



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

THIRD SECTION

CASE OF KASA v. TURKEY

(Application no. 45902/99)

JUDGMENT

STRASBOURG

20 May 2008

FINAL

20/08/2008

This judgment may be subject to editorial revision.

In the case of Kasa 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,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele, *judges*,

and Stanley Naismith, *Deputy Section Registrar*,

Having deliberated in private on 29 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 45902/99) 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 Hamdi Kasa (“the applicant”) on 11 November 1998.

2. The applicant was represented by Mr Behiç Aşçı, Mr Metin Narin and Mr Basri Akyüz, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an agent for the purpose of the proceedings before the Court.

3. The applicant alleged, in particular, that the killing of his son Hakan Kasa by police officers had been in violation of Articles 2 and 6 of the Convention.

4. On 19 February 2002 the Court decided to give notice of the application to the Government and on 30 March 2006, 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**

5. The applicant was born in 1950 and lives in Istanbul. He is the father of Hakan Kasa, who was killed by a number of police officers on 13 August 1993.

A. Introduction

6. The facts of the case as presented by the applicant and the Government are based on a number of documents drawn up in the course of the domestic investigation. The following information is taken from the parties' submissions as well as from the documents submitted by them.

B. The Facts

1. Background

7. On 12 July 1993 police officer Mehmet Bulut was shot in the shoulder in a marketplace in Istanbul. The injury was not fatal. The perpetrators managed to escape and the police officer's pistol went missing during the incident. The police began a search to find the perpetrators and to recover the pistol.

2. The operation

8. At around midday on 13 August 1993 the police received an anonymous telephone call from a man who stated that there were a number of armed persons in a café on the 11th floor of a shopping mall in the Beyoğlu district of Istanbul who were behaving suspiciously.

9. According to an incident report drawn up and signed by twenty-two members of the anti-terrorist police on 13 August 1993, a police team carried out reconnaissance in the café and determined that the information given by the anonymous caller had been correct. Armed police officers then secured the area in and around the shopping mall and a special police team, wearing bulletproof vests, entered the building.

10. When the members of the special police team were on the 11th floor and were walking towards the café, a man and a woman outside the café drew their pistols and opened fire at them. The two persons failed to cease firing and surrender despite warnings from the police officers. As a result, the police officers returned fire and an armed clash ensued which resulted in the deaths of the two persons.

11. While the police officers were dealing with the two persons, firing began from inside the café. The officers asked the people inside the café to stop and surrender. Nevertheless, when they failed to comply with that request, the officers returned fire. When the firing finally ceased from inside the café, the officers entered the café and saw three men lying on the floor behind a fridge. The members of the special police team then informed their superiors and the prosecutor. A search team was sent to the café.

12. A stick of dynamite was found during the search subsequently carried out in the café and was defused by bomb-disposal teams. It was

destroyed the following day. It was also established that the five persons were all dead. Each of the five deceased had a pistol next to their right hands. The identities of the five deceased persons were established from the identity cards found in their pockets.

13. The woman killed outside the café was identified as 22-year-old Selma Çıtlak. The man killed next to her was identified as 21-year-old Mehmet Salgın. The three men inside were 16-year-old Sabri Atılmış, 32-year-old Nebi Akyürek and the applicant's 18-year-old son Hakan Kasa. A large number of bullet cases and deformed bullets were also found in and around the café. These were secured for the necessary examinations to be carried out.

3. The preliminary investigation

14. The following information appears from the report prepared on the same day by a prosecutor who had gone to the scene after having been informed by the police at 1.30 p.m. The prosecutor, who was accompanied by a doctor from the Forensic Medicine Institute, arrived at the scene at 2 p.m.

15. Following the arrival of the prosecutor and the doctor, the bodies were moved to a suitable room within the shopping mall for the necessary examinations to be carried out. There were eight bullet wounds on Selma Çıtlak's body. Mehmet Salgın's body had ten bullet wounds. The pistol found next to his body bore serial number 302-83715. Nebi Akyürek's body had eighteen bullet wounds, whereas the bodies of Sabri Atılmış and the applicant's son had nine and seven bullet wounds respectively.

16. Following the preliminary examinations, the bodies were taken to the Forensic Medicine Institute for post-mortem examinations to be carried out. The prosecutor noted that by this time the identity cards of the deceased persons, with the exception of Mehmet Salgın and Sabri Atılmış, were missing. He was thus unable to identify the bodies of the applicant's son and the remaining two deceased.

