



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

FOURTH SECTION

CASE OF NECDET BULUT v. TURKEY

(Application no. 77092/01)

JUDGMENT

STRASBOURG

20 November 2007

FINAL

20/02/2008

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 Necdet Bulut v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. TÜRMESEN,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 77092/01) 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 Necdet Bulut (“the applicant”), on 9 August 2001.

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

3. On 3 July 2003 the Court decided to give notice of the application to the Government.

4. In a letter of 24 June 2005, the Court informed the parties that in accordance with Article 29 §§ 1 and 3 of the Convention it would decide on both the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1984 and lives in Freiburg, Switzerland.

6. On 15 July 2000, in the early hours of the morning, the applicant was injured by gunfire during arrest. He received a single bullet to his lower left leg. He was sixteen years old.

7. A report of the incident was drafted on the same day at 4.30 a.m. by the police officers involved in the incident and signed by all the suspects, with the exception of the applicant who had been taken to hospital. According to this report, at around 2.30 a.m. the police officers had received information from police headquarters that a group of masked persons had been seen writing on walls and tampering with cars on Tufan Street in the district of Kartal. On arrival at the scene, the police officers had seen graffiti on the walls and, at that moment, someone had started to shoot at them from a dark alley on the opposite side of the street. The police officers and reinforcement police teams which had arrived in the meantime had chased the suspects for about one hour. The suspects had eventually been cornered on an empty plot of land at number 6 Spor Street. Despite being ordered to surrender, the suspects had continued to shoot before entering a tent. Following a clash, the applicant had been injured and immediately taken to Kartal Hospital for treatment. The other suspects had resisted arrest. The incident report stated that the police officers had found masks, illegal documents, knives and spray paint in the tent. It also mentions that a cap gun (a toy gun that creates a loud sound akin to a gunshot and a puff of smoke when the trigger is pulled) had been found in the applicant's possession.

8. Between 15 and 17 July 2000 the applicant received medical treatment at Kartal State Hospital. According to the medical report of 17 July 2000 the applicant had suffered a fracture of the fibula (small bone located on the outside of the lower leg). The bullet trajectory was established as having entered from the back of the leg and exited from the front.

9. On 17 July 2000 the applicant was examined by a doctor who noted no physical signs of ill-treatment on his person apart from the gunshot wound.

10. In the meantime, on 16 July 2000, the Istanbul Criminal Police Laboratory conducted a ballistics examination of the cap gun and eight cartridges. The experts found, *inter alia*, that the 99 mm. semi automatic cap gun fired noise and gas caps and that the cartridges submitted corresponded to the gun. However, they asserted that with some modifications, the gun could shoot real cartridges. They submitted that the cap gun in question was no different from a real gun in terms of both its size and mechanical structure and that it was impossible to distinguish it, at first glance, from a real gun, even for those who were familiar with guns.

11. On 17 July 2000 forensic experts at the Istanbul Criminal Police Laboratory examined samples taken from the hands and palms of the applicant and the other suspects. They found no traces of gunpowder. However, they noted that in certain cases it was possible for traces of gunpowder on hand and palm extracts to go undetected depending on the

type of gun and powder used, the way a gun was handled and whether the suspects' hands had been previously washed.

12. On the same day, the public prosecutor at the Istanbul State Security Court heard evidence from the applicant, who denied knowing the other suspects and writing graffiti. He claimed, *inter alia*, that he had started to run out of fear after he had heard gunshots nearby and that the police officers had beaten him when they caught him. The applicant stated that he did not know whether the police were shooting into the air or at the ground when he was shot.

13. In the meantime, the Istanbul State Security Court also heard evidence from the suspects arrested at the same time as the applicant. The co-accused Mr A.U, Mr M.B, heard on 15 July 2000, and Mr D.Ş.A., heard on 18 July 2000, all admitted that they had written slogans on the walls. However, they affirmed that none of them had fired at the police officers, including the applicant. Moreover, they suggested that the applicant had been injured after they had been taken out of the tent and made to lie down on the ground. Some of the accused referred to hearing gunshots from a wedding nearby.

14. On an unspecified date, the Kartal public prosecutor instigated an investigation into the incident. On 23 March 2001 he decided not to prosecute the eight police officers who took part in the incident on the ground that there was no evidence supporting the suspects' allegations that they had been ill-treated during arrest. The prosecutor further considered that the applicant had been injured as a result of the clash between the police officers and the suspects after the latter had responded to the police officers' order to surrender by opening fire from the tent. The applicant's objection to this decision was dismissed by the Kadıköy Assize Court on 17 May 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. A description of the relevant domestic law at the material time can be found in *Şimşek and Others v. Turkey*, nos. 35072/97 and 37194/97, §§ 82-87, 26 July 2005).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 5 AND 13 OF THE CONVENTION

16. The applicant complained that the force used by the police officers during his arrest had been disproportionate and had caused him to suffer

serious bodily harm. He further complained that there had been no adequate or effective investigation into the circumstances surrounding the incident. The applicant relied on Article 3 of the Convention.

