



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

THIRD SECTION

CASE OF ALİ AND AYŞE DURAN v. TURKEY

(Application no. 42942/02)

JUDGMENT

STRASBOURG

8 April 2008

FINAL

08/07/2008

This judgment may be subject to editorial revision.

In the case of Ali and Ayşe Duran v. Turkey,

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Rıza Türmen,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Egbert Myjer, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 18 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 42942/02) 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 two Turkish nationals, Mr Ali Duran and Mrs Ayşe Duran (“the applicants”), on 6 September 2002.

2. The applicants, who had been granted legal aid, were represented by Mr Ş. Turgut, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 25 January 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the alleged violations of Articles 2, 3 and 13 of the Convention and the complaint under Article 6 § 1 concerning the alleged excessive length of the criminal proceedings brought against seven police officers 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 were born in 1933 and 1945 respectively and live in Istanbul. They are the parents of Mr Bayram Duran, aged 26, who died in a

police station in Istanbul on 16 October 1994, as a result of having been beaten by four police officers.

5. On 12 October 1994 a certain M.Y. filed a complaint with the police maintaining that a man had threatened his son and taken his money.

6. On 15 October 1994 M.Y. saw Bayram Duran on a bus and told the bus driver to go to the police station. Once in front of the police station, M.Y. asked the police officers to arrest Bayram Duran, maintaining that the latter was the person who had threatened his son. Subsequently, at around 11 a.m. Bayram Duran was arrested on suspicion of having committed robbery (*gasp*).

7. On 16 October 1994 at around 5 a.m. Bayram Duran was found dead at the Gazi police station.

8. On the same day, at 12.35 p.m. a “scene of incident and examination of the corpse” report was drafted and signed by the Gaziosmanpaşa public prosecutor, a medical expert, the director of the Gaziosmanpaşa police headquarters and four other persons. According to the report, there was no sign of ill-treatment or bullet wound on Bayram Duran’s body. The medical expert concluded that an autopsy was necessary to discover the cause of death. The report also contained details concerning the detention conditions, according to which the cell where Bayram Duran had been found dead had not been cleaned for around one week. There were several cigarette butts on the floor and spider webs on the walls. Furthermore, a sketch plan of the cell where Bayram Duran was found dead was drawn.

9. On the same day, the Gaziosmanpaşa public prosecutor took statements from the police officers who were on duty. The officers all contended that Bayram Duran had not been tortured or subjected to ill-treatment while in custody and that they had found him dead in his cell when they had gone there to offer him a cup of tea.

10. On 17 October 1994 an autopsy was carried out on Bayram Duran’s body. In the autopsy report drafted on 14 December 1994 and signed by four doctors from the hospital at the Cerrahpaşa University, the cause of death was identified as cardiac failure. The forensic experts found a haemorrhage of 3 x 8 cm in the left scapular region. They nevertheless considered that the haemorrhage had not directly caused Bayram Duran’s death.

11. On 29 December 1994 the Gaziosmanpaşa public prosecutor issued a decision not to prosecute in respect of Bayram Duran’s death. Basing his decision on the autopsy report of 14 December 1994, the public prosecutor noted that the cause of death was not the haemorrhage.

12. On 21 February 1995 the first applicant, Ali Duran, filed an objection with the Beyoğlu Assize Court against the decision of 29 December 1994. He maintained that the content of the autopsy report was inadequate as, *inter alia*, it did not specify how the haemorrhage in Bayram Duran’s body could have been caused. He further contended that

the public prosecutor had questioned only the police officers before rendering his decision. Ali Duran finally submitted that his son had been tortured to death and that the decision not to prosecute constituted a violation of his right to life.

13. On 30 May 1995 the Beyoğlu Assize Court requested the Gaziosmanpaşa Magistrates' Court to hear evidence from the first applicant and a witness and to conduct an examination of the case.

