist, A.U., who gave his opinion on the basis of Emin Yıldırım's medical records. He stated that the haematoma was located between the dura mater and the skull, and not in the actual brain. A subdural haematoma of that kind was more likely to result from cranial trauma. It was therefore improbable in his view that the haematoma had been caused by hypertension, especially as the patient's blood pressure had been recorded as normal at the hospital.

37. On 21 April 1998 the neurological surgeon Ö.R. gave evidence. He stated that he did not agree with the note attached to the back of the scan image that the haematoma was "chronic", which meant that it had formed very gradually. He added that he did not know who could have attached the note but that he was convinced, having himself operated on Emin Yıldırım, that the haemorrhage was "sub-acute" and that it could thus have been caused by a second blow, occurring in the two weeks before the death. He further noted that the patient had been admitted to hospital in a coma, a symptom not associated with cases of chronic haemorrhages, and explained that while Mr Yıldırım's hypertension and age might also have played a part in the aggravation of his condition, no diagnosis could be provided with any certainty in the circumstances of the case.

38. At the next hearing, some ten inhabitants of the deceased's native village stated that he had told them that he had been beaten by Officer Akgün and was suffering from pains in the head, stomach and feet but that, as a matter of pride, he had not wanted to see a doctor.

39. At the hearing on 22 October 1998 the Assize Court heard evidence from a radiologist, A.A., who stated that according to standard medical practice, the results of the scan performed on Emin Yıldırım should have been analysed by a radiologist; at the relevant time, however, he had been the only radiologist employed at the general hospital and he could not imagine who else could have attached the note indicating the presence of a chronic haemorrhage.

Counsel for the applicant accordingly demanded that the Institute clarify the contradictions between the various medical opinions.

40. On 23 December 1998 the Institute's First Specialist Committee submitted its report. It found that it could not be concluded with any certainty that Mr Emin Yıldırım had died as a result of an injury sustained

on 7 January 1996, particularly as no scan images had revealed any traces of ecchymotic lesions to the bone. The report concluded that the haemorrhage observed during the autopsy could have developed after the operation.

On 25 February 1999 the applicant's lawyer challenged that conclusion and asked for the case to be reviewed by the Institute's General Assembly.

41. The General Assembly gave its opinion on 22 April 1999, after studying the seven different medical opinions in the file. It concluded that the causes of death could not be determined with any certainty and that no causal link could be sufficiently established between the alleged acts of violence and the deceased's clinical presentation.

Having inspected the deceased's medical records, the General Assembly nevertheless noted certain shortcomings which made it impossible to determine the exact process by which the death had occurred. The autopsy report gave no indication of the colour, density, quantity and extent of the intracranial haematoma and there had been no histological examination of blood samples or of the area described as having been affected by diffuse degeneration of the brain tissue.

At the hearing on 10 June 1999 counsel for the applicant also challenged these conclusions, arguing that they had no scientific basis.

42. In its judgment of 14 June 1999 the Assize Court endorsed the public prosecutor's opinion that the charge of unintentional homicide should be dismissed as there was no clear causal link between the death and the alleged blows.

However, the Assize Court found Officer Akgün guilty of ill-treatment in the performance of official duties, within the meaning of Article 245 of the Criminal Code. It sentenced him to the minimum penalty of three months' imprisonment and suspended him from duty for two months and fifteen days.

The court considered that what constituted ill-treatment on Officer Akgün's part was that he had "made remarks that were likely to offend the victim and engender feelings of distress and anxiety in him" and not that he had beaten him. It found that, even assuming that Officer Akgün had hit the victim as well, such an act would at most have also fallen within the scope of Article 245 of the Criminal Code, which prohibited all forms of ill-treatment of others, including physical violence, in the performance of duties involving the preservation of order in a region affected by terrorism.

43. As to the length of the sentence, the judges pointed out that the accused deserved a favourable assessment on account of the socio-economic conditions in the region where he was serving and his various personal qualities. They thus decided to reduce his prison sentence to two months and fifteen days in view of his "good conduct". The sentence was subsequently commuted to a fine of 375,000 old Turkish liras, which at the relevant time was equivalent to approximately 0.90 United States dollars or 0.68 euros.

Lastly, the Assize Court decided to suspend the enforcement of the fine, being persuaded that Officer Akgün would not reoffend.