17. In addition, the applicant stated that he had been injured during his arrest and that therefore Article 5 § 1 (c) of the Convention had been breached.

18. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which provides:

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

19. The applicant further complained that he had been denied the right to an effective remedy in breach of Article 13 of the Convention, which provides:

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

A. Admissibility

20. The Court notes that the application 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.

B. Merits

1. The parties' submissions

21. The Government submitted that the applicant had been arrested in the course of a random operation which had given rise to unexpected developments to which the police officers had had to react without prior preparation. They admitted that at the scene of the incident the police officers had outnumbered the suspects. However, they pointed out that the applicant had been in possession of a cap gun which was indistinguishable, at first glance, from a real gun. They submitted that the police officers had used their guns only when it had become absolutely necessary and that they had aimed at the person who had opened fire. In this connection, the Government pointed out that the police officers had not aimed at the vital organs of the applicant. They maintained that, in the circumstances of the present case, the use of force had been proportionate to the aim pursued.

22. The applicant maintained his allegations. He submitted, in particular, that neither he nor the other suspects had resisted arrest and that they had never fired the gun. He denied that there had been a clash between them and

the police and maintained that he had been shot after he had been taken out of the tent. He claimed that the police officers had used disproportionate force and that he had been injured as a result of their arbitrary shootings.

2. *The Court's assessment*

23. The Court reiterates that Article 3 does not prohibit the use of force in certain well-defined circumstances, such as to effect an arrest. However, such force may be used only if indispensable and must not be excessive (see, among others, *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007, *Rehbock v. Slovenia*, no. 29462/95, §§ 68-78, ECHR 2000-XII; *Krastanov v. Bulgaria*, no. 50222/99, §§ 52 and 53, 30 September 2004, and *Günaydin v. Turkey*, no. 27526/95, §§ 30-32, 13 October 2005).

24. In the instant case the applicant was injured by a single gunshot to his left knee. The Court finds this injury sufficiently serious to bring it within the scope of Article 3. It is undisputed that the applicant's leg injury resulted from the use of force by the police officers in the performance of their duties, namely while effecting an arrest. However, differing versions of how the applicant had actually sustained the injury were put forward by the parties.

25. At the outset, the Court cannot ignore that the police were initially called upon to attend to an incident without any prior preparation (see, *a contrario*, *Rehbock v. Slovenia*, no. 29462/95, § 72, ECHR 2000-XII). It further notes that the incident occurred late in the evening in a residential area where gunshots were heard. In addition, according to the official documents, the applicant was found with a cap gun in his possession which could have conveyed the impression that he was carrying a weapon. However, the Court similarly cannot overlook the fact that the police officers, who largely outnumbered the suspects, gave chase for about an hour before they cornered the applicant and the other suspects in a tent where the applicant was shot and arrested. The security forces were thus able, with the lapse of time, to properly evaluate the situation and to organise and coordinate their efforts accordingly. Against this background and, particularly, in the light of the type of force used, namely firearms, the Court considers that the burden rests on the Government to demonstrate with convincing arguments that the use of force, which resulted in the applicant's injury, was not excessive (see, *mutatis mutandis*, *Matko v. Slovenia*, no. 43393/98, §104, 2 November 2006, and *Zelilof v. Greece*, no. 17060/03, § 47, 24 May 2007).

26. However, in the instant case, the Government merely stated that the police officers had opened fire only after the applicant had shot at them without providing any explanation or documentation which could shed light on the exact circumstances regarding the applicant's arrest. In this regard, the Court observes that there is no information in the case file as regards the manner in which the police operation was conducted. For example it is not

clear from the case file whether the applicant was injured in the crossfire or whether he was aimed at and shot by a police officer who had received such an instruction. There is no information regarding the number of shots fired by the parties and the official documents do not indicate whether any shots were effectively fired from the cap gun found on the applicant or whether any empty cartridges were found in the area (see paragraph 10). Finally, the Court also finds it noteworthy that the bullet trajectory indicates that the applicant was not facing towards the police officers when he was hit (see paragraph 8) and that consequently he could not have been shooting at the police officers, at least at that precise moment, as the Government suggested. In these circumstances, the Court finds that the Government have failed to provide convincing or credible arguments which would justify the degree of force used against the applicant in order to arrest him.

27. Finally, although the applicant's injury - a single gunshot wound to a non-vital organ - appears not to have had any lasting consequences for his health, the Court finds that it must have led to severe pain and suffering, particularly when account is taken of his young age at the time of the events.

28. In light of the above, the Court concludes that the force used against the applicant during his arrest was excessive and that therefore the State is responsible, under Article 3 of the Convention, for the injury sustained by him on that date. It follows that there has been a violation of Article 3 of the Convention.

