



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

SECOND SECTION

CASE OF ÖZCAN AND OTHERS v. TURKEY

(Application no. 18893/05)

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 Özcan and Others 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. 18893/05) 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 sixteen Turkish nationals (“the applicants”) on 29 April 2005. The applicants, whose particulars are set out in the appendix, are close relatives of Yılmaz Özcan, who was killed during a military operation on 24 September 2000. At the time of his death Yılmaz Özcan was forty-two years old.

2. The applicants were represented by Ms Kadriye Doğru, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. Relying, *inter alia*, on Articles 2 and 3 of the Convention, the applicants alleged that Yılmaz Özcan had been severely beaten and then shot and killed by a first lieutenant. They also argued that the investigation into the killing had been ineffective.

4. On 25 June 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

THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. On 26 October 1999 the Koyulhisar Magistrates' Court found Yılmaz Özcan guilty of violating the Forest Law because the trunks of unlawfully cut down trees were found in his garden. He was sentenced to six months' imprisonment. On 13 July 2000 the Koyulhisar prosecutor issued a warrant for his arrest. What followed, particularly the events which took place on 24 September 2000, is disputed by the parties.

6. The facts as presented by the applicants are set out in Section B below (see paragraph 7). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 8-10). The documentary evidence submitted by the applicant and the Government is summarised in Section D (see paragraphs 11-45).

B. The applicants' submissions on the facts

7. Early in the morning of 24 September 2000 the commander of the Koyulhisar Gendarme Squadron, first lieutenant Muhammet Sevinç, non-commissioned officer Resul Askerden, Koyulca prosecutor Mehmet Çömük and a number of gendarme soldiers arrived at the applicants' house to arrest Yılmaz Özcan. Yılmaz Özcan was then handcuffed and taken out of the house and into the garden. Other occupants of the house, who were not allowed to leave the house, then heard four or five rounds of gunfire. When they looked out of the window, they saw the first lieutenant hitting Yılmaz Özcan on the head with the butt of his rifle. When Yılmaz Özcan asked the first lieutenant to stop, four or five soldiers began kicking him and hitting him with the butts of their rifles. The first lieutenant then shouted "kill him". When one of the soldiers asked them to stop because "otherwise they would kill" Yılmaz Özcan, the first lieutenant told the soldier to shut up, before shooting Yılmaz Özcan in the back of the neck at close range. The soldiers then threw Yılmaz Özcan's body over the fence surrounding the garden and dragged it down the slope. After the incident the soldiers cleaned up the blood in the garden and took the spent bullet cases with them.

C. The Government's submissions on the facts

8. On 23 September 2000 first lieutenant Muhammet Sevinç put together a plan to arrest Yılmaz Özcan. The following day the first lieutenant, accompanied by his soldiers and the Koyulca prosecutor Mehmet Çömük, left for the applicants' village. Approximately one kilometre from the village one of the tyres of the vehicle carrying the prosecutor blew out. As a result, the prosecutor and his driver remained there. The rest of the group continued on their way.

9. The soldiers took positions in the form of two circles around Yılmaz Özcan's house before the first lieutenant knocked on the door. Yılmaz Özcan opened the door, ran back inside the house and jumped from the window into the garden at the rear of the house. There he was met by expert sergeant Ömer Davut Akyol, who was one of the soldiers forming the first circle around the house. When Yılmaz Özcan managed to evade him, the expert sergeant gave chase but was unable to catch up. The expert sergeant then fired into the air at least twice.

10. Yılmaz Özcan ran down the slope surrounding the garden for approximately seventy-six metres but was caught by private Fatih Yılmaz, who was in the second circle and who had by then heard the gunfire and cocked his rifle. A scuffle then ensued between private Yılmaz and Yılmaz Özcan and they rolled down the slope, which was very steep. At some point, private Yılmaz was lying on his back when Yılmaz Özcan made an attempt to escape. Private Yılmaz then fired his rifle at least twice. One of the bullets entered the back of Yılmaz Özcan's neck and exited his face, killing him instantly. According to the Government, medical reports revealed that, during their scuffle with Yılmaz Özcan, expert sergeant Ömer Davut Akyol suffered injuries which prevented him from working for a period of three days, and private Fatih Yılmaz suffered injuries which prevented him from working for five days afterwards.

