



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

SECOND SECTION

CASE OF ALİCAN v. TURKEY

(Application no. 21868/02)

JUDGMENT

STRASBOURG

26 January 2010

FINAL

26/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Alican 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 Sally Dollé, *Section Registrar*,

Having deliberated in private on 5 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 21868/02) 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 three Turkish nationals, Mr Kamuran Alican, Mr Ramazan Alican and Mr Ahmet Alican (“the applicants”), on 27 February 2002.

2. The applicants were represented by Mr F. Gümüş, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

3. On 10 September 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

4. The applicants were born in 1983, 1946 and 1936 respectively. The first and the third applicant live in Diyarbakır and the second applicant resides in Manisa. The application concerns the wounding of the first applicant, who was eleven years old at the time, and the death of the second and third applicants' sons, Çetin Alican and İlhami Alican, who were fourteen and thirteen years old respectively, as a result of the explosion of

an RPG-7 (anti-tank grenade launcher) grenade outside the applicants' village, Kızıdüzü, in Van.

5. The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

A. The incident

6. On 22 April 1994 Kamuran Alican, Çetin Alican and İlhami Alican took their animals out to graze. When the animals returned to the village without the children, the villagers launched a search party and informed the military nearby; the Van 6th Armoured Brigade Barracks. A search was also unsuccessfully conducted within the military confines. The next day, the dead bodies of Çetin Alican and İlhami Alican were found in a wheat field between the army barracks and Nemrut Mountain. The first applicant, who had injuries to his eyes and legs, was found a few hundred metres away. He was immediately taken to Tatvan State Hospital for treatment. As a result of the explosion, the first applicant suffered partial loss of the sight of one eye and the total loss of sight in the other.

7. According to the first applicant's testimony, given to a prosecutor on 10 June 1994, the children were grazing their sheep in the field when they found an object with an iron head which looked like a bullet. The first applicant left the other two children to find water while they were trying to hit the iron head with pieces of metal. At that moment the bullet exploded.

B. The criminal investigation

8. On 23 April 1994 the Tatvan public prosecutor instigated an investigation into the incident. The prosecutor noted that there were numerous trenches around the area for tank and gun practice. The remains of the ammunition at the scene were secured. Reports and sketches were drafted and a post-mortem examination was conducted on the deceased. The cause of death was attributed to hemorrhagic shock and the doctor deemed it unnecessary to conduct a classic autopsy of the deceased.

9. On 4 May 1994 the Tatvan public prosecutor decided that he lacked jurisdiction to investigate the incident and forwarded his decision to the military prosecutor's office at the Van 21st gendarmerie border brigade commandership ("the military prosecutor").

10. The military prosecutor instigated an investigation into the incident. In particular, he requested the official records regarding the use of grenade launchers by the military during training, and medical reports regarding the health of the first applicant.

11. In the course of the investigation evidence was gathered from the first applicant, the third applicant, the head of the village, Mr M. M. Alican,

a fellow villager, the soldiers on patrol duty on the day of the incident and a higher-ranking military official.

12. On 6 May 1997 the military prosecutor gave a decision that there was no need to initiate criminal proceedings on the ground that there was no fault or negligence attributable to anyone except Kamuran Alican, Çetin Alican and İlhami Alican. In his decision, the prosecutor noted that the children, while they were grazing their animals, had collected, near the trenches, a grenade from an RPG-7 grenade launcher and parts of a rocket, and that the incident had occurred while they were trying to explode them. He further noted that the incident had occurred 2,200 metres away from the Armoured Brigade Barracks where three fields met and that it was not a military area. In this connection, the prosecutor held that, according to the official military records, no unexploded grenades or rockets had been found after military training exercises, that the origin of these artefacts could not be established and that, even assuming that they were launched from the military training field, their range made it impossible for them to have landed 2,200 metres away from it.

13. The decision of the military prosecutor was served on 29 May 1997 on Ahmet Alican, on 7 July 1997 on Kamuran Alican and on 19 July 1997 on Ramazan Alican. The applicants did not object to the military prosecutor's decision.