14. On 15 September 1995 the Gaziosmanpaşa Magistrates' Court heard evidence from the first applicant and two witnesses, H.K. and Ü.Y. The court then ordered the Forensic Medicine Institute to draft a report in order to determine whether the haemorrhage in Bayram Duran's body could have been caused by ill-treatment and whether there was a link between the haemorrhage and Bayram Duran's death.

15. On 13 March 1996 a report was drafted and signed by six forensic medicine experts, including the director of the Forensic Medicine Institute. Having examined the autopsy report, the experts noted that Bayram Duran had suffered from a heart condition. They further considered that the haemorrhage had been caused by a direct trauma to the scapular region. The experts concluded that the stress caused by the trauma and the material conditions in which he had been detained had aggravated Bayram Duran's heart condition and had given rise to a cardiac failure.

16. On 9 April 1996 the Beyoğlu Assize Court annulled the decision not to prosecute and decided to initiate criminal proceedings against the seven police officers who had signed the documents concerning Bayram Duran's arrest on 15 October 1994. In its decision, the court noted that Bayram Duran's death might have occurred as a result of torture inflicted on him and it therefore considered that criminal proceedings should be initiated.

17. On 6 June 1996 the Eyüp public prosecutor filed a bill of indictment with the Eyüp Assize Court charging seven police officers with causing death unintentionally as a result of an act of violence, under Articles 452 § 2 and 251 of the former Criminal Code.

18. On 28 August 1996 the Eyüp Assize Court decided to transfer the case to the Denizli Assize Court on the ground of public security.

19. On 18 November 1996, upon the request of the Denizli Assize Court, the Silopi Assize Court heard evidence from one of the accused police officers, A.K., who denied the allegations against him.

20. On 26 November 1996, at the request of the Denizli Assize Court, the Istanbul Assize Court heard evidence from the persons who had alleged that Bayram Duran had committed robbery.

21. On 11 December 1996 the Istanbul Assize Court heard evidence from two of the accused police officers, H.A. and M.S., who denied the allegations against them and contended that Bayram Duran had died as a result of a heart attack.

22. On 20 December 1996 the Istanbul Assize Court heard evidence from the first applicant, H.K. and Ü.Y. The court postponed the hearing as a third witness was not present.

23. On 24 January 1997 the Istanbul Assize Court heard evidence from the third witness.

24. On 26 February 1997, at the second hearing before the Denizli Assize Court, the first applicant joined the proceedings as a civil party seeking redress for his pecuniary and non-pecuniary loss (*müdahil*).

25. On 26 March 1997 the Istanbul Assize Court heard evidence from one of the accused officers, A.Ç., who contended that he had not inflicted ill-treatment on Bayram Duran.

26. On the same day, at the request of the Denizli Assize Court, the Edirne Assize Court heard evidence from a doctor who had worked at a medical centre close to the Gazi police station at the time of the incident. The doctor maintained that he had been called to the police station by police officers in order to examine Bayram Duran, but that when he arrived there, Bayram Duran had already died.

27. Between 7 July 1997 and 10 May 1999 the Denizli Assize Court postponed hearings due to the absence of one of the accused, police chief A.Ş., whose statements had to be taken.

28. On 10 May 1999 the first-instance court ordered A.Ş.'s detention in his absence.

29. On 22 June 1999 the second applicant made a request to the Denizli Assize Court to join the proceedings as a civil party, seeking redress for her pecuniary and non-pecuniary loss. The first-instance court did not take a decision regarding the applicant's request.

30. On 3 December 1999 A.Ş. made statements before the Denizli Assize Court and denied the allegation that Bayram Duran had died as a result of ill-treatment inflicted on him. A.Ş. maintained that Bayram Duran had been in custody on account of a simple accusation and that there had been no reason for inflicting ill-treatment on him. On the same day, the first-instance court reversed its order to detain A.Ş.

