



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

SECOND SECTION

CASE OF ONAY v. TURKEY

(Application no. 31553/02)

JUDGMENT

STRASBOURG

20 September 2007

FINAL

20/12/2007

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 Onay 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 I. CABRAL BARRETO,

Mr R. TÜRMEK,

Mr M. UGREKHIDZE,

Mr V. ZAGREBELSKY,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 August 2007,

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

PROCEDURE

1. The case originated in an application (no. 31553/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Turkish nationals, Mr Sıddık Onay and Mrs Zinnet Onay, on 27 June 2002.

2. The applicants were represented by Mr M Beştaş, Mr S Karadayı and Mrs M Beştaş, lawyers practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 12 July 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

4. The applicants, Sıddık Onay and Zinnet Onay, were born in 1985 and 1948 respectively and live in Diyarbakır. The second applicant is the mother of the former.

5. When the first applicant (“the applicant”) was 17 years old, on 25 May 2002 at about 2 p.m. he was arrested at his home by police officers from the Department of Peace and Order attached to the Diyarbakır Security

Directorate, on suspicion of involvement in various incidents of bag snatching in Diyarbakır.

6. According to the report drafted by the police, the arrest took place on 26 May 2002 at 9.50 p.m. on the street outside his residence. The report stated that the police had acted upon the information of a certain M.D., a fellow detainee, who had cited the applicant's name during his interrogation in relation to the bag snatching in Diyarbakır. The report also stated that the applicant's mother had been informed of the arrest and detention.

7. On 26 May 2002 the applicant was given a medical examination at the Forensic Medicine Institute. A subsequent medical report revealed that there were some blade cuts on his left arm which were three or four days old but, apart from those injuries, no signs of possible ill-treatment were noted. The applicant was then taken into custody at the Peace and Order Department.

8. On 27 May 2002 at 3.30, 4.15, 4.45, 5.10, 5.35 and 6 p.m., the applicant and M.D. were taken to on-site inspections. A lawyer assigned by the Diyarbakır Bar Association was present during these inspections, when the applicant gave detailed statements as to how he and M.D. had planned and committed the offences.

9. Around 6.15 p.m. the same day, he was again given a medical examination. The medical report drafted on that occasion recorded no signs of beatings or the use of physical force on the applicant's body. The same day, at the request of the police, the public prosecutor, without seeing the applicant, extended his custody period by two more days under Article 128 § 2 of the former Code of Criminal Procedure. According to the report drafted by the police at 6.25 p.m. on that day, the applicant was handed over to the Juvenile Department of the Security Directorate.

10. On 28 May 2002 at 10.30 a.m., the applicant was brought for a further medical examination. The medical report prepared on that day noted two bruises of 10 x 2 cm on his right upper arm and a bruise of 5 x 1 cm on his left upper arm just below his shoulder, which were estimated to be two or three days old; some old cutting scars on his arms and chest were also noted. The applicant was given a second medical examination at 4.15 p.m. on the same day. The second medical report confirmed the findings of the first report. These reports both stated that the medical examinations had been performed upon the request of the Peace and Order Department.

11. On 29 May 2002 the Juvenile Police took the applicant for a medical examination. The forensic medical report prepared on that occasion recorded the old cutting scars on the applicant's body, but no signs of the use of recent physical force were noted.

12. On the same day the applicant was brought before the public prosecutor. In his statement to the public prosecutor, made in the presence of another duty lawyer, the applicant denied the charges against him. The lawyer claimed that the applicant had been ill-treated whilst in police custody and that he still bore the signs of that treatment. He requested that

the applicant be referred to the forensic medicine institute for a complete medical report.

13. Later the same day, the applicant repeated his allegations of ill-treatment before the investigating judge. He alleged that, after the police officers had apprehended him, they blindfolded him; electric shocks were administered to his body; he was beaten with truncheons and forced to admit to the charges. He showed the marks on his body to the judge. The judge noted a bruise of 7 cm about the thickness of a little finger on the applicant's right upper arm, a bruise of 3 cm the thickness of a little finger just under his left shoulder, a scab-covered lesion under his left kneecap, a swelling on his left ankle and some old blade cuts. The applicant was then remanded in custody.

