



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

SECOND SECTION

CASE OF BEKTAŞ AND ÖZALP v. TURKEY

(Application no. 10036/03)

JUDGMENT

STRASBOURG

20 April 2010

FINAL

20/07/2010

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

In the case of Bektaş and Özalp 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 30 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 10036/03) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Turkish nationals, Mrs Kezban Bektaş and Ms Gülay Özalp (“the applicants”), on 28 January 2003.

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

3. The applicants alleged, in particular, that their relatives had been killed by police officers in breach of Article 2 of the Convention and that the investigation into the killings had been ineffective.

4. On 21 June 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

5. The first applicant was born in 1968 and lives in Adana. The second applicant was born in 1966 and lives in Hatay. The first applicant is the wife of Mr Murat Bektaş and the second applicant is the sister of Mr Erdiņç

Arslan. Mr Bektaş and Mr Arslan were killed by police officers on 5 October 1999.

A. The killings and post-mortem examinations

6. On 5 October 1999 at around 9.30 p.m. six police officers from the anti-terrorist and special forces of Adana police headquarters raided a block of flats where Murat Bektaş, aged 32, and Erdiñ Arslan, aged 22, had been living. The following day at 4.00 a.m. a police report (*olay-yakalama-ev arama-zapt etme-görgü tespiti tutanağı*) was drawn up and signed by thirty-six police officers.

7. According to this report, at 9.00 p.m. on 5 October 1999 Adana police headquarters received an anonymous telephone call. The caller stated that several persons had been acting suspiciously and carrying bags and suitcases into one of the flats on the third floor of a building.

8. A total of thirty-six police officers arrived outside the block of flats at around 9.30 p.m. and secured the surrounding area. Seven officers went up to the landing on the third floor, where there were three doors. There was no lighting in the building and it was dark. As the police officers did not know which flat to enter, they decided to raid all of them at the same time. Immediately thereafter, shots were fired from one of the flats but the police officers were unable to determine from which of the three flats the shots were coming.

9. At that moment one of the doors was opened by a man carrying a gun who, upon seeing the police officers, closed the door immediately and locked it. The officers told this person that they were police officers and ordered him to surrender. As he did not reply, the police officers broke the door and, without entering the flat which was also in the dark, started firing towards the ceiling and the upper parts of the walls.

10. At around that time the police officers realised that the gunfire had in fact been coming from the flat on the opposite side of the landing and ordered the persons in that flat to surrender. However, the occupants chanted slogans and continued shooting. The officers then broke down their door, entered the flat – which was also in the dark – and returned fire. The occupants of the flat then retreated to a room and the police officers intensified their fire towards that room. When the officers realised that no more gunfire was coming from the occupants of the room they stopped firing. In this room the police officers captured a certain Mr Mustafa Köprü alive, and found Mr Erdiñ Arslan's body. Upon discovering that there were explosives in the flat the police officers left the building for their own safety and notified bomb disposal experts, who subsequently arrived and defused the explosives.

11. Meanwhile, a number of other officers entered the first flat and found the second applicant and her three-year-old son as well as the body of Murat Bektaş.

12. The same evening the Istanbul prosecutor arrived at the scene of the incident. In his presence the police officers searched Erdinç Arslan's flat and found a Kalashnikov machine gun numbered SG29101, a Unique firearm, empty cartridges and bullets. The police officers found a Star firearm numbered 1898622 in Murat Bektaş's flat. They also recovered empty Kalashnikov cartridges and bullets by the entrance to Mr Bektaş's flat.

13. On 6 October 1999 at 12.30 a.m. the Adana prosecutor drew up a report from which it appears that he arrived at the scene of the incident after having received a telephone call from the security forces. The prosecutor first conducted an inspection in Erdinç Arslan's flat and observed the presence of a Kalashnikov machine gun, another firearm, several cartridges, bullets, empty cartridges, explosives and materials for making explosives. In Murat Bektaş's flat the prosecutor noted the presence of the Star firearm and the empty Kalashnikov cartridges and bullets. The prosecutor further observed and recorded in his report the existence of numerous bullet marks on the walls and ceilings in both flats. The prosecutor stated in the report that a doctor from the Forensic Medicine Institute had examined the corpses and had observed that there were bullet entry wounds to Erdinç Arslan's head, abdomen and lumbar regions. As regards Murat Bektaş, the doctor had noted bullet entry wounds on his head and hands. The doctor had concluded that classic autopsies were required in order to establish the cause of death. The corpses were then sent to the morgue of the Forensic Medicine Institute.

