



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

SECOND SECTION

CASE OF FİLİZ UYAN v. TURKEY

(Application no. 7496/03)

JUDGMENT

STRASBOURG

8 January 2009

FINAL

08/04/2009

This judgment may be subject to editorial revision.

In the case of Filiz Uyan 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,
 Dragoljub Popović,
 Nona Tsotsoria,
 İşıl Karakaş, *judges*,
and Françoise Elens-Passos, *Deputy Section Registrar*,
Having deliberated in private on 2 December 2008,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7496/03) 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, Ms Filiz Uyan (“the applicant”), on 3 February 2003.
2. The applicant was represented by Mrs I.G. Kireçkaya, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.
3. On 13 December 2005 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 applicant was born in 1966 and at the time of the events was serving a prison sentence in the Buca Prison in İzmir.
5. She had been convicted of being a member of a terrorist organisation and sentenced to twenty-two years’ imprisonment.
6. On 12 November 2001, following the prison doctor’s referral, the applicant was taken to İzmir-Yesilyurt Atatürk Training and Research Hospital, escorted by three male security officers (two gendarmes and a

male prison guard) and one female prison guard, in order to undergo an ultrasound scan by a gynaecologist.

7. In the hospital the applicant was taken to a consultation room located on the ground floor. The bottom of the consulting room windows was only 50 cm above floor level and the windows were unprotected. The applicant's handcuffs were not removed and the male security officers refused to leave the consultation room for security reasons. They stated that they would wait behind a folding screen. The applicant refused to be examined in such conditions. Accordingly, the gynaecologist issued a medical report stating that she had not been able to perform the requested ultrasound scan as the patient had not given her consent.

8. On 14 November 2001 the applicant's representative applied to the İzmir Public Prosecutor's Office, accusing the gendarmes and the male prison guard of misconduct, arbitrary treatment and insulting the applicant.

1. The proceedings against the gendarme officers

9. On 15 November 2001 the İzmir Public Prosecutor's Office separated the investigation file in respect of the accused gendarme officers, noting that, pursuant to Law no. 4483 on the Prosecution of Civil Servants and Public Officials, permission to prosecute had to be sought from the District Governorship.

10. On 28 December 2001 the Buca District Governor decided not to authorise the prosecution of the gendarme officers, stating that the applicant's allegations were unsubstantiated.

11. The applicant did not file an appeal and the decision became final on 30 January 2002.

2. The proceedings against the male prison guard

12. On 26 and 27 November 2001 respectively, the İzmir public prosecutor took statements from the male prison guard and the applicant as the complainant.

13. On 3 December 2001 the public prosecutor decided not to prosecute the prison guard. Referring to the doctor's note dated 12 November 2001, in which it was stated that no examination had been performed as the applicant had not given her consent, the prosecutor decided that the applicant's allegations were unsubstantiated.

14. On 29 July 2002 the Karşıyaka Assize Court dismissed the applicant's appeal against that decision.

3. The proceedings against the doctor

15. In the meantime, on 23 January 2002, the applicant's lawyer filed a complaint with the İzmir Medical Association (*İzmir Tabip Odası*) against

the doctor who had not asked the male security officers to leave the room or remove the applicant's handcuffs.

16. On 8 April 2002 the İzmir Medical Association found it unnecessary to initiate criminal proceedings against the doctor, holding that she had not treated the applicant disrespectfully.

17. The applicant objected and on 5 October 2002 the Turkish Medical Association (*Türk Tabipleri Birliği*) quashed that decision.

18. On 23 January 2003 the İzmir Medical Association examined the file once again and decided to issue the doctor with a warning for professional misconduct, namely for not taking the initiative to request the male security officers to leave the consultation room or remove the applicant's handcuffs, as required by ethical rules.