C. Compensation proceedings

14. On 20 February and 20 May 1995 the applicants made applications to the Ministry of the Interior for compensation on account of the injury sustained by the first applicant and the death of the other applicants' sons. They received no positive reply.

15. On 4 May 1995 the first and the second applicants, and on 17 April 1995 the third applicant, brought actions for compensation against the Ministry before the Van Administrative Court. They were represented by the same lawyers. In their petitions, the applicants claimed that Kamuran Alican had been injured and Çetin Alican and İlhami Alican had died as a result of a mine which had been placed there by the gendarmerie police station. The first applicant requested the court to award 1,000,000,000 Turkish liras (TRL) for pecuniary damage and TRL 100,000,000 for non-pecuniary damage. The second and the third applicant each requested TRL 500,000,000 for loss of income on account of the death of their sons.

1. In respect of Kamuran Alican

16. On 26 January 1998 the Van Administrative Court, basing its decision on the doctrine of "social risk", awarded the applicant's claim in full. Although the amount determined by experts for pecuniary damage was

significantly higher, the court was bound by the amount requested by the applicant.

17. The Ministry appealed.

18. On 8 February 2001 the Supreme Administrative Court quashed the judgment of the first-instance court on the ground that the latter had failed to determine which administrative entity, that is either the Ministry of the Interior or the Ministry of Defence, had responsibility for compensating the applicant.

19. On 28 September 2001 the Van Administrative Court, deciding that the Ministry of the Interior had responsibility, gave its judgment. The court held as follows:

“ ...

According to the report of the public prosecutor, the incident took place 1,500 metres from the Van 6th Armoured Brigade Barracks. (According to the sketch plan the distance is 2,200 metres.) It was a grenade for a rocket launcher called RPG-7, which exploded. The explosion occurred in an area where rockets are launched. Yet the origin of the grenade which caused the explosion is unknown. According to the inventory of the Turkish Military Forces, this type of weapon (RPG-7) is used by the military. However, it was included in the inventory of the 6th Armoured Brigade after the date of the incident in question. The maximum shooting range of the RPG-7 is 700 metres. The results of an investigation into the military units deployed in the region prior to the incident revealed that only one of these units had engaged in shooting practice. According to the records of that unit they had left no unexploded grenades. The rocket launcher in question is frequently used by members of the PKK terrorist organisation. Furthermore, the incident took place 1,500 metres from the barracks, in an area, which according to the attached map, has been declared to be a 2nd degree military security zone.

Although it is established that the explosion occurred in the vicinity of the rocket launching zone, since the distance from the barracks was 1,500-2,200 metres it cannot be accepted that the unexploded grenade which caused the explosion was one used during a military unit's training. The investigation conducted by the military prosecutor at the 21st Gendarmerie Division Commander's office resulted in the same conclusion. Moreover, the conditions in the region are particular: the weapon in question is frequently used and hidden by the terrorist organisation. The grenade might have been left by terrorists who attacked the barracks. It should therefore be concluded that the damage in the present case was not caused by the activities of military forces but rather by terrorist activities. Nevertheless, taking into account the fact that a state of emergency was in force in the region at the time and the extraordinary nature of the damage, compensation should be awarded by the administration in accordance with the theory of “social risk”.

... The plaintiff should therefore be paid his claim in full, TRL 1,000,000,000¹ for pecuniary damage... although according to the expert reports, pecuniary damage in the present case could amount to TRL 19,237,229,000².

1. Approximately EUR 722 at the time of the date of the judgment.

2. Approximately EUR 13,894 at the time of the date of the judgment.

... As regards non-pecuniary damage, the plaintiff should be awarded TRL 100,000,000¹.

20. The Ministry appealed.

21. On 23 May 2002 the Supreme Administrative Court upheld the judgment of the first-instance court.

2. In respect of Ramazan Alican

22. On 19 March 1998 the Van Administrative Court, basing its decision on the doctrine of “social risk”, awarded the applicant a certain amount of compensation.