44. In his capacity as an intervening party, the applicant appealed to the Court of Cassation, arguing in particular that insufficient consideration had been given to the evidence for the prosecution, that the accused had never been placed in pre-trial detention and that, in view of his status as a high-ranking officer, he had remained free to exert pressure on the witnesses and forensic experts.

On 8 May 2000 the Court of Cassation upheld the impugned judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

45. The relevant provisions of the Criminal Code read as follows:

Article 245

“Any law-enforcement officer ... who, in the course of duty ... and in circumstances other than those prescribed by law ..., ill-treats, injures or strikes or does bodily harm to another person shall be sentenced to between three months' and three years' imprisonment and temporarily barred from public service. ...”

Article 452

“Where death results from an act of violence ... inflicted without the intention to kill the victim, ... a sentence of eight years' imprisonment shall be imposed on the offender ...

If the death occurs as a result of the offender's act combined with circumstances which had existed prior to the act and had not been known by the offender or as a result of fortuitous circumstances that the offender could not anticipate, ... a sentence of a minimum of five years' imprisonment shall be imposed ...”

46. Articles 151 to 153 of the Code of Criminal Procedure (CCP) govern investigations into acts capable of constituting offences such as those punishable under Articles 245 (ill-treatment) or 452 (unintentional homicide) of the Criminal Code. Such acts may be reported to the authorities or members of the security forces as well as to public prosecutors' offices. The complaint may be made in writing or orally. If it is made orally, the authority to which it has been made must make a record of it. The complaint may also be lodged through provincial governors, district governors or village mayors. By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the course of his duties is liable to imprisonment (see *Yaşa v. Turkey*, 2 September 1998, §§ 48-50, *Reports of Judgments and Decisions* 1998-VI, and *İlhan v. Turkey* [GC], no. 22277/93, § 36, ECHR 2000-VII).

47. For a summary of the rules governing civil and administrative liability for the acts of State agents, see, for example, *Şahmo v. Turkey* ((dec.), no. 37415/97, 1 April 2003) and *Okkalı v. Turkey* (no. 52067/99, § 51, ECHR 2006-XII).

48. For the determination of criminal sentences and the rules governing their execution, see *Okkalı*, cited above, §§ 47 and 49.

THE LAW

I. ALLEGED VIOLATIONS OF THE CONVENTION

A. Scope of the case

49. Relying on the substantive aspect of Article 2 of the Convention, the applicant asserted that his father had died as a result of the blows he had received from Officer Akgün.

He also alleged a procedural violation of Article 2 on account of the inadequate and biased nature of the investigations and the criminal proceedings conducted in connection with his father's death.

He further submitted that the length of the proceedings, almost four and a half years, had breached the requirement of promptness entailed by Article 6 § 1 of the Convention.

Lastly, he alleged that there was no effective remedy by which he could assert his rights at domestic level, in breach of Article 13 of the Convention.

The relevant parts of those provisions read as follows:

Article 2

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ...

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

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.”

Article 6 § 1

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

50. The Government contested the applicant's arguments.

B. The parties' submissions*1. The Government*

51. Referring to the discretion enjoyed by the national courts in assessing the evidence gathered, the Government asserted that the inquiry initiated immediately after the applicant's father's death and the subsequent criminal proceedings were not open to criticism.

52. Officer Akgün had been tried under ordinary law by an assize court, whose independence was beyond dispute. Prior to the proceedings, an investigation had been conducted, again according to the standard procedure, by an ordinary prosecutor's office. No military and/or administrative authorities had intervened in the proceedings in issue.

The inquiry had been thorough, impartial and careful and had indeed resulted in the criminal conviction of the accused. Accordingly, the Government submitted that the obligation to use best endeavours, inherent in both Article 13 and the procedural aspect of Article 2 (they cited, among other authorities, *McKerr v. the United Kingdom*, no. 28883/95, § 121, ECHR 2001-III), had been fully satisfied in the present case.

The fact that the clear discrepancy between the medical evidence and the various witness statements had meant that a finding of unintentional homicide could not be reached did not in any way undermine the adequacy of the judicial response in the present case. No other outcome had been possible, since no causal link could be established from the available evidence between the act of which Officer Akgün had been accused and the death of Emin Yıldırım one month after the disputed events.