17. According to a report prepared by the Police Laboratory on 16 August 1993 concerning the examination of "the pistols found after the police operation involving members of the THKP-C/Dev Sol¹", the pistol found outside the café next to the body of Mehmet Salgın, with serial number 302-83715, was the missing pistol belonging to police officer Bulut who had been shot and injured on 12 July 1993 (see paragraph 7 above). It was established that the pistol found next to the body of Sabri Atılmış had also been used in the shooting incident during which officer Bulut was injured. It also appears from this report that the special police team

1. Revolutionary People's Liberation Party/Front-Revolutionary Left (*Devrimci Halkın Kurtuluşu Partisi/Cephe-Dev Sol; THKP/C-Dev Sol*), an illegal organisation.

members had fired 332 rounds, and 35 rounds had been fired from the five pistols found next to the deceased.

18. On 19 August 1993 the applicant's elder son and members of the Contemporary Lawyers' Association submitted a petition to the prosecutor's office in Istanbul. They alleged that the killings had been arbitrary and that the police officers had been covering up their tracks by destroying the evidence. They also alleged that the pistols found next to the bodies and the dynamite had been "part of a set up".

19. On 20 August police officer Bulut identified the deceased Mehmet Salgın and Nebi Akyürek as the persons who had shot and injured him on 12 July 1993.

20. On 9 September 1993 the wife and the father of Mr Nebi Akyürek also submitted a petition to the prosecutor's office and complained that the killings had been arbitrary. Nebi had not been a member of any illegal organisation; had he not been killed, it would have been established that he was innocent. They challenged the prosecutor to divulge the evidence, if any such evidence existed, to show that Nebi had been a member of the illegal organisation as alleged by the police. They also drew the prosecutor's attention to the fact that one of the deceased had only been 16 years old. He was also their relative and had been working in their family business.

21. They denied that Nebi or the other deceased had been armed and maintained that the pistols found next to the bodies had been planted there after the killings. Nebi was not left-handed but the pistol had been found next to his left hand. Furthermore, the pistols did not bear the finger prints of the deceased. Moreover, there were no bullet holes in the walls of the café to indicate that the three persons inside the café had opened fire. The broken windows of the café and the surrounding shops had been replaced by the police officers immediately after the operation, making it impossible to determine the direction from which the shooting had been coming and what types of weapons had been used.

22. None of the police officers who had taken part in the operation had any injuries. This, they maintained, showed that the deceased had been unarmed and killed at close range. Finally, they argued that alternative methods could have been used to arrest the five persons alive. They had been in a café on the 11th floor of a shopping mall and, as such, it would have been impossible for them to escape. They asked the prosecutor to carry out autopsies on the bodies with a view to establishing the distance from which they had been shot. They also asked the fingers of the deceased to be examined to establish whether they had indeed handled the weapons found next to their bodies and whether they had fired them as alleged.

23. According to a report prepared by the chief of the anti-terrorist police in Istanbul on 13 September 1993, the five deceased had been members of the THKP-C/Dev-Sol. There were police records concerning Nebi Akyürek and Mehmet Salgın's participation in unlawful

demonstrations but there were no records in the police files in relation to the remaining three, including the applicant's son.

24. On 16, 18, 21 and 25 September 1993 five reports were drawn up in relation to the post-mortem examinations which had apparently been carried out on 13 August 1993 on the bodies of the five deceased. The reports detail the various injuries caused by the bullets in their bodies and heads. As the finger tips of the deceased had been covered with ink by the police to obtain their fingerprints, it had not been possible to test them for gunpowder residues.

25. On 3 December 1993 the prosecutor began questioning the police officers who had taken part in the operation on 13 August 1993. One of the police officers stated that police officers Ayhan Çarkın, Ayhan Özkan and Ömer Kaplan had fired first after they had come under fire from the five persons.

26. On 27 April 1994 the explosives expert who had defused the dynamite found in the café was questioned by the prosecutor. The expert stated that he had found the bombs underneath the bodies inside the café.

27. On 29 September 1994 police officers Ayhan Çarkın, Ayhan Özkan and Ömer Kaplan, who had taken part in the operation, were questioned by a prosecutor for the first time. All three maintained that they had acted in the execution of their duties.