14. The same day autopsies were carried out on the bodies of the two deceased men. It appears from the autopsy reports that Murat Bektaş was shot in the head and hands. A bullet entry wound was observed on his left temple. Another bullet entry wound was observed on the back of his right hand. The third bullet had entered his left hand through the third finger. Bullet exit wounds were observed in the occipital region, on the right palm and on the left wrist. The experts were unable to determine the number of bullets which Murat Bektaş had received to his head. They maintained that all the shots had been fired at long range. Murat Bektaş's death was stated to have been caused by a fractured skull, laceration of the brain and a cerebral haemorrhage as a result of firearms injuries.

15. The report concerning Erdinç Arslan revealed that he had been shot in the head and chest. Two bullet entry wounds were observed in the left orbital region. One bullet entry wound was found on the left side of the chest. The bullet exit wounds were found on the left parietal region and the right side of the lumbar region. The forensic experts concluded that the bullets to Erdinç Arslan's head had been fired at long range, but they were

unable to determine the distance because the deceased's clothing had been covering his body.

16. Also on 6 October 1999 a police chief informed the Adana prosecutor that the fingerprints taken from “the two dead terrorists” did not match any fingerprints in their archives.

B. Investigation into the circumstances of the killings

17. On 7 October 1999 Mustafa Köprü, who survived the shooting, made a statement before the Adana prosecutor regarding the incident. He maintained, *inter alia*, that he and Erdinç Arslan had rented the flat ten days before the incident and had been manufacturing explosives there. On the day of the incident, when he had heard footsteps on the roof, he had approached the entrance to the flat and opened fire on the police officers who were outside the flat. The police officers had then returned fire and shot Erdinç Arslan but he had not seen Erdinç Arslan firing the Kalashnikov machine rifle.

18. On 8 October 1999 the prosecutor questioned the first applicant, who maintained, *inter alia*, that her husband had not had a firearm and that he had actually been on the telephone when the police officers had suddenly stormed their flat without any prior warning, opened fire and shot her husband. She had then hidden in the flat with her son. After her husband had been hit, the officers had continued firing into the flat. The officers had not informed them that they were police officers. The first applicant also gave a description of the officer who shot her husband. She stated that she had heard the officers unsuccessfully ordering the occupants of the other flat to surrender. She maintained that the shooting had continued for a while and, when it stopped, two uniformed men had entered her flat and taken her and her son outside. Before she left the flat she had looked at her husband's body and she had not seen any weapons next to him. She requested that the persons responsible for killing her husband be punished.

19. On 12 October 1999 the prosecutor questioned the police officers who had participated in the operation. The officers stated, *inter alia*, that they had been surprised on their arrival on the third floor by the fact that there were three doors, one of which turned out to be the door to a storeroom. While they were reflecting on how to proceed, shooting had come from one of the flats. As they could not establish from which direction the gunfire was coming, they had decided to raid all the flats. At that moment a man with a pistol in his hand had briefly emerged from one of the doors and then gone back inside. The officers had then broken the door to that flat (occupied by Murat Bektaş) and fired their weapons at random in order to warn the occupants. They had then realised that the gunfire had actually come from the flat on the other side of the landing (Erdinç Arslan's flat) and had called for assistance from the Special Forces.

20. Officers Nurettin Bülbül, Eyüp Yalçinkaya and Haydar Erol from the anti-terrorist branch stated that, together with the officers from the special forces, officer Bülbül and officer Yalçinkaya had broken the door to Mr Arslan's flat and opened fire. The occupants of the flat who had been firing at them had then retreated to a room and continued to fire from there. According to officer Bülbül, the armed clash had continued for approximately ten minutes, whereas officer Yalçinkaya was of the opinion that it had lasted for five minutes. After the operation, officers Bülbül and Yalçinkaya had seen a Kalashnikov rifle, a pistol, a cartridge and explosives in the room. Officer Yalçinkaya added that he had used a Kalashnikov rifle in the operation.