53. As to the complaint under Article 6, the Government submitted that a complex trial that had lasted four years and three months for two levels of jurisdiction did not raise an issue in terms of the promptness requirement. They further contended that in his capacity as an intervening party the applicant had contributed to the length of the proceedings by calling several witnesses and repeatedly challenging the expert medical reports.

2. *The applicant*

54. The applicant submitted in reply that his allegations were corroborated by the findings of the autopsy report. In his submission, it was unsurprising that a man of over 65 who had received so many blows to the head should subsequently have died from cerebral haematomas developing over a protracted period.

55. With regard to the criminal proceedings in the instant case, the applicant deplored the fact that the preliminary investigations had been conducted by officials directly subordinate to Officer Akgün. Despite the requests by the complainant, Officer Akgün had not been detained pending trial and had therefore remained capable of exerting pressure on the witnesses and forensic experts.

56. Furthermore, Officer Akgün had not been relieved of his duties during his trial and had continued to obstruct the course of justice. The letter concerning his suspension by the local gendarmerie command did not correspond to reality, as during the course of the proceedings he had been promoted from the rank of captain to major.

In that connection the applicant asserted that, abusing his authority in the region, Officer Akgün had arranged for witnesses to be escorted from their village by gendarmes and had received them in his office in an attempt to influence them before they testified. The applicant also submitted that while the trial was ongoing, the witness Ö.Y. had been called up for military service and that Officer Akgün had arranged for him to be brought to the courthouse in a military vehicle.

57. Under Article 13, the applicant alleged that, instead of lodging a formal complaint with the judicial authorities, his late father had, through ignorance, thought it appropriate to apply to the district governor, who had ultimately prevented him from raising his grievances in due time. This had worked to the accused's benefit alone; despite the public prosecutor's submissions and the medical evidence, Officer Akgün had eventually been given the most lenient penalty possible under Article 245 of the Criminal Code.

In any event, the applicant submitted that the mere fact that the criminal proceedings had resulted in a conviction was not sufficient to conclude that this legal remedy had been effective, especially as the reclassification of the charge had in his view been solely intended to spare the accused, who, moreover, had not been deprived of his liberty for a single day.

58. Under Article 6, the applicant contended that the extended length of the proceedings was due solely to the delaying tactics used by Officer Akgün with a view to concealing evidence and rendering the accusations devoid of all substance.

C. The Court's assessment

59. Mr Emin Yıldırım died of a brain haemorrhage on 7 February 1996, one month after an incident between him and the commanding officer from the Çermik gendarmerie post. However, there was radical disagreement between the parties as to the exact circumstances of the incident. The Government maintained, as the Turkish judicial authorities had done, that no causal link could be established between the death and any conduct attributable to the commanding officer in question. The applicant, however, submitted that the evidence available corroborated his assertion.

1. Assessment of the main factual circumstances

(a) Time and place of the incident

60. The Court notes that the incident of 7 January 1996 took place in the Çermik district (Diyarbakır), where the situation prevailing at the material time required the State to take exceptional measures to put a stop to acts of violence perpetrated by the PKK.¹

At the precise time of the events, the climate was marked by a risk of terrorist action against the local gendarmerie post, of which Mr Akgün was the commanding officer. In view of the time – nearly midnight – and the place of the incident, due regard should be had to the pressure that the three gendarmes must have been under when they went out on patrol to ascertain where the sound of gunfire had come from.

61. These circumstances must to some extent have contributed to heightening fears among the gendarmes, including Captain Akgün, as to the threat potentially constituted by the fact that Emin Yıldırım's drapery shop was open at such a late hour. The statements by the protagonists themselves give a sufficient indication of what the atmosphere may have been like in the shop (see paragraphs 19 and 21 above).

The witness statements differ as to what actually happened.

(b) Nature of the alleged acts of violence

62. According to the concurring statements of the civilian eyewitnesses Ö.Y., H.Y. and B.N., Emin Yıldırım was not only insulted and threatened, but the commanding officer severely beat him, in particular by repeatedly banging his head (see paragraphs 17, 22, 27 and 31 above).

This version of events is supported by the statements by Emin Yıldırım's widow (see paragraph 26 above), by H.A., the mayor of Çermik (see paragraphs 14 and 28 above), and by some ten friends from the deceased's village (see paragraph 38 above).