31. On 31 January and 6 April 2000, upon the request of the Denizli Assize Court, the Istanbul Assize Court and the Bakırköy Assize Court once again heard evidence from A.Ç., H.A. and M.S., who reiterated their previous statements.

32. On 6 September 2000 the Denizli Assize Court gave its judgment in the case. In the judgment, the assize court noted that M.S. had retired from public service and the other accused were serving as police officers. The Denizli Assize Court acquitted A.Ş., A.Ç. and H.A. of the charges against them, holding that there was insufficient evidence to convict them since they had left the police station at around 7 p.m. on 15 October 1994 and since the applicant had visited Bayram Duran a number of times up until 7 p.m. on 15 October 1994. The court considered that M.S., A.A., A.K. and

İ.U., the officers who had been on duty between 7 p.m. on 15 October 1994 and 5 a.m. on 16 October 1994, had caused Bayram Duran's death unintentionally by beating him, for reasons that could not be determined, and convicted them. Noting that the death had occurred as a result of the officers' acts combined with a circumstance that had existed prior to the act which had not been known to the officers, namely Bayram Duran's heart condition, the court sentenced M.S., A.A., A.K. and İ.U. to five years' imprisonment pursuant to Articles 448 and 452 § 2 of the former Criminal Code. The court did not apply Article 243 of the former Criminal Code applicable at the time of the commission of the offence as it was unable to establish that the convicted officers had beaten Bayram Duran with a view to extracting a confession of guilt. In its judgment, the court noted that Bayram Duran had been beaten by the convicted police officers and that he had died as a result of the stress caused by this trauma. Taking into account the fact that the actual offender who had caused the trauma to Bayram Duran's head could not be identified, the assize court reduced the police officers' prison sentences to two years and six months pursuant to Article 463 of the former Criminal Code. Having regard to the fact that the officers had committed an offence while on duty, the first-instance court increased the sentence to three years and four months pursuant to Article 251 of the former Criminal Code. The assize court finally reduced the sentence to two years, nine months and ten days of imprisonment for each convict pursuant to Article 59 of the Criminal Code, having regard to the fact that some of the convicted police officers' statements had been of help to the authorities during the investigation and the criminal proceedings in establishing the circumstances of the case. The first-instance court held that the applicants' right to redress for the pecuniary and non-pecuniary damage that they had suffered should be reserved.

33. The first applicant, through the lawyer who had represented him during the proceedings before the assize court, and the convicted police officers appealed.

34. In his appeal, the first applicant's lawyer submitted that the application of Article 452 of the former Criminal Code and the lack of severity of the prison sentences rendered the first-instance court's judgment ineffective, and thus constituted a violation of the provisions of the United Nations Convention against Torture, the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

35. On 1 October 2001 the Court of Cassation quashed the judgment of 6 September 2000 on procedural grounds. The court held that the Denizli Assize Court had failed to take a decision in respect of the second applicant's request to join the proceedings. The case file was then remitted to the Denizli Assize Court.

36. On 10 December 2001 the first-instance court decided to allow the second applicant's request to join the proceedings as a civil party.

37. On 25 March 2002 the Denizli Assize Court heard evidence from the accused police officers, who denied the allegations against them. On the same day, the first-instance court once again convicted M.S., A.A., A.K. and İ.U. as charged and sentenced each of them to two years, nine months and ten days' imprisonment and reserved the applicants' right to redress for the pecuniary and non-pecuniary damage that they had suffered.

38. The applicants, through their lawyer, appealed. They alleged that their son had been killed as a result of torture inflicted on him and that the first-instance court had failed to interpret the facts of the case correctly. They contended that the police officers should have been convicted of homicide as a result of torture under Articles 243 and 450 § 3 of the former Criminal Code in accordance with Article 3 of the European Convention on Human Rights and the provisions of the United Nations Convention against Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The applicants finally claimed that the convicted officers should have been debarred from employment in public service.

