



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

SECOND SECTION

CASE OF ERDOĞAN YILMAZ AND OTHERS v. TURKEY

(Application no. 19374/03)

JUDGMENT

STRASBOURG

14 October 2008

FINAL

14/01/2009

This judgment may be subject to editorial revision.

In the case of Erdoğan Yılmaz and Others 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 23 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 19374/03) 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 seven Turkish nationals, Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz, Ms Birsan Kaya, Ms Sırma Yeter, Mr Mustafa Yeter, Mr Dursun Yeter and Ms Ayşe (Yeter) Yumli (“the applicants”), on 30 May 2003.

2. The applicants were represented by Mr F.N. Ertekin, Mr T. Ayçık and Mr K. Öztürk, lawyers practising in İstanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 16 April 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1960, 1955, 1974, 1924, 1955, 1957 and 1970 respectively. The first, second and the seventh applicants live in İstanbul, the fourth and the fifth applicants live in Erzincan and the sixth applicant is residing in Nevnkirchen (Austria).

5. The fourth, fifth, sixth and seventh applicants are relatives of Mr Süleyman Yeter, who died on 7 March 1999.

6. According to the applicants, on 22 February 1997 Mr Süleyman Yeter was arrested by police officers while walking along the street, in Avcılar, Istanbul, and taken into police custody at the Istanbul Security Headquarters on suspicion of membership of an illegal armed organisation, namely the MLKP (Marxist Leninist Communist Party). According to the arrest report, drafted by police officers, Mr Yeter was arrested at an apartment, together with eight other people. The arrest report does not contain the signatures of those arrested.

7. That same day, the first three applicants - Mr Erdoğan Yılmaz, Ms Birsen Kaya and Ms Ayşe Yılmaz - were also arrested at their houses and taken into police custody at the Istanbul Security Headquarters on suspicion of involvement in the activities of the MLKP.

8. The head of the security headquarters requested the public prosecutor at the Istanbul State Security Court to authorise the police to detain Mr Süleyman Yeter, as well as the first three applicants and fourteen others, until 7 March 1997. The public prosecutor gave his consent to detain them for fifteen days. He also noted that the detainees should be taken for a medical examination every three days.

9. The first three applicants and Mr Süleyman Yeter were allegedly subjected to various forms of ill-treatment while in custody. It is claimed that Mr Erdoğan Yılmaz was blindfolded, beaten, suspended by his arms, subjected to electric shocks, forced to remain standing, deprived of food and sleep and threatened with death. Mrs Ayşe Yılmaz was allegedly blindfolded, beaten, sexually harassed, forced to remain standing, forced to listen to loud music, deprived of sleep and threatened. It is further claimed that Ms Birsen Kaya was blindfolded, beaten, insulted, stripped naked, suspended by her arms and forced to remain standing. Finally, Mr Süleyman Yeter was allegedly blindfolded, beaten, insulted, hosed with cold water, suspended by his arms, forced to listen to loud music and deprived of sleep.

10. During his police custody, the first applicant, Mr Erdoğan Yılmaz, was examined three times by a forensic doctor:

- In a report dated 26 February 1997, it was noted that the applicant had a lesion measuring 0,5 cm on his right elbow and a scab-covered lesion measuring 3 to 4 cm on the left scapula.
- The second examination of the applicant was carried out on 3 March 1997. It was noted that the applicant had a scab-covered lesion measuring 1 cm by 1 cm on his left elbow, several hyperaemic lesions measuring 1 cm by 2 cm on his back and bruising measuring 2 cm by 1 cm on his right wrist.
- In his third examination, carried out on 6 March 1997, the forensic doctor noted that the findings of the report dated 3 March 1997 still showed. He also observed that the applicant had pain in his chest.

11. The second applicant Ayşe Yılmaz was taken to the doctor on 26 February, 3 March and 6 March 1997 respectively. According to the first two reports, there were no traces of ill-treatment on her body. The medical report of 6 March 1997 noted that she was examined together with some other detainees. However, there were no comments regarding her. Following her release, the second applicant applied to the Istanbul Human Rights Foundation for a medical report. In the report, which was drafted on 23 October 1997, it was recorded that the applicant had scab covered lesions on her wrists, had pain on her right elbow and several other small scab covered lesions on both arms.

12. The third applicant, Ms Birsen Kaya was also examined three times during the police custody period.

- In a report dated 27 February 1997, prepared by a doctor at the Vakıf Gureba Hospital, it was noted that the applicant had numbness in her left shoulder and wrist and that she was unable to move her left hand.
- In a medical report dated 4 March 1997, which was issued at the Istanbul Forensic Medicine Institute, it was noted that the applicant had a scab covered lesion measuring 10 cm. on her back, had pain and numbness on her left arm and could not use her left hand.
- On 6 March 1997 the applicant was once again examined at the Istanbul Forensic Medicine Institute. In a report drafted on that day it was observed that the injuries which had been noted on 4 March 1997 still showed.