1. The Workers' Party of Kurdistan, an illegal organisation.

63. However, NCOs A.B. and F.Ö., who were Captain Akgün's subordinates (see paragraph 19 above), police officers A.Ö. and Ö.Ş. (see paragraphs 17 and 28 above) and the four people stopped and questioned near the shop (see paragraph 22 above) stated that they had not seen Officer Akgün hit Mr Yıldırım.

This account is consistent with the statements by the district governor E.T., Captain Akgün's immediate superior (see paragraph 32 above).

(c) Emin Yıldırım's original complaint and the action taken by the district governor E.T.

64. The Court notes that it was common ground that on 8 January 1996 Mr Emin Yıldırım handed a written complaint against Officer Akgün to the district governor E.T., who arranged a meeting the following day with a view to settling the differences between the two men (see paragraphs 10, 11 and 14 above). However, the contents of the complaint and of the conversation in E.T.'s office cannot be determined with certainty.

65. According to the mayor H.A. (see paragraph 14 above), the written complaint subsequently found in the deceased's pockets (see paragraph 15 above) was the same one intended for the district governor E.T. and, during the meeting in E.T.'s office, Emin Yıldırım had complained that Officer Akgün had beaten him up and that he was still suffering from pain in the head. E.T. had thereupon promised to send him for a medical examination (see paragraph 14 above).

66. E.T., however, stated (see paragraph 32 above) that the written complaint he had been handed by Emin Yıldırım was not the same one that was produced to the Court. He maintained that the complaint he had received was brief and made no mention of assault. E.T. added that during the meeting with Officer Akgün, Emin Yıldırım had not at any time alleged that he had been beaten by him.

...

4. Compliance with the positive and procedural obligations under Article 2 of the Convention

(a) General principles

74. The obligation to protect the right to life under Article 2 of the Convention requires by implication that there should be some form of adequate and effective official investigation when individuals have died in suspicious circumstances (see *Yaşa*, cited above, §§ 98 and 100).

75. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life. The investigation must therefore be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. Although this is an

obligation to use best endeavours and not absolute, the authorities must nevertheless have taken the reasonable steps available to them to gather the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence (see *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000) and, where appropriate, a proper autopsy (see *Salman v. Turkey* [GC], no. 21986/93, §§ 73, 105 *in fine* and 106, ECHR 2000-VII).

Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness (see *Makaratzis*, cited above, §§ 73 and 74, and the references therein, and also *Avşar*, cited above, § 394).

76. In any event, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures.

A requirement of promptness and reasonable expedition is implicit in this context: a prompt response by the authorities in such matters may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Avşar*, cited above, §§ 393 and 395).

77. It must be pointed out, moreover, that the procedural requirements of Article 2 – like those of Article 3 – go beyond the stage of the preliminary investigation, where, as in the present case, this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 2.

Accordingly, the domestic judicial authorities should not under any circumstances be prepared to allow acts endangering people's lives and physical integrity to go unpunished (see *Öneryıldız*, cited above, § 96, and, *mutatis mutandis*, *Okkalı*, cited above, §§ 65 and 66).

(b) Application of the above principles to the present case

78. It was not disputed that the death in the present case was “suspicious” (see paragraph 74 above), as is shown by the file on the investigation and the fact that Officer Akgün was charged with homicide, although the trial judges subsequently altered the charge.

Having regard to the facts of the case as recapitulated above (see paragraphs 60 to 66), the Court is persuaded that the difficulties encountered both by itself and by the domestic courts in establishing the precise circumstances of Emin Yıldırım's death were largely due to the following instances of negligence at the various stages of the judicial proceedings.

(i) Response by the district governor E.T. to Emin Yıldırım's complaint

79. In the first place, the district governor E.T. failed to perform his statutory duties (see paragraph 10 above). On 8 January 1996 the late

Mr Yıldırım handed the official in question a written complaint concerning the incident of the previous evening. Bearing in mind his vulnerable position (see paragraphs 10 and 61 above), he might legitimately have expected E.T. to react promptly (see paragraph 76 above).

80. Although E.T. did not deny having received such a complaint, he maintained at the trial that the document said to have been found on the deceased's person (see paragraph 32 above) was not the same one that Emin Yıldırım had handed to him on 8 January 1996 (see paragraph 10 above). The Court considers, however, that that argument cannot in itself undermine the credibility of the content of the document in question, which the Government did not challenge and which they themselves produced to the Court (see paragraph 15 above).

