



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

SECOND SECTION

CASE OF ORHAN KUR v. TURKEY

(Application no. 32577/02)

JUDGMENT

STRASBOURG

3 June 2008

FINAL

29/09/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Orhan Kur v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Ayşe Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 32577/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Orhan Kur (“the applicant”), on 20 August 2001.

2. The applicant was represented by Mrs Z.S. Özdoğan, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

3. On 2 April 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1980 and lives in İzmir.

A. The alleged ill-treatment

1. The applicant's version

5. On 28 July 1997, at around 10 p.m., the applicant was on his way home when he saw a street fight and stopped to watch it. The police from Balçova police station arrived at the scene and arrested three or four adolescents who took part in the fight and the applicant.

6. At the station, three police officers, one of whom was in civilian clothes, decided to hit the youngsters' hands with a truncheon so as to teach them a lesson. When it was his turn, the applicant asked the police officers not to hit his hands as he had recently undergone surgery. Therefore, the police officers decided to subject him to *falaka* (beating of the soles of the feet). The applicant was also beaten up. Afterwards, he was released without any formalities. He was seventeen years old.

7. The applicant hid the incident from his family but his feet were swollen and he had difficulty walking. The applicant's father immediately took him to the Casualty department of Dokuz Eylül University Hospital for a medical examination on 29 July 1997, at around 11 p.m. According to the report drafted by Dr S.Y., the applicant had a blue-purple coloured ecchymosis of 2x3x2 cm on the sole of his left foot.

2. The Government's version

8. The Government deny that the applicant was ever taken to Balçova police station or subjected to ill-treatment.

B. The investigation into the alleged ill-treatment

9. On 30 July 1997 the applicant filed a petition with the İzmir public prosecutor's office, gave a detailed description of the alleged ill-treatment and subsequent events and requested to be immediately transferred to the Forensic Medical Institute for a medical examination.

10. On 30 July 1997 the applicant was examined by a doctor at the İzmir Forensic Medical Institute who noted sensitivity and light reddish and purplish ecchymosis on the soles of his feet. The doctor concluded that the applicant had sustained soft tissue trauma. He considered that the injuries, which would heal in fifteen days, rendered the applicant unfit for work for three days.

11. On the same day the applicant applied to the Human Rights Foundation of Turkey for treatment. He was examined by a general surgeon and an orthopaedist, both of whom noted, *inter alia*, ecchymosis, oedema and sensitivity on the applicant's feet. The next day, on 31 July 1997, the

applicant saw a psychiatrist who considered that he was suffering from minimal anxiety. No drugs were prescribed.

12. On 18 August 1997 the applicant lodged an official complaint with the İzmir public prosecutor's office and requested the prosecution of the impugned police officers for having committed the offence of torture, in breach of, *inter alia*, Article 3 of the Convention. In his petition the applicant repeated the description of the events and the alleged ill-treatment.

13. On 22 September 1997 the prosecutor questioned the applicant and his father. The applicant repeated his allegations.

14. On 13 January 1998 the applicant was able to identify from photographs Mr B.Y. and Mr M.Y. as two of the three police officers who had ill-treated him on 28 July 1997.

15. On the same day, the prosecutor gave a decision of incompetence *ratione materiae* and transferred the investigation file to the İzmir Governor's Office.

16. On 18 and 27 February 1998 Mr L.B., in his capacity as investigator (*muhakkik*), heard the applicant and his father. They both repeated their allegations.

17. On 20 March 1998 Mr L.B. questioned the accused police officers, who denied the allegations against them.

18. Between 26 June 1998 and 21 July 1998, Mr L.B. took statements from two police officers on duty that day and from Mr I.B., who was held in custody on the day of the incident. They all submitted that the applicant had not been brought to the police station that day. In particular, one of the police officers affirmed that the name of whoever was brought to the station was noted in a book, and his/her identity was checked. However, the applicant's name was not in the book.

19. On 28 May 1998 the applicant identified the above mentioned police officers in the course of an identification procedure.