39. On 10 June 2003 the Court of Cassation dismissed the applicants' appeal and upheld the judgment of 25 March 2002.

40. On 1 June 2005 the new Criminal Code (Law no. 5237) entered into force.

41. Subsequently, A.A., A.K. and İ.U. filed requests with the Denizli Assize Court asking that their convictions be revised in the light of the provisions of the new Criminal Code. They maintained that their acts should be considered as "inflicting minor injury". They further submitted that they had been debarred from public service. A.A., A.K. and İ.U. finally noted that the execution of their prison sentences had been suspended pursuant to Law no. 4616, which governed conditional release, suspension of proceedings and execution of sentences in respect of offences committed before 23 April 1999.

42. On 24 November 2005 the Denizli Assize Court reviewed the sentences of A.A., A.K. and İ.U. and decided not to reverse its judgment of 25 March 2002.

43. A.A., A.K. and İ.U. appealed against the judgment of 24 November 2005.

44. According to the information in the case file based on the latest submissions by the parties, the case is still pending before the Court of Cassation.

II. RELEVANT DOMESTIC LAW

45. The relevant provisions of the former Criminal Code, in force at the time of the death of the applicants' son, read as follows:

Article 243

“Any ... public official who, in order to extract a confession of guilt in respect of a criminal offence, tortures or ill-treats any person, engages in inhuman conduct or violates human dignity, shall be punished by up to five years' imprisonment and disqualified from holding public office temporarily or for life.

Where such conduct causes death, the sentence incurred under Article 452 (...) shall be increased by between one third and one half.”

Article 448

“Any person who intentionally kills another shall be sentenced to a term of imprisonment of twenty-four to thirty years.”

Article 452

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

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

Article 251

“If a public official commits an offence while on duty ... the sentence stipulated for that offence shall be increased by between one third and one half.”

Article 463

“If the offence proscribed by Article 448 (...) is committed by two or more persons and if it is not established at the trial which one of those persons caused the death, the prison sentence to be imposed on any of the offenders is not more than two thirds and not less than half of the maximum prison sentence stipulated in the relevant provision of the Criminal Code (...)”

Article 59

“If a court considers that, besides the mitigating statutory excuses, there are mitigating circumstances in favour of reducing the sentence imposed on an offender, (...) the prison sentences shall be reduced by up to one sixth.”

46. According to Law no. 4616, execution of sentences in respect of offences committed before 23 April 1999 could be suspended if no crime of the same or a more serious kind was committed by the offender within a five year period. Section 5 (a) of Law no. 4616 stipulated that execution of sentences in respect of the offence proscribed by, *inter alia*, Article 243 of the former Criminal Code could not be suspended.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2, 3, 6 AND 13 OF THE CONVENTION ON ACCOUNT OF THE DEATH OF BAYRAM DURAN

47. Relying on Articles 2, 3, 6 and 13 of the Convention, the applicants complained that their son had been tortured to death at the hands of the security forces and that the authorities had failed to carry out an effective investigation, as the criminal proceedings brought against the police officers had not been concluded within a reasonable time and since no deterrent sanction had been imposed on those who were responsible for their son's ill-treatment and death.

48. The Court considers that the aforementioned complaints, as formulated by the applicants, essentially concern the positive obligations to protect the life and physical and moral integrity of the person through the law (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 95, ECHR 2004-XII; *Okkalı v. Turkey*, no. 52067/99, § 54, ECHR 2006-... (extracts); *Zeynep Özcan v. Turkey*, no. 45906/99, § 38, 20 February 2007; and, *a contrario*, *Dölek v. Turkey*, no. 39541/98, 2 October 2007) and therefore should be examined from the standpoint of Articles 2 and 3 of the Convention, which read as follows, alone:

Article 2

“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.”

Article 3

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

A. Admissibility

1. *The parties’ submissions*

49. The Government argued that the applicants had not raised their Convention grievances before the national authorities.