21. Officers Fevzi Mustan and Muammer Topaç from the special forces told the prosecutor that when they and their team arrived outside the building they had heard gunfire and had gone up to the third floor where they had met with officers from the anti-terrorist branch. No fire had been opened from Mr Arslan's flat before they stormed the flat. After having entered the flat they had asked the occupants of the flat to surrender but one shot had been fired in response from one of the rooms, followed by an object which had been thrown towards them from the same room and which they had considered at the time to be a bomb. They and another colleague from the anti-terrorist branch had then opened fire towards the room; they had used M16 rifles and the remaining officer had used a Kalashnikov rifle. Officer Mustan stated that he was sure that only a total of three officers – including himself – had opened fire. The firing had continued for approximately five to six seconds. After the firing had ceased, they had seen a pistol in the room but no bombs or any other rifles.

22. On 13 October 1999 Adana Magistrates' Court questioned the police officers. Officers Mustan and Topaç stated that on their arrival on the third floor landing gunfire had been coming from inside Mr Erdinç's flat. The Magistrates' Court rejected the prosecutor's request to order the pre-trial detention of six of the police officers, namely Nurettin Bülbül, Haydar Erol, Eyüp Yalçinkaya, Ali Erdurucan, Fevzi Mustan and Muammer Topaç. The following day the prosecutor successfully lodged an objection against the Magistrates' Court's decision.

23. On 18 October 1999 the first applicant identified police officer Ali Erdurucan as the person who had shot her husband Murat Bektaş.

24. The same day the six police officers being held in pre-trial detention lodged an objection against their detention. The following day the Adana Assize Court ordered the release of five of them and rejected the objection lodged by Officer Ali Erdurucan.

25. On 21 October 1999 the prosecutor heard evidence from the second applicant, who contended that on the day of the incident at around 9.35 pm. her brother Erdinç Arslan had telephoned her. She had heard him shouting

“Let me go! Leave me!”. She maintained that she had heard noises on the telephone but not gunfire.

C. Criminal proceedings against the police officers

26. On 25 October 1999 the Adana prosecutor filed a bill of indictment with the Adana Assize Court. In the indictment the prosecutor stated that, prior to the operation, the security forces had failed to conduct an investigation or gather information about the suspected persons and had thus failed to plan the operation in a proper manner. The prosecutor noted that officers Nurettin Bülbül, Haydar Erol, Eyüp Yalçinkaya and Ali Erdurucan had broken down the door to Murat Bektaş's flat and entered there without issuing a warning. The prosecutor considered that, although the officers alleged that they had not directly aimed at Murat Bektaş, the wounds to Murat Bektaş's head could not have been the result of random firing. As for the firearm found next to Mr Bektaş's body, the prosecutor stated that his office had been unable to determine how the firearm had come to be there; no cartridges or bullets belonging to that firearm had been found at the scene of the incident.

27. With regard to the killing of Erdiñ Arslan, the prosecutor observed in his indictment that the wound to Mr Arslan's head could not have been the result of warning shots. Noting that the deceased had only fired once, the prosecutor considered that officers Nurettin Bülbül, Fevzi Mustan and Muammer Topaç had exceeded the limits of self-defence by killing him.

28. The prosecutor charged Ali Erdurucan, Haydar Erol and Eyüp Yalçinkaya with the offence of murder. Nurettin Bülbül was charged with murder and with exceeding the limits of legitimate self-defence. Finally, Fevzi Mustan and Muammer Topaç were charged with the offence of causing death by exceeding the limits of legitimate self-defence.

29. On 12 December 1999 the Adana Assize Court (hereinafter “the trial court”) held the first hearing on the merits of the case. On the same day the applicants and the deceased men's other relatives joined the proceedings as interveners.

30. On 2 February 2000 the representative for the interveners requested the trial court to order an investigation into the accused police officers' superiors who had planned and controlled the operation. The trial court dismissed this request, holding that the intervening parties should apply to the prosecutor's office.