20. On 13 August 1998, the Balçova District Administrative Council decided that, in the absence of evidence proving the allegations, there was no need to open an investigation with a view to prosecuting the accused police officers. A doctor, Mr S.C., also sat on the Council and took part in this decision. The applicant objected to this decision.

21. On 25 November 1998 the İzmir Regional Administrative Court overruled the decision of the Balçova District Administrative Council and decided that the accused police officers should be prosecuted under Article 245 of the Criminal Code.

C. The criminal proceedings against the police officers

22. On an unspecified date the criminal proceedings against the accused police officers commenced before the İzmir Criminal Court of First Instance.

23. On 7 June 1999 the court heard evidence from the applicant and his father. They reiterated their previous submissions. The accused were absent. The court scheduled the next hearing for 18 October 1999.

24. On 8 July 1999 judge B.Ö. requested to withdraw from the case on the ground, *inter alia*, that there was a feud between the family of one of the defendants and his own. The request was accepted by the İzmir Assize Court on 14 July 1999.

25. In the course of the proceedings the applicant and his father applied to various authorities to complain that they were being harassed. A disciplinary investigation by the Provincial Police Disciplinary Commission was discontinued when they withdrew their complaint.

26. On 22 December 2000 the İzmir Criminal Court of First Instance decided that the proceedings against the accused police officers should be suspended and subsequently discontinued if no offence of the same or a more serious kind was committed by the offenders within a five-year period. The applicant's objection to this decision, notably as regards the qualification of the act in question, was dismissed on 19 July 2002.

27. On 11 September 2006 the İzmir Assize Court, noting that the five-year period had expired and that the accused had not committed another crime during this time, decided to drop the criminal proceedings against them.

D. The disciplinary proceedings

28. In the meantime, upon the applicant's complaint, disciplinary investigations were instigated against Dr S.C., the doctor who had sat on the Balçova District Administrative Council, and the accused police officers.

29. On 20 October 1998 the Provincial Police Disciplinary Commission, after having examined the case file, decided that the accused police officers had ill-treated the applicant. The Commission ordered their suspension from duty for four months.

30. On 13 September 1999 the İzmir Chamber of Medicine held that Dr S.C. had acted contrary to Article 2 of the Medical Deontology Statute and gave him a warning. This decision was upheld in December 1999 by the High Commission of the Turkish Medical Association.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Okkalı v. Turkey*, (no. 52067/99, § 47, ECHR 2006-... (extracts)), and *Çalışır v. Turkey* (no. 52165/99, §§ 17-19, 21 February 2006).

THE LAW

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

32. The applicant complained about the treatment he had received at the Balçova police station on 28 July 1998 and about the manner in which the investigation and the criminal proceedings had been conducted by the authorities, resulting in impunity. He invoked Articles 3 and 13 of the Convention.

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

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

A. Admissibility

34. The Government asked the Court to dismiss the application as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. They argued that the applicant could have sought reparation for the harm he had allegedly suffered by instituting an action in the civil or administrative courts.

35. The applicant disputed the Government’s arguments.

36. The Court reiterates that it has already examined and rejected the same argument by the Government in previous cases (see, for example, *Nevruz Koç v. Turkey*, no. 18207/03, § 31, 12 June 2007). The Court finds no particular circumstances in the present application which would require it to depart from that conclusion. Consequently, the Court rejects the Government’s preliminary objection.

37. Moreover, the Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

38. The Government maintained that the applicant was never taken to the Balçova police station as alleged. In this connection, they submitted that there was no record of his presence in the police station’s register. They further noted that the witness testimonies obtained during the domestic

proceedings did not support the applicant's allegations. In addition, the Government pointed out that the applicant went to a doctor two days after the alleged events. Finally, referring to the various actions undertaken by the domestic authorities, they considered that an effective investigation had been conducted in the instant case.