D. Documentary evidence submitted by the parties

11. The following information appears from the documents submitted by the parties.

1. Documents pertaining to the criminal investigation into the killing

12. According to two incident reports prepared by the gendarme soldiers, the soldiers arrived at the village at around 5.30 a.m. on 24 September 2000. Yılmaz Özcan jumped out of the window of his house, evaded the expert sergeant Ömer Davut Akyol who had been waiting in the garden, and started running downhill until he was stopped by private Fatih Yılmaz. A scuffle then ensued between Yılmaz Özcan and private Yılmaz. During the scuffle Yılmaz Özcan attempted to take private Yılmaz's rifle but

the rifle went off. As a result, Yılmaz Özcan was shot in the neck and died on the spot.

13. At 7.00 a.m. the same day Mr Fuzuli Aydoğdu, who was also a prosecutor in the town of Koyulhisar, arrived at the scene. The relatives of the deceased complained to Mr Aydoğdu that Yılmaz Özcan had been shot and killed in the vicinity of the house and his body had then been dragged down the hill by the soldiers. When the applicants made that complaint to the prosecutor, the soldiers who had taken part in the operation examined the area between the house and the location of the body, and told the prosecutor that there were no bloodstains or other marks to indicate that the body had been dragged along the ground. While examining the area the soldiers found two spent bullet cases discharged from a Kalashnikov type automatic rifle. It later turned out that the bullets had been fired from the expert sergeant Ömer Davut Akyol's rifle.

14. The prosecutor, with the assistance of a doctor, examined the body and observed a large number of injuries on the body as well as a single bullet entry hole on the back of the neck. The body was then taken to Sivas hospital for a full post-mortem examination.

15. On the same day the prosecutor Aydoğdu began questioning the soldiers who had taken part in the operation.

16. In his statement of 24 September 2000 private Fatih Yılmaz confirmed the version of events set out in the above-mentioned on-site reports, and added that he did not know how the rifle had come to be fired. Private Yılmaz was then released by a judge who considered that the “nature of the offence” and the fact that private Yılmaz was “performing his military service” did not require him to be remanded in custody.

17. Expert sergeant Ömer Davut Akyol told the prosecutor the same day that when Yılmaz Özcan had evaded him and started running down the hill, he had fired two rounds into the air. He had then given chase and heard one or two rounds of gunfire emanating from the bottom of the hill. When he arrived at the scene Yılmaz Özcan was already dead.

18. The non-commissioned officer Resul Askerden told the prosecutor the same day that he had heard the expert sergeant fire two or three rounds into the air. He had then started running downhill after Yılmaz Özcan and had heard three or four rounds of gunfire coming from the bottom of the hill. On his arrival at the scene Yılmaz Özcan had already been killed.

19. On the same day private Fatih Yılmaz and expert sergeant Ömer Davut Akyol were examined at Koyulhisar State Hospital, where the doctors observed a number of bruises on their bodies (see paragraph 10 *in fine* above).

20. The prosecutor questioned first lieutenant Muhamet Sevinç on 27 September 2000. The first lieutenant told the prosecutor that on their arrival at his house Yılmaz Özcan had been outside the house and had lied, saying he was not Yılmaz Özcan and that Yılmaz Özcan was his father. He

had then gone inside to call his father. The first lieutenant had then heard noises at the back of the house, then the gunfire, but he had not witnessed the incident himself.

21. Four gendarme soldiers questioned by the prosecutor on 27 September 2000 stated that on their arrival Yılmaz Özcan had been outside the house. One of the soldiers said that he had heard a single gunshot from the bottom of the hill, while another one told the prosecutor that he had heard three gunshots from the same direction. The remaining two soldiers were not sure how many gunshots they had heard.