31. On 28 March 2000 the trial court had regard to the time spent by Officer Ali Erdurucan in detention and also noted that the collection of the evidence was almost complete. Noting that Mr Erdurucan had a permanent residence, the trial court ordered his release from prison.

32. During the subsequent hearings the trial court heard evidence from the defendants, the applicants, the intervening parties, the police officers

who participated in the operation, the deceased persons' neighbours and Mustafa Köprü. Mr Köprü changed his previous statement and maintained that Erdiñ Arslan had in fact fired the Kalashnikov. The trial court also conducted an on-site inspection of the two flats and ordered experts to take photographs of the scene of the incident and to draw up a sketch map.

33. During the on-site inspection on 19 February 2001, the trial court ordered an expert to draw up a report in order to determine whether the shots had been fired at random and to establish the accuracy of the police officers' account that they had not been able to establish the source of the firing at the beginning of the operation.

34. On 16 March 2001 the expert submitted his report to the trial court. He concluded that the police officers had fired their guns at random. The expert also considered that it was probable that the police officers had failed to determine the direction of the shots fired from the Kalashnikov because shots from such a powerful weapon would have caused an echo in the building.

35. On 9 May 2001 the trial court rendered its judgment. It held that there was no evidence in the case file to prove that there had been a premeditated plan to kill the two persons or that the firearms found at the scene of the incident had been planted there by the police officers who had participated in the operation.

36. With regard to the killing of Murat Bektaş, the trial court rejected the first applicant's allegation that the lights had been on in the flat at the time of the incident and that her husband had not had a firearm. The trial court considered it probable that Murat Bektaş had had a firearm in his hand as there were armed men in the building. The trial court further noted that the police officers had planned to render Mr Bektaş harmless in order to be able to arrest him. It also observed that Murat Bektaş had not fired his gun.

37. The trial court observed that the police officers had fired a total of eighteen bullets and that Mr Bektaş had been shot in the head, whereas the police officers should have aimed at other parts of his body, such as his legs and feet, in order to avoid the risk to his life. The trial court concluded that Nurettin Bülbül, Haydar Erol, Eyüp Yalçinkaya and Ali Erdurucan had exceeded the limits of their powers in resorting to force and had thus caused Murat Bektaş's death. However, the trial court could not determine which officer had actually killed Murat Bektaş and it thus reduced the four police officers' sentences to eight years, before further reducing them to six months and then suspending them altogether.

38. As to the killing of Erdiñ Arslan, the trial court noted at the outset that the security forces had received information that the deceased and Mustafa Köprü had been making explosives in their flat with a view to carrying out bomb attacks on the provincial offices of the three political parties which formed the coalition Government at the time. The trial court observed that, according to the expert report of 7 October 1999, Erdiñ

Arslan and Mustafa Köprü's hand swabs revealed traces of antimony. It further noted that an exchange of gunfire had begun between the police officers who had secured the area outside the building and Erdinç Arslan and Mustafa Köprü, who had been in the flat. It recorded that twelve bullets had been fired from the Kalashnikov and nine from the Unique firearm; both these weapons had been found in Mr Arslan's flat. The court noted that a bullet had been fired from the room in the direction of the police officers who had been on the other side of the door.

39. The trial court considered that the police officers, who had been facing two persons armed with weapons and bombs in a confined place, could not have been expected to fire at non-life-threatening parts of Mr Arslan's body. It therefore held that Nurettin Bülbül, Fevzi Mustan and Muammer Topaç had remained within the limits of legitimate self-defence. It concluded that there were no grounds for imposing any punishment on those officers for the killing of Erdinç Arslan.

40. On 6 June 2001 the applicants appealed against the judgment of 9 May 2001 and maintained that the use of lethal force in the circumstances of the case had not been absolutely necessary.

41. On 29 May 2002 the Court of Cassation upheld the judgment of the Adana Assize Court. On 31 July 2002 the Court of Cassation's decision was deposited with the registry of the Adana Assize Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. The relevant domestic law and practice are set out in the judgment of *Kasa v. Turkey* (no. 45902/99, §§ 57-62, 20 May 2008).

