



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

1959 · 50 · 2009

SECOND SECTION

CASE OF TERZİ AND ERKMEN v. TURKEY

(Application no. 31300/05)

JUDGMENT

STRASBOURG

28 July 2009

FINAL

28/10/2009

This judgment may be subject to editorial revision.

In the case of Terzi and Erkmen 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,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 7 July 2009,

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

PROCEDURE

1. The case originated in an application (no. 31300/05) 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 two Turkish nationals, Mr Abdulvahap Terzi and Mr Recahi Erkmen (“the applicants”), on 23 August 2005.

2. The applicants were represented by Mr S. Ulufer, a lawyer practising in Adana. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged that they had been subjected to torture during their detention in the custody of security forces and that the national authorities had failed to establish the criminal and administrative responsibilities of the accused police officers. This had consequently allowed the police officers to enjoy impunity. The applicants relied on Articles 3, 5, 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 applicants were born in 1969 and 1971 and live in Malatya and Sivas respectively.

6. On 21 May 1997, at about midnight, the applicants were taken into police custody at the Mersin Security Headquarters for car theft. They were allegedly ill-treated by police officers, who stripped them naked, beat them and subjected them to electric shocks.

7. On 23 May 1997, at about 9.35 a.m., the applicants were brought before a forensic doctor (S.T.) who reported that there were no traces of ill-treatment on their bodies.

8. The applicants were released the same day (23 May), following which they lodged a complaint with the public prosecutor against the police officers (S.D. and I.A.) who had interrogated them and against the doctor (S.T.) who had drawn up their medical report.

9. The public prosecutor referred the applicants to a forensic doctor who reported the same day (23 May) that the first applicant had red marks of various sizes on both the scapula and the thorax, a 2-cm-wide bruise on the lower right lip and an 0.5-cm-wide ecchymosis on his right eye. Moreover, it was noted that the second applicant had a red 1 x 1 cm skin wound on his groin. The report stated that the marks and bruises on their bodies did not render the applicants unfit for work.

10. By an indictment filed on 27 November 1997, the public prosecutor instituted criminal proceedings against S.D. and I.A. for having insulted and tortured the applicants, and against S.T. for professional misconduct.

11. On 13 December 1999 the Mersin Assize Court delivered its judgment. Referring to the second medical report, which noted the presence of marks on the applicants' bodies, the court found S.D. and I.A. guilty of ill-treatment during the performance of their duties under Article 245 of the former Criminal Code, and sentenced them to imprisonment, which was converted to a fine. The court added that for treatment to be qualified as torture under domestic law, the victims needed to have been charged with a particular crime, whereas in the present case the applicants had only been suspects and were later released without charge. Therefore the officers' acts could not be qualified as torture under Article 243 of the Criminal Code, but as ill-treatment under Article 245. The court acquitted S.T., however. It noted that, although S.T. had not examined the applicants, he had simply written down what they had said and had therefore had no criminal intention.

12. On 31 January 2001 the Court of Cassation quashed the judgment on the ground that the provisions applicable to the police officers and the

doctor were contained in Articles 243 and 230 of the Criminal Code which concerned the offences of torture and negligence in the performance of public duties respectively. The Court of Cassation added that S.D. had previously been convicted of the same offence; therefore the prison sentence should not have been converted to a fine.

13. On 30 January 2002 the Mersin Assize Court persisted in its earlier judgment on the same grounds.

14. By a decision of 15 November 2002, the Joint Criminal Chambers of the Plenary Court of Cassation (Criminal Divisions) (*Yargıtay Ceza Genel Kurulu*) quashed the Mersin Assize Court's judgment and held that the evidence in the case file showed that the applicants had been subjected to torture by S.D. and I.A., who had intentionally inflicted ill-treatment in order to extract confessions; their acts therefore fell under Article 243 of the Criminal Code. As for S.T., he had drawn up the applicants' medical report in the presence of police officers without examining the applicants, and had thus committed an offence under Article 230 of the Criminal Code.

15. On 16 January 2004 the Mersin Assize Court held that the prosecution was time-barred in respect of S.T. However, it convicted and sentenced S.D. to two years and two days' imprisonment and I.A. to two years' imprisonment. S.D. and I.A. were further prohibited from holding public office for a period of six months. S.D. and I.A. appealed.

16. On 24 June and 15 October 2004 the applicants' representatives asked the Court of Cassation to expedite the proceedings, as there was a danger that the prosecution of the offences would also become time-barred in respect of the accused police officers.

17. On 15 December 2004 the Court of Cassation held that the prosecution was indeed time-barred and dismissed the criminal proceedings under the statute of limitations. The decision was deposited with the first-instance court's registry on 24 February 2005.

18. On 11 August 2005 the applicants requested the Ministry of Justice to identify the judges involved in the proceedings and to hold them responsible for not having shown due diligence and for ultimately having allowed the proceedings to become time-barred.

