



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

1959 · 50 · 2009

SECOND SECTION

CASE OF MÜDET KÖMÜRCÜ v. TURKEY (no. 2)

(Application no. 40160/05)

JUDGMENT

STRASBOURG

21 July 2009

FINAL

21/10/2009

This judgment may be subject to editorial revision.

In the case of Müdet Kömürcü v. Turkey (no. 2),

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 30 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 40160/05) 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 Müdet Kömürcü (“the applicant”), on 13 October 2005.

2. The applicant was represented by Mr and Ms M. Kırdök and Ms M. Hanbayat, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that he had been subjected to torture during his detention in police custody and that the national authorities had failed to establish the criminal and administrative responsibilities of the accused police officers. This had consequently denied him the right to seek compensation before the civil courts. The applicant relied on Articles 3, 6 and 13 of the Convention.

4. On 15 May 2008 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

5. The applicant was born in 1972 and lives in Istanbul.

6. On 25 November 1997 the applicant was taken into police custody at the İstanbul Security Headquarters, where he was held until 2 December 1997 and questioned regarding his alleged involvement in a terrorist organisation.

7. On 2 December 1997 the applicant and nine other detainees were examined by a forensic doctor who noted a 1-cm-long crusted scar on the lower part of the applicant's left leg and a 2-cm-wide lesion surrounding his lower left eyelid.

8. In statements made before the State Security Court on 1 December 1997 and before the Fatih Public Prosecutor on 10 March 1998, the applicant complained about having been subjected to torture by the police officers while in custody. He said, in particular, that he had been subjected to various forms of pressure: he had been beaten and his testicles had been squeezed. He added that he might be able to recognise the perpetrators.

9. On 17 April 1998 the İstanbul Public Prosecutor filed a bill of indictment and charged four police officers (S.A., M.C., E.M. and N.C.) with ill-treating the applicant and three other detainees.

10. On 25 June 1998 the applicant joined the proceedings as a civil party.

11. During hearings before the İstanbul Assize Court, the accused police officers claimed that the applicant had shown resistance at the time of his arrest, which explained the marks found on his body. Consequently, at the hearing held on 29 June 2000 the applicant requested a consultation with the Forensic Medicine Institute in order to determine the exact cause of the marks on his body.

12. In its report issued on 19 December 2001, the Forensic Medicine Institute concluded that the crusted scar on the applicant's leg could have been around seven days old at the time he was examined by the forensic doctor on 2 December 1997 whereas the purple lesion under his left eye could have occurred three to four days previously. The report further stated that the lesions under the eye could have been caused by the application of a hard substance directly to the eye or the person's hitting his eye or having his head forced against a solid and dented surface. The report added that it was not medically possible to identify which of the three reasons was the exact cause.

13. On 20 June 2003 the İstanbul Assize Court held that, on the basis of the evidence in the case file, the complainants had been subjected to ill-treatment which fell under Article 243 of the Criminal Code. Accordingly, the police officers had inflicted this treatment intentionally in order to extract confessions. Referring, *inter alia*, to the findings in the medical reports, the court sentenced as charged M.C. and S.A., who had previously been identified by the applicant during the hearings, to one year's imprisonment and acquitted E.M. and N.C. due to lack of evidence.

14. Both parties appealed. On 29 March 2005 the Court of Cassation quashed the judgment in respect of M.C. and S.A. on the ground of the insufficiency of the investigation. The court noted in particular that the medical reports of the complainants, which had been issued when they were taken into police custody, and their statements taken there, were absent from the case file.

15. The case was remitted to the Istanbul Assize Court, which decided on 24 June 2006 to discontinue the proceedings as the prosecution had become time-barred in the meantime.

II. RELEVANT DOMESTIC LAW

16. A description of the relevant domestic law at the material time can be found in *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, ECHR 2004-IV) and *Zeynep Özcan v. Turkey* (no. 45906/99, 20 February 2007).

THE LAW

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

17. The applicant complained under Article 3 of the Convention that he had been subjected to torture whilst in police custody. Relying on Articles 6 and 13, he further alleged that he had been denied a fair trial and an effective remedy in respect of his ill-treatment complaint. He maintained, in particular, that the national authorities had failed to carry out an effective official investigation capable of establishing the facts and identifying and punishing those responsible for torturing him.

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

Article 3

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

A. Admissibility

19. The Government argued that the applicant had not exhausted domestic remedies. He had neither appealed against the decision of the Istanbul Assize Court discontinuing the proceedings nor used civil or administrative remedies in the domestic courts.