28. On 14 October 1994 the prosecutor filed an indictment with the Istanbul Assize Court, charging nine police officers with the offence of causing death in the execution of their duties.

29. On 31 October 1994 the criminal proceedings against the police officers began before the Istanbul Assize Court (hereinafter "the trial court"). The applicant and the relatives of the other four deceased joined the proceedings as interveners. During the trial the applicant and his wife informed the trial court that their son Hakan had not been involved in any criminal activity, and alleged that he had been killed unlawfully.

30. The Higher Disciplinary Board of the police observed on 20 July 1995 that the time-limit for initiating disciplinary proceedings under the statute of limitations had expired, and decided not to bring any disciplinary proceedings against the police officers.

31. A number of hearings had to be postponed on account of the failure of some of the defendants and prosecution witnesses to attend the hearings. When one particular defendant, Mr Ayhan Çarkın, failed to give evidence in court, he was questioned elsewhere and his statement was included in the case file. The requests made by the interveners to question Mr Çarkın before the trial court was rejected.

32. During one of the hearings, one of the defendants stated that they had come under fire and had responded by firing back. When he was asked by one of the lawyers representing the families whether the police always had to return fire and kill persons who opened fire on them, the defendant

replied that in this particular operation they had not opened fire with an intention to kill. The witnesses and the defendants confirmed that during the operation they had used MP-5 automatic submachine guns.

33. The husband of the deceased Sema Çıtlak informed the trial court that his wife had been working in the café as a cashier. She had had no involvement in any illegal activity. Following the killing of his wife the police had told him that his house would be searched, but this had never been done.

34. During the hearing held on 15 January 1998 the lawyers for the families repeated their requests for the trial court to carry out an on-site inspection in the shopping mall with a view to ascertaining whether or not it would have been possible for the five persons to escape. The trial court, considering that “the [answer] to this question was obvious because the five persons [had been] killed on the 11th floor of the shopping mall”, rejected the request.

35. During the next hearing a civilian eyewitness to the events testified before the trial court and stated that during the operation he had been shot accidentally and injured. He had not seen who had shot him. He did not remember whether he had heard the police shouting “surrender”.

36. One of the prosecution witnesses, police officer Adalet Aküzüm, testified before the trial court and stated that he had also participated in the operation and had opened fire. The lawyers for the families then requested the trial court to prosecute this particular witness as he had clearly been more than just a witness to the events. This request was not accepted.

37. During the trial the lawyers for the families alleged that the police officers had destroyed the evidence. In particular, the police officers had taken the deceased persons’ clothes and had immersed them in water, making it impossible to forensically determine whether the deceased persons had opened fire and whether their clothes had gunpowder residues.

38. On 14 May 1998 the lawyers representing the families asked for the judges of the trial court to be withdrawn from hearing the case. In support of their request the lawyers pointed out that even the most basic steps had not been taken in the proceedings despite the fact that the trial had been going on for three and a half years. In this connection they submitted that their requests for a ballistic comparison of the bullets found in the victims’ bodies with the weapons used by the police officers had been rejected. Similarly, their requests for the court to determine the distance between the police officers and the deceased and to have forensic examinations of the clothing the deceased had been wearing carried out had also been rejected by the trial court.

39. The lawyers also pointed to the testimony given by officer Aküzüm (see paragraph 36 above) in his capacity as a witness, confirming that he had also opened fire on the deceased persons. The lawyers stated that their request to have Mr Aküzüm prosecuted had been rejected. They alleged that

their request for the defendant Ayhan Çarkın to be questioned and for an inspection of the café to be carried out with a view to ascertaining whether or not it would have been possible to apprehend the five deceased persons alive had also been rejected without any justification. In this connection they also drew the trial court's attention to a number of highly publicised criminal proceedings pending against two of the defendants, namely Ayhan Çarkın and Selim Kostik, on account of their alleged involvement in the killings of a number of other persons and their alleged involvement in ransoms and protection rackets.

40. The request for the withdrawal of the judges was rejected on 22 May 1998 because the points raised by the lawyers were not of a nature to call into question the independence of the judges of the trial court.

41. During the hearing held on 3 November 1998 the applicant's lawyers informed the trial court that they had applied to the European Court of Human Rights as they believed that the criminal proceedings were not being conducted in an independent fashion. During the same hearing one of the three judges on the bench withdrew from sitting on the case on account of the distrust displayed by the families towards him and his two colleagues.