22. On 3 and 4 October 2000 the prosecutor questioned two of the applicants, who are daughters of the deceased Yılmaz Özcan. They stated that a number of soldiers had arrived at their house and had taken their father into the garden. They had then heard their father begging the soldiers to release him but that the soldiers had shot and killed him.

23. In the meantime, on 25 September 2000 a post-mortem examination was carried out on Yılmaz Özcan's body at the Sivas hospital. It was established that the large number of injuries on Mr Özcan's body had been caused before his death.

24. On 13 October 2000 the Şebinkarahisar prosecutor filed an indictment with the Şebinkarahisar Assize Court and charged private Fatih Yılmaz with manslaughter.

25. On 22 November 2000 members of the Şebinkarahisar Assize Court and an expert visited the area where the incident had taken place. Private Şenel Selcan, who claimed to have been standing next to private Fatih Yılmaz at the time of the killing of Yılmaz Özcan, told the expert that at the time of the shooting Yılmaz Özcan's back had been turned to private Fatih Yılmaz, who was kneeling down at the time. Private Fatih Yılmaz told the expert, however, that at the time of the shooting he had been lying on his back and trying to push Yılmaz Özcan away. Private Yılmaz also added that during the scuffle he and Yılmaz Özcan had rolled approximately forty-five metres down the hill.

26. The expert noted in his report that the wife, mother and four daughters of the deceased had been consistent when they showed him the location in their garden as the place where they claimed Yılmaz Özcan was shot and killed. Having regard to the conflicting information with which he had been provided by privates Şenel Sercan and Fatih Yılmaz, the expert recommended that the Forensic Medicine Institute's opinion should be sought, to establish whether the trajectory travelled by the bullet in Yılmaz Özcan's head had been compatible with private Fatih Yılmaz's version of events.

27. On 6 February 2001 prosecutor Aydoğdu decided not to prosecute the gendarmerie personnel – with the exception of private Fatih Yılmaz – or the prosecutor Çömük because, “other than the family's abstract allegations”, there was no evidence implicating them in the killing.

28. On 2 March 2001 the Şebinkarahisar prosecutor filed another indictment with the Şebinkarahisar Assize Court and charged the remaining gendarmerie personnel, with the exception of first-lieutenant Muhamet Şevinç, with manslaughter.

29. It appears from a report drawn up on 2 March 2001 pursuant to the Ministry of Justice's instructions, that the applicants had lodged a number of official complaints with that Ministry. The author of the report, Mr İzzet Sandal, who was an inspector with the Ministry of Justice, stated in this report that on 11 July 2000 the Koyulhisar prosecutor Mehmet Çömük (see paragraph 8 above) had drawn up a letter addressed to Yılmaz Özcan inviting him to give himself up to serve his prison sentence. Nevertheless, even before that letter was posted, the same prosecutor had issued an arrest warrant on 13 July 2000 (see paragraph 5 above) and had then himself taken part in the operation to apprehend Yılmaz Özcan. According to the information provided to the inspector by the applicants, the prosecutor Mehmet Çömük himself had been present when Yılmaz Özcan was allegedly shot and killed in his garden by the first lieutenant. According to the inspector's report, the prosecutor Mehmet Çömük defended himself by telling the inspector that the reason why he wanted to take part in the operation was because he wanted to visit the village, as he had never had the opportunity previously. He did not however go to Yılmaz Özcan's house, and remained with the vehicle.

30. The inspector concluded that prosecutor Çömük, contrary to his denials, had been present during the operation and had neglected his duties by failing to prevent the incident and he had thus contributed to the death of Yılmaz Özcan.

31. The inspector also noted that the other prosecutor in Koyulhisar, Mr Fuzuli Aydoğdu (see paragraph 13 above), had given a decision not to prosecute first lieutenant Muhamet Şevinç or prosecutor Çömük without first examining the evidence and eyewitness statements which, in the opinion of the inspector, were credible and deserved further investigation.