13. The relative of the fourth, fifth, sixth and seventh applicants, Mr Süleyman Yeter, was also given three medical examinations during his detention in police custody:

- The first was performed by a doctor at the Vakıf Gureba Hospital on 27 February 1997, who noted a scab-covered lesion measuring 5 cm to the side of the right armpit.
- In a report of 3 March 1997, a forensic doctor noted pain and numbness in both of Mr Süleyman Yeter's arms, extending to his fingertips. He also noted pain on his scapula. He certified him unfit for work for three days.
- According the medical report dated 6 March 1997, drafted by a different forensic doctor, there was loss of movement in both of his arms and bruising measuring 1 cm on the right scapula.

14. On 6 March 1997, the first three applicants and Mr Süleyman Yeter were brought to the office of the public prosecutor at the Istanbul State Security Court, where they denied all accusations against them. They also described in detail the treatment to which they had been allegedly subjected in police custody. Mr Süleyman Yeter was not able to sign his statement, as he could not move his arms. Later, that same day Mr Süleyman Yeter was remanded in custody by a judge at the Istanbul State Security Court, whereas the first three applicants were released pending trial.

15. On 10 March 1997 Mr Süleyman Yeter filed a complaint with the Fatih Public Prosecutor against the police officers who had allegedly tortured him during his detention. In his written statement, submitted through the prison authorities, he gave a detailed description of the methods of torture inflicted on him.

16. On 17 March 1997 the public prosecutor at the Istanbul State Security Court forwarded to the Fatih Public Prosecutor statements by the first three applicants and Mr Süleyman Yeter, complaining about the police officers' conduct during their detention and the relevant medical reports, and requested him to carry out the necessary investigation.

17. On 31 March 1997 the Fatih Public Prosecutor requested the Istanbul Security Headquarters to provide his office with all relevant documents concerning the complainants' detention in police custody.

18. On 28 March 1997 and 2 April 1997 the head of the Istanbul Security Headquarters submitted the public prosecutor's authorisation to detain the suspects, the arrest reports, the incident reports, medical reports and the list of names of the police officers involved.

19. On 8 May 1997 the Fatih Public Prosecutor took statements from all the police officers who had been on duty between 21 February 1997 and 6 March 1997. On 23 June 1997 he drew up a report in which he recommended that the Istanbul Public Prosecutor initiate criminal proceedings against eight police officers, pursuant to Article 243 of the Criminal Code. On 4 July 1997 the Istanbul Public Prosecutor filed an indictment against eight officers before the Istanbul Assize Court, accusing them of ill-treatment pursuant to Articles 243 of the Criminal Code. The first two applicants were included in the proceedings as complainants, whereas the third applicant and Mr Süleyman Yeter joined the case as intervening parties.

20. The first hearing took place on 24 October 1997. The Istanbul Assize Court heard Mr Erdoğan Yılmaz and Ms Ayşe Yılmaz, who described the ill-treatment inflicted on them by the police. The first applicant maintained that he had been suspended by the arms and insulted and that he had remained handcuffed for six days. The second applicant complained that during the first five days of her detention she had been blindfolded, beaten, threatened, insulted and forced to listen to loud music. Both applicants claimed that they would be able to identify the police officers who had tortured them and they also provided the name of one police officer. On the same day, a statement by Mr Süleyman Yeter, which had been taken by the Gebze Assize Court by means of a rogatory letter, was read out in court.

21. On 16 December 1997 the accused police officers appeared before the Istanbul Assize Court for the first time. They refused to give any statements as their lawyers were not present.

22. On 7 May 1998 all the accused police officers, except one, and their lawyers were present in court. According to the minutes, they denied the allegations against them.

23. On 7 July 1998, relying on the nature of the offence and the content of the case file and considering the fact that they all had permanent jobs and addresses, the court rejected the request that the accused officers be remanded in custody.

24. At a hearing on 2 October 1998, a witness identified someone in the audience as one of the police officers who had tortured her. Subsequently, the public prosecutor filed a separate indictment against that individual and the number of the accused increased from eight to nine persons.

25. On 10 December 1998 the court took a statement from the third applicant, Ms Birsen Kaya, who testified that she had been suspended by the arms and sexually harassed. She further maintained that the doctor who had examined her had not noted all her complaints. When she had asked the doctor for his name in order to file a complaint, he had refused to give it. Furthermore, she complained that, on the way back to the prison, a police officer whose name she had given to the court had slapped her and squeezed her throat.

26. At the hearing on 2 March 1999, the court decided to confront the accused police officers and the plaintiffs at the next hearing on 29 April 1999.