The Court observes that to avoid having to bear the burden of proof in this respect, it would have been sufficient for E.T. to comply with Article 151 of the CCP (see paragraph 46 above) and to forward to the judicial authorities the complaint he had been handed; it notes, moreover, that as district governor he was required to take such action, without indulging in personal considerations or encroaching on the prerogatives of the criminal justice system.

81. Instead, the district governor chose to bring Mr Yıldırım face to face with his alleged aggressor, who was also the person in charge of preserving public order and, in that context, combating terrorism in Çermik. As Captain Akgün's immediate superior, the district governor should have refrained from taking any measures that might have given the impression of tolerating the unlawful acts of which his subordinate was accused.

In those circumstances, the Court considers that Emin Yıldırım cannot be criticised for not seeking to bring his complaint before a public prosecutor after being called to discuss the matter with these two men in authority.

82. It should be pointed out in this connection that the question whether E.T. might have been held liable under Article 235 of the Criminal Code (see paragraph 46 above) does not seem to have been raised, despite the fact that his decision resulted in a criminal case escaping judicial investigation, and hence public scrutiny.

Had a different course of action been taken, it would have been open to the competent prosecutor's office to order a prompt medical examination of Emin Yıldırım, which might have afforded an opportunity both to verify his allegations and to detect any early signs of potentially dangerous cranial injuries. In the context of the preliminary examination, it would also have been possible to take samples of any epidermal tissue and blood still present in the drapery shop, where it was alleged that Mr Yıldırım's head had repeatedly been banged against walls, tables or shelves.

83. Admittedly, by that early stage of the proceedings no death had occurred. However, having regard to the time and place of the incident, the nature of the alleged acts of brutality and the victim's age (see paragraphs

11, 61 and 62 above), the Court considers that the degree of the violence and the nature of the blows allegedly inflicted by Officer Akgün, coupled with their possible intention or purpose, justify examining the matter under Article 2 (compare *İlhan*, cited above, § 76), particularly as the omission by the district governor E.T. was followed by others after the death.

(ii) Inadequacy of the autopsy

84. The Court reiterates that the obligation to conduct an effective investigation involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death (see paragraph 75 above and *Salman*, cited above, § 105 *in fine*).

85. It observes in this connection that the General Assembly of the Forensic Medicine Institute concluded that since the autopsy report had not included a full description of the characteristics of the intracranial haematoma and there had been no histopathological examination of blood or brain-tissue samples, any effort to establish the precise causes of the death and whether it was linked to the alleged acts of violence had been bound to fail (see paragraph 41 above and *Salman*, cited above, § 106).

(iii) Conduct of the trial of Officer Akgün

86. While the shortcomings noted above undoubtedly prevented the Diyarbakır Assize Court from establishing the facts as thoroughly as it might have done in different circumstances, there were nevertheless several flaws in the trial phase too, one of which merits particular attention.

87. The Court has held that where State agents have been charged with serious offences involving acts contrary to Articles 2 and/or 3 of the Convention, it is scarcely conceivable that they should continue to perform their duties during the investigation and the trial (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004, and *Türkmen v. Turkey*, no. 43124/98, § 53, 19 December 2006).

In the instant case, however, Officer Akgün was promoted during the course of his trial (see paragraph 23 above) and was maintained in his post and in his military duties until 20 May 1997 (see paragraph 30 above).

88. The Court further notes that, despite requests by appropriate persons (see paragraphs 18, 24 and 35 above), no measures were ever taken in respect of Officer Akgün to secure the evidence and, in particular, to protect the legitimate interests of Ö.Y., H.Y. and B.N., the only eyewitnesses who were independent of the accused and capable of shedding light on what actually happened in Emin Yıldırım's drapery shop.

The judges considered that the accused posed no risk in that respect.

89. However, having previously given evidence to the public prosecutor against Officer Akgün (see paragraph 17 above), the three witnesses in

question withdrew their initial statements in court (see paragraph 22 above), only to reconfirm them later (see paragraphs 27 and 31 above).

Having regard to their position as agents of the State, the Court is certainly not required to pay any attention to possible conflicts of interest and malicious rumours concerning the mayor H.A., the district governor E.T. and the members of the gendarmerie involved in the case, including Officer Akgün, or to the alleged plots and conspiracy theories mentioned by the latter (see paragraphs 21, 25, 28 *in fine*, 29 and 32 above).

