



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

SECOND SECTION

CASE OF SAMÜT KARABULUT v. TURKEY

(Application no. 16999/04)

JUDGMENT

STRASBOURG

27 January 2009

FINAL

27/04/2009

This judgment may be subject to editorial revision.

In the case of Samüt Karabulut 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 6 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 16999/04) 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 Samüt Karabulut (“the applicant”), on 29 March 2004.

2. The applicant was represented by Ms Y. Yeşilyurt and Mr A.T. Ocak, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 14 February 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 applicant was born in 1964 and lives in Istanbul. He is a member of the Human Rights Association in Turkey.

5. According to the official police documents, drafted on 8 April 2002, at 9.15 and 9.30 p.m., the security forces received information that the Human Rights Association would hold an unauthorised demonstration and press release concerning Israel’s operations against Palestine, at Tünel Square, on that day. The police took the necessary precautions in the area as

of 7 p.m. At 8 p.m., around 30-35 persons gathered at the square holding candles, photos and banners which stated, *inter alia*, “All the world is Palestine, all of us are Palestinians”, “an end to the occupation, freedom to Palestine” and “Wanted Ariel Sharon war-criminal”. They sat down on the street. The police chief warned the demonstrators, many times, to disperse and a passage was opened by the police for the demonstrators to leave. The group started to disperse; however, two persons, including the applicant, despite warnings, continued to sit and shout slogans. The police used force to arrest them.

6. The applicant submitted, in the application form, that, on 8 April 2002, he had arrived to Tünel Square in order to participate in the Human Rights Association’s press release on Israel’s invasion of Palestine. However, the police intercepted the group and told them that they would not permit such a demonstration. As a result, the organisers decided to disperse and told the group to disband. While the group was dispersing, the applicant saw that the police were trying to arrest Ms M.A., a fellow demonstrator. When he intervened and asked why they were arresting her, the police chief got angry. He and 5 or 6 other police officers beat him up. They then arrested him and Ms M.A. In this connection, the applicant claimed to have received punches and kicks, and to have been hit by truncheon on various parts of his body, including his head and his back.

7. The applicant and Ms M.A. were brought to the Beyoğlu police station. They were released 1,5 hours later. The applicant was asked to give a statement to the prosecutor’s office the next day.

8. In the meantime, the police took the applicant for a medical examination to Taksim Hospital where the doctor who examined him noted a swelling and ecchymosis of 2 cm on the applicant’s head in the frontal region. In the report it is mentioned that the applicant had complained of a headache and of difficulty in breathing.

9. On 9 April 2002 the applicant was heard by Mr Y.A., a prosecutor at the Beyoğlu public prosecutor’s office. In his deposition the applicant complained, *inter alia*, about the manner in which he had been arrested and requested that those who had committed these offences be punished.

10. On the same day, the applicant was examined by a doctor at the Beyoğlu Forensic Medicine Department who noted a swelling of 2 cm on his head in the frontal region. In addition, the doctor noted that the applicant had sensitivity to the right of his chest.

11. On 10 June 2002 an Istanbul deputy police chief was appointed to carry out a preliminary investigation on behalf of the governor of the allegations of ill-treatment made by the applicant and Ms M.A.

12. On an unspecified date the deputy police chief prepared his report and submitted it to the governor’s office. It recommended that authorisation for the prosecution of Mr Ş.P., the police chief on duty that day, should be declined since the complaints were ill-founded.

13. On 4 July 2002 the Istanbul Deputy Governor, on the basis of the information contained in the deputy police chief's report and statements, refused authorisation for Mr Ş.P.'s prosecution.

14. On 12 August 2002 the applicant lodged an objection to the governor's decision with the Regional Administrative Court. He submitted, in particular, that his complaint of ill-treatment not only concerned the police chief but also all those officers who had carried out his order to beat him.

15. On 26 November 2002 the Istanbul Regional Administrative Court upheld the applicant's objection on account of an insufficient investigation, notably regarding the other police officers.

16. On an unspecified date the same deputy police chief prepared his second report in which he reiterated his previous findings and submitted it to the governor's office.

17. On 7 March 2003 the Istanbul Governor, on the basis of the information contained in this second report and statements, declined authorisation for the police officers' prosecution.

18. On 4 July 2003 the Istanbul Regional Administrative Court, upon the objection of Ms M.A., transferred the case to the Beyoğlu public prosecutor's office on the ground that the complainant's accusations concerned allegations of ill-treatment under Article 245 and that, pursuant to amendments to the criminal law and code on criminal procedure, authorisation was no longer a prerequisite to prosecute the accused police officers.

