



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

THIRD SECTION

CASE OF GÜLŞENOĞLU v. TURKEY

(Application no. 16275/02)

JUDGMENT

STRASBOURG

29 November 2007

FINAL

29/02/2008

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 Gülşenoğlu v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,

Mr C. BÎRSAN,

Mr R. TÜRMEŖ,

Mrs E. FURA-SANDSTRÖM,

Mr DAVID THÓR BJÖRGVINSSON,

Mrs I. ZIEMELE,

Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 8 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 16275/02) 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 a Turkish national, Mr Can Gülşenoğlu (“the applicant”), on 12 July 2001.

2. The applicant was represented by Mrs F. Karakaş Doğan and Mrs Eren Keskin, 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 1 June 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 applicant was born in 1963 and lives in Montreuil (France). The applicant's brother, Vedathan Gülşenoğlu, was a nineteen year-old university student at the material time.

5. On 22 March 1994 Vedathan Gülşenoğlu participated in a demonstration in Istanbul during which he allegedly threw Molotov

cocktails at a bank. He was arrested, along with another person named İ.M., by three traffic police officers, who had been on duty in the neighbourhood.

6. According to the police officers, Vedathan Gülşenoğlu and İ.M. had been taken to the Kasımpaşa police station in a taxi, without being searched or handcuffed. According to İ.M., both he and Vedathan had had to cover their heads with their jackets.

7. At the police station, Vedathan Gülşenoğlu and İ.M. were kept in separate rooms. A few minutes later a shot was heard. Vedathan Gülşenoğlu was shot in the back of his head by A.B., one of the traffic police officers who had arrested him. He was taken to the Taksim hospital, where he died while being prepared for surgery.

8. On the same day, a police officer took a statement from A.B., who explained that while he was on duty in the Kasımpaşa neighbourhood, a large group of demonstrators had gathered and thrown Molotov cocktails at several banks. When he saw three demonstrators, one holding a gun, running away, he had taken out his gun and started chasing them with other police officers. The demonstrator holding a gun had escaped down a side street but they had caught the two others, Vedathan Gülşenoğlu and İ.M., and taken them to the police station. When he had tried to search Vedathan Gülşenoğlu in the station, the latter had taken out a gun and pointed it at him. There had been a struggle during which a bullet had been fired from his gun.

9. On the same day, the body was examined by a doctor in the presence of the public prosecutor. The doctor's report observed two sutured injuries of 2 x 1 cm. on the right parietal lobe and on the left occipital lobe and fractures on the cranium. The report further indicated that Vedathan Gülşenoğlu had been reported dead following the explosion of a bomb which he had been holding in his hand. To determine the exact cause of death, the body was sent for a classical autopsy.

10. On 23 March 1994 the autopsy was performed by four forensic medicine experts from the Cerrahpaşa Faculty of Medicine. The doctors indicated that the cause of death was a fracture of the cranium and cerebral haemorrhage due to a gunshot wound. The doctors delivered their final report on 9 May 1994, which stated that the gun had been fired from a long distance and that there was a bullet entry hole on the left side of the occipital lobe.

11. Again on 23 March 1994, the Istanbul provincial criminal police laboratory carried out a ballistic examination of two weapons, a 7.65 mm calibre Browning-type, which allegedly belonged to Vedathan Gülşenoğlu, and a 9 mm Parabellum-type, belonging to officer A.B, as well as a cartridge found at the site of the incident. The report indicated that the cartridge had been fired from A.B.'s weapon.

12. On the same day, statements were taken from the other traffic police officers who had arrested the applicant's brother and İ.M. They all

contended that there had been a struggle between Vedathan Gülşenoğlu and A.B. and that the former had been shot during this struggle.

13. On 25 March 1994 a scene of incident report was drafted, which was signed by the Beyoğlu public prosecutor and eight police officers, including A.B., who were at the Kasımpaşa police station on 22 March 1994. A sketch plan was also drawn.

14. On the same day, the Beyoğlu public prosecutor took statements from three police officers who had been on duty at the Kasımpaşa police station on 22 March 1994 and the three traffic police officers who had been involved in the arrest of Vedathan Gülşenoğlu. The police officers, who had been on duty at the police station, maintained that they had not witnessed the shooting. The traffic police officers, however, all contended that there had been a struggle between A.B. and Vedathan Gülşenoğlu.

15. On 25 March 1994 the Beyoğlu public prosecutor again questioned A.B., who reiterated his statements of 22 March 1994.

16. On 28 March 1994 the Beyoğlu public prosecutor took a statement from İ.M., who contended that the police officers had not carried out a body search when they had arrested him. He further maintained that he had covered his head with his jacket. He had been waiting at the entrance of the police station when he heard the gunshot. He explained that he had not witnessed the shooting of Vedathan Gülşenoğlu.