50. They further argued that the investigation conducted by the Gaziosmanpaşa public prosecutor, the bringing of the criminal proceedings against four police officers and their conviction by the Denizli Assize Court had constituted an effective remedy for the alleged violations of the Convention. The Government further submitted that had the applicants not been satisfied with the domestic courts’ decisions, they could and should have sought reparation from the administrative authorities and, subsequently, the administrative courts. The Government concluded that the applicants had failed to exhaust the domestic remedies available to them.

51. The applicants contended, in reply, that they had exhausted the domestic remedies by way of filing a criminal complaint, joining the criminal proceedings brought against the police officers and making submissions on the merits of the case to the first-instance court and the Court of Cassation. They further submitted that although the police officers had been convicted, no deterrent sanction had been imposed on them and the execution of their prison sentences had in any case been suspended. They maintained that the remedy for reparation referred to by the Government was not an effective remedy.

2. *The Court’s assessment*

52. As regards the first limb of the Government’s submissions, the Court reiterates that it is sufficient that the complaints intended to be made subsequently before it should have been raised, at least in substance and in compliance with the formal requirements before the national authorities (see *Gökçe and Demirel v. Turkey*, no. 51839/99, § 63, 22 June 2006; and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

53. In this connection, the Court observes that following Bayram Duran’s death, an investigation was initiated *ex proprio motu* by the Gaziosmanpaşa public prosecutor, which was concluded by a decision not to prosecute on 29 December 1994 (see paragraph 11 above). Upon the

applicants' objection, the decision of 29 December 1994 was quashed and criminal proceedings were brought against seven police officers, in which the applicants actively participated. In their requests to the first-instance court as well as the Court of Cassation, the applicants not only made submissions concerning the alleged criminal responsibility of the accused police officers, but they also explicitly maintained that their son's death had constituted a violation of the prohibition of ill-treatment and the right to life under the provisions of the United Nations Convention against Torture, the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see paragraphs 12, 34 and 38 above).

54. Having regard to the aforementioned elements, the Court finds that the applicants raised their Convention grievances before the national authorities. It therefore rejects the first limb of the Government's objections.

55. As regards the Government's submissions that the criminal law remedy in the case provided appropriate and effective redress to the applicants and that the latter failed to seek reparation from the administrative authorities and, subsequently, the administrative courts, the Court reiterates that the present application essentially concerns the positive obligations to protect the life and physical and moral integrity of the person through the law (see paragraph 48 above). It therefore considers that the Government's objections are inextricably linked to the substance of the applicant's complaints. It follows that this issue should be joined to the merits of the case (see *Okkali*, cited above, § 61).

56. The Court considers, in the light of the parties' submissions, that the applicants' complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

B. Merits

1. The parties' submissions

57. The Government submitted that the investigation into Bayram Duran's death had been prompt, thorough and effective. They maintained in that connection that an autopsy had been conducted and statements of the police officers who had been on duty at the relevant time had been taken immediately. They further submitted that the Denizli Assize Court had also conducted the criminal proceedings brought against the seven police officers meticulously. The court gathered the relevant evidence

and heard evidence from witnesses, subsequently to which it convicted four of the officers.

58. The applicants submitted, in reply, that the Denizli Assize Court had failed to take into account the fact that Bayram Duran had been tortured to death. They contended that the qualification of the offence committed by the Denizli Assize Court under Article 452 of the former Criminal Code, as a result of which the execution of the prison sentences had been suspended, had granted the convicted officers virtual impunity.

2. *The Court's assessment*

a. **General principles**

59. The Court reiterates that Article 2 of the Convention ranks as one of the most fundamental provisions in the Convention. Together with Article 3, from which no derogation is permitted, it 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 beings also requires that these provisions be interpreted and applied so as to make its safeguards practical and effective (see *Uçar v. Turkey*, no. 52392/99, § 102, 11 April 2006; and *Anguelova v. Bulgaria*, no. 38361/97, § 109, ECHR 2002-IV).