42. On 8 July 1999 the lawyers for the applicant submitted their written arguments to the trial court. They pointed out that the first time the prosecutor had questioned the police officers had been some four months after the killings. It had taken the prosecutor thirteen months to question all the defendants. No thought had been given to identifying the eye-witnesses to the incident. Furthermore, the pistols found next to the bodies had not been examined for finger prints. They believed that the failure to take the above-mentioned steps had rendered the investigation ineffective, in violation of Articles 2 and 6 of the European Convention on Human Rights. This, they alleged, had encouraged the police to carry out similar summary executions in future.

43. On 21 December 1999 the trial court found five of the nine police officers guilty of the offence of intentional homicide. The trial court rejected the prosecutor's request to acquit these five defendants who, in the opinion of the prosecutor, had killed the deceased in the execution of their duties and had remained within the permissible limits of self-defence.

44. The remaining four defendants were acquitted because they had not taken part in the armed operation, but had been involved in the securing of the area in and around the shopping mall. The trial court left it to the discretion of the prosecutor to bring criminal proceedings against police officer Adalet Aküzüm, who had participated in the operation with the above-mentioned five police officers and who gave evidence as a witness during the trial (see paragraph 36 above).

45. The trial court observed that thirty-five rounds had been fired from the five pistols found next to the bodies. The five accused police officers and officer Aküzüm, on the other hand, had fired 322 bullets. According to

the trial court, the deceased had been greatly outnumbered by the police officers, some of whom had been highly trained in anti-terrorist operations. The area around the shopping mall had been secured by the police officers and it would have been impossible for the five deceased persons to escape from the building. It could have been possible, therefore, to apprehend the five persons alive. Furthermore, although the five accused police officers had acted in self-defence, they had used disproportionate force, in violation of the applicable legislation.

46. The trial court held that the right to life was the most fundamental right of all the rights and freedoms, and was protected in Article 2 of the European Convention on Human Rights. Police officers were representatives of the State and in their dealings with the public they were expected to comply with, *inter alia*, the international conventions which formed part of the domestic law. Nevertheless, the killing of the five persons had not been absolutely necessary within the meaning of Article 2 § 2 of the Convention as the police officers had exceeded what was absolutely necessary to eliminate the danger. Although under domestic law they were entitled to open non-lethal fire at parts of the individuals' bodies, and they could have thus fired once or twice at each person, they had in fact fired between seven and eighteen rounds at each victim. In this connection the trial court pointed to the fact that the officers had been wearing bulletproof vests.

47. The trial court sentenced the five police officers to death. Nevertheless, the death penalty was commuted to eight years' imprisonment in accordance with Article 50 of the Criminal Code. The prison sentences were then halved pursuant to Article 463 of the Criminal Code which concerned joint enterprises in the commission of the offence of homicide. The sentences were then increased to four years and eight months in accordance with Article 281 of the Criminal Code, as the trial court considered that the defendants had abused their "means and powers". Finally, the trial court used its discretion under 59 of the Criminal Code and reduced the prison sentences to three years and twenty days. The trial court further decided to ban the five defendants from carrying out their duties as police officers for a period of three months.

48. The convicted police officers, the prosecutor and the applicant appealed against the judgment.

49. The prosecutor argued that the police officers had acted in the execution of their duties and, in accordance with Article 49 of the Criminal Code, they should not have been punished.

50. In their appeal petitions the police officers maintained that the deceased had been members of an illegal organisation and that they had remained within the permissible limits of self-defence when they shot them.

51. The applicant, for his part, argued that the judgment had not been in compliance with the applicable law and procedure.

52. On 23 May 2001 the Court of Cassation quashed the judgment convicting the five police officers, and considered that they had acted in self-defence, on the orders of a competent authority and out of immediate necessity.

53. Criminal proceedings recommenced before the trial court. During the re-trial the applicant asked the trial court not to depart from its previous judgment.

54. On 22 October 2001 the trial court recalled its previous judgment but held, in accordance with the Court of Cassation decision, that “the defendants had committed the offence out of legitimate necessity” and, as such, it was not possible to punish them.

55. The applicant and the relatives of the other deceased persons appealed against the judgment and argued that it was difficult to reconcile the judgment of 22 October 2001 with the judgment of 21 December 1999 in that, in its later judgment, the trial court had not explained why it was abandoning its previous conclusion. Given that the elements on which the Court of Cassation decision was based had already been examined and answered by the trial court in its first judgment, and also having regard to the fact that the circumstances surrounding the killings had not changed, it was impossible to comprehend how the trial court could decide to acquit the defendants.