However, in the absence of plausible explanations from the Government, there is no cause to doubt the sincerity of the accusation by Ö.Y., H.Y. and B.N. that Officer Akgün intimidated them into withdrawing their statements. The three men were ordinary citizens but were just as much caught in the grip of the tensions prevailing in Çermik at the relevant time, and their vulnerability entitled them to protection.

90. In circumstances as exceptional as those of the instant case, the Court considers that the procedural obligations deriving from the aim of Article 2 of the Convention (see paragraph 77 above) may imply that criminal proceedings should be organised in such a way that the interests of witnesses called upon to testify against agents of the State are not unjustifiably imperilled, particularly where their life, liberty or security of person may be at stake (see, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996-II).

91. However, there is no evidence that any measures were taken that might reasonably have struck the requisite balance between the interests of Officer Akgün and those of the three witnesses for the prosecution, whose testimonies ultimately carried no weight.

Instead, the Diyarbakır Assize Court showed clemency towards the accused for “good behaviour” during the trial (see paragraph 43 above) without even seeking to verify the indisputably arguable claims of threats (see paragraph 89 above) that had been raised before it.

92. It appears that the Court of Cassation could have remedied that situation (see *Okkalı*, cited above, § 75) but failed to do so.

93. In short, it cannot be concluded that the trial of Officer Akgün had the deterrent effect which Article 2 requires of the Contracting States' criminal justice systems.

(c) Conclusion

94. Having regard to the foregoing, and notwithstanding the prosecution that led to Officer Akgün's conviction for “ill-treatment”, the Court concludes that the Turkish criminal justice system as applied in this case proved to be far from rigorous. It considers that in those circumstances, the system in question was incapable of effectively preventing the commission of unlawful acts by agents of the State or of offering appropriate redress for an infringement of the principles enshrined in Article 2 of the Convention.

95. There has therefore been a procedural violation of that Article in respect of the late Mr Emin Yıldırım.

5. The applicant's other complaints

96. In view of its finding of a violation of Article 2 of the Convention (see paragraph 95 above), the Court considers that it has determined the main legal issue raised by the application in the instant case (see, for example, *Aksoy (Eroğlu) v. Turkey*, no. 59741/00, § 35, 31 October 2006). Having regard to the facts of the case and the parties' submissions as a whole, it considers that no separate examination of the applicant's other complaints is necessary (see paragraph 49 above).

...

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a procedural violation of Article 2 of the Convention in respect of the late Mr Emin Yıldırım;
2. *Holds* unanimously that it is not necessary to examine separately the applicant's other complaints;

...

Done in French, and notified in writing on 19 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) partly concurring opinion of Judge Myjer;
- (b) partly dissenting opinion of Judge Türmen.

B.M.Z.
S.Q.

PARTLY CONCURRING OPINION OF JUDGE MYJER

I agree with the final conclusion that there has been a procedural violation of Article 2 of the Convention.

I also agree with the underlying reasoning in paragraphs 84-85 (inadequacy of the autopsy) and 86-93 of the judgment (conduct of the trial of Officer Akgün). In that connection I would like to explicitly draw attention to the important reasoning in paragraph 90 on the obligation to give – if necessary – extra protection to persons who are witnesses against State agents.

I have, however, some hesitation as far as the role of the Çermik district governor is concerned (see paragraphs 79-83 of the judgment). From the facts of the case it seems clear that after the district governor had received the complaint by the applicant's father, he tried to mediate between the father and the officer. According to the district governor, the officer offered his apologies to the father, after which the father accepted the apologies and the original complaint was torn up by the district governor (paragraph 11). Even if the complaint which was later found on the body of the by then deceased father had the same contents as the one which was torn up (something which was denied by the district governor – see paragraph 32), and notwithstanding the legal obligations laid down in Article 235 of the Criminal Code (see paragraph 46), I still do not see that the way the district governor acted at that time was contributory to the procedural violation, unless it should have been clear to the district governor at that time that the applicant's father had been so badly beaten up that an immediate medical investigation was also necessary. There are, however, no indications that this was the case. The only thing I am prepared to accept is that the district governor should have assumed his responsibility and should have ordered an immediate, independent, effective and adequate investigation once he had learnt that the applicant's father had all of a sudden died.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEŒ

I agree with the majority that there has been no substantive violation of Article 2. However, I regret that I am unable to agree with the majority in finding a violation of Article 2 in its procedural aspect.

