



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

SECOND SECTION

CASE OF TÜRKAN v. TURKEY

(Application no. 33086/04)

JUDGMENT

STRASBOURG

18 September 2008

FINAL

18/12/2008

This judgment may be subject to editorial revision.

In the case of Türkan v. Turkey,

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

Françoise Tulkens, *President*,

Antonella Mularoni,

Ireneu Cabral Barreto,

Danutė Jočienė,

Dragoljub Popović,

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. 33086/04) 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 Mahfuz Türkan (“the applicant”), on 9 July 2004.

2. The applicant was represented by Ms K. Doğru, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged that he had been subjected to ill-treatment while in police custody and that there were no effective remedies in domestic law in respect of his grievances under Articles 3, 6 and 13 of the Convention.

4. On 11 September 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

5. The applicant was born in 1968 and lives in Batman.

6. At the material time he was working at a tea shop at the Esenler Bus Terminal in Istanbul. On 5 July 1998 he was arrested by police officers for

his alleged involvement in a fight and causing a disturbance while drunk. He was then taken to the police station inside the terminal building.

7. The police officers allegedly covered the applicant's head with his coat and started kicking, punching and beating him. They strangled him and banged his head against the wall. They also allegedly threatened the applicant and swore at him.

8. The applicant was released the next day without being brought before the public prosecutor.

9. On 8 July 1998 the applicant applied to the Human Rights Foundation of Turkey for the treatment of his injuries resulting from his ill-treatment in police custody. His symptoms included pain in the left side of the chest and back, and restricted movement of the left arm.

10. On 13 July 1998 the applicant underwent a full bone scintigraphy (scan) at the Marmara Nuclear Medicine Centre. The scintigraphy report concluded that there were hyperactive areas in the soft tissue of the sixth left rib, left shoulder, right knee, ankles and cranium (occipital¹ and left temporo-parietal² bones). The report noted that the symptoms were probably the result of physical trauma.

11. On 21 July 1998 the applicant filed a petition with the Eyüp Chief Public Prosecutor's Office complaining about the ill-treatment he had suffered at the hands of the police officers at the terminal building.

12. On 22 July 1998 a public prosecutor from the Eyüp Chief Public Prosecutor's office took statements from the applicant. The applicant reiterated his complaints and described the police officers who had ill-treated him. He then asked the public prosecutor to send him for a forensic medical examination and to bring the police officers to justice. At the request of the public prosecutor, the applicant was taken to the Forensic Medicine Institute where an expert examined the applicant and requested an X-ray as the applicant complained about pain in his skull and chest.

13. On 31 July 1998 the Eyüp Public Prosecutor took statements from the three police officers who had allegedly ill-treated the applicant. The police officers denied the allegations made by the applicant and claimed that the bruising found on his body could have been caused by other persons with whom he had fought.

14. On 7 August 1998 the Eyüp Public Prosecutor instituted criminal proceedings in the Eyüp Criminal Court pressing charges against the three police officers for inflicting ill-treatment on the applicant in violation of Article 245 of the former Criminal Code.

15. According to a report dated 13 October 1998 prepared by doctors from the Human Rights Foundation, the findings of the above-mentioned

¹ Occipital bones are on the back of the head

² The left side bone of the skull

medical examinations were compatible with the applicant's account of the use of physical violence against him.

16. At a hearing on 24 November 1998, the Eyüp Criminal Court heard evidence from the applicant and the accused police officers. Although the accused denied the allegations of ill-treatment, the applicant gave a detailed description of the treatment he had suffered while in their custody. The court then sent the applicant for a medical examination at the Eyüp Forensic Medicine Institute. After noting all the findings in the previous reports and radiological examinations, the institute referred the applicant to the Committee of Experts of the Forensic Medicine Institute for a complete report.

17. On the same day the applicant filed a petition with the Eyüp Criminal Court seeking leave to become a third-party intervener in the criminal proceedings against the police officers who had ill-treated him.

18. On 14 December 1998 the Batman Assize Court heard evidence from the applicant at the request of the Eyüp Criminal Court. The applicant reiterated his complaints and asked the judicial authorities to bring the police officers to justice.

