



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

SECOND SECTION

CASE OF DİRİ v. TURKEY

(Application no. 68351/01)

JUDGMENT

STRASBOURG

31 July 2007

FINAL

31/10/2007

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 Diri v. Turkey,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr R. TÜRMEŖ,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Mrs A. MULARONI,

Mr D. POPOVIĆ, *judges*,

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

Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in an application (no. 68351/01) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Sabri Diri (“the applicant”), on 2 March 2001.

2. The applicant, who had been granted legal aid, was represented by Mr Elban and Mr Kirdök, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged in particular that he had been ill-treated during his detention in the Tekirdağ F-Type Prison and that the authorities had failed to conduct an effective investigation into his allegations. He invoked Articles 3 and 13 of the Convention.

4. On 15 April 2001 the applicant asked the Court to request the Turkish Government, under Rule 39 of the Rules of Court, to order a medical examination of the applicant, with a view to establishing the traces of *falaka*.

5. On 31 May 2001 the President of the Third Section of the Court decided to apply Rule 39 of the Rules of Court and informed the respondent Government that it was desirable, in the interests of the parties and the proper conduct of the proceedings before the Court, to conduct a medical examination of the applicant, in particular a Magnetic Resonance Imaging (MRI) scan and/or a bone scintigraphy.

6. On 20 January 2006 the Court decided to give notice of the application 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1969 and currently lives in Switzerland.

Background to the case

8. The applicant, convicted of membership of an illegal organisation, was serving his prison sentence in the Ümraniye E-Type Prison in Istanbul at the time of the events.

9. In December 2000 a large number of prisoners, including the applicant, started a hunger strike to protest against the F-Type prisons. On 19 December 2000 the security forces conducted an operation in several prisons to stop the protests. In the course of these operations, numerous prisoners and members of the security forces were wounded and 32 persons died. Following these events, on 22 December 2000 the applicant was transferred from Ümraniye E-Type Prison to the Kocaeli Kandıra F-Type Prison, together with several other prisoners. The Government stated that the applicant showed resistance to the security forces during the operation in the Ümraniye E-Type Prison. In a medical report issued by the Kocaeli Kandıra F-Type Prison doctors on 22 December 2000, it was noted that the applicant had scars on the right side of his jaw and nose; bruises on his eye lids, a round hyperaemic oedema on his head measuring 3 cm and sensitivity on his abdomen. The report concluded that the applicant was unfit to work for one week. The applicant maintained that he was beaten on admission to the Kandıra F-Type Prison.

The applicant's detention in the Tekirdağ F-Type Prison

10. On 23 February 2001 the applicant was transferred to the Tekirdağ F-Type Prison. On admission to the prison, he was allegedly strip searched and beaten and his hair and moustache forcibly cut. He also stated that he was put in a cell alone and was forced to listen to loud music. According to the applicant, as he refused to stand up and shout his name during the daily headcounts, he was subjected to ill-treatment by the prison guards, in particular *falaka* (beating on the soles of the feet).

11. On 24 February 2001 and 3 March 2001, respectively, the applicant was examined by the prison doctor, who did not find any signs of ill-treatment on the applicant's body.

12. On 4 March 2001 the applicant's lawyer filed a petition with the Tekirdağ public prosecutor's office and complained about the ill-treatment which the applicant had suffered in the Tekirdağ prison. He also requested that the applicant be examined by a forensic doctor.

13. The Tekirdağ public prosecutor initiated an investigation into the applicant's allegations. Upon the order of the public prosecutor, on 8 March 2001 the applicant was examined once again by the prison doctor, who reported that there were no signs of ill-treatment on his body. On the same day, the Tekirdağ public prosecutor took a statement from the applicant. Before the prosecutor, the applicant explained that, on admission to the Tekirdağ Prison, the prison personnel had shaved his hair and moustache by force and that he had been stripped naked. He further maintained that he had been placed in a single cell and subjected to *falaka* twice.

14. On 14 March 2001 the public prosecutor issued a decision of non-prosecution relying on the medical reports dated 24 February, 3 March and 8 March 2001, according to which there was no sign of ill-treatment on the applicant's body.

15. On 6 April 2001 the applicant filed an appeal against the decision of the public prosecutor.

16. On 19 April 2001 the Kırklareli Assize Court rejected the applicant's appeal.

17. Following the introduction of the present application, on 31 May 2001 the Court requested the Government to conduct further medical examinations on the applicant, namely a bone scintigraphy and a Magnetic Resonance Imaging scan (MRI).

18. On 26 June 2001 the Government submitted two medical reports dated 13 and 14 June 2001 which had been drawn up as a result of the MRI scan and the bone scintigraphy respectively.

The MRI report dated 13 June 2001 stated the following:

“Bone signal intensity was normal. Bone contours were regular. Achilles tendon signal characteristics and thickness were normal.