17. On 3 June 1994 the Beyoğlu public prosecutor filed an indictment with the Beyoğlu Assize Court, charging A.B. with homicide under Article 448 of the Criminal Code. The public prosecutor considered that Vedathan Gülşenoğlu had taken out a gun at the police station and that A.B. had shot him at long range.

18. On 8 September 1994 the Beyoğlu Assize Court held the first hearing in the case and heard evidence from three witnesses.

19. On 24 October 1994 the Beyoğlu Assize Court heard evidence from A.B., who reiterated his previous statements.

20. On 1 November 1994 the applicant joined the criminal proceedings as an intervening party. On the same day, the first-instance court heard evidence from two more witnesses.

21. On 22 December 1994 two more witnesses made statements before the Beyoğlu Assize Court. On the same day, the court issued summonses, requiring other witnesses to give evidence.

22. On 15 December 1995 statements were taken from another witness.

23. Between 21 September 1995 and 4 July 1996, the first-instance court postponed the hearings due to the absence of two witnesses, M.T., a watchman, and M.B., a traffic police officer who had arrested Vedathan Gülşenoğlu along with A.B.

24. On 4 July 1996 the first-instance court heard evidence from M.T.

25. Between 4 July 1996 and 18 January 2000, the Beyoğlu Assize Court postponed twelve hearings as M.B. could not be located.

26. On 18 January 2000 M.B. made statements before the assize court. On the same day, the court ordered A.B.'s pre-trial detention.

27. On 12 January 2001 A.B. gave himself up. He requested that the provisions of Law no. 4616 be applied in his respect and that he be released pending trial. The court dismissed the request and ordered his pre-trial detention.

28. On 23 January 2001 A.B. maintained before the first-instance court that he had been using the 9 mm Parabellum-type weapon until 12 January 2001.

29. On 13 April 2001 the Beyoğlu Assize Court ordered A.B.'s release pending trial.

30. Throughout the proceedings, the applicant maintained that his brother had not possessed a firearm. In this connection, he claimed that both his brother and İ.M. had had their jackets over their heads and that, if they had been carrying firearms, the officers would have seen them. The applicant alleged that his brother had been shot from a long range in the back of his head, which demonstrated that the killing had been deliberate.

31. On 28 June 2001 the Beyoğlu Assize Court convicted A.B. as charged and sentenced him to twenty years' imprisonment. In its judgment, based on witness statements and medical reports, the court held that if A.B. had shot the applicant's brother during a struggle as he alleged, the deceased would have been shot at close range, not from a long distance. The court further decided that the provisions of Law no. 4616 applied in respect of the execution of A.B.'s sentence.

32. On 13 November 2001 the applicant appealed.

33. On 2 October 2002 the Court of Cassation quashed the judgment of the first-instance court on procedural grounds.

34. On 9 October 2003 the Beyoğlu Assize Court once again convicted A.B. of homicide and sentenced him to twenty years' imprisonment, following rectification of the procedural defects.

35. On 24 December 2003 the applicant appealed.

36. On 21 October 2004 the Court of Cassation quashed the judgment of 9 October 2003. It considered that the first-instance court had not sufficiently examined the question of whether Vedathan Gülşenoğlu had had a firearm and whether he had attempted to use it. The case file was subsequently referred to the Beyoğlu Assize Court.

37. According to the information available from the case file and the information provided by the parties to date, the criminal proceedings against A.B. are apparently still pending before the Beyoğlu Assize Court.

THE LAW

I. ADMISSIBILITY

38. The Government argued that the applicant had failed to exhaust domestic remedies. In this connection, they maintained that the criminal proceedings against the police officer, who had allegedly shot and killed the applicant's brother, were still pending before the domestic courts.

39. Whether the criminal proceedings which started in 1994 and are still pending before the domestic courts could be regarded as effective under the Convention is closely linked to the substance of the applicant's complaints. The Court therefore joins the Government's preliminary objection to the merits.

40. 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.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

41. The applicant alleged that the killing of his brother, Vedathan Gülşenoğlu, constituted a violation of Article 2 of the Convention, which provides as follows:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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.”

42. The Government disputed the applicant's submissions. They maintained that the criminal proceedings against the police officer, who had shot and killed the applicant's brother, were still pending before the domestic courts. Recalling the subsidiary role of the Court, they maintained that there was no violation of Article 2 in the present case.

A. General principles

43. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted (see *Velikova v. Bulgaria*, no. 41488/98, § 68, ECHR 2000-VI). Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII). The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

44. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted to intentionally kill an individual, but describes situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than “absolutely necessary” for the achievement of any of the purposes set out in subparagraphs (a), (b) or (c). In this respect the use of the term “absolutely necessary” in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8-11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in the subparagraphs of the Article (see *McCann and Others*, cited above, p. 46, §§ 148-149).