19. Meanwhile, on 9 August 1999 the Istanbul Provincial Police Discipline Board, composed of the Governor of Istanbul, four senior police directors and a member of the legal service of the Governor's office, decided not to impose any punishment on the three police officers on the ground that there was insufficient evidence that they had ill-treated the applicant.

20. In a report dated 22 November 2000, the Nuclear Medicine Department of the Cerrahpaşa Medical Faculty opined that the findings in the applicant's scintigraphy reports were the result of physical trauma.

21. On 20 December 2000 the Committee of Experts of the Forensic Medicine Institute submitted their report, which confirmed the previous medical findings that the applicant's body bore signs of soft tissue bruising caused by physical trauma. It further stated that the applicant's medical condition at the relevant time was sufficient to render him unfit for work for five days.

22. In her petition dated 26 April 2001, the applicant's legal representative asked the Eyüp Criminal Court to characterise the acts of the accused police officers as torture falling within the scope of Article 243 of the now defunct Criminal Code

23. On 21 December 2000 a law (Law no. 4616) on conditional release was enacted. This law provided for the suspension of the substantive proceedings or of the execution of sentences in respect of crimes committed before 23 April 1999 and for which the maximum penalty did not exceed ten years' imprisonment. Section 5 (a) of Law no. 4616 stipulated that the execution of sentences in respect of the offence proscribed by, *inter alia*, Article 243 of the former Criminal Code could not be suspended.

24. On 9 October 2001 the Eyüp Criminal Court held that the criminal proceedings against the 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, in accordance with that law. The applicant was notified of this decision on 29 December 2003.

25. On the same day the applicant challenged the decision before the Eyüp Assize Court, arguing that the proceedings should be continued and that the accused police officers' acts should be characterised as torture within the meaning of Article 243 of the Criminal Code.

26. On 19 January 2004 the Eyüp Assize Court dismissed the applicant's appeal and upheld the decision of the criminal court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. The relevant provisions of the former Criminal Code, in force at the time of the events, read as follows:

Article 243

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

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

Article 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 three years' imprisonment and temporarily barred from public service. ..."

28. Article 10 of the Directive on Apprehension, Arrest and Taking of Statements [from Suspects] (dated 1 October 1998) states that when someone is placed in custody, or force has been used against that person, a medical examination must be carried out with a view to determining the state of health of the individual at the time of arrest.

THE LAW

I. ADMISSIBILITY

29. 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 the applicant had not availed himself of the civil and administrative law remedies which could have provided reparation for the harm he had allegedly suffered.

30. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Karayığit v. Turkey* (dec.), no. 63181/00, 5 October 2004). It 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 application 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.

II. ALLEGED VIOLATION OF ARTICLES 3, 6 AND 13 OF THE CONVENTION

32. The applicant complained that he had been subjected to various forms of ill-treatment and that there were no effective remedies for his complaints. He relied on Articles 3, 6 and 13 of the Convention, which provide, as relevant:

Article 3

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

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Submissions of the parties

1. The applicant

33. The applicant alleged that he had been subjected to severe ill-treatment by the police officers during his detention at the Esenler bus terminal police station. He claimed that the officers had kicked, punched and strangled him and banged his head against the wall. He referred to the findings contained in the medical reports in support of his allegations.

2. The Government

34. The Government contested these claims. They maintained that the applicant had been arrested because he had been involved in a fight with other people at the bus terminal. They alleged that the bruising on his body could have occurred during the fight. They further submitted that there was no medical evidence proving that he had been subjected to ill-treatment at the police station and that therefore his allegations were unsubstantiated.

B. The Court's assessment

1. General principles

35. The Court reiterates that Article 3 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. It also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human rights requires that these provisions be interpreted and applied so as to make its safeguards practical and effective (see *Avşar v. Turkey*, no. 25657/94, § 390, ECHR 2001-VII (extracts)).

36. The Court further reiterates that, where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (see *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 30, 8 January 2004; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Aksoy v. Turkey*, cited above, § 61; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

37. The Court 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 fact where this is not rendered unavoidable by the circumstances

of a particular case (see, among other authorities, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). However, where allegations are made under Article 3 of the Convention, the Court must conduct a particularly thorough scrutiny (see *Ülkü Ekinçi v. Turkey*, no. 27602/95, § 135, 16 July 2002) and will do so on the basis of all the material submitted by the parties.