23. The Ministry appealed.

24. On 22 December 1998 the Supreme Administrative Court quashed the judgment of the first-instance court on the ground that the latter had failed to determine which administrative entity, that is either the Ministry of the Interior or the Ministry of Defence, had responsibility for compensating the applicant.

25. On 16 November 1999 the Van Administrative Court, basing its decision on the doctrine of “social risk”, on the same ground as above, awarded the second applicant TRL 366,954,367² in respect of pecuniary damage together with legal interest running from the date of the incident, 23 April 1994.

26. The Ministry appealed.

27. On 9 April 2001 the Supreme Administrative Court upheld the judgment as regards the amount of compensation awarded but quashed the judgment of the first-instance court in respect of the date from which the interest should run.

28. On 28 November 2001 the Van Administrative Court held that the date of interest would start to run from the date when the applicant lodged an application with the Ministry, i.e. 20 February 1995.

3. In respect of Ahmet Alican

29. On 19 March 1998 the Van Administrative Court, basing its decision on the doctrine of “social risk”, awarded the applicant a certain amount of compensation.

30. The Ministry appealed.

31. On 15 March 2001 the Supreme Administrative Court quashed the judgment of the first-instance court on the ground that the latter had failed to determine which administrative entity, either the Ministry of the Interior or the Ministry of Defence, had responsibility for compensating the applicant.

1. Approximately EUR 71 at the time of the date of the judgment.

2. Approximately EUR 711 at the time of the date of the judgment.

32. On 9 October 2001 the Van Administrative Court, basing its decision on the doctrine of “social risk” on the same ground as above, awarded the third applicant TRL 305,135,146¹ in respect of pecuniary damage together with legal interest running from 20 May 1995.

33. The Ministry appealed.

34. On 31 December 2004 the Supreme Administrative Court upheld the judgment of the first-instance court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

35. The relevant domestic law and practice in force at the material time can be found in the following judgments: *Doğan and Others v. Turkey* (nos. 8803-8811/02, 8813/02 and 8815-8819/02, §§ 68-69 and 75-78, ECHR 2004-VI (extracts)), and *Tepe v. Turkey* (no. 27244/95, §§ 115-119, 9 May 2003).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

36. The applicants complained that the injury sustained by Kamuran Alican and the death of Çetin Alican and İlhami Alican violated their right to life under Article 2 of the Convention. They further maintained under Article 13 of the Convention that no effective investigation was conducted into the incident in order to find those responsible.

37. The Court considers that the applicants' complaint falls to be examined under Article 2 of the Convention alone, which read, in so far as relevant, as follows:

“Everyone's right to life shall be protected by law.”

38. The Government argued that an effective investigation had taken place and that, subsequently, the applicants were awarded compensation. Thus, they considered that the applicants were no longer victims under Article 2, within the meaning of Article 34 of the Convention. The Government further maintained that Kamuran Alican and Ahmet Alican had failed to observe the six-month rule prescribed by Article 35 § 1 of the Convention.

39. The applicants did not specifically respond to the Government's arguments.

1. Approximately EUR 185 at the time of the date of the judgment.

40. The Court considers it unnecessary to determine whether the applicants have victim status or have complied with the six-month rule within the meaning of Article 35 § 1 of the Convention, since this part of the application is inadmissible for the following reasons.

41. The Court reiterates the basic principles laid down in its judgments concerning a State's obligations under Article 2 of the Convention (see, in particular, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III; *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 89 and 91, ECHR 2004-XII; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; and *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 90 and 94-95, ECHR 2002-VIII). It will examine the present case in the light of those principles and in the light of the documentary evidence adduced by the parties, in particular the documents furnished by the parties in respect of the judicial investigations carried out into the impugned incident, and the parties' written observations on the merits.