THE LAW

ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

43. The applicants complained under Article 2 of the Convention that the use of force by the security forces against Murat Bektaş and Erdinç Arslan had been disproportionate and had resulted in their unlawful killing. They further maintained under the same head that the investigation and the criminal trial had been flawed and ineffective. They contended in this connection that the acquittal of Nurettin Bülbül, Fevzi Mustan and Muammer Topaç, and the deferral of the execution of the sentences imposed on Nurettin Bülbül, Haydar Erol, Eyüp Yalçınkaya and Ali Erdurucan, had undermined the deterrent role of the judicial system in preventing violations of the right to life.

Article 2 of the Convention reads as follows:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

44. The Government contested the applicants' arguments.

A. Admissibility

45. The Court notes that the application 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. It must therefore be declared admissible.

B. Merits

1. The killing of Murat Bektaş

46. The first applicant alleged that her husband had been killed unlawfully and that the police officers responsible for the killing had not been punished.

47. The Government submitted that there had never been any intention to kill the applicant's husband; the police officers standing at the entrance to the flat had fired warning shots towards the ceiling and not directly at Mr Bektaş.

48. The Court observes that it has already been established by the Adana Assize Court that the police officers exceeded the limits of their powers and unlawfully caused the death of Murat Bektaş. Instead of aiming at other parts of his body – such as his legs and feet – and thus avoiding the risk to his life, the four police officers fired eighteen bullets and shot Mr Bektaş in the head. For the Court, that conclusion amounts to an acknowledgment in substance that the death of Mr Bektaş was in breach of Article 2 of the Convention. This conclusion makes it unnecessary for the Court to establish whether the force used by the police officers was absolutely necessary and justified under Article 2 § 2 of the Convention. The Court's examination of

the first applicant's complaint will therefore be limited to ascertaining whether or not the national authorities afforded appropriate and sufficient redress for the violation. In this connection the Court notes that, although the police officers who killed Mr Bektaş were found guilty of the offence of murder, they were sentenced to six months' imprisonment which, in any event, was suspended.

49. Article 2 of the Convention imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII; *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 67 and 89, ECHR 2002-VIII; *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V). Compliance with the State's positive obligations under Article 2 requires the domestic legal system to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

50. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence, ensuring adherence to the rule of law and preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004-XII; *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts); *Türkmen v. Turkey*, no. 43124/98, § 51, 19 December 2006).

51. Although the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 61, 20 December 2007).

52. In the present case, although the domestic law permitted the trial court to mete out much higher sentences, it handed down extremely lenient sentences for the offence of unlawful killing and then suspended them altogether. By imposing such disproportionate sentences, the trial court used its power of discretion to lessen the consequences of a serious criminal act rather than to show that such acts could in no way be tolerated (see *Okkalı*, cited above, § 75).

53. In conclusion, the Court considers that the criminal-law system, as applied to the killing of Mr Bektaş, proved to be far from rigorous and had little dissuasive effect capable of ensuring the effective prevention of unlawful acts, such as those complained of by the first applicant.

There has accordingly been a violation of Article 2 of the Convention in respect of the killing of Murat Bektaş.

2. *The killing of Erdinç Arslan*

54. The second applicant argued that the force used by the police officers in killing her brother Erdinç Arslan had not been absolutely necessary.

55. The Government were of the opinion that there was insufficient evidence to prove that the police officers had acted with the intention to kill.

56. As for the Government's submission, the Court reiterates that the text of Article 2 read as a whole demonstrates that paragraph 2 does not primarily define instances where it is permitted to intentionally kill an individual, but describes situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of any of the purposes set out in subparagraphs (a), (b) or (c). In this respect the use of the term "absolutely necessary" in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8-11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in the subparagraphs of the Article (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 148-149, Series A no. 324).

57. In the present case the Court notes firstly that it is undisputed between the parties that the second applicant's brother Erdinç Arslan was shot and killed by police officers. It follows therefore that the Government bear the burden of proving that the force used by the police officers was no more than absolutely necessary, within the meaning of Article 2 § 2 of the Convention. In examining whether the Government have discharged their burden the Court will not only examine whether the use of lethal force used by the police officers was no more than absolutely necessary, but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to life (see *Makaratzis v. Greece* [GC], no. 50385/99, § 60, ECHR 2004-XI).