38. In assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt” (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002, and *Avşar*, cited above, § 282). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ülkü Ekinçi*, cited above, § 142).

39. Furthermore, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

40. Lastly, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 102).

2. Application of the above principles to the circumstances of the present case

(a) Alleged ill-treatment suffered by the applicant

41. In the instant case, the Court finds it regrettable that the applicant was not taken for a medical examination before being taken into custody at the Esenler bus terminal police station. Such an examination would have been appropriate, particularly bearing in mind that the applicant had allegedly been in a fight with other persons. Such a report could also have

provided clarification regarding the possibility that third parties might have contributed to the applicant's condition.

42. Furthermore, in cases of this kind, it is all the more important that the arrested person is medically examined before being placed in police custody. This would not only ensure that the person is fit to be questioned in police custody but would also enable the respondent Government to discharge their burden of providing a plausible explanation for those injuries. In this connection, the Court notes that a medical examination, together with the right of access to a lawyer and the right to inform a third party of the detention, constitute fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.) (see the 2nd General Report of the European Committee for Prevention of Torture, CPT/Inf/E (2002) 1 - Rev. 2006, § 36). The Court observes that three months after the events in the present case, Turkish legislation was aligned with these CPT standards, when the medical examination of suspects on being taken into custody became a requirement through the Directive on Apprehension, Arrest and Taking of Statements dated 1 October 1998 (see paragraph 28 above).

43. Accordingly, in view of the national authorities' failure to conduct such an examination before placing the applicant in detention, the Government cannot rely on that failure in their defence and claim that the injuries in question pre-dated the applicant's detention in police custody. The Court may thus assume that the applicant was in good health prior to his being taken into custody (see, *mutatis mutandis*, *Abdulsamet Yaman v. Turkey*, no. 32446/96, § 45, 2 November 2004).

44. That being so, the Court notes that, following his release from custody, the applicant sought medical help from the Human Rights Foundation of Turkey after allegedly being ill-treated by the police officers. He then underwent four medical examinations by doctors from the Human Rights Foundation, the Marmara Nuclear Medicine Institute, the Nuclear Medicine Department of the Cerrahpaşa Medical Faculty and a Committee of Experts of the Forensic Medicine Institute, who all concluded that the injuries found on his body had been caused by physical trauma and were capable of rendering him unfit for work for five days (see paragraphs 9, 15, 20 and 21 above). In the Court's opinion, the findings contained in those reports are consistent with the applicant's allegation of having been subjected to beatings, kicking and punching. These findings are also sufficiently serious to amount to ill-treatment within the meaning of Article 3 (see, among other authorities, *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2699, § 21, and *Ribitsch*, cited above, pp. 9 and 26, §§ 13 and 39).

45. It therefore needs to be ascertained whether the Government have provided a plausible explanation of how those injuries were caused and produced evidence casting doubt on the veracity of the victim's allegations.

46. The Court notes that the Government did not challenge the findings contained in the above-mentioned medical reports. They claimed, however, that the physical trauma in question could have occurred during the fight between the applicant, who was drunk, and other persons prior to his arrest by the police officers. They also submitted that the applicant's allegations had not been corroborated by any evidence. Similar conclusions had also been reached by the domestic authorities in charge of the disciplinary investigation (see paragraph 19 above).

47. The Court reiterates that, in respect of a person deprived of liberty, recourse to physical force which has not been made strictly necessary by the individual's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Ribitsch*, cited above, § 38). Furthermore, the use of force in the context of an arrest, even if it entails injury, may fall outside Article 3, particularly in circumstances resulting from an applicant's own conduct (see *Berliński v. Poland*, nos. 27715/95 and 30209/96, § 64, 20 June 2002). In this connection, the Court takes note of the allegation made by the police officers that the applicant was reckless, drunken and aggressive on the day of the incident (see paragraph 6 above).