No pathology in the soft tissues was detected.

Result: Normal

Note: An increased intensity observed in the fat suppression sequences in the medial regions of both feet is attributed to the coil artefact.”

The bone scintigraphy report dated 14 June 2001 read as follows:

“Examination of dynamic, blood flow and blood pool images of both feet taken following intravenous injection of 20mCi Tc-99m MDP and of delayed static and anterior/posterior images of the whole body taken four hours later revealed the following:

In both feet, blood flow was normal; increased activity uptake was observed in the blood pool phase in the areas of the lower extremity of the left tibia and the ankle.

The delayed static images revealed increased radiopharmaceutical uptake in the lower extremities of both tibias and in the bones of the big toe (more noticeable in the right foot). Increased radiopharmaceutical uptake was also observed in the left-tibia joint and the upper fibula.

Apart from in the regions indicated above, radiopharmaceutical distribution and uptake in the skeletal system fell within normal limits.

Both kidneys were visualised slightly.

Conclusion: The increased radiopharmaceutical uptake in the regions described above is indicative of traumatism.”

19. On 19 July 2001, taking into account the applicant's poor health due to the hunger strike, the authorities released him from prison for six months.

20. On 25 September 2001 the Tekirdağ public prosecutor requested the Forensic Medicine Institute to make an assessment of the applicant's bone scintigraphy result, in particular to indicate the cause of the findings mentioned in the report.

21. In the meantime, on 16 October 2001 having regard to the findings indicated in the bone scintigraphy, the International Law Department of the Ministry of Justice consulted the Directorate General of Criminal Law Issues as to whether a writ of mandamus (*yazılı emir*) should be issued to restart the investigation into the applicant's allegations of ill-treatment. On 17 October 2001 the General Directorate of Criminal Law Issues wrote to the Tekirdağ public prosecutor, requesting his opinion on the matter. In his reply dated 28 December 2001, the public prosecutor argued that, as the bone scintigraphy test did not reveal the exact cause or the timing of the injuries, a writ of mandamus to quash the decision of the Kırklareli Assize Court could not be issued in the circumstances of the present case.

22. On 30 November 2001 the Forensic Medicine Institute replied that the findings mentioned in the bone scintigraphy report could not have resulted from rheumatism or the hunger strike, but were caused by a trauma.

23. On 7 December 2001 the Tekirdağ public prosecutor asked the Forensic Medicine Institute to clarify whether it was possible to determine the date when these injuries had been sustained.

24. On 12 December 2001 the Forensic Medicine Institute replied that it was not possible to make such an assessment.

25. The applicant returned to the Tekirdağ F-Type Prison on 5 April 2002, but was released once again on 12 April 2002 for another six months.

26. On 2 September 2006 the applicant's lawyer requested an additional expert report from Dr Şebnem Korur Fincancı, a forensic expert. Dr Fincancı was asked to evaluate the findings of the bone scintigraphy test dated 14 June 2001 and to assess whether the findings indicated in the

report matched the applicant's allegation of *falaka*. In this connection, Dr Fincancı was provided with a written statement by the applicant, in which he gave a detailed description of the ill-treatment to which he had been subjected in the Tekirdağ F-Type Prison. In this statement, the applicant explained that, as a protest against the F-Type prison system, he had refused to stand up and shout his name out during the daily headcounts. When he did not obey the warnings of the prison guards, a large group of guards entered his cell and started beating him, while two guards held his arms and another two secured his feet. Then one guard sat on the applicant's abdomen and another placed his hand over the applicant's mouth. After they had tied his feet with a belt, several guards struck his feet with their belts.

27. In her report dated 11 September 2006, Dr Fincancı concluded that when the static and dynamic images of the bone scintigraphy test were examined together, the findings in the report corresponded to the applicant's allegation of *falaka*. She further opined that the trauma complained of was inflicted on the applicant about three months prior to the test. While drafting her report, Dr Fincancı had regard to the applicant's previous medical reports dated 22 December 2000, 24 February 2001, 3 March 2001 and 8 March 2001.

28. In response to the report of Dr Fincancı, the Government submitted another report issued by the Forensic Medicine Institute dated 9 January 2007 which contradicted Dr Fincancı, stating that the findings in the bone scintigraphy test did not reveal the cause of the injuries on the applicant's feet and that it was not possible to make an evaluation as to when these injuries could have been sustained.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

29. The applicant complained in the first place that the prison conditions in the Tekirdağ F-Type Prison breached Article 3. He maintained in particular that on admission to the prison he had been strip searched and his hair and moustache forcibly cut. He also maintained that he had been kept alone in a cell and forced to listen to loud music. Secondly, the applicant complained that he had been beaten and subjected twice to *falaka*, when he refused to participate in the daily headcounts. Article 3 reads as follows:

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

30. The Government contested those arguments.

A. Concerning the conditions of detention

31. The applicant complained under Article 3 that, on admission to the Tekirdağ F-Type Prison, he had been strip searched and his hair and moustache forcibly shaved; he had been kept in a cell alone and subjected to loud music.