II. RELEVANT LAW AND PRACTICE

19. The Protocol for Prisons signed by the Ministries of Justice, Health and the Interior (6 January 2000) provides:

Article 66

"...during the medical examination at the hospital of those who are remanded or convicted in connection with terror-related crimes, the gendarmerie will wait in the consultation room to secure the area, at a distance so as not to hear the conversation between the doctor and the patient. Where women prisoners are remanded or convicted in connection with terror-related crimes, if the consultation room has protection the gendarme officers will wait outside the consultation room. If the room does not have protection the gendarme officers will wait in the room at a distance so as not to hear the conversation between the doctor and the patient."

Article 72

"Remand and convicted prisoners who are transferred to health institutions from Closed Prisons and Detention Centres and who are to be examined or hospitalised in these health institutions will be accompanied by an adequate number of guards, appointed by the prison administration, and the remanded and convicted prisoners' administrative formalities in the hospital will be carried out by these guards."

20. The Regulation on the External Protection of Prisons and Transfer Procedures provides insofar as relevant as follows:

Section 3 (Course of Action during Examination and Treatment in Health Institutions)

"...handcuffs are not removed unless they hinder the treatment/examination and as long as their removal is not requested by the doctor."

21. The CPT Standards (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) concerning

health care services in prisons (see the CPT standards, document no. CPT/Inf/E (2002) 1- Rev. 2006, pages 31 and 34) provide as follows:

“... All medical examinations of prisoners (whether on arrival or at a later stage) should be conducted out of the hearing and - unless the doctor concerned requests otherwise - out of the sight of prison officers...”

If recourse is had to a civil hospital, the question of security arrangements will arise. In this respect, the CPT wishes to stress that prisoners sent to hospital to receive treatment should not be physically attached to their hospital beds or other items of furniture for custodial reasons. Other means of meeting security needs satisfactorily can and should be found; the creation of a custodial unit in such hospitals is one possible solution.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

22. The applicant complained that during her visit to the hospital for an ultrasound scan she had been subjected to inhuman and degrading treatment. She further maintained that she had not had an effective remedy for her complaint concerning that treatment, which, in her view, had also been discriminatory. She relied on Articles 3 and 13 of the Convention. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which reads as follows:

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

23. The Government contested these arguments.

A. Admissibility

24. The Government argued in the first place that the application should be rejected for non-exhaustion of domestic remedies. They maintained that the applicant had failed to lodge an appeal against the Buca District Governor’s decision, dated 28 December 2001, not to prosecute the gendarme officers. They also maintained that the application must be dismissed for failure to comply with the six-month rule. Furthermore, they contended that the applicant could not be considered as a “victim” within the meaning of Article 34 of the Convention as no medical examination had been performed on her since she had not given her consent.

25. The Court observes that there were three separate sets of proceedings in the present case. The first set of proceedings concerned the two gendarme

officers who had refused to leave the consultation room for security reasons. The Court notes that the applicant failed to file an appeal against the Buca District Governor's decision dated 28 December 2001, which became final on 30 January 2001. Accordingly, this part of the application, concerning the prosecution of the gendarme officers, should be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

26. As regards the Government's second objection, concerning non-compliance with the six-month time-limit, the Court observes that the proceedings against the male prison guard ended on 29 January 2002 with the decision of the Karşıyaka Assize Court. The parties have not informed the Court of the notification date of that decision. Be that as it may, the applicant lodged her application with the Court on 3 February 2003, within six months following the decision of the İzmir Medical Council dated 23 January 2003. In the Court's opinion, it was not unreasonable for the applicant to await the outcome of the proceedings against the doctor, before lodging her application with the Court. Accordingly, the Government's objection under this head cannot be upheld.

27. As regards the Government's objection concerning the applicant's "victim" status, the Court reiterates that the word "victim", in the context of Article 34, denotes the person directly affected by the act or omission which is in issue. In the present case, the applicant's complaint concerns the distress she allegedly suffered as a result of the fact that she had been taken to hospital for a gynaecological examination whilst handcuffed and under the surveillance of three male security officers. In the Court's opinion, whether or not the doctor conducted the medical examination has no effect on the applicant's victim status. In sum, the Court considers that the applicant was a victim of the impugned act and it dismisses this part of the Government's objection.

