



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

SECOND SECTION

**CASE OF ATALAY v. TURKEY**

*(Application no. 1249/03)*

JUDGMENT

STRASBOURG

18 September 2008

**FINAL**

*18/12/2008*

*This judgment may be subject to editorial revision.*



**In the case of Atalay 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,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 28 August 2008,

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

## PROCEDURE

1. The case originated in an application (no. 1249/03) 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 Yunus Atalay (“the applicant”), on 18 September 2002.

2. The applicant was represented by Mr Şeref Turgut, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. Invoking Articles 3 and 13 of the Convention, the applicant alleged that a number of police officers had subjected him to ill-treatment and that the national authorities had not only failed to carry out an effective investigation into the circumstances of the ill-treatment, but had also failed to punish those responsible.

4. On 10 May 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Istanbul.

6. At approximately 11 p.m. on 24 August 1995, a police car stopped outside the shop run by the applicant in Istanbul’s Beyoğlu district. Three

police officers got out of the car and asked the applicant to remove the letters “DHKP/C” (the abbreviation for the Revolutionary People’s Liberation Party/Front, an illegal organisation) written on a wall, two shops down the road from the applicant’s shop.

7. When the applicant refused to comply with that request and told the police officers that it was not his wall and therefore he had no obligation to clean it up, the police officers started to beat him. A number of other police officers, who were driving in the area at the time, also stopped and took part in the beating. The police officers then took the applicant into custody where they continued to beat him in order to force him to sign statements, confessing to the offence of obstructing the police in the course of their duty.

8. According to the incident report prepared by the three police officers who had beaten the applicant, the letters “DHKP/C” had been on the wall of the applicant’s shop and the applicant had told them that he would “rather die than wipe them away” and had then run away. When the police officers gave chase, the applicant had thrown stones at them and had kicked and punched them, injuring one of them in the process. Consequently, the officers had taken the applicant to the police station.

9. The following day the applicant was taken to the First Aid Hospital in Istanbul’s Taksim district where a medical report was prepared. According to this report, the applicant’s body bore a number of ecchymoses and lacerations.

10. The applicant was then brought to the office of the public prosecutor in Beyoğlu district where he told the prosecutor that the police officers had tortured him.

11. The same day the prosecutor referred the applicant to the Beyoğlu branch of the Forensic Medicine Institute where he was examined by a doctor. The following injuries are recorded in the medical report prepared at the end of that examination: a one centimetre long abrasion on the left side of the rear parietal region; a thirty centimetre long ecchymosed area stretching from the back of the left shoulder to the right scapular area; an ecchymosed area measuring fifteen by three centimetres below the left scapular region; an ecchymosed area, measuring fifteen by five centimetres, on the left lumbar; two ecchymosed areas, measuring seven by three and seven by fourteen centimetres, on the right side of the chest; four one centimetre long bleeding grazes and two ecchymosed areas, each measuring three centimetres in diameter, on the inside of the left arm; two ecchymosed areas, each measuring two centimetres, on the left cheek; and another ecchymosed area on the right tibial region. The report concluded that the applicant would be unable to work for a period of ten days.

12. The same day the prosecutor ordered the applicant’s release.

13. On 10 October 1995 the applicant lodged a formal complaint with the Beyoğlu prosecutor, seeking the prosecution of the three police officers responsible for the ill-treatment.

14. The following day the Beyoğlu prosecutor rendered a decision of non-jurisdiction, under the Law on the Trial of Civil Servants, and transferred the case file to the governor's office in Beyoğlu for the "necessary action to be taken".

15. On 21 July 1997 the Beyoğlu District Administrative Council, presided over by the Beyoğlu governor, granted authorisation for the prosecution of the three officers.

16. In its decision of 29 February 2000, the Beyoğlu Criminal Court of First Instance (hereinafter "the trial court") convicted the three police officers of the offence of ill-treatment contrary to Article 245 of the Criminal Code, and sentenced each of them to three months' imprisonment. The trial court also ordered their suspension from duty for a period of three months. Considering that the applicant's "refusal to wipe away the writing on the wall and his attacks on the police officers" amounted to a "provocation", within the meaning of Article 51 § 1 of the Criminal Code, the trial court reduced the prison sentences by a quarter and sentenced each officer to two months and seven days' imprisonment. Taking into account the way in which the incident had taken place and the unlikelihood of police officers committing offences, the trial court was of the opinion that these particular officers would not reoffend if their sentences were suspended. Accordingly, it suspended their sentences under Article 6 of Law no. 647.