The majority concluded that it was not established beyond reasonable doubt that there was a causal link between the death of Mr Emin Yıldırım and the alleged beating he received from Captain Sezai Akgün. This was also the conclusion of the Diyarbakır Assize Court. Nevertheless, the domestic court, considering that Mr Emin Yıldırım had been subjected to ill-treatment by Officer Akgün, either because the alleged beating had occurred or because, as the officer himself admitted, he had shouted at the deceased, sentenced him to imprisonment for three months and fifteen days and he was temporarily prohibited from public service for two months and fifteen days. The fact that the sentence was decreased to imprisonment for two months and fifteen days and then commuted to a fine does not change the main element of the case, that Officer Akgün was put on trial and, after a fair trial, which has not been disputed, was sentenced. Moreover, a heavy penalty of a fine, regardless of the amount, has serious consequences for a convicted person. The majority's finding of a procedural violation could have been justified if Officer Akgün had not been brought to trial or had not been punished. This was not the case. Furthermore, it should be taken into account that Mr Yıldırım did not lodge a complaint against Officer Akgün, as the officer had apologised to him.

Moreover, the majority's criticism in paragraph 94 against the Turkish penal system for not being rigorous is not well-founded. According to the majority's opinion, three months and fifteen days' imprisonment is not an adequate punishment for ill-treatment. The question which arises is whether it falls within the competence of the Court to decide what punishment for what offences should be included in the criminal codes of the Contracting States. The obvious answer to such a question is that the principle of subsidiarity should prevail.

Other reasons given by the majority in finding a procedural violation of Article 2 do not seem to be very convincing. One reason is the inadequacy of the autopsy. This conclusion does not have a sound basis.

There was a full autopsy. During the proceedings, the Assize Court obtained all the medical documents concerning the deceased from Diyarbakır General Hospital and sent them to the Forensic Medicine Institute for a final report on the cause of death of Mr Yıldırım. The shortcomings in the case file indicated by the Forensic Medicine Institute were remedied and the file was completed. After a thorough examination of the file, the Forensic Medicine Institute submitted a report to the domestic court. However, the applicant's representative did not accept the findings of this report. Upon this objection, the domestic court decided to request a

report from the General Assembly of the Forensic Medicine Institute. The judgment of 14 June 1999 is based upon the report of the General Assembly of the Forensic Medicine Institute which was signed by twenty-four physicians, all experts in their fields. Some of them are specialists in forensic medicine, some in traumatology, some in radiology, etc.

The purported lack of a detailed description of the subdural haematoma, as mentioned in paragraph 85 of the judgment, is not correct. A full, detailed description of the findings is provided in paragraph 6 of the autopsy report. It is noteworthy that the report of the Forensic Medicine Institute stated that upon examination of three computerised tomography (CT) scans – a very sensitive method of diagnosis – no traces of subdural haematoma or any other trauma were found. Therefore, it is likely that the subdural haematoma was formed during the operation, that is, after the CT scans. Even if it is assumed that a subdural haematoma existed before the operation, there was no evidence to suggest that this was the result of the incident that took place one month earlier. In fact, there is every reason to believe that there was no causal link between the alleged beating and the death of Mr Yıldırım, since a subdural haematoma is an acute process that occurs immediately after a head trauma. In the present case, the deceased became unconscious one month after the incident. It should be added that during this period of one month he did not seek any medical help.

Reference to the judgment in *Salman v. Turkey* ([GC], no. 21986/93, ECHR 2000-VII) is misplaced. Mr Salman was taken into custody and no plausible explanation was provided for injuries to his left ankle, bruising and swelling of the left foot, a bruise to the chest and a broken sternum. This was not the case with Mr Yıldırım.

The second reason given by the majority is that the Government had failed in their positive obligation to protect the three eyewitnesses. However, there is no indication in the judgment that either the witnesses or the applicant asked for such protection. In other words, domestic remedies were not exhausted.

During the proceedings, the witnesses changed their statements at different stages of the investigation. The domestic court took the view that it was impossible to know which of these contradictory statements reflected the truth.

The general principle is that assessment of evidence is primarily a matter for the domestic judge. In the present case, the domestic judge assessed the evidence before him and gave a verdict. The finding of a violation of Article 2 in its procedural aspect in the present case seems to me not to be in line with the case-law of the Court. I am therefore of the opinion that there has been no violation of Article 2.