19. In the meantime, on 7 August 2003 the Beyoğlu public prosecutor decided not to prosecute the accused police officers. In this connection, he noted that about 30-35 persons had gathered, with candles and banners, at Tünel in Beyoğlu in order to protest Israel's invasion of Palestine but that, following warnings from the police, they had started to disperse. However, the complainants had continued to sit down and shout slogans and, as a result, the police had had to use force and arrest them. The prosecutor considered therefore that the force used by the security forces was in line with Article 24 of the Assemblies and Marches Act (Law no. 2911).

20. On 26 August 2003 the applicant filed an objection with the Beyoğlu public prosecutor's office, to be referred to the assize court, against the decision of 7 August 2003. In his petition the applicant complained that his right to freedom of expression and peaceful assembly had been infringed by his unlawful arrest and ill-treatment.

21. On 9 September 2003 the Istanbul Assize Court dismissed the applicant's objection. This decision was notified to the applicant's legal representative on 27 October 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. A description of the relevant domestic law at the material time can be found in *Mehmet Ümit Erdem v. Turkey*, no. 42234/02, § 19, 17 July 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 10 AND 11 OF THE CONVENTION

23. The applicant complained that the police intervention in the demonstration and the force used during his arrest infringed his rights to freedom of expression and peaceful assembly, and amounted to inhuman and degrading treatment. The applicant relied on Articles 3, 10 and 11 of the Convention.

24. The Court considers that the applicant's complaints should be examined under Articles 3 and 11 of the Convention alone, which, in so far as relevant, provide as follows:

Article 3

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

Article 11

"1. Everyone has the right to freedom of peaceful assembly...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of ... public safety, [or] for the prevention of disorder or crime...."

A. Admissibility

25. The Government asked the Court to dismiss the application as being inadmissible for failure to comply with the six-month rule on the ground that the applicant had not lodged his application within six months of the date on which the final decision was rendered, namely 9 September 2003.

26. The Court reiterates that, where an applicant is entitled to be served *ex officio* with a written copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the

six-month period as running from the date of service of the written judgment (see *Mahmut Aslan v. Turkey*, no. 74507/01, § 16, 2 October 2007). In the instant case, the final decision in question was delivered on 9 September 2003 by the Istanbul Assize Court. This decision was served on the applicant's legal representative on 27 October 2003. As the application was lodged with the Court on 29 March 2004, the applicant's above complaints were introduced with the Court within the six-month time-limit. It therefore rejects the Government's objection under this head.

27. Moreover, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The Government maintained that there had been no interference with the exercise of the applicant's right to freedom of assembly. They further submitted that, even assuming that there had been interference, it was prescribed by law and pursued the legitimate aims of preventing disorder and protecting public safety. They further claimed that the measure imposed by the security forces should be regarded as answering a pressing social need and was proportionate to the legitimate aims pursued. In this connection, the Government dismissed the applicant's allegations of ill-treatment and claimed that, in the circumstances of the present case, the force used on the applicant had been proportionate to the aims pursued.

29. The applicant submitted that the interference with his right to peaceful assembly had been unjustified. He noted that the police had unlawfully prevented the reading out of the press release prepared by the Human Rights Association and had used disproportionate force to arrest him and a fellow demonstrator. In this connection, the applicant maintained that he had been beaten by the police because he had taken part in a demonstration and had intervened when a fellow demonstrator was being arrested. He further claimed that, despite a cursory examination, the medical report still noted his head injury, which demonstrated in itself that he had been subjected to torture and inhuman treatment.

2. The Court's assessment

30. The Court will first determine whether the police intervention to the demonstration in question infringed the applicant's right to peaceful assembly, in breach of Article 11 of the Convention. It will then consider,

under Article 3 of the Convention, the manner in which the applicant was arrested.

a) Article 11

31. The Court considers that the police intervention and the subsequent arrest of the applicant constituted, in itself, an interference with the applicant's rights under Article 11 of the Convention (see *Saya and Others v. Turkey*, no. 4327/02, § 39, 7 October 2008¹).

32. The Court reiterates that an interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims. For the purposes of the present case and the reasons stated below (see paragraph 34), the Court is satisfied that the interference in the present case had a legal basis, namely Article 24 of the Assemblies and Marches Act (Law no. 2911), and was thus "prescribed by law" within the meaning of Article 11 § 2 of the Convention and pursued the legitimate aims of preventing disorder and protecting public safety.

33. Turning to the question of whether the interference was "necessary in a democratic society", the Court refers in the first place to the fundamental principles underlying its judgments relating to Article 11 (see, in particular, *Oya Ataman v. Turkey*, no. 74552/01, §§ 35-37, ECHR 2006-..., and *Éva Molnár v. Hungary*, no. 10346/05, §§ 35-38, 7 October 2008²).