17. Two of the three police officers lodged appeals against the judgment. The judgment became final in so far as it concerned the third police officer, who did not appeal.

18. On 30 January 2002 the judgment was quashed by the Court of Cassation in so far as it concerned the two appellant police officers. The Court of Cassation held that the provisions of Law no. 4616 should be applied to them.

19. On 26 April 2002 the trial court suspended the proceedings against the two police officers in accordance with Law no. 4616, which had entered into force on 22 December 2000 and which provides for the suspension of criminal cases in respect of certain offences committed before 23 April 1999.

20. The applicant lodged an objection with the Beyoğlu Assize Court against the trial court's decision, pointing out that the Court of Cassation had waited two years before rendering its judgment, and had only quashed the judgment following the entry into force of Law no. 4616. In any event, criminal proceedings concerning the offence of torture were outside the scope of that Law and could not, therefore, be suspended. Since, under Turkish law, ill-treatment could only be classified as torture if it was inflicted with the aim of extracting information from the victim (the offence

defined in Article 243 of the Criminal Code), the trial court had no choice but to apply Article 245 of the Criminal Code in the present case. Nevertheless, the fact remained that the ill-treatment to which he had been subjected constituted “torture” within the meaning of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

21. On 28 May 2002 the Beyoğlu Assize Court rejected the applicant’s objection.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The relevant provisions of the Criminal Code, in force at the material time, were as follows.

### Article 51 § 1

“If a person commits an offence in a fit of anger or under the influence of a strong grievance caused by unjust provocation...the punishment prescribed for the offence shall be reduced by a quarter.”

### Article 243 § 1

“Any public servant ... who inflicts torture or cruel, inhuman or degrading treatment on accused parties to make them confess their crimes shall be sentenced to up to five years’ imprisonment and temporarily or permanently barred from public service.”

### Article 245

“Any law-enforcement officer ... who, in the course of duty ... and in circumstances other than those prescribed by law ..., ill-treats, injures or strikes a person or does them bodily harm shall be sentenced to between three months’ and five years’ imprisonment and temporarily barred from public service. ...”

23. Pursuant to Article 153 of the Code of Criminal Procedure, in force at the material time, a public prosecutor who was informed by any means whatsoever of a situation that gave rise to the suspicion that an offence had been committed was obliged to investigate the facts in order to decide whether or not there should be a prosecution.

24. Under Law no. 4616, which entered into force on 21 December 2000, criminal proceedings in respect of offences committed before 23 April 1999 can be suspended for a period of five years. Suspended criminal proceedings can subsequently be discontinued if no offence of the same or a more serious nature is committed by the offender within the five-year period. Article 5 (a) of Law no. 4616 stipulates that criminal proceedings concerning the offence proscribed by, *inter alia*, Article 243 of the former Criminal Code cannot be suspended.

25. Pursuant to the Law on the Trial of Civil Servants, in force at the material time, if the alleged perpetrator of an offence was an agent of the State, permission to prosecute had to be obtained from the local administrative council. An appeal against the local council's decision lay to the Supreme Administrative Court; a refusal to prosecute was subject to an automatic appeal of this kind.

## THE LAW

### I. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION

26. The applicant complained under Articles 3 and 13 of the Convention that he had been subjected to ill-treatment amounting to torture by police officers but that they were not punished.

27. The Court considers that these complaints should be examined solely from the standpoint of Article 3 of the Convention, which reads as follows:

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

#### A. Admissibility

28. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention. In this connection, they submitted that there were various civil and administrative remedies provided by domestic law in respect of persons claiming to be the victims of ill-treatment in police custody, and that the applicant could have sought reparation for the harm he had allegedly suffered.

29. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Nevruz Koç v. Turkey*, no. 18207/03, § 31, 12 June 2007 and the case cited therein). It reiterates that the remedies referred to by the Government cannot be regarded as sufficient for a Contracting State's obligations under Article 3 of the Convention as they are aimed at awarding damages rather than identifying and punishing those responsible.