42. The Court finds, having regard to the undisputed facts established by the domestic authorities, that there is no evidence to conclude beyond reasonable doubt that the unexploded grenade which injured Kamuran Alican and caused the death of Çetin Alican and İlhami Alican had been abandoned there by security forces and that, consequently, the State authorities had failed to take preventive operational measures to protect the life of these individuals from military activities in the region. However, the events leading to the first applicant's injury and the death of the other applicants' sons are matters which must also be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events. In this connection, the Court observes that criminal proceedings were promptly initiated *ex officio* by the Tatvan prosecutor, who conducted an on-site visit and secured the collection of forensic evidence. Subsequently, the investigation was transferred to the military public prosecutor, who heard evidence from witnesses and examined official records regarding the use of grenade launchers by the military during training at the material time. The prosecutor concluded that no fault could be attributed to the military authorities. Although, this decision was served on the applicants (see paragraphs 13 above), the applicants failed to object. They thereby deprived the authorities of the opportunity to redress any deficiencies there might have been in the course of the investigation.

43. As to the administrative proceedings, the Court observes that the applicants chose to institute a compensation claim against the Ministry of the Interior. In their application the applicants claimed that Kamuran Alican had been injured and Çetin Alican and İlhami Alican killed as a result of a mine which had been placed there by the gendarmerie police station (see paragraph 15 above). The Court finds that the courts dealing with the applicants' cases were indisputably empowered to assess the facts

established thus far, to apportion liability for the events in issue and to deliver an enforceable decision. In the instant case, the administrative courts, after having examined the documentary evidence submitted to them, also concluded that no fault could be attributed to the military authorities and that the grenade in question might have been abandoned there by terrorists. Consequently, the domestic courts attributed compensation to the applicants solely on the basis of the “social risk” doctrine”, a no-fault-based principle adopted by administrative courts in Turkey when awarding compensation to those who suffer damage as a result of terrorist acts, or in the fight against terrorism, without establishing the identity of those responsible for the incident. In this connection, the Court notes that the applicants, who were represented by lawyers and who had the opportunity to participate actively in the proceedings and to avail themselves of their procedural rights to influence their course, chose not to appeal against the decisions of the first-instance courts to oppose their factual or legal findings.

44. In the light of the above, the Court finds no indication in the circumstances of the present case, that there has been a failure by the State to provide a mechanism whereby the criminal or civil responsibility of persons who may be held answerable could be established. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

45. The applicants complained under Article 6 § 1 of the Convention that they had been denied a fair hearing on account of the excessive length of the compensation proceedings, as a result of which the amounts awarded to them failed to reflect the real damage incurred. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

46. The Government argued that Kamuran Alican and Ahmet Alican had failed to observe the six-month rule laid down in Article 35 § 1 of the Convention.

47. The applicants did not specifically respond to the Government's arguments.

48. The Court reiterates that the six-month time-limit imposed by Article 35 § 1 requires applicants to lodge their applications within six months of the final decision in the process of exhaustion of domestic remedies. In this connection, it further reiterates that the last stage of

domestic remedies may be reached shortly after the lodging of the application, but before the Court is called upon to pronounce on admissibility (see, for example, *Sağat, Bayram and Berk v. Turkey* (dec.), no. 8036/02, 8 March 2007, and *Yıldırım v. Turkey* (dec.), no. 40074/98, 30 March 2006). The Court observes that the proceedings concerning the applicant's allegations were concluded on 23 May 2002 and 31 December 2004, which was before any Court ruling on admissibility. In view of the Court's above considerations, the Court finds that the application lodged on 27 February 2002 was introduced in conformity with Article 35 § 1 of the Convention. It therefore rejects the Government's preliminary objection in this connection.

49. The Court notes that this complaint 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. This part of the application must therefore be declared admissible.

B. Merits

50. The Government submitted that the length of the proceedings had not exceeded the reasonable time requirement. They further maintained that since an interest rate had been applied to the amount awarded, the applicants had suffered no loss of value due to the length of the proceedings.