56. On 20 May 2002 the Court of Cassation upheld the judgment of 22 October 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

57. The version of the Turkish Criminal Code which was in force at the time of the events contained provisions dealing with unintentional homicide (Articles 452, 459), inadvertent and negligent homicide (Article 455) and intentional homicide (Article 448). Articles 49 and 50 of the Criminal Code addressed the commission of offences carried out, *inter alia*, in excess of duty and in self-defence.

58. According to Article 448 of the Criminal Code, any person who intentionally killed another was liable to be sentenced to a term of imprisonment of twenty-four to thirty years. According to Article 450, the death penalty could be imposed in cases of, *inter alia*, multiple murder. Under Article 452, where death resulted from an act of violence but it was not the intention of the perpetrator to kill the victim, a sentence of eight years’ imprisonment could be imposed on the perpetrator. Where death resulted from an act of carelessness, negligence or inexperience on the part of the offender in breach of a law, orders or regulations, Article 455 stipulated that the guilty party was to be sentenced to a term of imprisonment of two to five years and to a substantial fine.

59. Article 49 of the Code provided that:

“A person shall not be punished for committing an act which was carried out in pursuance of a law or on the orders of a competent authority or where the person was obliged to commit the act out of immediate necessity to repel an unjustified assault against his own or another’s person or chastity or in order to save his life or the life of another from an immediate and grave personal danger for which he was not responsible and the commission of the act was the only way in which the danger could be avoided.”

Article 50 of the Code qualified the provisions of Article 49:

“Where the person in committing the act exceeds the limits of a duty prescribed by law or by the competent authority or exceeds the exigencies of the situation, that person shall be sentenced to a minimum term of imprisonment of eight years if the punishment in respect of the act is the death penalty, and to a minimum term of imprisonment of between six and fifteen years if the punishment in respect of the act is life imprisonment.”

60. According to Article 463 of the Criminal Code, if a person was killed by two or more persons, and if it was not established at the trial which one of these persons had caused the death, the prison sentence to be imposed on any of the perpetrators could not be more than two-thirds and not less than half of the maximum prison sentence stipulated in the Criminal Code for the offence of homicide.

61. Article 59 of the Criminal Code provided as follows:

“If the court considers that, other than the statutory mitigating circumstances, there are other circumstances favourable to reducing the penalty [imposed] on the perpetrator, capital punishment shall be commuted to life imprisonment and life imprisonment to a term of imprisonment of thirty years.

Other penalties shall be reduced by a maximum of one-sixth.”

62. The relevant provisions of the Act on the Duties and Powers of the Police (*Polis Vazife ve Selahiyet Kanunu*, Law No. 2559), read as follows:

Article 16

“The police may use firearms:

(a) in self-defence;

(b) for the purpose of thwarting an attack involving sexual abuse of, or bodily harm to, individuals where it is not possible to thwart such an attack through any means other than using a weapon;

...

(g) where police warnings to hand over weapons or other instruments of aggression are ignored or where an attempt is made by force by a third party to recover such weapons and instruments;

...”

THE LAW

I. ADMISSIBILITY

63. The Government argued that the applicant had failed to comply with the requirement to exhaust domestic remedies. They submitted that the applicant had not raised in the domestic proceedings the issues he raised before the Court. Secondly, they submitted that at the time of the introduction of the application, the proceedings were still ongoing before the domestic courts.

64. 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). In the present case the applicant not only expressly argued before the domestic court that the killing of his son had been unlawful under the domestic legislation, but also complained that the killing had been in violation of, *inter alia*, Article 2 of the Convention (see paragraph 42 above). The Court rejects, therefore, the Government's submission on this issue.

65. As for the second limb of the Government's submissions, the Court observes that the criminal proceedings against the police officers were completed on 20 May 2002.

66. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies.

67. 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 VIOLATIONS OF ARTICLES 2 AND 6 OF THE CONVENTION

68. The applicant alleged that his son had been killed in violation of Article 2 of the Convention. Relying on Article 6 of the Convention he also complained that the investigation into the killing had been ineffective.

69. The Court considers that these complaints should be examined from the standpoint of Article 2 of the Convention alone, 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.”