30. The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned case. It therefore rejects the Government's preliminary objection.

31. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

32. The Government submitted that the applicant had been afforded the necessary procedural guarantees within the meaning of Article 3 of the Convention. An investigation had been conducted into the actions of the police officers, who had subsequently been brought to trial. At the end of that trial, one of the police officers had been convicted and the proceedings against the remaining two had been suspended. In the Government's opinion, Law no. 4616 could not be regarded as an amnesty law and the suspension of the criminal proceedings against the two police officers did not mean that they were acquitted.

33. The Government referred to the judgments in the cases of *Hatton and Others v. the United Kingdom* [GC] (no. 36022/97, § 97, ECHR 2003-VIII) and *Handyside v. the United Kingdom* (judgment of 7 December 1976, Series A no. 24, p. 22, § 48), and maintained that the national authorities were better placed than an international court to evaluate local needs and conditions. Furthermore, referring to the judgment in the case of *Ashingdane v. the United Kingdom* (judgment of 28 May 1985, Series A no. 93, p. 24, § 57), the Government submitted that "it [was] no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field".

34. As the applicant had failed to claim compensation by bringing a case before the administrative courts, his allegations were ill-founded and the Government had fulfilled their obligations under Article 1 of the Convention.

35. The Court observes at the outset that the Government have not challenged the accuracy of the applicant's allegations of ill-treatment. In any event, it notes that the Beyoğlu Criminal Court of First Instance found the three police officers guilty of ill-treating the applicant on the basis of, *inter alia*, the medical reports referred to above (see paragraphs 9 and 11). In these circumstances the Court accepts that the applicant was ill-treated by the police officers and, as a result, suffered the injuries detailed in the medical reports.

36. The second issue to be decided by the Court, therefore, is whether that ill-treatment attained the minimum level of severity for it to fall within the scope of Article 3 of the Convention (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). To that end, the Court refers to the medical reports mentioned above (see paragraphs 9 and 11). It appears from the first report that the day after he was detained the applicant had to be taken directly from the police station to

the local hospital. Furthermore, according to the second report drawn up at the Forensic Medicine Institute the same day, the applicant's body bore fifteen separate injuries which required a ten-day period to heal.

37. In the light of the foregoing, the Court considers that the applicant's injuries were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention. It further considers that the decision adopted by the Beyoğlu Court of First Instance on 29 February 2000, which became final in respect of one of the three police officers, amounted to an acknowledgement that the applicant's ill-treatment had been in violation of Article 3 of the Convention (see, *mutatis mutandis*, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 51, 20 December 2007).

38. The next issue to be decided by the Court is whether this violation has been sufficiently redressed by the national authorities. In this connection the Court reiterates that, under the subsidiarity principle, it falls first to the national authorities to redress any alleged violation of the Convention. The principle of subsidiarity does not mean, however, renouncing all supervision of the result obtained through the domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance. In that connection, it should be reiterated that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective (*ibid.* § 49).

39. As for the Government's reference to the applicant's failure to claim compensation in respect of the ill-treatment, and assuming that reference to be an argument to the effect that payment of compensation would constitute adequate redress, the Court reiterates that if the authorities could confine their reaction to incidents of wilful police ill-treatment to the mere payment of compensation, while not doing enough in the prosecution and punishment of those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity and the general legal prohibitions of killing and torture and inhuman and degrading treatment, despite their fundamental importance, would be ineffective in practice (*ibid.* § 55 and the cases cited therein; see also *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 102)).

40. The important point for the Court to review, therefore, is whether and to what extent the national authorities have done everything within their powers to prosecute and punish the police officers responsible for the applicant's ill-treatment and whether they have imposed adequate and deterring sanctions on them. It must be stated at this juncture that it is not the Court's task to verify whether the domestic courts correctly applied domestic criminal law; what is in issue in the present proceedings is not the individual criminal-law liability of the officers, but the Convention responsibility of the State. For this reason, although the Court should grant substantial deference to the national courts in the choice of appropriate

sanctions for ill-treatment by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed (see *Nikolova and Velichkova v. Bulgaria*, cited above, § 62).