19. On 16 December 2005 the Court of Cassation, and on 13 March 2006 the Ministry of Justice, replied in respect of the judges who had sat on the bench of the Court of Cassation and the Mersin Assize Court respectively. It notified the applicants that no proceedings or investigations were to be instituted against the judges since the complaint concerned the use of judicial power.

20. S.D. was still on duty at the Organised Crime and Trafficking Branch of the Muğla Security Headquarters at the time the application was lodged with the Court.

II. RELEVANT DOMESTIC LAW

21. A description of the relevant domestic law at the material time can be found in *Bati 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 VIOLATIONS OF ARTICLES 3, 6 and 13 OF THE CONVENTION

22. The applicants complained under Article 3 of the Convention that they had been subjected to torture whilst in police custody. Relying on Articles 6 and 13, they further alleged that the criminal and administrative responsibilities of the accused police officers had not been established as the criminal proceedings had not been concluded within a reasonable time, so had ultimately become time-barred. They had therefore not been fair. The police officers had also not been suspended from duty, which had allowed them to enjoy impunity during the criminal proceedings.

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

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

A. Admissibility

24. The Government argued that the applicants had failed to exhaust the domestic remedies available to them within the meaning of Article 35 § 1 of the Convention. In this connection, they submitted that the applicants had not availed themselves of the civil and administrative-law remedies which could have provided reparation for the harm which they had allegedly sustained.

25. The Court reiterates that it has already examined and rejected the Government’s preliminary objections 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 its previous findings. It therefore rejects the Government’s preliminary objection.

26. 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

27. The Government maintained that the medical reports drawn up in respect of the applicants indicated that the bruises and marks on their bodies had not rendered them unfit for work. Accordingly, the treatment of the police officers had not attained the level of severity proscribed by Article 3.

28. 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.

29. The Court observes that, after acquainting itself with the evidence and examining the facts of the case, the Plenary Court of Cassation (Criminal Divisions) (*Yargıtay Ceza Genel Kurulu*), in its decision of 15 November 2002, found that the applicants had been subjected to torture by S.D. and I.A. In establishing that the treatment by the police officers fell under Article 243 of the Criminal Code, the Plenary Court of Cassation further found that they had inflicted this treatment intentionally in order to extract confessions (see paragraph 14 above). The Court further notes that the applicants' allegations included the administration of electric shocks and beatings. These allegations are partly corroborated by the medical reports, as confirmed by the domestic court judgment. In these circumstances, the Court concludes that the injuries observed on the applicants must be attributable to a form of ill-treatment for which the authorities bore responsibility.

30. As to the seriousness of the treatment in question, the Court reiterates that, according to its case-law in this sphere (see, among other authorities, *Selmouni v. France* [GC], no. 5803/94, §§ 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.

31. In this connection, the Court agrees with the domestic court's findings and considers that the treatment complained of was inflicted intentionally by the police officers for the purpose of extracting confessions.

In these circumstances, the Court finds that these acts were particularly serious and cruel, 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.

32. Consequently, there has 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

33. 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 *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, § 56, 14 October 2008). The Court further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

34. The Court notes in the instant case that the case against the police officers was dropped on 15 December 2004 as the statutory time-limit had elapsed. Furthermore, the two police officers were not suspended from duty at any time. In this context 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 no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents if criminal proceedings brought against the latter become time-barred (see, among other authorities, *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.

35. In the light of the foregoing, the Court finds that the criminal proceedings brought against the police officers were inadequate, and therefore in breach of the State's procedural obligations under Article 3 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

37. The applicants relied on Article 5 of the Convention, complaining that they had been taken into police custody without any reasonable suspicion against them. Moreover, they had not been permitted to inform a relative of their custody. The Government contested these arguments.

38. The Court observes that the applicants were taken into police custody on 21 May 1997 and that their detention in police custody ended on

23 May 1997, when the judge released them. However, the applicants only introduced their application with the Court on 23 August 2005, that is, more than six months later (see *Arslan v. Turkey* (dec.), no. 31320/02, 1 June 2006). It follows that the applicants' complaints under Article 5 of the Convention have been lodged out of time and must be declared inadmissible for non-compliance with the six-month rule laid down in Article 35 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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."

40. The applicants claimed 500,000 euros (EUR) and EUR 350,000 respectively in respect of non-pecuniary damage and EUR 4,845 for the costs and expenses incurred before the Court. They did not request any pecuniary damages. The Government submitted that the amounts claimed were excessive and unjustified.

41. 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 applicants have suffered pain and distress which cannot be compensated solely by such findings. Making its assessment on an equitable basis, the Court awards the applicants EUR 15,000 each in respect of non-pecuniary damage.

42. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court observes that the applicants did not produce any document in support of their claims, which the Court accordingly dismisses.

43. 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* inadmissible the applicants' complaints under Article 5 of the Convention;
2. *Declares* the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 3 of the Convention under both its substantive and procedural limbs;
4. *Holds*
 - (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, which sum is to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President