14. On 30 May 2002 the applicant's lawyer filed a complaint with the Diyarbakır Public Prosecutor's Office, requesting the public prosecutor to bring criminal proceedings against the police officers who had been on duty when the applicant was in their custody. He also repeated that the applicant should be referred for a full medical examination. Subsequently, the public prosecutor launched an investigation into the applicant's complaint of ill-treatment.

15. On the same day, the public prosecutor took a detailed statement from the applicant, in which he complained about the police officers and repeated almost the same submissions he had made to the investigating judge, adding that he had not been subjected to further ill-treatment after he had been handed over to the Juvenile Police. He also admitted that the scars on his upper and lower arms as well as his wrist were self-inflicted with metal wire, which he had torn off the cell window, as he could not bear the pain of ill-treatment. After taking the applicant's statement, the public prosecutor issued a letter to the Forensic Medicine Institute, asking for a detailed medical report on the applicant, including an explanation as to the nature and cause of his injuries.

16. A report submitted by the Forensic Medicine Institute on 30 May 2002 made reference to the previous medical reports dated 26, 27 and 28 May 2002, and drew its own conclusions after the applicant had been examined. It noted that the applicant had a bruise of 5 x 0.5 cm of which the outer line was a green-yellow colour and the centre was purple-dark blue, on the right upper arm, estimated to be three or four days old, and an old scar of 3 x 1 cm on his left kneecap. The bruising was deemed to have been caused by blunt force trauma. The applicant's injuries were not regarded as life threatening but classified as sufficient to render him unfit for a day.

17. On 18 November 2004 the public prosecutor decided not to prosecute the police officers concerned. Referring to all the medical reports, this decision concluded briefly that the lesions had occurred prior to the applicant's arrest and that the scars on his body and arms had been self-

inflicted, as he admitted in his statement of 30 May 2002. The applicant challenged this decision before the Siverek Assize Court.

18. On 19 January 2005 the Assize Court rejected the applicant's objection.

II. RELEVANT DOMESTIC LAW

19. Section 18 (b) of the Regulations on Apprehension, Detention and Interrogation (1 October 1998, as amended on 13 August 1999) provides:

“Anyone who has reached the age of eleven, but is no more than eighteen, may be arrested. The parents and a lawyer shall be informed of the arrest and the minor shall be brought promptly before the public prosecutor. In these cases, the preliminary investigation shall be conducted personally by the Principal Public Prosecutor or by a public prosecutor to whom the former delegates that duty...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

20. The first applicant complained that he had been ill-treated whilst in police custody. In particular, he submitted that he had been beaten; water had been poured on him, followed by electric shocks. The second applicant also claimed that she had suffered on account of the emotional distress on hearing of her son's isolated detention and ill-treatment. The first applicant further alleged that he had not had an effective remedy before the national authorities for his complaint of ill-treatment.

21. They relied on Articles 3 and 13 of the Convention, which provide as follows:

Article 3

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

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.”

A. Admissibility

22. The Government argued that the second applicant, Zinnet Onay, who is the mother of the first, was not a victim of the alleged violation of Article 3 of the Convention. They contended that it was clear from the documents of apprehension and detention that the young man's parents had not made any attempt to visit him or challenge his detention, although they had been promptly informed of his arrest.

23. The Court notes that, in the present case, the anguish suffered by the second applicant cannot be regarded as being of a dimension or character distinct from the emotional stress which may be regarded as inevitably caused to relatives of victims of alleged human-rights violations (see *Nesibe Haran v. Turkey*, no. 28299/95, § 84, 6 October 2005, and, *a contrario*, *İpek v. Turkey*, no. 25760/94, § 183, ECHR 2004-II).

24. In these circumstances, the Court considers that the second applicant cannot claim to be a victim of a violation of Article 3 of the Convention in terms of Article 34. It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4.

25. The Court further notes that the first applicant's complaint 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.

B. Merits

1. *The alleged ill-treatment of the first applicant*

26. The first applicant submitted that he had been subjected to ill-treatment in police custody. He relied on his medical reports in support of the allegation.