32. It also appears from this report that when members of the Şebinkarahisar Assize Court visited the village on 22 November 2000 (see paragraph 25 above), they were assisted by the soldiers who had taken part in the operation during which Yılmaz Özcan was killed. When the deceased Yılmaz Özcan's father, wife and three of his children – that is the applicants Hacı İbrahim Özcan, Kadriye Özcan, Zeynep Özcan, Ziyet Özcan and Ömer Özcan – told the prosecutor Fuzuli Aydoğdu that they did not want the soldiers who had been involved in the killing of Yılmaz Özcan to take part in the investigation, criminal proceedings were initiated against them for obstructing the officials in the execution of their duties. When one month later these applicants went to make statements in relation to the charges against them, a judge ordered their detention on remand in a prison. They were subsequently released on bail.

33. The inspector also heard a number of eyewitnesses to the events who had not previously been questioned by the prosecutors. These eyewitnesses confirmed that they had seen bloodstains in the garden where the family claimed Yılmaz Özcan was killed. They also stated that they had seen a trail of blood all the way to the bottom of the hill where the soldiers claimed Yılmaz Özcan had been killed by mistake. The inspector also noted that first lieutenant Sevinç, non-commissioned officer Askerden and expert sergeant Akyol had given a number of contradictory statements about their movements during the operation.

34. The inspector recommended that prosecutors Çömük and Aydoğdu be removed from their duties in the town of Koyulhisar. He also recommended that criminal prosecutions be brought against first lieutenant Sevinç and prosecutor Çömük in relation to the killing of Yılmaz Özcan.

35. On 30 May 2001 seven forensic experts working for the Forensic Medicine Institute, acting on a request from the Şebinkarahisar Assize Court, concluded that the large number of injuries on Yılmaz Özcan's head, chest, back, arms and legs could not have been caused by jumping from a window or by falling down while running. According to these experts, the injuries had been caused close to the time of death or shortly before it, by hard objects such as stones, sticks, rifle butts or boots worn by military personnel, whereas the lesions on the back of the body had been caused by dragging the body on the floor. It was also established that Yılmaz Özcan had been shot at a range of between two and fifteen centimetres.

36. On 4 July 2001 the Şebinkarahisar prosecutor filed another indictment with the Şebinkarahisar Assize Court and charged a number of soldiers who had taken part in the operation with making false statements and destroying crucial evidence. On the same day the Şebinkarahisar Assize Court joined all three cases (see paragraphs 24 and 28 above).

37. On 17 July 2001 the Giresun prosecutor filed an indictment with the Giresun Assize Court and charged first lieutenant Muhammet Sevinç and Koyulhisar prosecutor Mehmet Çömük with manslaughter. On 2 November 2001 the Giresun Assize Court decided that, on account of prosecutor Çömük's seniority, the Court of Cassation's Criminal Division had the power to try him. All cases mentioned above were then joined and sent to the Court of Cassation's Criminal Division acting as a first instance court. Subsequently, all officers were acquitted, apart from private Fatih Yılmaz (see paragraph 42 below).

2. Documents pertaining to the trial

38. On 12 June 2003 the First Section of the Court of Cassation's Criminal Division, sitting as a first-instance court ("the trial court"), adopted its judgment in relation to all defendants. According to the judgment, a fourth indictment had apparently also been filed against the defendants, charging them with ill-treatment.

39. It appears from the judgment that, immediately after the killing, a number of villagers had seen bloodstains in the garden where the applicants claimed Yılmaz Özcan was shot and killed. They had informed the prosecutor about this but the prosecutor had made no mention of it in his report. The judgment discloses that the applicants had told the investigating authorities that after the shooting the soldiers had collected bloodstained soil from their garden and put it in a box. One villager told the investigating authorities that he had found the box with the bloodstained soil in it. This box was subsequently examined for fingerprints but no matching prints were found.