58. In this connection the Court reiterates that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of facts, where this is not rendered unavoidable by the circumstances of a particular case (see *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. Though the Court is not bound by the findings of the domestic authorities, in normal circumstances

it requires cogent elements to lead it to depart from the findings of fact reached by such authorities (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, § 29-30, Series A no. 269).

59. The central importance of the protection afforded under Article 2 of the Convention is such that the Court is required to subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force, but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination, even where domestic proceedings and investigations have already taken place (see *Erdoğan and Others v. Turkey*, no. 19807/92, § 71, 25 April 2006).

60. As for the organisation of the operation, the Court observes that thirty-six police officers arrived outside the block of flats half an hour after having received an anonymous telephone call informing them that a number of persons had been going in and out of a flat, carrying suitcases. The Court has not been provided with information to show that the police officers had to act as swiftly as they did and that it was not possible to gather more information about the activities of the suspicious persons by, for example, observing or following them.

61. However, even assuming that the police officers had to act within that limited time, not even the most rudimentary attempt appears to have been made to establish the exact location of the target flat. As set out above, the confusion created by that uncertainty tragically resulted in the loss of life of Mr Bektaş. For the Court, the decision taken by the police officers to raid all three flats simultaneously, coupled with the fact that they were ready to employ lethal force with little hesitation, is an indication that no discernible concern was entertained by the police officers for the lives of the residents of the three flats.

62. Similarly, the Court has not been provided with any information to show that the police officers had given thought to employing non-lethal methods, such as securing the area around the block of flats and then evacuating the residents who had nothing to do with the operation and, if all else failed, using non-lethal weapons. In fact the Government, who were requested by the Court to provide documentary evidence concerning the planning and conduct of the operation, have failed to do so. As such, the Court is unable to establish how exactly the police officers were instructed by their superiors to apprehend the suspects.

63. In the light of the foregoing, the Court shares the prosecutor's view (see paragraph 26 above) that no adequate steps were taken in the planning of the operation.

64. With reference to the carrying-out of the operation itself the Court will have regard to the investigation, trial and documents drawn up. As stated above, the Adana Assize Court concluded that the police officers

responsible for the killing of Mr Arslan had acted within the permissible limits of self-defence (see paragraph 39 above).

65. The Court observes at the outset that the police officers who killed Mr Arslan on 5 October 1999 were not questioned until 12 October 1999. For the Court, a delay of seven days in questioning the main suspects in an investigation into the killings fails to show the required diligence. It not only creates an appearance of collusion between the judicial authorities and the police, but is also liable to lead the relatives of the deceased – as well as the public in general – to form the opinion that members of the security forces operate in a vacuum in which they are not accountable to the judicial authorities for their actions. Moreover, it cannot be excluded that the failure to question the police officers in a timely fashion, coupled with the fact that they continued in the meantime to work as police officers, created the risk of collusion with one another (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 330, ECHR 2007-...).

66. Secondly, it is to be noted that the police officers who took part in the investigation also carried out the initial investigation themselves and secured the crucial evidence such as bullets, spent cartridges and weapons. The Court considers that allowing the very same police officers who killed the second applicant's brother to secure the crucial evidence is so serious as to taint the independence of the entirety of the criminal proceedings (see, *mutatis mutandis*, *Ramsahai*, cited above, §§ 339-341).

67. Thirdly, the Court is struck by the trial court's failure to attempt to clarify the conflicting information with which it was provided concerning the number of times the deceased Mr Arslan and Mr Mustafa Köprü allegedly opened fire. According to the initial police report, fire was opened from Mr Arslan's flat on a number of occasions and subsequently there was crossfire between the police officers and the occupants of the flat (see paragraph 10 above). According, however, to the information given by two of the police officers from the Special Forces who took an active part in the operation, there was no crossfire and only one shot was fired from the room where Erdinç Arslan and Mustafa Köprü had been hiding (see paragraph 21 above).

68. Fourthly, there is no information in the case file to indicate that the two weapons allegedly found in Erdinç Arslan's flat were examined for fingerprints to establish whether or not they had been handled by the deceased or by Mustafa Köprü. This failure exacerbates the failure to clarify the above-mentioned contradictory information concerning the exchange of fire.