29. Having regard to the facts of the case, the parties' submissions and the grounds on which it has found a violation of Article 3 above (see, in particular, paragraph 26 above), the Court considers that there is no need to give a separate ruling on the applicant's remaining complaints under Articles 3 and 13.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 60,000 for non-pecuniary damage.

32. The Government contested those amounts.

33. As regards the alleged pecuniary damage sustained by the applicant, the Court considers that the applicant has failed to properly substantiate his claim. The Court accordingly dismisses it.

34. However, the Court accepts that the applicant must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Ruling on an equitable basis, the Court awards the applicant EUR 5,000.

B. Costs and expenses

35. The applicant, who received EUR 701 by way of legal aid from the Council of Europe, also claimed EUR 4,287 for the costs and expenses incurred before the Court. In support of his claim the applicant submitted a breakdown of costs drawn up by his legal representative.

36. The Government contested the amount.

37. Since the applicant submitted no substantiation by way of vouchers or receipts of his costs claim, as required by Rule 60 of the Rules of Court, and having regard to the fact that he has already received a certain amount in legal aid from the Council of Europe, the Court makes no award under this head.

C. Default interest

38. 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

1. *Declares* the application admissible unanimously;
2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention on account of the injury sustained by the applicant during his arrest;
3. *Holds* unanimously that there is no need to examine separately the applicant's remaining complaints under Articles 3 and 13 of the Convention;
4. *Holds* by six votes to one
 - (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, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, to be converted into new Turkish liras at the rate applicable at the date of the settlement and free of any taxes or charges that may be payable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 applicant's claim for just satisfaction.

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

T.L. EARLY
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr R. Türmen is annexed to this judgment.

N.B.
T.L.E.

DISSENTING OPINION OF JUDGE TÜRMEK

I regret that I am unable to agree with the majority in finding a violation of Article 3 in its substantive aspect. The facts as contained in the judgment are as follows:

The police were called upon to attend an incident without any preparation. The incident occurred late in the evening in a residential area where gunshots were heard. According to the report prepared by the police, a group of masked persons was writing on walls and tampering with cars. The applicant was in possession of a gun which, according to experts, “was no different from a real gun in terms of both size and mechanical structure.” They also said that it was “impossible to distinguish it, at first glance, from a real gun, even for those who were familiar with guns” (paragraph 10). After a long chase of one hour, the applicant and his friends were cornered and, despite being ordered to surrender, the applicant continued to shoot and the policemen returned the fire, which resulted in a fracture of the applicant's fibula.

To determine whether the force used was “proportionate” several elements have to be taken into consideration.

First of all, the police were called upon to conduct a random operation without any preparation. Therefore, it seems unreasonable to consider, as the majority does in paragraph 25, that, with the lapse of time, the police could have properly evaluated the situation and that they should or could have organised and coordinated their efforts accordingly. Such an assertion fails to take into account the practical realities of police work and imposes a disproportionate burden on the authorities.

Secondly, the authorities found that the applicant was in possession of a cap gun that was not distinguishable from a real gun. According to official police records the applicant produced his gun and shot at the policemen. In such circumstances the police had no choice but to return fire in self-defence since they could not have known at that time that the applicant's gun was not real. In addition, the majority gave undue consideration to the fact that the bullet trajectory was established as having entered from the back of the leg and exited from the front. The bullet trajectory does not in my opinion disprove the fact that the applicant was shooting at the policemen before he was injured. The majority's consideration under this head is therefore speculative.

Thirdly, the majority disregarded the fact that the applicant's version of facts both before the domestic authorities and the Court lacked coherence and credibility. For example the applicant denied knowing the other suspects and writing graffiti, whereas all the co-accused had admitted that they knew each other and had written graffiti on the walls together with the applicant. In this connection, I find it difficult to believe, in the absence of a plausible explanation by the applicant, that the police officers shot the applicant after having already apprehended him and made him lie down.

Finally, taking into account the fact that the only injury sustained by the applicant was a single gun shot to a non-vital organ and that neither he nor the other suspects had sustained any other injuries, I accept the Government's argument that the force used against the applicant in this case was made necessary by his own conduct. The foregoing circumstances count heavily against the applicant, with the result that, in my view, the Government's burden to prove that the use of force was not excessive in this case was less stringent (see, *mutatis mutandis*, *Berliński v. Poland*, nos. 27715/95 and 30209/96, § 64, 20 June 2002).

However, it seems that the majority has accepted facts relating to the investigation, such as the lack of information regarding the number of shots fired by each side or whether any empty cartridges were found in the area, as the basis for finding a violation of the substantive aspect of Article 3.

It would have been more in line with the Court's case-law to examine all these issues that are closely linked to the investigation under the procedural aspect of Article 3.

I am therefore of the opinion that there has been no violation of Article 3 in its substantive aspect.