40. The trial court noted that the first time the applicants had given evidence to the investigating authorities was some ten days after the killing (see paragraph 22 above). In the opinion of the trial court, the applicants' failure to make statements in the immediate aftermath of the events showed that the applicants had not witnessed the killing, but had made the allegations in order to blame the State for it. Thus, not only the statements made by the applicants but also the statements made by their witnesses were not to be relied on in evidence. On the other hand, there were no legal reasons to disregard the conclusions of the investigations carried out by the soldiers who had themselves had taken part in the investigation. It was "impossible" that the soldiers would collude in order to protect the first lieutenant by blaming private Fatih Yılmaz. The fact that the search carried out by those soldiers revealed no traces of bloodstains in the garden was sufficient to conclude that Yılmaz Özcan had not been killed as alleged by the applicants. According to the trial court, a lack of spent bullet cases discharged from private Fatih Yılmaz's rifle did not necessarily show that the real perpetrator was somebody else.

41. The trial court also considered that the Forensic Medicine Institute's above-mentioned conclusion (see paragraph 35) discredited the applicants' allegation that Yılmaz Özcan had been killed in the garden by the first lieutenant and that his body had then been dragged by the soldiers. According to the "experience of the judiciary", the injuries could have been caused by Yılmaz Özcan falling down the hill while he was trying to escape and by soldiers who were trying to apprehend him. The fact that Yılmaz Özcan had been involved in a scuffle with the soldiers who tried to apprehend him was borne out by medical reports showing that the two soldiers had suffered injuries (see paragraph 10 above).

42. With the exception of private Fatih Yılmaz who had been charged with manslaughter, the trial court acquitted all the defendants – that is prosecutor Mehmet Çömük, first lieutenant Muhammet Sevinç, non-commissioned officer Resul Askerden, expert sergeant Ömer Davut Akyol and the privates who took part in the operation. The trial court considered that private Yılmaz had not acted with an intention to kill; he had pulled the trigger with the aim of catching Yılmaz Özcan and had considered that it

would only injure him and not kill him. The trial court sentenced private Fatih Yılmaz to ten years' imprisonment but reduced it to two years and one month because it considered that private Yılmaz had killed Yılmaz Özcan in the execution of his duties as a soldier and had later regretted his actions. The trial court also concluded that there was no evidence to show that Yılmaz Özcan had been ill-treated, and acquitted all the defendants charged with that offence.

43. On 20 April 2004 the Joint Penal Chambers of the Court of Cassation ("the appeal court") rejected the appeal lodged by the applicants. Like the trial court, the appeal court also considered that the Forensic Medicine Institute's conclusions discredited the applicants' allegations.

44. According to a document submitted to the Court by the applicants, the appeal court's decision was served on the first applicant Mr Hacı İbrahim Özcan on 11 November 2004 "in accordance with the letter of the Court of Cassation's Criminal Division's President".

3. Documents pertaining to the compensation proceedings

45. In 2001 the applicants brought proceedings against the Ministry of the Interior and claimed compensation for the killing of Yılmaz Özcan. On 12 December 2003 the Sivas Administrative Court observed that Mr Özcan had been killed by a soldier and there had thus been a connection between the killing and the compensation claim. It awarded the applicants the sum of approximately 48,500 euros (EUR) in compensation for their pecuniary and non-pecuniary damage. This decision became final following the dismissal by the Supreme Administrative Court on 29 September 2004 of the appeals lodged by the applicants as well as by the Ministry of the Interior.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

46. The applicants complained that their relative Yılmaz Özcan had been deliberately shot and killed by members of the gendarmerie in violation of Article 2 of the Convention. Relying on Articles 6 and 13 of the Convention, the applicants also argued that the authorities had failed to conduct a proper and adequate investigation into their relative's death.

47. The Court considers it appropriate to examine these complaints solely from the standpoint of Article 2 of the Convention, which 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.”

48. The Government contested the applicants' arguments.

A. Admissibility

1. Six months

49. The Government argued that the applicants had failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention because they had not introduced their application within six months of the deposit of the decision of the appeal court with the registry of the trial court on 25 May 2004.

50. The Court reiterates that where an applicant is entitled to be served *ex officio* with a written copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment (see *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V). The decision adopted by the Joint Penal Chambers of the Court of Cassation on 20 April 2004 was served on the first applicant on 11 November 2004 (see paragraph 44 above). The application was introduced less than six months thereafter, namely on 29 April 2005.