69. In its judgments in a number of cases against Turkey concerning similar operations during which police officers used lethal force, the Court held that it could not with detached reflection substitute its own assessment of the situation for that of the officers who had been required to react in the heat of the moment; to hold otherwise would be to impose an unrealistic

burden on the States and their law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others (see *Gülen v. Turkey*, no. 28226/02, § 37, 14 October 2008; *Kasa*, cited above, § 87; *Yüksel Erdoğan and Others v. Turkey*, no. 57049/00, § 99, 15 February 2007; *Perk and Others v. Turkey*, no. 50739/99, § 72, 28 March 2006). In the present case, however, owing to the lack of proper planning of the operation, coupled with the defects in the investigation which are highlighted above, the Government have not proved to the Court's satisfaction that the police officers had to act in the heat of the moment and that the lethal force used by them was no more than absolutely necessary.

Accordingly, there has been a violation of Article 2 of the Convention in respect of the killing of the second applicant's brother, Erdinç Arslan.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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

71. The first applicant claimed that her husband had been working as a cleaner in a factory, earning approximately 50 euros (EUR) per month. After he was killed she had been unable to find a job for a period of two years and during that time she and her son had not had any income. She thus claimed the sum of EUR 2,800 in respect of pecuniary damage. This sum represented her deceased husband's wages for the two years in question, together with interest. The first applicant also claimed the sum of EUR 100,000 in respect of non-pecuniary damage.

72. The second applicant stated that her deceased brother Erdinç Arslan had been a university student and had not had any income. Under the head of pecuniary damage she claimed EUR 200 in respect of her brother's funeral expenses. She also claimed EUR 100,000 in respect of non-pecuniary damage.

73. The Government considered that the sums claimed by the applicants were excessive, unsubstantiated and therefore unacceptable.

74. The Court's case-law has established that there must be a clear causal connection between the damages claimed by an applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994,

§§ 16-20, Series A no. 285-C). The Court has found (see paragraphs 53 and 69 above) that the authorities were liable under Article 2 of the Convention for the deaths of the first applicant's husband Murat Bektaş and the second applicant's brother Erdiñç Arslan. It also notes that the first applicant's submission that her husband had been providing for her and her son financially was not disputed by the Government. In these circumstances, a direct causal link has been established between the violation of Article 2 and the first applicant's loss of the financial support provided by her husband. The Court also considers that the sum claimed by the second applicant in respect of the funeral expenses of her brother does not, owing to its nature, require substantiation.

75. Furthermore, the Court is not persuaded that the sums claimed by the applicants for pecuniary damage are excessive. It therefore awards the applicants the sums claimed by them in full – that is, EUR 2,800 to the first applicant and EUR 200 to the second applicant – in respect of pecuniary damage.

76. Deciding on an equitable basis, the Court also awards the first applicant EUR 60,000 and the second applicant EUR 40,000 in respect of non-pecuniary damage.

B. Costs and expenses

77. The applicants claimed EUR 500 for translation costs and EUR 1,000 in respect of the fees of their legal representative, and submitted documentary evidence in respect of their claims.

78. In the Government's opinion, the applicants had not submitted any documents in respect of their claims.

79. 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. Contrary to what was suggested by the Government, the applicants did in fact submit to the Court fee agreements with their legal representative and a certified receipt from an interpreter in respect of the amounts claimed by them. Thus, regard being had to the information and documents in its possession, the Court considers it reasonable to award the applicants jointly the sum of EUR 1,500 for their costs and expenses.

C. Default interest

80. 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 2 of the Convention in respect of the killing of the first applicant's husband Murat Bektaş;
3. *Holds* that there has been a violation of Article 2 of the Convention in respect of the killing of the second applicant's brother Erdinç Arslan;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with 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) to the first applicant, Mrs Kezban Bektaş, EUR 2,800 (two thousand eight hundred euros) in respect of pecuniary damage and EUR 60,000 (sixty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) to the second applicant, Ms Gülay Özalp, EUR 200 (two hundred euros) in respect of pecuniary damage and EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable; and
 - (iii) to the two applicants jointly, EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to them;
 - (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President