51. The applicants maintained their allegations. The first applicant submitted that, due to the excessive length of the proceedings and the belated submission of the expert reports, they had been deprived of the opportunity to introduce an additional compensation claim for the damage they had sustained.

52. The periods to be taken into consideration began on 20 February 1995 for the first and second applicants and on 20 May 1995 for the third applicant (see paragraph 14 above). They ended on 23 May 2002, 28 November 2001 and 31 December 2004 respectively (see paragraphs 21, 28 and 34 above). The proceedings at issue thus lasted seven years and three months, six years and nine months and nine years and seven months, respectively, before two levels of jurisdiction, with two remittals.

53. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

54. As regards the complexity of the three present cases, the Court does not consider that they presented any exceptional legal or factual difficulties since the impugned proceedings concerned an action for compensation in respect of the injury sustained by the first applicant and the death of the

second and the third applicants' son as a result of the explosion of a rocket launcher bullet. The mere fact that the domestic courts had to investigate the truth of the applicants' allegations is not in itself sufficient to conclude that the case was complex, particularly since the administrative courts relied exclusively on documentary evidence and awarded compensation on the basis of the "social risk" doctrine. However, having regard to the subject matter of the case and the socio-economic background of the applicants, the Court considers that the subject matter of the case was important for them.

55. As regards the conduct of the applicants, the Court observes that it does not appear that they contributed to the prolongation of the proceedings. The Government have not argued the contrary.

56. As to the conduct of the domestic authorities, it is true that the domestic courts delivered four decisions in the proceedings during periods of seven years and three months, six years and nine months and nine years and seven months respectively. In this connection, the Court observes that it took the first-instance court initially between two years and eight months and three years to decide on the merits of the applicants' compensation claims. It finds, having regard to the fact that during that time the first-instance court merely asked for the production of documents from various authorities and twice sought experts' report without having to hold hearings, hear witnesses or conduct on-site inspections, such durations to have been unreasonable. Moreover, as regards the proceedings initiated by the first and third applicants, the Court cannot overlook the fact that an additional lengthy period - three years - elapsed between the date of the decision of the Van Administrative Court and the date of the Supreme Administrative Court's determination of the Ministry's appeal against that decision. Such delays, when account is taken of the high rate of inflation in Turkey at the time of the events, undoubtedly caused a significant depreciation in the value of the amounts asked by the applicants and in those subsequently awarded by the domestic courts. Reiterating that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each requirement of that provision, including the obligation to decide cases within a reasonable time (see, among other authorities, *Frydlender*, § 43, cited above), the Court finds that, in the absence of any convincing explanation from the Government, the above proceedings in the instant case were unnecessarily prolonged, as the national courts failed to act with the necessary diligence.

57. In the light of the foregoing, the Court concludes that the "reasonable time" requirement of Article 6 § 1 has not been satisfied. Consequently, there has been a violation of Article 6 § 1 of the Convention as regards the length of the compensation proceedings brought by the applicants.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. Only the first applicant made claims under this provision, requesting 50,000 euros (EUR) for damage.

60. The Government contested the amount requested.

61. The Court considers that the first applicant must have sustained non-pecuniary damage as a result of the prolongation of the compensation proceedings. Having regard to the particular circumstances of the case and ruling on an equitable basis, it awards Kamuran Alica EUR 5,000 under that head.

B. Costs and expenses

62. The first applicant also requested reimbursement of the costs and expenses incurred before the Court. In support of his claim, the applicant submitted a schedule of costs prepared by his lawyer and which calculated the costs and expenses as TRL 3,350 (approximately 1,585 euros (EUR)).

63. The Government contested the amount.

64. The Court reiterates that 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 and the above criteria, the Court considers it reasonable to award the applicant EUR 500 for the proceedings before the Court.

C. Default interest

65. 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 complaint concerning the alleged breach of the applicants' right to a fair hearing on account of the excessive length of the compensation proceedings, as a result of which the amounts awarded to them failed to reflect the real damage incurred, admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the first applicant, Mr Kamuran Alican, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 500 (five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (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 first applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President