34. In the instant case the Court observes that the Government failed to elaborate on the exact grounds why the demonstration organised by the Human Rights Association was unlawful. In this regard, the Court notes that the official documents submitted by the parties refer to the absence of authorisation, which is not a requisite under Turkish law, and not to the absence of any prior notification. However, the applicant has neither argued that a prior notification had been given to the authorities, in accordance with Article 10 of Law no. 2911, nor that the situation in Palestine called for a spontaneous demonstration overriding this obligation (see, for example, *Bukta and Others v. Hungary*, no. 25691/04, § 36, ECHR 2007-...). In such circumstances, the Court will presume that the reference to the absence of authorisation in the official documents implied the absence of prior notification.

35. The Court considers that, in the absence of notification, the demonstration was unlawful. In this connection, the Court reiterates that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility. Therefore, in order to enable the domestic authorities to take the necessary preventive security measures, associations and others organising demonstrations, as actors in the

¹ The judgment is not final yet.

² The judgment is not final yet.

democratic process, should respect the rules governing that process by complying with the regulations in force (see *Oya Ataman*, cited above, §§ 38 and 39, and *Balçık and Others v. Turkey*, no. 25/02, § 49, 29 November 2007). However, it also points out that an unlawful situation does not justify an infringement of freedom of assembly and that regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly as protected by the Convention (*ibid*).

36. In the instant case, the Court observes that the group in question concerned around 30-35 people. It appears that they were carrying banners and candles and that they wanted to read out a press statement regarding Israel's actions against Palestine, a topical issue, at Tünnel square. In this connection, the Government gave no particular reasons, such as the specificities of the location of the demonstration, to show that this group represented a danger to public order or public safety. The Court finds no such evidence on its own motion.

37. Moreover, the Court reiterates that, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, § 46, 18 December 2007). According to the incident report in the present case, drafted at 9.15 p.m., the demonstration began at 8 p.m. It appears that the demonstrators decided to disband the demonstration after the police had ordered them, several times, to disperse. As to whether police intervention was immediate or after a certain period of time, the Court notes that the applicant claimed that the police intervention was immediate, a fact not disputed by the Government. In these circumstances and taking into account that the police had already returned to the Beyoğlu police station by 9.15 p.m., the Court considers that the dispersal was quite prompt. Consequently, it is not satisfied that the applicant had sufficient time - together with his fellow demonstrators - to manifest his views (see *Oya Ataman*, §§ 41-42; *Balçık and Others*, § 51, and *a contrario*, *Ěva Molnár*, §§ 42-43, all cited above).

38. Accordingly, the Court considers that in the instant case the police intervention against the demonstration was disproportionate and was not necessary for preventing disorder and protecting public safety within the meaning of the second paragraph of Article 11 of the Convention.

39. There has accordingly been a violation of that provision.

b) Article 3

40. As to the manner in which the applicant was arrested, the Court finds, at the outset and having regard to the documentary evidence, particularly to the medical reports, the applicant's version of events, namely

a gratuitous, excessively brutal attack on his person by several police officers, to be unsubstantiated. Any ill-treatment inflicted in the way alleged by the applicant would have left several distinctive marks on his body which would have been seen by the doctors who examined him the very same day and the day after (see *Tanrıkulu and Others v. Turkey* (dec.), nos. 29918/96, 29919/96 and 30169/96, 24 February 2005). Although the applicant challenged the veracity of the medical reports established in his respect, the Court considers that, since the applicant had been released from detention the day of the incident, he had the possibility to obtain an alternative medical report from a doctor of his choice in order to support his allegations.

41. However, the findings of the medical reports, in the Court's opinion, match at least the applicant's allegations of having received a blow on the head. It finds this injury, particularly because of its location, sufficiently serious to bring it within the scope of Article 3. The Government have not denied that the applicant's injury resulted from the use of force by the State authorities in the performance of their duties. They have, however, stressed the mitigating circumstances surrounding the incident.

42. The Court notes that Article 3 does not prohibit the use of force in certain well-defined circumstances, such as to effect an arrest. However, such force may be used only if indispensable and must not be excessive (see, in particular, *Kurnaz and Others v. Turkey*, no. 36672/97, § 52, 24 July 2007, and the references therein). The Court considers that, since it is not disputed between the parties that the applicant's head injury resulted from the use of force by the security forces in the performance of their duties, the burden rests on the Government to demonstrate with convincing arguments that the force used was indispensable and not excessive (see *Balçık and Others*, cited above, § 31).

43. However, the Government did no more than claim that the applicant had sustained injuries as a result of having resisted arrest by the police, without providing any explanation or documentation which could shed light on the exact circumstances which led the police to use force on the applicant and the nature of the force inflicted on him. In this connection, the Court observes that, although no prior notification was given to the authorities about the meeting, the police had received information that there would be a gathering on that date. The security forces were thus able to take more appropriate measures. As a result, in the particular circumstances of the present case, it cannot be said that the security forces were called upon to react without prior preparation. The Court further observes that, after warnings, the group decided to disband and started to disperse, on its own accord, without a forceful intervention on the part of the police. Having regard to the documentary evidence, the Court finds credible the Government's assertion that the applicant, despite the warnings and the dispersal of the crowd, continued to demonstrate and, as a result, was

arrested. However, there is nothing in the case file to suggest that the police had encountered any violent or active physical resistance on the part of the applicant during the arrest which would explain the injury which he sustained and, particularly, its location. In these circumstances, the Court finds that the Government have failed to furnish convincing or credible arguments which would provide a basis to explain or to justify the head injury sustained by the applicant during his arrest, at the end of a peaceful demonstration.