48. However, considering the absence of any arrest protocol indicating the conditions of the applicant's arrest and a medical report showing his state of health at that point, the Court does not find it convincingly proved that the injuries suffered by the applicant were inflicted by persons with whom he had allegedly had a fight. In this context, the Court attaches great importance to the fact that the applicant, in his statements to the investigating authorities (11, 12, 16, 17, 18 and 25), was unequivocal in his account that he had been ill-treated by police officers while in custody at the Esenler terminal police station. He gave a detailed account of the treatment he had suffered and a description of the police officers who had inflicted the ill-treatment (see paragraph 12 above). Furthermore, the investigating authorities did nothing to determine the cause of the physical trauma suffered by the applicant. In view of the police officers' denials and the defence submissions that the injuries in question could have been inflicted by the persons with whom the applicant had allegedly had a fight, the judicial authorities could have taken statements from those persons and any possible witnesses at the bus terminal with a view to verifying such allegations.

49. The Court reiterates that the State is responsible for the welfare of all persons held in detention. Such persons are in a vulnerable situation and the authorities have a duty to protect them. Bearing in mind the authorities' obligation to account for injuries caused to persons within their control in

custody, and in the absence of any convincing explanation concerning the origin of the physical trauma noted in the four medical reports mentioned above, the Court considers that the Government have failed to provide a plausible explanation of how the injuries to the applicant were caused. It therefore concludes that the physical trauma in question was the result of treatment for which the Government bore responsibility.

50. There has accordingly been a substantive violation of Article 3 of the Convention.

(b) Alleged ineffectiveness of the domestic remedies

51. The Court notes that subsequent to the complaints of ill-treatment lodged by the applicant with the Eyüp Chief Public Prosecutor's office (see paragraph 11 above), the authorities commenced an investigation into his allegations and ultimately pressed charges against three police officers for inflicting ill-treatment on him. However, the Eyüp Criminal Court suspended the proceedings by virtue of Law no. 4616. These proceedings will subsequently be discontinued if no offence of the same or a more serious kind was committed by the offenders within a five-year period, in accordance with that law. The applicant challenged that decision before the Eyüp Assize Court, albeit unsuccessfully (see paragraphs 26 and 27 above).

52. The Court reiterates that the rights enshrined in the Convention are practical and effective, and not theoretical and illusory. Therefore, investigations of the present kind must be able to lead to the identification and punishment of those responsible. In the instant case, however, the proceedings in question did not produce any concrete result owing to the qualification of the alleged offence committed by the police officers as ill-treatment, within the meaning of Article 245 of the Criminal Code, and the suspension of the criminal proceedings against them in accordance with Law no. 4616 (see paragraphs 14 and 23 above). Thus, the application of the said law to the present case created virtual impunity for the perpetrators of the acts of violence, irrespective of the evidence against them (see, *mutatis mutandis*, *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, § 147, ECHR 2004-IV, and *Abdulsamet Yaman*, cited above § 59).

53. 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 v. Turkey*, no. 52067/99, § 78, ECHR 2006-...).

54. In the light of the foregoing and given the authorities' failure to pursue the criminal proceedings against the police officers leading to the determination of their responsibility and to their punishment in the event of a conviction, the Court does not consider that the above proceedings can be described as sufficiently thorough and effective to have met the procedural requirements of Article 3 of the Convention.

55. There has accordingly been a procedural violation of this provision.

56. In these circumstances, the Court considers that no separate issue arises under Articles 6 and 13 of the Convention (see *Timur v. Turkey*, no. 29100/03, §§ 35-40, 26 June 2007).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 for non-pecuniary damage.

59. The Government contended that the amount claimed was excessive and that any award to be made under this head should not lead to unjust enrichment.

60. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, having regard to the violation found and ruling on an equitable basis, it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

61. The applicant also claimed EUR 4,500 for costs and expenses incurred before the Court.

62. The Government submitted that in the absence of any supporting documents, the claim should be dismissed.

63. 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, the Court notes that the applicant solely referred to the Istanbul Bar Association's scale of fees and failed to submit any documents in support of his claims. The Court therefore makes no award under this head (see *Balçık and Others v. Turkey*, no. 25/02, § 65, 29 November 2007).

C. Default interest

64. 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 application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention both under its substantive and procedural aspects;
3. *Holds* that there is no need to examine separately the complaints under Articles 6 and 13 of the Convention;
4. *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, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *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