39. The applicant maintained his allegations.

2. *The Court's assessment*

40. The Court reiterates the basic principles laid down in its judgments concerning Article 3 (see, in particular, *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 62, 12 April 2007, *Yavuz v. Turkey*, no. 67137/01, § 38, 10 January 2006, *Emirhan Yıldız and Others v. Turkey*, no. 61898/00, §§ 41-42, 5 December 2006, and *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 113, ECHR 2004-IV (extracts)). It will examine the present case in the light of these principles.

41. In the instant case, the Court notes that the applicant complains of having been beaten on the soles of his feet during the time he was held at the Balçova police station on the night of 28 July 1997. The Government deny this allegation.

42. The Court finds that the applicant's injuries (see paragraph 10 above), whether caused by the police or by someone else, were sufficiently serious as to bring them within the scope of Article 3. It remains to be considered whether the State should be held responsible under Article 3 in respect of these injuries.

43. The Court takes into account, firstly, the fact that, save for minor details, the applicant's version of events has been constant both before the Court and the domestic authorities. Secondly, it notes that the findings of the medical reports issued on 29 and 30 July 1997, including the type and colour of the injuries, match and confirm the applicant's description of ill-treatment. Thirdly, the Court observes that the applicant was able to identify two of the three alleged perpetrators, twice, and that these police officers were subjected to a disciplinary punishment for having ill-treated the applicant (see paragraph 29 above).

44. In light of the above and in the absence of a plausible explanation from the Government as to the cause of the injuries sustained by the applicant, the Court finds it established beyond reasonable doubt that the applicant was taken to the Balçova police station on the night of 28 July 1997 and subjected to *falaka* (see, *a contrario*, *Çevik v. Turkey* (dec.), no. 57406/00, 10 October 2006). Consequently, for the Court, the applicant's injuries were the result of treatment for which the respondent State bore responsibility.

45. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay*

v. Turkey, no. 30951/96, §§ 59-60, 22 March 2005). The minimum standards as to effectiveness defined by the Court's case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary diligence and promptness (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004).

46. In addition, the Court reiterates that the rights enshrined in the Convention are practical and effective, and not theoretical and illusory. Therefore, in such cases, an effective investigation must be able to lead to the identification and punishment of those responsible (see, *mutatis mutandis*, *Nevruz Koç*, § 53, cited above).

47. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by the applicant. An effective investigation was therefore required.

48. Turning to the present case, the Court observes that an investigation into the allegations of the applicant was initiated promptly by the public prosecutor's office. During this time the applicant was able to identify two of the three alleged perpetrators. However, from 13 January 1998, the Balçova District Administrative Council acquired jurisdiction to conduct the preliminary investigation (see paragraph 15 above). The Court refers to a number of cases in which it has expressed doubts as to the effectiveness of investigations carried out by administrative councils, as their composition lacked the requisite independence from governors (see, for example, *Kurnaz and Others v. Turkey*, no. 36672/97, § 62, 24 July 2007 and the cases referred to therein). The administrative council's decision not to initiate proceedings against the accused police officers was overruled by the İzmir Regional Administrative Council in November 1998. It was only after that date that criminal proceedings against the police officers commenced. However, the Court notes that the proceedings in question did not produce any result due to the application of Law no. 4616, which created virtual impunity for the perpetrators of the acts of violence (see *Nevruz Koç*, § 53, cited above). Consequently, the Court considers that the criminal-law system, as applied in the applicant's case, has proved to be far from rigorous and has had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant (see, *mutatis mutandis*, *Okkalı*, § 78, cited above).

49. In the light of the foregoing, the Court does not find that the above proceedings can be described as thorough and effective so as to meet the requirements under Article 3 of the Convention.

50. There has therefore been both a substantive and a procedural violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

52. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part.”

53. In the instant case, on 14 August 2007 the Court invited the applicant to submit his claims for just satisfaction by 25 September 2007. However, he did not submit any such claim within the specified time-limit.

54. In view of the above, the Court makes no award under Article 41 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been both a substantial and a procedural violation of Article 3 of the Convention.

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

Sally Dollé
Registrar

Françoise Tulkens
President