44. In light of the above, the Court concludes that the force used against the applicant during his arrest was excessive. Consequently, the State is responsible, under Article 3 of the Convention, for the injury sustained by him on that date. It follows that there has been a violation of Article 3 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. The applicant further complained under Article 5 of the Convention that his arrest and subsequent detention in police custody for 1,5 hours was unlawful.

46. However, an examination by the Court of the material submitted to it does not disclose any appearance of a violation of this provision (see *Nurettin Aldemir and Others*, § 57, and *Saya and Others*, § 50, both cited above). It follows that this part of the application is manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed, in total, 7,500 euros (EUR) in respect of pecuniary and non-pecuniary damage. He requested the reimbursement of legal costs and expenses incurred during the domestic proceedings and medical costs.

49. The Government contested the amounts.

50. As regards the alleged pecuniary damage sustained by the applicant, the Court considers that he has failed to substantiate this claim properly. The Court accordingly dismisses it.

51. As regards non-pecuniary damage, the Court considers that the applicant is sufficiently compensated by the finding of a violation of Article 11 of the Convention (see *Oya Ataman*, cited above, § 48). However, the Court finds that the applicant must have suffered pain and distress which cannot be compensated solely by the Court's finding of a violation of Article 3. Having regard to the nature of this violation and ruling on an equitable basis, it awards the applicant EUR 3,000 in respect of non-pecuniary damage (see *Balçık and Others*, cited above, § 62).

B. Costs and expenses

52. The applicant also claimed EUR 13,094.79 for the costs and expenses incurred before the Court. In respect of his claims, the applicant referred to the Istanbul Bar Association's scale of fees.

53. The Government contested the amount.

54. 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 are reasonable as to quantum. In the present case, the applicant has not substantiated that he had actually incurred the costs claimed. Accordingly, it makes no award under this head.

C. Default interest

55. 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

1. *Declares* unanimously the applicant's complaints under Articles 3 and 11 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by 5 votes to 2 that there has been a violation of Article 3 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 11 of the Convention;

4. *Holds* by 5 votes to 2

(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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into new 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 27 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly separate opinion is annexed to this judgment:

Partly dissenting opinion of Judges Vladimiro Zagrebelsky and András Sajó;

F.T.
S.D.

PARTLY DISSENTING OPINION OF JUDGES VLADIMIRO ZAGREBELSKY AND ANDRÁS SAJÓ

While sharing the opinion that in the instant case there has been a violation of Article 11 of the Convention, which is in our view the main point of interest in the case, we were not able to follow the majority in finding also a violation of Article 3.

In the majority's view the applicant's version of his arrest, "namely a gratuitous, excessively brutal attack on his person by several police officers" is unsubstantiated (paragraph 40). However, the majority take account of the traces of a blow on the frontal region of the applicant's head and finds "this injury, particularly because of its location, sufficiently serious to bring it within the scope of Article 3" (paragraph 41). As to the origin of the injury the applicant suffered, the majority acknowledge that he continued to demonstrate despite the police warnings and the dispersal of the crowd. It is in that context that the applicant was arrested and was injured.

The majority find a violation of Article 3 because "the Government have failed to furnish convincing or credible arguments which would provide a basis to explain or to justify the head injury sustained by the applicant during his arrest, at the end of a peaceful demonstration" (paragraph 43). In our view, the peaceful nature of the demonstration has no bearing on the circumstances of the applicant's arrest, because the key factor was his own attitude when he refused to disperse and intervened when the police were arresting a fellow demonstrator (paragraph 6).

When an applicant suffers injuries while in custody and thus in the hands of the authorities, the Court rightly ask the Government to provide convincing reasons and explanations. If such explanations are not offered by the Government, a kind of presumption of the authorities' responsibility often operates (*Anguelova v. Bulgaria*, judgment of 13 June 2002, § 110, and *Ipek v. Turkey*, judgment of 17 February 2004, § 165) But in totally different circumstances like the present ones, where investigations and judicial decisions took place at national level and excluded any police responsibility (paragraph 11-21), the reversal of the burden of proof appears to us unjustified. In fact the majority's reasoning contradicts the conclusions of the national judge without finding any procedural violation of Article 3 and compels the Government to provide a *probatio diabolica* in the procedure before the Court.