60. The Court further reiterates that where there is a credible assertion that a detainee has died as a result of ill-treatment by the police or other such agents of the State in breach of Article 3, that provision and the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention", require by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible (see, *mutatis mutandis*, *Slimani v. France*, no. 57671/00, §§ 30 and 31, ECHR 2004-IX (extracts); and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 102). Otherwise, the obligation to protect the right to life and the prohibition of ill-treatment would, despite their 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, *mutatis mutandis*, *Zeynep Özcan*, cited above, § 40; and *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 177, 24 February 2005).

61. The requirements of Articles 2 and 3 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill-treatment. While

there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished (see *Öneryıldız*, cited above, §§ 95 and 96; *Salman v. Turkey* [GC], no. 21986/93, § 104-109, ECHR 2000-VII; and *Okkalı*, cited above, § 65).

62. The important point for the Court to review, therefore, is whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Articles 2 and 3 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life and the prohibition of ill-treatment are not undermined (see *Okkalı*, cited above, § 66).

63. That being said, a requirement of promptness and reasonable expedition is implicit in this context (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 108, ECHR 2001-III (extracts)). A prompt response by the authorities in a case in which a person dies while in the custody of the authorities may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Slimani*, cited above, § 32).

64. The Court finally reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and the trial and be dismissed if convicted (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

b. Application of the general principles to the circumstances of the present case

65. The Court notes, at the outset, that a preliminary investigation was conducted by the Gaziosmanpaşa public prosecutor, which resulted in a decision not to prosecute. Nevertheless, following the applicants' objection against this decision, criminal proceedings were brought against seven police officers before the Denizli Assize Court and a judicial determination of the facts took place in these criminal proceedings. The Denizli Assize Court established that the applicants' son had been beaten by four police officers and subsequently died. The Court further notes that the facts of the case, as established by the Denizli Assize Court, are not disputed between the parties before the Court.

66. Therefore, in the Court's view, rather than examining whether there was a preliminary investigation fully compatible with all the procedural requirements as suggested by the Government (see paragraph 57 above), the issue to be assessed is whether the judicial authorities, as the guardians of the laws laid down to protect the lives and physical and moral integrity of

persons within their jurisdiction, were determined to sanction those responsible (see *Okkallı*, cited above, § 68, and *Öneryıldız*, cited above, § 115). While it is true that it is not the Court's task to address issues of domestic law concerning individual criminal responsibility, or to deliver guilty or not guilty verdicts (see *Öneryıldız*, cited above, § 116), in order to determine whether the respondent Government have fulfilled their international law responsibility under the Convention (see, *mutatis mutandis*, *Tanlı v. Turkey*, no. 26129/95, § 111, ECHR 2001-III (extracts)) the Court must have regard to the Denizli Assize Court's considerations while convicting the four officers and to the punishment imposed on them as a result. While doing that, the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents. However, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.

67. In this connection the Court reiterates that it has been established that M.S., A.A., A.K. and İ.U. caused Bayram Duran's death unintentionally by beating him (see paragraphs 32 and 65 above). It has also been established that the offence in question was committed, and thus Bayram Duran died, while he was detained on a charge of robbery in a police station, where he was under the control of the police officers who beat him, and while the officers' primary responsibility was to question Bayram Duran regarding the accusations against him. Indeed, the first-instance court increased the sentence by one third pursuant to Article 251 of the former Criminal Code, taking into account the fact that the officers had been on duty when they beat Bayram Duran and caused his death (see paragraph 32 above).

68. Yet, the convicted police officers benefited from a reduction of their prison sentences as "their statements had provided help to the authorities during investigation and the criminal proceedings in the establishment of the circumstances of the case". Given that the police officers did not make any statements before the Gaziosmanpaşa public prosecutor and the Denizli Assize Court other than by persistently denying the allegations against them (see paragraphs 9, 19, 30, 31 and 37 above), the Court considers that the Denizli Assize Court used its power of discretion to lessen the consequences of a serious criminal act – causing death as a result of inflicting ill-treatment upon a detainee – rather than to show that such acts could in no way be tolerated (see *Okkallı*, cited above, § 75).