45. In determining whether the force used is compatible with Article 2, it may be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (*ibid*, § 194, and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, § 79). Finally, law-enforcement officers, such as the police or the gendarmerie, should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect (see, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, § 59, ECHR 2004-XI).

46. The Court further recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to “secure to everyone within

[its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101 and 103, ECHR 1999-IV). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 321, ECHR 2007-...). The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Velikova*, cited above, § 80; *Ülkü Ekinci v. Turkey*, no. 27602/95, §144, 16 July 2002).

47. There is also a requirement of promptness and reasonable expedition implicit in this context (*Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, §§ 102-04; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, in general, *Avşar v. Turkey*, no. 25657/94, § 390-395, ECHR 2001-VII (extracts)).

48. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the 'no more than absolutely necessary' standard required by Article 2 § 2 of the Convention. 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 measure of effectiveness (*Ramsaha and Others*, cited above, § 321).

B. Application of these principles in the present case

49. In the present case there is no dispute between the parties that Vedathan Gülşenoğlu was shot and killed by A.B., the traffic police officer

who had arrested him during a demonstration. In this connection, the Court observes that A.B. had been accused of homicide and was convicted as charged and sentenced to twenty years' imprisonment twice by the first-instance court. These judgments were subsequently quashed by the Court of Cassation based on procedural shortcomings and defects in the investigation.

50. The Court recognises that the proceedings are still pending before the Beyoğlu Assize Court. However, having regard to the length of the proceedings, the Court considers that the investigation in question cannot be considered as prompt and effective for the purposes of the Convention. At this point, the Court observes that there have been substantial delays in the course of these proceedings, in particular it cannot overlook the fact that it took the first-instance court four years and four months to find one of the witnesses, namely Mr M.B., who was a police officer.

51. Furthermore, the Court notes that there were important shortcomings in the conduct of the traffic police officer who had chased and arrested the applicant's brother. As stated above (see paragraph 45), when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous, police officers should take appropriate precautions so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life. In the present case, however, it is striking that the traffic police officer in question did not search or handcuff Vedathan Gülşenoğlu when he apprehended him. It would also appear irregular that it was a traffic police officer who stayed with Vedathan Gülşenoğlu in the interrogation room at the police station. The Court notes that no explanation has been forthcoming from the Government on this point.

52. In the Court's opinion, the use of lethal force in the instant case falls squarely within the ambit of Article 2, which requires any such action to pursue one of the purposes set out in the second paragraph and to be absolutely necessary to that end. As the Court of Cassation stated in its decision dated 21 October 2004, a number of key factual issues still remain to be determined in this case, in particular whether or not Vedathan Gülşenoğlu had been in possession of a gun as alleged. In the absence of any findings in that regard, the Government have failed to provide any convincing explanation for the events.

53. In view of the above, the Court finds that in the particular circumstances of the present case, the authorities failed in their obligation under Article 2 of the Convention. It further concludes that the Government's preliminary objection regarding the non-exhaustion of domestic remedies should be dismissed.

54. Thus, there has been a violation of Article 2 in this case.

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

55. The applicant alleged that the domestic authorities failed to conduct an effective investigation into his brother's death. In respect of his complaint, he invoked Articles 6 and 13 of the Convention.

56. The Government contested that argument.

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

58. However, having regard to the finding relating to Article 2 (see paragraphs 49-55 above), the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Articles 6 and 13.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant claimed 80,000 euros (EUR) in respect of non-pecuniary damage.

61. The Government contested the claim.

62. Deciding on an equitable basis, the Court awards the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

63. The applicant stated that his family lived in Mardin and, in order to attend the domestic court hearings in Istanbul, they have been travelling back and forth for the past thirteen years. Without submitting any documents, he claimed EUR 5,000 under this head. He also requested EUR 3,000 for costs and EUR 3,000 for legal fees incurred before the domestic courts. Finally, the applicant requested to be awarded EUR 3,800 for the expenses incurred before the Court. In this respect, he referred to the Istanbul Bar Association's scale of fees and submitted an invoice amounting to 5,000 Turkish Liras (approximately EUR 2,800).

64. The Government, considering them excessive, contested these claims.

65. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 3,000 for the proceedings before the Court.

C. Default interest

66. 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* unanimously the application admissible;
2. *Joins to the merits* unanimously the Government's preliminary objection concerning the non-exhaustion of domestic remedies and *dismisses* it;
3. *Holds* unanimously that there has been a violation of Article 2 of the Convention;
4. *Holds* unanimously that there is no need to examine separately the complaint raised under Articles 6 and 13 of the Convention;
5. *Holds* by 6 votes to 1
 - (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 3,000 (three thousand euros) in respect of costs and expenses;
 - (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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President