27. On 5 March 1999, police officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters arrested Süleyman Yeter, who had been released from detention on remand apparently in the meantime, and placed him into custody once again. On 7 March 1999 he died in police custody¹.

28. On 29 April 1999 the confrontation procedure was not performed as the accused police officers were not present in court. Mr Süleyman Yeter's lawyer informed the court that his relatives, that is, the fourth, fifth, sixth and seventh applicants, would pursue his case.

29. At the hearing of 1 October 1999, the police officers appeared before the court for the first time since 7 May 1998. However, the court decided to postpone the confrontation procedure.

30. The next hearing took place on 23 November 1999. The police officers were not present.

31. During several hearings, the plaintiffs repeated their request that the police officers be remanded in custody. The court reiterated its earlier decision on the subject, holding that, since there had not been any change in the content of the case file, there was no need to decide otherwise.

32. On 8 July 2002 the public prosecutor submitted his opinion on the merits of the case. He maintained that witness statements and medical

¹ An application concerning this incident is currently pending before the Court (application no. 33750/03, Yeter (Yumli) and others v. Turkey).

reports confirmed the allegations that the complainants had been subjected to psychological and physical torture inflicted by some of the accused police officers. He therefore requested the court to convict and sentence those officers pursuant to Article 243 of the Criminal Code.

33. In the meantime, on 16 October 2002 the Istanbul State Security Court acquitted Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz and Ms Birsen Kaya of the charges against them and dropped the charges against Mr Süleyman Yeter, since he had died.

34. In a hearing on 2 December 2002 the Istanbul Assize Court gave judgment. It acquitted five of the accused police officers for lack of evidence. Furthermore, based on the evidence in the file, the court found it established that the remaining four officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters had intentionally ill-treated Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz, Ms Birsen Kaya and Mr Süleyman Yeter in order to extract confessions from them. Accordingly, pursuant to Section 243 § 1 of the Criminal Code, the court sentenced each of them to one year and two months' imprisonment. It also made an order banning them from public service for three months and fifteen days. These sentences were subsequently reduced to eleven months and twenty days' imprisonment and two months and twenty-seven days' suspension from duty under Section 59 § 2 of the Criminal Code. The court then ordered a stay of execution, as the defendants had no criminal record and the judges were convinced that they would not reoffend.

35. On 1 April 2004 the Court of Cassation upheld the assize court's decision to acquit five of the police officers. However, it quashed the decision to convict the other four, noting that the statutory time-limit for the offence had expired and that, accordingly, the criminal proceedings against them should be discontinued.

36. On 11 November 2004 the Istanbul Assize Court followed the decision of the Court of Cassation and dropped the criminal proceedings against the police officers.

37. On 29 November 2006 the Court of Cassation rejected an appeal application from the intervening parties.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. The relevant domestic law and practice in force at the material time are outlined in *Batı and others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-100, ECHR 2004-IV (extracts)).

THE LAW

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

39. The first, second and third applicants complained about the treatment to which they had been subjected during their police custody and about the ineffectiveness of the ensuing criminal proceedings against the accused police officers which were ultimately dropped for being time-barred. The remaining applicants raise the same allegations in respect of their relative Mr Süleyman Yeter. In respect of their complaints, the applicants relied on Articles 3 and 13 of the Convention.

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

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

41. The Government contested the allegations.

A. Admissibility

42. The Government argued that the application should be rejected for non-exhaustion of domestic remedies. In this connection, they stated that the applicants could have brought compensation proceedings before the administrative courts to seek reparation for the harm they had allegedly suffered.

43. 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 that case. Accordingly, the Court rejects the Government's preliminary objection.

44. 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.

B. Merits

1. The responsibility of the State in the light of the substantive aspect of Article 3

45. The first three applicants alleged that they had been subjected to torture during their police custody. The remaining applicants raised the same complaint in respect of their relative, Süleyman Yeter.

46. The Government did not make any comments about the substantive aspect of Article 3 of the Convention.

47. 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; *Diri v. Turkey*, no. 68351/01, §§ 35-39, 31 July 2007). It will examine the present case in the light of these principles.

48. The Court observes that, after acquainting itself with the evidence and examining the facts of the case, the Istanbul Assize Court, in its decision of 2 December 2002, found that Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz, Ms Birsen Kaya and Mr Süleyman Yeter had been ill-treated by four police officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters. In convicting these police officers under Section 243 of the Criminal Code, the court further found that the police officers had inflicted this treatment intentionally in order to extract confessions (see paragraph 34 above). The Court further notes that the applicants' allegations included the administration of electric shocks, suspension by the arms and beatings. These allegations are corroborated by the medical reports, as confirmed by the domestic court judgment. In these circumstances, the Court concludes that the injuries observed on Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz, Ms Birsen Kaya and Mr Süleyman Yeter must be attributable to a form of ill-treatment for which the authorities at the Anti-Terrorist Branch of the Istanbul Security Headquarters bore responsibility.