32. The Court recalls that it has in the past examined similar complaints and declared them inadmissible (see, *Gündoğan v. Turkey* (dec.), no. 29/02, 13 December 2005; *Yılmaz Karakaş v. Turkey* (dec.), no. 68909/01, 9 November 2004). It finds no particular circumstances in the instant case, nor any elements apt to disclose treatment of the prohibited severity, which would require it to depart from this jurisprudence.

33. In view of the above, the Court concludes that the applicant has not laid the basis of an arguable claim and that this part of the application should therefore be declared inadmissible as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Concerning the alleged ill-treatment

1. Admissibility

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

2. Merits

a) The alleged ill-treatment

i. General principles

35. The Court reiterates that Article 3 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. It also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human rights requires that these provisions be interpreted and applied so as to make its safeguards practical and effective (see *Avşar v. Turkey*, no. 25657/94, § 390, ECHR 2001-VII (extracts)).

36. Furthermore, the Court reiterates that, in respect of a person deprived of liberty, recourse to physical force which has not been made strictly necessary by the individual's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Ribitsch v.*

Austria, judgment of 4 December 1995, Series A no. 336, p. 26, § 38; *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

37. Where allegations are made under Article 3 of the Convention, the Court must conduct a particularly thorough scrutiny (see *Ülkü Ekinci v. Turkey*, no. 27602/95, § 135, 16 July 2002) and will do so on the basis of all the material submitted by the parties.

38. In assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt” (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002; *Avşar*, cited above, § 282). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ülkü Ekinci*, cited above, § 142).

39. Furthermore, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

ii. Submissions of the parties

40. In the present case, the applicant complained that he had been subjected to *falaka* twice, when he resisted standing up and shouting his name out during the daily headcounts.

41. The Government denied that the applicant had been ill-treated. They stated that the applicant must have sustained these injuries in the course of the incidents that took place in December 2000 in the Ümraniye E-Type Prison. They also stated that the applicant's allegation that he had been subjected to *falaka* in the Tekirdag F-Type Prison was unsubstantiated since there was twenty-four hour video surveillance in that prison. The Government further explained that the applicant had been examined three times by the prison doctor who had found no traces of ill-treatment on his body. They argued that, since there were no traces on his body, the doctor was not required to transfer the applicant to a hospital for further tests. Any such obligation in that regard would, in the Government's opinion, impose an excessive burden on the authorities. They also maintained that, although the bone scintigraphy results revealed that the applicant's feet had been exposed to trauma, in their view this did not necessarily mean that the applicant had been subjected to *falaka* as alleged. A trauma could have been caused by stress or insufficiency fractures. In this connection, the Government referred to the fact that the applicant had been on a hunger strike for a long time and that his bones had been weakened due to improper nourishment and a lack of physical exercise. In the absence of any concrete evidence proving the origin and the timing of the injuries, the Government

maintained that the applicant's ill-treatment allegations should be considered as unsubstantiated.

iii. The assessment of the Court

42. In line with the above-mentioned case-law, the Court remains free to make its own assessment in the light of all the material before it (see, *mutatis mutandis*, *Selmouni v. France* [GC], no. 25803/94, § 86, ECHR 1999-V).

43. The Court notes that the findings indicated in the bone scintigraphy report dated 14 June 2001 and the medical report issued by the Forensic Medicine Institute on 30 November 2001 are consistent with the applicant's allegation that he had been subjected to *falaka* in the Tekirdağ F-Type Prison. As clearly indicated in these reports, the injuries to the applicant's feet could not have been caused by rheumatism or the result of his hunger strike. They could only have been sustained by trauma. The Court takes note of the Government's observations that these injuries must have been caused during the incidents which took place in the Ümraniye E-Type Prison in December 2000. In this connection, it refers to the medical report dated 22 December 2000, which noted several injuries on the applicant's body. The Court does not see any reason why the doctors who examined the applicant on 22 December 2000 would not have reported the injuries to the applicant's feet if they had been sustained on that occasion. It further notes that the Government maintained that the trauma could have been caused by stress fractures or insufficiency fractures; however these submissions are not supported by any convincing evidence. As a result, the Court concludes that the injuries to the applicant's feet must be attributable to a form of ill-treatment for which the authorities at Tekirdağ bore responsibility.

44. As to the seriousness of the treatment in question, the Court reiterates that, under its case-law in this sphere (see, among other authorities, *Selmouni*, cited above, §§ 96-97), in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

45. In this connection, the Court considers that the treatment complained of was inflicted on the applicant intentionally by the prison guards with the purpose of punishing him and of breaking his physical and moral resistance to the prison administration. In these circumstances, the Court finds that this act was particularly serious and cruel and capable of causing severe pain and suffering. It is therefore concludes that this sort of ill-treatment amounted to torture within the meaning of Article 3 of the Convention.