69. Furthermore, as appears from the petitions submitted to the Denizli Assize Court by A.A., A.K. and İ.U. following the entry into force of the new Criminal Code on 1 June 2005, the convicted police officers never served their prison sentences, as the execution was suspended pursuant to Law no. 4616 (see paragraph 41 above). The Court has already held that where a State agent has been charged with crimes involving

ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that measures such as the granting of an amnesty or pardon should not be permissible (see *Abdülşamet Yaman*, cited above, § 55). In the Court's view, suspension of the execution of the convicted police officers' prison sentences pursuant to Law no. 4616 is comparable to a partial amnesty (see, *mutatis mutandis*, *Kalan v. Turkey* (dec.), no. 73561/01, 2 October 2001) and is a measure which cannot be considered permissible under its jurisprudence since, consequently, the convicted officers enjoyed virtual impunity despite their conviction.

70. The Court observes that it appears in the petitions submitted to the Denizli Assize Court by A.A., A.K. and İ.U. following the entry into force of the new Criminal Code on 1 June 2005 that these officers were dismissed from duty following their conviction (see paragraph 41 above), although the Denizli Assize Court had failed to make a ruling in this respect. The Court considers that this measure is insufficient to compensate the consequences of the fact that the convicted officers' sentences were never executed. The Court notes that neither pending the criminal investigation nor when the results of the criminal proceedings were known were any disciplinary measure taken in respect of the police officers (to compare with *Fazıl Ahmet Tamer and Others v. Turkey*, no. 19028/02, § 97, 24 July 2007).

71. In the light of the foregoing, the Court considers that the assessment made by the Denizli Assize Court combined with the fact that the convicted officers' sentences were never executed demonstrated a clear disproportion between the gravity of the offence in question and the punishment imposed (see, *mutatis mutandis*, *Zeynep Özcan*, cited above, § 43, and compare *Dölek*, cited above, §§ 76-83, where the Court considered that the necessary individual responsibility was established and therefore there had been an effective investigation, in a case where the national court established that the applicant's husband had been killed by a member of the security forces when the deceased had attempted to reach for the gun of the member of the security forces, convicted the latter under Article 452 of the former Criminal Code and suspended the execution of the prison sentence imposed on him pursuant to section 6 of Law no. 647).

72. In conclusion, the Court considers, as to the suspension of execution of sentences pronounced against the police officers, that the criminal law system, as applied in the instant case, proved to be far from rigorous and had little dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicants (see *Okkalı*, cited above, § 61, and *Zeynep Özcan*, cited above, § 45). It therefore concludes that the respondent State failed to fulfil its positive obligations to protect the life and physical and moral integrity of the person through the law in the present case.

73. The Court accordingly dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies (see paragraph 55 above) and concludes that there has been a violation of Articles 2 and 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF BAYRAM DURAN'S DETENTION

74. The Court does not deem it necessary to make a separate finding under Article 3 of the Convention on account of the conditions of Bayram Duran's detention, in view of its aforementioned finding of a violation of Articles 2 and 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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. Pecuniary Damage

76. The applicants submitted that Bayram Duran, who was 26 years old at the time of his death, was married and worked as street vendor selling *simit*¹. On 14 March 1995, five months after Bayram Duran's death, his wife gave birth to their son, Erdem Duran. On 7 April 2006 the first applicant, Ali Duran, was appointed as his grandson's legal guardian. The applicants submitted a report prepared by an expert witness specialising in the calculation of loss of income in compensation cases in Turkey in support of their claim in respect of pecuniary damage. Taking into account the average life expectancy in Turkey and having regard to the legal minimum wage, the expert calculated 8,872.06 new Turkish liras (TRY) (5,051 euros (EUR)) in respect of the loss of financial support which Bayram Duran's son purportedly suffered and would suffer until the age of eighteen years on account of his father's death. The applicants however maintained that this sum did not include any interest. They also claimed the sum of TRY 30,000 (EUR 17,081) in respect of the expenses for the education of their grandson. In sum, the applicants claimed EUR 50,000 in respect of pecuniary damage.