20. The Court reiterates that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case. Accordingly, an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009). In this connection the Court observes that in its decision of 24 June 2005 the Istanbul Assize Court held that the prosecution had become time-barred. Noting the domestic law on statutory time-limits in force at the material time, the Court finds that lodging an appeal against this decision would not have had any prospect of success. The Court concludes that the applicant did everything that could reasonably be expected of him to exhaust domestic remedies in respect of his complaint against the police officers.

The Court further recalls that it has already examined and rejected the Government's preliminary objections regarding the exhaustion of civil and administrative domestic remedies in similar cases (see, in particular, *Ataş and Seven v. Turkey*, no. 26893/02, § 29, 16 December 2008). The Court finds no particular circumstances in the instant case which would require it to depart from such previous conclusions. It therefore rejects this part of the Government's preliminary objection.

21. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

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

22. The Government contested the complaints and argued that the marks found on the applicant's body had occurred during his arrest, when he had shown physical resistance. This had been substantiated by the medical reports.

23. The Court refers to 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; *Selmouni v. France* [GC], no. 25803/94, §§ 96-97, ECHR 1999-V). It will examine the present case in the light of these principles.

24. 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 20 June 2003, found that the complainants had been subjected to ill-treatment and that Officers M.C. and S. A. had been identified as the perpetrators by the applicant during the hearings. In establishing that the treatment of the police officers fell under Article 243 of the Criminal Code, the Istanbul Assize Court further found that they had inflicted this treatment intentionally in order to extract confessions (see paragraph 13 above). The Court further notes that the applicant's allegations included beatings. The applicant was taken into custody on 25 November 1997 and the medical report drawn up on 2 December 2007 found marks on his leg and eye. The crusted scar on the leg was found to have occurred approximately seven days earlier, whereas the lesion around the eye would have been caused three to five days prior to the medical examination.

25. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. 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 such 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).

26. In the present case, regard being had to the applicant's allegations, which were corroborated by the medical reports and the judgment of the İstanbul Assize Court, the Court considers that the Government have not furnished convincing or credible arguments which would provide a basis to explain the marks found on the applicant's body.

27. The Court therefore concludes that the State is responsible under Article 3 on account of the ill-treatment to which the applicant was subjected while in police custody.

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

2. *The responsibility and positive obligation of the State in the light of the procedural aspect of Article 3 of the Convention*

29. The Court reaffirms that when, in principle, an agent of the State is accused of crimes that violate Article 3 of the Convention, the criminal proceedings and sentencing must not become time-barred and the granting of an amnesty or pardon should not be permissible (see *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, § 56, 14 October 2008, and, *mutatis mutandis*, *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 72, 8 April 2008).

30. The Court notes in the instant case that the case against the police officers was dropped on 24 June 2006 as the statutory time-limit had expired. Furthermore, the two police officers were not suspended from duty at any time. Consequently, the Court reiterates its earlier finding in a number of cases that the Turkish criminal-law system as applied can prove to be far from rigorous and have little 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, *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.

31. 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.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

33. The applicant asserted that he had been denied the right to seek compensation before the civil courts as the criminal proceedings against the police officers had been dismissed for exceeding the statutory time-limit. The applicant relied on Article 13 of the Convention, which reads as follows:

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.”

34. The Government rejected this allegation and maintained that effective domestic civil law remedies had been available to the applicant.

35. The Court refers to its findings above (see paragraph 21) and reiterates its conclusion in a number of previous cases that the civil-remedies were inoperative in similar situations, as they did not enable the

applicants to obtain compensation for the alleged violations (see, among others, *Bati and Others*, cited above, § 148). The Court finds no reason in the instant case to depart from its earlier conclusion.

36. There has accordingly been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage. He did not seek an amount for pecuniary damage. The Government submitted that the amount claimed was excessive and unjustified.

39. The Court has found violations of Article 3 of the Convention under its substantive and procedural limbs. In view of their gravity, the Court considers that the applicant has suffered pain and distress which cannot be compensated solely by such findings. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

40. The applicant also claimed 600 Turkish liras (TRY) (approximately EUR 285) for the costs and expenses incurred before the domestic courts and the Court and EUR 5,500 for his lawyer's fee. The applicant documented those expenses on the basis of the legal fee agreement concluded with his representative, according to which the applicant would pay EUR 5,500 to the lawyer when the Court decided the application. As for the remaining costs and expenses, the applicant submitted a list without any invoices. The Government submitted that the applicant had failed to substantiate his claims.

41. 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, regard being had to the documents in its possession, in particular the fee agreements, and the above criteria, the

Court considers it reasonable to award the applicant the sum of EUR 2,000 for his costs before the Court.

C. Default interest

42. 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* that there has been a violation of Article 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, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President