A. The killing of the applicant’s son

70. The applicant submitted that, at the time of his killing, his son had been on the 11th floor of a shopping mall and, as such, it would have been possible to apprehend him alive. In the opinion of the applicant, the police could have used non-lethal methods, such as plastic bullets and smoke bombs, to do so. In any event, a failure to comply with the order to surrender did not justify the killing of his son. In the opinion of the applicant, the police had had a premeditated plan to kill the persons in the café. Moreover, the police had covered their tracks by destroying the evidence by, *inter alia*, replacing the windows of the café and the surrounding shops, smearing the deceased persons’ fingers in ink and confiscating their clothing.

71. The Government submitted that the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation for the death of the applicant’s son in line with the Court’s case-law. To this end, the Government maintained that the investigation carried out by the national authorities had shown that the killings had been inevitable, as the applicant’s son and the other persons had refused to surrender and had instead opened fire at the police officers. The police officers, who had come under fire, had used force which had been no more than absolutely necessary and strictly proportionate to achieve the aim of protecting their own lives and the lives of other persons in the shopping mall.

72. The Court reiterates that 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).

73. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III). This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

74. 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, §§ 148-9).

75. In this connection, the Court reiterates that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of facts, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court’s task to substitute its own assessment of facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them. Though the Court is not bound by the findings of domestic authorities, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those authorities (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 18, §§ 29-30).

76. However, the central importance of the protection afforded under Article 2 is such that the Court is required to subject allegations of breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances including such matters as

the planning and control of the actions under examination even where domestic proceedings and investigations have already taken place (see *Erdoğan and Others v. Turkey*, no. 19807/92, § 71, 25 April 2006).

77. In the present case, the Court notes firstly that it is undisputed between the parties that the applicant's son Hakan was shot and killed by police officers. The Court is however confronted with fundamentally divergent accounts of how he was killed. The applicant maintained that the police officers had arrived at the café with the aim of killing the persons there, including his son. The Government, on the other hand, submitted that the killing had not been premeditated and that the applicant's son had been killed in self-defence and defence of others from unlawful violence.

78. The Court observes that a judicial determination of the facts took place in the criminal proceedings brought against nine police officers before the Istanbul Assize Court. Even if certain facts remain unclear, the Court considers, in the light of all the material produced before it, that there is a sufficient factual and evidentiary basis on which to assess the case, taking as a starting point the findings of the national court (see *Makaratzis v. Greece* [GC], no. 50385/99, § 47, ECHR 2004-XI, and *Perk and Others v. Turkey*, no. 50739/99, § 57, 28 March 2006).

79. The Court observes, on the basis of the material before it, that the applicant's son was killed in the course of a police operation by officers from the anti-terrorist branch. In this connection, as to the applicant's allegation that there was a premeditated plan to kill his son, the Court does not find it sufficiently established, on the basis of the material provided by the parties, that there was such a plan.

80. As regards the legal framework defining the circumstances in which law enforcement officials may use force and firearms, the Court notes that it has already held that the applicable legislation at the time of the incident, that is, Law no. 2559, enacted in 1934, would not appear sufficient to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe (see *Erdoğan and Others*, cited above, § 77) but that the difference between the relevant national standard and the standard provided by the expression "absolutely necessary" in Article 2 § 2 of the Convention is not sufficiently great that a violation of Article 2 § 1 could be found on this ground alone (see *Perk and Others*, cited above, § 60; see also *Yüksel Erdoğan and Others v. Turkey*, no. 57049/00, § 92, 15 February 2007).

81. In carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the context in which the incident occurred as well as to the way in which the situation developed (see *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 182).

82. The Court observes in this connection that the police officers arrived at the scene of the incident following a phone call received by the police on 13 August 1993 according to which a number of armed persons were behaving suspiciously there (see paragraph 8 above). Therefore, this was an emergency situation which demanded that the police officers act with great rapidity.

83. The Court also observes that the use of force by the police officers was the direct result of the unlawful violence emanating from the deceased persons. In this connection, the Court observes that the police officers secured the area around the shopping mall. Consequently, the operation in question should be considered to have been effected “in defence of any person from unlawful violence” and “in order to effect a lawful arrest” within the meaning of Article 2 § 2 of the Convention.

84. The Court should therefore determine whether the use of force in the instant case was no more than absolutely necessary and strictly proportionate to the achievement of the aforementioned aims.