41. In the present case, three police officers were convicted of the offence of ill-treatment. However the convictions of two of them were quashed on appeal and the criminal proceedings against them were subsequently suspended pursuant to Law No. 4616. The conviction of the remaining police officer became final as he did not appeal.

42. Although it could have imposed a maximum of five years' imprisonment on the police officer found guilty of ill-treating the applicant, the trial court saw fit to impose a three-month sentence. Moreover, that sentence was reduced by a quarter because the trial court considered that the applicant had provoked the police officers.

43. The Court reiterates the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see, *inter alia*, *Saadi v. Italy* [GC], no. 37201/06, §§ 38-40, ECHR 2008-...). Accordingly, provocation can never be regarded as a justification for the infliction of severe ill-treatment on an individual, in breach of Article 3 of the Convention. Moreover, as regards the circumstances of the present case, the Court fails to see the relevance of a defence of provocation once the events in the street had ended, yet the assault on the applicant continued at the police station (see paragraph 7 *in fine* above). Thus, in the Court's view, the reduction of the prison sentence imposed on the police officer on grounds of provocation fell short of the Convention standard of protection from ill-treatment. Lastly, it is to be noted that the police officer in question did not have to serve any term in prison because the execution of his sentence was suspended (see paragraph 16 above).

44. In the light of the foregoing, the Court considers that the lenient prison sentence imposed on the police officer and its suspension must be regarded as manifestly disproportionate to the gravity of the offence in question (see *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 54, 8 April 2008).

45. As regards the suspension of the criminal proceedings against the other two officers (see paragraph 19 above), the Court considers that it rendered the criminal-law system far from rigorous and had no deterrent effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant (see *Nevruz Koç*, cited above, § 54).

46. In the light of the foregoing, the Court concludes that the criminal-law system, as applied in the instant case, neither had an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant (see *Ali and Ayşe Duran*, cited above, § 72), nor provided adequate redress for the ill-treatment to which he was

subjected. The failures highlighted above undermined the deterrent effect of the judicial system in place and the significance of the role it was required to play in preventing violations of the prohibition of ill-treatment (see *Okkali v. Turkey*, no. 52067/99, § 66, ECHR 2006-... (extracts)).

47. The Court therefore concludes that there has been a violation of Article 3 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

48. In his observations the applicant also alleged, without explaining how or why, a violation of Article 6 of the Convention.

49. The Court notes that this complaint was not introduced until after the present application had been communicated to the respondent Government. The Court observes in this context that the criminal proceedings against the police officers ended on 28 May 2002 (see paragraph 21 above) and the applicant lodged his complaint under Article 6 of the Convention in his observations in reply to those of the Government submitted to the Court on 11 January 2008, that is, more than six months later.

50. It follows that this complaint must be declared inadmissible for non-compliance with the six-month rule laid down in Article 35 § 1 of the Convention.

## III. 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.”

### A. Damage

52. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage and EUR 30,000 in respect of non-pecuniary damage.

53. As regards the applicant's claim for pecuniary damage, the Government pointed out that the applicant had failed to substantiate his claim with any evidence, and asked the Court not to make an award under this head. Concerning the applicant's claim for non-pecuniary damage, the Government submitted that it was excessive and that the finding of a violation would compensate the applicant's alleged losses.

54. The Court observes that the applicant failed to substantiate his claim in respect of pecuniary damage. It therefore rejects this claim. However, the Court considers that the applicant must have suffered pain and distress

which cannot be compensated solely by the finding of a violation. Having regard to the extent and seriousness of the applicant's injuries caused by the police officers, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

### **B. Costs and expenses**

55. The applicant claimed EUR 2,588 for the costs and expenses incurred before the Court.

56. The Government invited the Court not to make an award to the applicant for costs and expenses as he had failed to submit to the Court invoices, receipts or other documents in support of his claim.

57. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were 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 2,000 in respect of costs and expenses.

### **C. Default interest**

58. 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. *Declares* the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into new Turkish liras at the rate applicable at the date of settlement:
    - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of his costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé  
Registrar

Françoise Tulkens  
President