28. Finally, the Government contended that the presence of gendarmes in the doctor's consultation room was required by law for security reasons because of the poor security arrangements in the hospital. They further stated that the applicant had been convicted of being a member of a terrorist organisation and strict security measures had to be taken to prevent the risk of her absconding. Lastly, the Government maintained that the application was unsubstantiated, repeating that the applicant had not been forced to undergo a medical examination. The complaint was therefore manifestly ill-founded.

29. However, the Court does not find this complaint to be manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

30. The Court recalls that, to fall within the scope of Article 3 of the Convention, the alleged treatment must attain a minimum level of severity (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). It further reiterates that handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention, and does not entail a use of force or public exposure exceeding what is reasonably considered necessary. In this regard it is important to consider, for instance, whether there is a danger that the person concerned might abscond or cause injury or damage to himself / herself or others (see *Mouisel v. France*, no. 67263/01, § 47, ECHR 2002-IX; *Raninen v. Finland*, 16 December 1997, § 56, *Reports of Judgments and Decisions* 1997-VIII; *Tarariyeva v. Russia*, no. 4353/03, § 109, ECHR 2006-..., and *Henaf v. France*, no. 65436/01, § 48, ECHR 2003-XI).

31. Article 3 of the Convention also imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see *Mouisel*, cited above, § 40). There may be no derogation from this obligation.

32. In the present case, the Court notes that the applicant was referred to the hospital by the prison doctor to undergo an ultrasound scan. Consequently, she was taken to the hospital, handcuffed and escorted by one female and three male security officers. The Court recognises the security risk presented by the fact that the applicant had been heavily sentenced for being a member of a terrorist organisation and that the doctor's consultation room was on the ground floor of the hospital with no window bars. Nevertheless, the Court considers that the insistence on the use of handcuffs during an examination by a gynaecologist, and the presence of three male security officers in the examination room during consultation, even behind a folding screen, were disproportionate security measures, when there were other practical alternatives. For example, the officers could have secured the room by leaving the female prison guard there and placing one of the gendarmes outside the window of the consultation room.

33. However, the doctor and the gendarme officers had acted in compliance with the domestic legislation since, under the terms of the relevant protocol (see paragraph 19 above), the officers had been obliged to stay in the consultation room, keeping themselves at a sufficient distance behind the folding screen to avoid hearing the conversation between the doctor and the applicant. Furthermore, according to the domestic legislation, handcuffs were not to be removed if they did not hinder the medical examination and as long as their removal was not requested by the doctor.

These were strict requirements for all prisoners convicted of terrorism-related crimes who had to undergo such examinations. In the Court's view, these strict measures failed to allow a flexible and more practical approach to be taken, depending on the particular risk presented by such a prisoner and the type of medical examination to be performed. In particular, the Court finds that the Government have not demonstrated that the applicant presented such an acute security risk that measures of this nature were required for a gynaecological procedure.

34. The Court concludes that, even though no medical examination was performed, the above security conditions must have caused the applicant humiliation and distress, beyond that inevitably associated with the treatment of a prisoner, which was capable of undermining her personal dignity.

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

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

36. Relying on Article 14 of the Convention, the applicant contended that she had been discriminated against as she was a female prisoner.

37. However, having regard to all the materials in its possession, the Court finds nothing in the case file which might disclose any appearance of a violation of this provision. It follows that this part of the application is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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."

39. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award her any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by 4 votes to 3 that there has been a violation of Article 3 of the Convention.

Done in English, and notified in writing on 8 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judges Zagrebelsky, Tsotsoria and Karakaş is annexed to this judgment.

F.T.
F.E.-P.

JOINT DISSENTING OPINION OF JUDGES
ZAGREBELSKY, TSOTSORIA AND KARAKAŞ

To our regret, we are unable to agree with the majority that there has been a violation of Article 3 of the Convention in this case.