¹ A circular ring of bread topped with sesame seeds

77. The Government submitted that no compensation should be awarded to the applicants as they had failed to substantiate their claims. They maintained that the amounts requested were fictitious and were not based on any real expectations. They also disputed the calculation made in the expert report submitted by the applicants. The Government finally argued that the amounts awarded by the Court should not lead to unjust enrichment.

78. The Court observes that the Government have not provided any detailed arguments to contradict the basis of the applicants' calculation. Nor have they suggested any figure which they would regard as reasonable. The Court also notes that it has found violations of Articles 2 and 3 of the Convention (see paragraph 73 above). It considers that there is a direct causal link between the violation of Article 2 and the loss of financial support suffered by his son. The Court recognises that if Bayram Duran was still alive, his son would have been financially dependent on him.

79. Taking into account the awards made in comparable cases (see, *inter alia*, *Acar and Others v. Turkey*, nos. 36088/97 and 38417/97, § 121, 24 May 2005; *Çelikkilek v. Turkey*, no. 27693/95, § 119, 31 May 2005; and *Süheyla Aydın v. Turkey*, no. 25660/94, §223, 24 May 2005) and deciding on an equitable basis, the Court awards the applicants the sum of EUR 22,000, to be held by them for Bayram Duran's son, Erdem Duran, under this head.

B. Non-pecuniary damage

80. The applicants requested the Court to award them the sum of EUR 60,000 for themselves by way of non-pecuniary damage on account of the distress caused to them by the death of Bayram Duran. They further claimed the sum of EUR 50,000 for Erdem Duran, maintaining that he did not have the opportunity to know his father and that he suffered on account of being brought up without a father.

81. The Government argued that these sums were excessive.

82. The Court reiterates that it has found violations of Articles 2 and 3 of the Convention. It further accepts that non-pecuniary damage suffered on account of these violations cannot be compensated for solely by the findings of violations. The Court, on an equitable basis, awards the sum of EUR 10,000 to each of the two applicants.

C. Costs and expenses

83. The applicants also claimed EUR 10,000 for the costs and expenses incurred before the Court.

84. The Government submitted that the claim was excessive and unsubstantiated. They argued that no receipt or any other document had been produced by the applicants to prove their claims.

85. 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 considers it reasonable to award the sum of EUR 4,000 to cover the costs of the proceedings before the Court, less the EUR 850 which they received in legal aid from the Council of Europe.

D. Default interest

86. 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. *Dismisses* the Government's preliminary objection that the applicants did not raise their Convention grievances before the national authorities;
2. *Joins to the merits* the Government's preliminary objection that the applicants failed to seek reparation from the administrative courts and *dismisses* it;
3. *Declares* the remainder of the application admissible;
4. *Holds* that there has been a violation of Articles 2 and 3 of the Convention;
5. *Holds* that it is not necessary to examine separately whether there has been a violation of Article 3 of the Convention on account of the conditions of detention of the applicants' son;
6. *Holds*
 - (a) that the respondent State is to pay the applicants, 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:
 - (i) EUR 22,000 (twenty two thousand Euros), plus any tax that may be chargeable, in respect of pecuniary damage, which sum is to be held by the applicants for Bayram Duran's son, Erdem Duran;

- (ii) EUR 10,000 (ten thousand Euros) to each of the two applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 4,000 (four thousand Euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, less EUR 850 (eight hundred and fifty Euros) granted by way of 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;
7. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President