49. As to the seriousness of the treatment in question, the Court reiterates that, under its case-law in this sphere (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, §§ 96-97, ECHR 1999-V), in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

50. In this connection, the Court considers that the treatment complained of was inflicted intentionally by the police officers with the purpose of extracting confessions. In these circumstances, the Court finds that this act

was particularly serious and cruel and capable of causing severe pain and suffering. It therefore concludes that this ill-treatment amounted to torture within the meaning of Article 3 of the Convention.

51. There has therefore been a substantive violation of Article 3 of the Convention.

2. The responsibility of the State in the light of the procedural aspect of Article 3

52. The applicants maintained that the criminal proceedings against the police officers could not be considered to have been an effective remedy. They further stated that no disciplinary sanctions had been imposed on the accused officers.

53. The Government maintained that the prosecution of the police officers satisfied the procedural obligation inherent under Article 3 of the Convention.

54. The Court reiterates that where an individual raises an arguable claim that he or she has been 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 (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3290, § 102). 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 (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004).

55. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment 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 *Bati and Others*, cited above, § 136).

56. The Court reaffirms that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible (see *Yeşil and Sevim v. Turkey*, no. 34738/04, § 38, 5 June 2007).

57. In the present case, the Court observes that, following the applicants' complaint of ill-treatment, in March 1997 the public prosecutor initiated a prompt investigation, which led to the prosecution of nine police officers for

the offence of ill-treatment. However, in 2006 the proceedings against the officers were dropped as they were time-barred. The Court notes in the first place that, although the public prosecutor filed his indictment with the Istanbul Assize Court on 4 July 1997, the first-instance court pronounced its judgment on 2 December 2002, almost five years and five months later. In the Court's view, the length of the proceedings was excessive and the Government have not provided any explanation for this state of affairs. Despite the fact that the assize court found four police officers guilty of torture at the end of the proceedings, the case was then dropped as the statutory time-limit of five years had elapsed. In this context, the Court reiterates its earlier finding in a number of cases that the Turkish criminal law system can prove to be far from rigorous and have no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents if criminal proceedings brought against the latter are dropped for being time-barred (see among others, *Yeşil and Sevim*, cited above, § 42, and *Hüseyin Esen v. Turkey*, no. 49048/99, § 63, 8 August 2006). The Court finds no reason to reach a different conclusion in the present case.

58. In the light of the foregoing, the Court finds that the criminal proceedings brought against the police officers cannot be described as having been adequate, and were therefore in breach of the State's procedural obligations under Article 3 of the Convention.

59. It follows that there has been a violation of Article 3 under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicants requested pecuniary damage, but left the amount to the discretion of the Court. Furthermore, having regard to the pain and distress they had suffered, they requested the following sums in respect of non-pecuniary damage:

- 100,000 euros (EUR) in respect of Erdoğan Yılmaz;
- EUR 40,000 in respect of Ayşe Yılmaz;
- EUR 30,000 in respect of Birsen Kaya;
- EUR 80,000 jointly in respect of the relatives of Mr Süleyman Yeter, namely the fourth, fifth, sixth and seventh applicants.

62. The Government considered that these amounts were excessive.

63. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it is clear that an award of non-pecuniary damage is called for. Having regard to the nature of the breach found in the present case and ruling on an equitable basis, the Court awards EUR 15,000 each to the first, second and third applicants, and EUR 15,000 jointly to the fourth, fifth, sixth and seventh applicants.

B. Costs and expenses

64. The applicants also claimed EUR 7,340 for the costs and expenses incurred before the domestic courts and EUR 26,823 for those incurred before the Court. The applicants based their claim on the Istanbul Bar Association's Schedule of Costs. They also submitted a contingency fee agreement.

65. The Government contested the amounts claimed.

66. 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the applicants, jointly, the sum of EUR 5,000 for the proceedings before the Court.

C. Default interest

67. 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 under both its substantive and procedural limbs;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, the following amounts, to be converted into new Turkish liras at the rate applicable at the date of settlement:

- (i) EUR 15,000 (fifteen thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage to Mr Erdoğan Yılmaz, Ms Ayşe Yılmaz and Ms Birsen Kaya ;
- (ii) EUR 15,000 (fifteen thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage to Ms Sırma Yeter, Mr Mustafa Yeter, Mr Dursun Yeter and Ms Ayşe (Yeter) Yumli;
- (iii) EUR 5,000 (five thousand euros), jointly, plus any tax that may be chargeable to the applicants, in respect of 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President