As the majority rightly points out in paragraph 30, in order to fall within the scope of Article 3 of the Convention the alleged treatment must attain a minimum level of severity (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). In our view, the treatment of which the applicant in the present case complained did not attain the minimum level of severity within the meaning of Article 3 of the Convention, for the following reasons.

In the present case, the applicant, who had received a heavy prison sentence for being a member of a terrorist organisation, was taken to a civilian hospital to undergo an ultrasound scan. However, as her handcuffs were not removed and as the male security officers refused to leave the consultation room and waited behind a folding screen, the applicant did not give her consent for the scan and, in consequence, the doctor did not perform the examination. There is no dispute on this issue between the parties.

In this connection, we note that under section 66 of the Protocol for Prisons, signed by the Turkish Ministries of Justice, Health and the Interior and dated 6 January 2000, where female detainees have been remanded in custody or convicted in connection with terrorism-related crimes and are required to seek medical assistance, gendarme officers are required to wait outside the consultation room if the latter has adequate security. If the room has no security, as in the present case, they are to stay in the consultation room, remaining at a sufficient distance behind a folding screen to avoid hearing the conversation between the doctor and patient. The CPT Standards, referred in the judgment, also state that all medical examinations of prisoners should be conducted out of the hearing and, unless the doctor concerned requests otherwise, out of the sight of prison officers. There is no explicit requirement for male security officers to leave the consultation room when female convicts are involved or for the removal of handcuffs during an examination.

In our view, in paragraphs 32 and 33 of the judgment the majority has gone beyond its task by taking the place of the domestic authorities in suggesting which alternative measures could have been taken and in basing its decision on the fact that the Government failed to demonstrate that the applicant did not present an acute security risk. We consider that it is for the domestic authorities to assess the circumstances and to decide which security measures should have been imposed during the examination. It should be borne in mind that the applicant, a convicted terrorist, was being examined in a civilian hospital and, under section 3 of the Regulations on

the External Protection of Prisons and Transfer Procedures, it was for the doctor to decide whether the use of handcuffs hindered the examination. In the present case, the applicant was taken to hospital for an ultrasound scan, and we do not see how the use of handcuffs could have hindered the examination.

Furthermore, although the doctor subsequently received a warning from the Izmir Medical Association for not having taken the initiative to request the gendarme officers to leave the room, in our view the presence of the gendarmes was required by law in the circumstances of the present case, and the doctor had no authority to request otherwise. As regards the use of handcuffs, it was at the discretion of the doctor to request the removal of the handcuffs if she considered that they would hinder the examination of the applicant. However, given the security risk presented by the applicant and the hospital's material conditions, we do not find that the doctor's conduct was to have been unreasonable or disproportionate in the circumstances of the case. She merely complied with the domestic legislation in force at the time.

Last but not least, it should not be forgotten that the applicant was not forced to undergo the ultrasound scan. When she did not give her consent, she was returned to the prison. Furthermore, there is no allegation that her health deteriorated in consequence.

In this connection, we would refer to the judgment in *Devrim Turan v. Turkey* (no. 879/02, 2 March 2006). The applicant in that case, who was being held in police custody, was taken to hospital on the first and last days of custody for a gynaecological examination. However, since she refused to grant consent, the doctors did not perform any gynaecological examination. In paragraphs 20 and 21 of the *Turan* judgment, having regard to the fact that when the applicant refused to undergo a gynaecological examination, no force was used against her and the doctors had refrained from performing the said examination, the Court considered that the sole fact that the applicant was taken to hospital for a gynaecological examination on the first and last days of her custody did not attain the minimum level of severity within the meaning of Article 3 of the Convention.

We do not believe that the facts of the present case are different from those in the *Turan* case. In the *Turan* case, the Court declared the applicant's complaint inadmissible as no gynaecological examination had been performed. The situation is exactly the same in the present case.

Having regard to the above considerations, we find that the treatment complained of by the applicant did not attain the minimum level of severity to amount to degrading treatment within the meaning of Article 3 of the Convention.