27. The Government maintained that the allegation of ill-treatment was ill-founded. They referred to the findings in the applicant's medical reports and contended that the lesions on his upper arms had occurred before or on 26 May 2002 (the day of the arrest) at the latest. Moreover, the size and nature of the bruises were not sufficient to substantiate the alleged ill-treatment, such as the administration of electric shocks or beatings by truncheons. They further stated that, even assuming that the bruises on the applicant's arms had occurred at the time of the arrest on 26 May 2002, which may have been due to the police grasping him by his arms to prevent him fleeing.

They also alleged that the bruises which were deemed to be caused by blunt trauma may also have been self-inflicted by the applicant. In any case, the applicant's injuries were not regarded as life threatening in any medical

report. Had the applicant been beaten with truncheons, the lesions would have been larger and more serious. Thus, it was not clear beyond reasonable doubt that the bruises had occurred during police custody.

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. Otherwise, a clear issue will arise 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 assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under 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).

30. In the instant case, the Court observes that the applicant was medically examined at the time of his arrest and just before he was taken into police custody on 26 May 2002. This report noted no signs of ill-treatment on his body, but only some old blade cuts. The Government contended that the applicant had been handed over to the Juvenile Police Department on 27 May 2002. The Court notes that he was taken for a further medical examination on 28 May 2002. The two medical reports drafted on that day showed that the applicant bore bruises of 10 x 2 cm and 5 x 1 cm on both his arms. However, they recorded that the requests for medical examinations were made by police officers from the Peace and Order Department instead of the Juvenile Police. In this respect, the Court notes the inconsistency between the documents provided by the domestic authorities. On 29 May 2002 the applicant was taken for another medical examination by the Juvenile Police. That medical report recorded the old cutting scars but no signs of recent physical force. However, the bruises were again shown in the report of 30 May 2002 provided by the Forensic Medicine Institute.

31. The Court finds it striking that the lesions which were noted in the report of 28 May 2002 had disappeared on 29 May 2002 and then reappeared in the report of 30 May 2002. Therefore, it attaches no weight to the findings of the report of 29 May 2002, in which no signs of violence were found on the applicant's person.

32. The Court further observes that the applicant, whilst complaining in detail about the ill-treatment to the public prosecutor and the investigating judge, had only admitted at the beginning of his detention that the cutting scars were self-inflicted (paragraph 15 above).

33. In these circumstances, the Court is not satisfied with the Government's explanations as to the manner in which the bruises found during and after the custody period were sustained by the applicant.

34. There has accordingly been a substantive violation of Article 3 of the Convention.

2. The alleged lack of effective investigation

35. The applicant maintained that the authorities had not conducted an adequate investigation into his allegation of ill-treatment.

36. The Government submitted that, upon the applicant's petition concerning the allegation of ill-treatment, the public prosecutor took a detailed statement from him, and asked the Forensic Medicine Institute for a complete medical report, including an explanation as to the nature and cause of the injuries found on his body. Subsequently, on 18 November 2004 he decided not to prosecute the police officers concerned. Referring to all the medical reports, this decision concluded that the applicant's lesions had occurred prior to his arrest and that the scars on his body and arms had been self-inflicted.

37. The Court reiterates that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, 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. This investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102; *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

38. In the present case, the Court notes that the public prosecutor initiated an investigation as soon as the applicant's lawyer filed a petition concerning the ill-treatment. However, it appears from the case file that the prosecutor only relied on the applicant's statement of 30 May 2002, in which he admitted that the old cutting scars had been self-inflicted, when he decided not to prosecute the police officers (paragraph 17 above). He did not make any inquiry into the blunt trauma lesions noted in the medical

report of 30 May 2002, which were estimated to be three or four days old, and thus falling within the custody period. The Court further notes that the public prosecutor disregarded the inconsistency between the applicant's medical reports. Nor, did the Siverek Assize Court, which had dealt with the case on appeal, take account of the preceding elements. Moreover, the case file does not disclose any information as to whether the prosecutor or the Assize Court took testimony from the accused police officers.

39. In the light of the above, the Court concludes that the applicant's claim that he had been ill-treated at the hands of the police was not subject to an effective investigation by the domestic authorities, as required by Article 3 of the Convention.

40. There has therefore been a procedural violation of this provision.

41. In these circumstances, the Court considers that no separate issue arises under Article 13 of the Convention (see *Timur v. Turkey*, no. 29100/03, §§ 35-40, 26 June 2007).

II. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1, 3 AND 4 OF THE CONVENTION

42. The applicant alleged, first, that the domestic law required that minors be brought promptly before a public prosecutor, on apprehension, and that it was for the prosecutor to conduct the investigation in person. However, in his case, the police officers were in charge of the investigation, and the public prosecutor was not involved. Secondly, he maintained that his detention in police custody had been excessive. He relied on Article 5 §§ 1 (c) and 3 of the Convention.

43. Thirdly, the applicant submitted that he had been unable to challenge the lawfulness of his detention as he had had no legal representation during the police custody and that the presence of his lawyer during the on-site investigations had been limited to witnessing the events. He invoked Article 13 of the Convention in this respect. However, the Court finds it appropriate to examine this complaint under Article 5 § 4 of the Convention.

44. The relevant part of Article 5 of the Convention provides:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

45. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, as required by Article 35 § 1 of the Convention. In this connection, they submitted that, according to Article 128 § 4 of the former Code of Criminal Procedure, the applicant's parents or his representative could apply for his release. However, they did not pursue *habeas corpus* proceedings before the domestic courts.

46. The Government further submitted that, as the applicant had been acquitted, he was entitled to have access to the remedy provided for by the Compensation Law (No. 466) which was in force at the material time. Under Article 2 of that Act, persons who had been subjected to unlawful arrest or detention could apply to the nearest Assize Court within three months from the date of the competent authority's decision and claim compensation for any kind of loss which they may have sustained.

47. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges the applicants first to use remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. It also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law (see *Aksoy*, cited above, §§ 51-52; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, §§ 65-67).

48. The Court notes that, in the present case, the applicant complained of the circumstances of his detention which allegedly did not comply with the requirements of domestic law, and which had therefore been unlawful. The Court observes that the applicant's detention may have breached certain requirements of Section 18 (b) of the relevant regulations (paragraph 19 above). However, the Court cannot overlook the fact that the applicant was arrested at his home in the presence of his mother. The arrest report drafted by the police on 26 May 2002 (paragraph 6 above) confirmed that the applicant's mother had been informed of his arrest and detention. Furthermore, the applicant was assisted by two different duty lawyers during and after the police custody period (paragraphs 8 and 12 above). Although he claims that the first lawyer had only witnessed the events during the on-site inspections and had not provided him with sufficient legal assistance, the second lawyer had lodged a complaint concerning the ill-treatment before the public prosecutor (paragraph 14 above). However, that petition did not include any submission in relation to the alleged

unlawfulness of the detention. Nor, were there any other authorities whom his mother or lawyers approached on his behalf concerning his Article 5 grievances.

49. In the light of the foregoing, it would be reasonable to expect from the applicant that he had brought these complaints before the national authorities prior to his application to the Court, which has a role that is subsidiary to the national systems safeguarding human rights.

50. It follows, that this part of the application must be rejected for non-compliance with the requirement of exhaustion of domestic remedies pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The first applicant claimed 1,500 new Turkish liras (YTL) (approximately 838 euros (EUR)) in respect of pecuniary damage and YTL 100,000,000 (approximately EUR 55,796) for non-pecuniary damage.

53. The Government contested these claims as being unsubstantiated and excessive.

54. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, having regard to the violations found and ruling on an equitable basis, it awards the first applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

55. The first applicant also claimed YTL 11,200 (approximately EUR 6,247) for the costs and expenses incurred before the Court. In support of his claim, he submitted the Diyarbakır Bar Association's recommended scale of fees for 2006.

56. The Government disputed the amount claimed.

57. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the applicant has not substantiated that

has actually incurred the costs so claimed. Accordingly, it makes no award under this head.

C. Default interest

58. 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 first applicant's complaint concerning ill-treatment in police custody admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a substantive violation of Article 3 of the Convention as regards the complaint of ill-treatment;
3. *Holds* that there has been a procedural violation of Article 3 of the Convention on account of the authorities' failure to conduct an effective investigation into the allegations of ill-treatment;
4. *Holds*
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, which sums are to be converted into new Turkish liras at the rate applicable at the date of the settlement;
 - (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 first applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President