46. There has consequently been a violation of Article 3 on that account.

b) The alleged inadequacy of the investigation

47. The applicant further maintained, under Article 3, that the authorities had not conducted an adequate investigation into his complaints of ill-treatment.

48. The Government denied this allegation. They stated that the domestic authorities had conducted a serious investigation into the applicant's allegations.

49. The Court recalls that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

50. Turning to the facts of the present case, the Court observes that the applicant brought his complaints of ill-treatment to the attention of the authorities by filing a complaint with the Tekirdağ public prosecutor on 4 March 2001 (paragraph 12 above). In his petition, the applicant also requested to be examined by a forensic doctor. On 8 March 2001, upon the order of the public prosecutor, the applicant was once again examined by the same prison doctor, who did not report any signs of ill-treatment on the applicant's body. The same day, a short statement was taken from the applicant, who repeated his allegations of ill-treatment. At this point, the Court notes with regret that the public prosecutor omitted to request any further medical examination, to take statements from the accused prison guards or to question witnesses and the prison doctor who had drafted the three medical reports dated 24 February 2001, 3 March 2001 and 8 March 2001, before delivering his decision of non-prosecution. In delivering his decision, the prosecutor limited himself to the three medical reports which merely stated that there was no sign of ill-treatment on the applicant's body. The Court recalls in this connection that proper medical examinations are an essential safeguard against ill-treatment. The forensic doctor must enjoy formal and *de facto* independence, have been provided with specialised training and been allocated a mandate which is sufficiently broad in scope (see, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 55 and § 118, ECHR 2000-X). In the instant case, the medical reports dated 3 and 8 March 2001, which were drafted by the prison's own doctor, provided limited medical

information and did not include any explanation by the applicant as regards his complaints.

51. The Court also finds it noteworthy that, after the bone scintigraphy results dated 14 June 2001 and the subsequent report of the Forensic Medicine Institute dated 30 November 2001, which confirmed that the injuries to the applicant's feet could only have been sustained by a trauma, the public prosecutor, who had the authority under Article 167 of the Criminal Code to restart the domestic investigation into the applicant's allegations of ill-treatment, took no further action. It is further noted that, although the International Law Department of the Ministry of Justice consulted the Directorate General of Criminal Law Issues as to whether a writ of mandamus should be issued to restart the investigation into the applicant's allegations of ill-treatment, the public prosecutor gave a negative opinion on this proposal, stating that the bone scintigraphy results did not indicate the cause or the timing of these injuries. The Court considers that, had the public prosecutor restarted the domestic investigation on the basis of this new evidence, he could have collected valuable information as to how and when these injuries might have been sustained.

52. In the light of the above, the Court concludes that the applicant's claim that he was subjected to *falaka* during his detention in the Tekirdağ F-Type Prison was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

53. There has therefore been a procedural violation of Article 3 in this regard.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

54. The applicant alleged under Article 13 that the domestic authorities failed to conduct an effective investigation into his allegations of ill-treatment.

55. The Government contested that argument.

56. The Court notes that this complaint is linked to the one examined above and must likewise be declared admissible.

57. However, having regard to the finding relating to Article 3 (see paragraphs 49-53 above), the Court considers that it is not necessary to examine separately whether, in this case, there has been a violation of Article 13.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

60. The Government contested the claim.

61. The Court finds that the applicant must have suffered pain and distress which cannot be compensated solely by the Court's finding of a violation. Having regard to the nature of the violation found and ruling on an equitable basis, it awards the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant also claimed a total of EUR 9,826.18 for the costs and expenses incurred before the domestic courts and for those incurred before the Strasbourg Court.

63. The Government contested this claim.

64. 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, and ruling on an equitable basis, the Court awards the applicant a global sum of EUR 2,500 in respect of costs and expenses less the sum of EUR 850 received in legal aid from the Council of Europe.

C. Default interest

65. 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 complaint concerning the prison conditions inadmissible and the remainder of the application admissible;
2. *Holds* that there has been a substantive violation of Article 3 of the Convention on account of the applicant's torture in the Tekirdağ F-Type Prison;
3. *Holds* that there has been a procedural violation of Article 3 of the Convention on account of the failure of the authorities to conduct an effective investigation into the applicant's allegations that he was tortured in the Tekirdağ F-Type Prison;
4. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into New Turkish liras at the rate applicable at the date of settlement and free of any taxes or charges that may be payable:
 - (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, less the EUR 850 (eight hundred and fifty euros) received in legal aid;
 - (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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

F. ELEN-PASSOS
Deputy Registrar

F. TULKENS
President