85. In this connection it is significant that the first gunshot came from the deceased. As the statements of the witnesses before the prosecutor and the Istanbul Assize Court demonstrate, the police officers, who entered the building, did order the deceased to surrender and gave the necessary warnings before shooting and started shooting only after having been fired at (see paragraph 10 above).

86. The Court accepts, in the circumstances of the case, that when the police officers entered the building and were confronted with the shooting coming from the persons inside and outside the café, they believed that it was necessary to continue firing until the persons stopped firing back (see *Perk and Others*, cited above, § 68). In this connection, the Court notes that, according to the ballistic examination reports, thirty-five of the bullets found at the scene of the incident had been discharged from the firearms found next to the deceased persons’ bodies (see paragraphs 17 and 45 above).

87. The Court further considers that it is not necessary to speculate on the possibility for the police officers to use non-lethal methods in order to apprehend the applicant’s son alive. In this connection, the Court recalls that in the above-mentioned cases of *Andronicou and Constantinou* and *Perk and Others*, where the applicants’ relatives had been killed as a result of use of force by security forces, it held that it could not with detached reflection substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment. The Court further considered that to hold otherwise would be to impose an unrealistic burden on the States and their law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others (see *Andronicou and Constantinou*, cited above, § 192, and *Perk and Others*, cited above, § 72). The Court sees no reason to reach a different

conclusion in this case, where the police officers had to act rapidly when confronted with armed persons in a public place.

88. The Court considers therefore that the use of lethal force in the circumstances, however regrettable it may have been, did not exceed what was “absolutely necessary” for the purposes of self-defence and effecting a lawful arrest.

89. It follows that there has been no violation of Article 2 of the Convention in respect of the killing of Hakan Kasa.

B. Alleged inadequacy of the investigation

90. The applicant argued that the investigation into the killing of his son had not been effective. In this connection, the applicant repeated the arguments which he had submitted to the national investigating authorities, including the trial court (see paragraphs 18, 34, 36-39, 41-42 and 55 above).

91. The Government maintained that the applicant’s complaints about the investigation had no basis. The investigation had been commenced immediately after the operation had ended. Although the police officers had not been interviewed immediately, the time taken by the prosecutor to interview them could not be regarded as unreasonable.

92. The Court reiterates that 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”, 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, *mutatis mutandis*, *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 105). 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 *Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV).

93. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, § 139). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (see, for example, *Kaya*, cited above, § 87).

94. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports*

1998-VI, pp. 2439-2440, §§ 102-104; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV; and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-107, 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 a use of lethal force 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 *Avşar v. Turkey*, no. 25657/94, § 395, ECHR 2001-VII (extracts)).

95. Turning to the facts of the present case, the Court observes that the national investigating authorities did not begin questioning the police officers who killed the applicant's son on 13 August 1993 until 3 December 1993, that is, almost four months after the killing. Moreover, some of the police officers responsible for the killing were first questioned on 29 September 1994, that is, more than a year after the killing.

96. Unlike the respondent Government, the Court considers that the failure to question for a period of between four and fourteen months the police officers who were responsible for the killing of the five persons was unreasonable. The Government have not offered any explanation for the delays. The Court notes that the police officers who killed the applicant's son continued to perform their duties as police officers after the killing and that it would have been straightforward for the authorities to locate and question them in a timely fashion. These police officers were the only eye-witnesses to the events and their questioning should have been regarded as a priority. Furthermore, the Court cannot exclude that the failure to question the police officers for such lengthy periods damaged public confidence in the adherence to the rule of law not only of the police officers but also of the investigating authorities.

97. The Court considers this failure to be so serious as to lead to the conclusion that the investigation as a whole had been ineffective, contrary to the requirements of Article 2 of the Convention. It thus deems it unnecessary to examine the remaining alleged failures in the investigation.

98. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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."

100. On 3 April 2006 the Court invited the applicant to submit his just satisfaction claims by 2 May 2006. However, he did not submit any claims.

101. Accordingly, the Court considers that there is no call to award the applicant any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 2 of the Convention on account of the killing of the applicant's son by the police officers;
3. *Holds* that there has been a violation of Article 2 of the Convention on account of a lack of an effective investigation into the killing.

Done in English, and notified in writing on 20 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Deputy Registrar

Josep Casadevall
President