51. It follows that the Government's objection in this respect should be rejected.

2. Victim status

52. The Government were of the view that the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention because the soldier responsible for the killing had been convicted and the applicants had applied for and received compensation for the death of their relative.

53. The Court reiterates that a decision or measure favourable to an applicant is not in principle sufficient to deprive that individual of his or her status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 49, 20 December 2007, and the case cited therein).

54. Concerning the Government's objection to the applicants' victim status based on the issue of compensation the Court reiterates that, in cases concerning deprivations of life, Contracting States have an obligation under Article 2 of the Convention to conduct an effective investigation capable of leading to the identification and punishment of those responsible. That obligation would be rendered illusory if, in respect of complaints under Article 2 of the Convention, an applicant's victim status were to be remedied by merely awarding damages (see, *mutatis mutandis*, *Yaşa v. Turkey*, 2 September 1998, § 74, *Reports* 1998-VI; see also, more recently *Nikolova and Velichkova*, cited above, § 55 and the cases cited therein). Confining the authorities' reaction to incidents of deprivations of life to the mere payment of compensation would also make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibitions on killing, despite their fundamental importance, would be ineffective in practice (see *Leonidis v. Greece*, no. 43326/05, § 46, 8 January 2009). The Court therefore rejects the Government's objection in so far as it concerns the issue of compensation.

55. As for the Government's objection to the applicants' victim status based on private Fatih Yılmaz's conviction, the Court observes that that objection raises issues which are closely linked to the effectiveness of the investigation into the killing, as well as to the issue of redress. The Court thus considers it appropriate to address this point in its examination of the merits of the applicants' complaint under Article 2 of the Convention (see paragraph 73 below).

B. Merits

56. The Government submitted that it had been absolutely necessary for the gendarmes to resort to the use of force against Yılmaz Özcan, because he had attempted to escape and had attacked the soldiers. Private Fatih Yılmaz had fired his rifle not to kill Yılmaz Özcan but to wound him in order to be able to arrest him.

57. The Government were also of the opinion that, according to the Forensic Medicine Institute's report, the injuries on the body had occurred prior to his death. This conclusion, according to the Government, showed that the applicants' allegation concerning the dragging of Yılmaz Özcan's body after his death was baseless.

58. 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).

59. In the present case, the Court notes firstly that it is undisputed between the parties that Yılmaz Özcan was killed by the gendarmerie. The parties differ as to the events leading up to the killing and the identity of the killer, however. The applicants alleged that Yılmaz Özcan had been beaten up, shot and killed deliberately in the garden by first lieutenant Muhammet Sevinç and that his body had subsequently been dragged down the hill. The Government, on the other hand, submitted that after a struggle both private Yılmaz and Yılmaz Özcan had rolled down a hill before private Yılmaz had fired his rifle at least twice and one of the bullets entered the back of Yılmaz Özcan's neck and exited his face, killing him instantly.

60. The Court has thus been provided with two conflicting versions of the events. What is not disputed, however, is the fact that the soldiers went to the applicants' village with a view to apprehending Yılmaz Özcan, and that Yılmaz Özcan was shot and killed during the soldiers' visit. Two aspects of the killing are particularly important for the Court's examination. Firstly, Yılmaz Özcan was killed by a bullet fired by a member of the armed forces. Secondly, the killing took place during a planned military operation, at the beginning of which Yılmaz Özcan's house was surrounded by armed soldiers who formed two circles around the house. It follows that the killing lies within the exclusive knowledge of the authorities and the respondent Government are thus under an obligation to provide a satisfactory and convincing explanation of how the killing occurred, failing which an issue under Article 2 of the Convention will arise (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts); see also *Yasin Ateş v. Turkey*, no. 30949/96, § 95, 31 May 2005).

61. The Court will therefore examine whether the Government have discharged their burden of justifying the killing. In doing so, it will have particular regard to the investigation carried out at the domestic level in order to establish whether that investigation was effective, in the sense that

it was capable of leading to the establishment of the cause of death and a determination of whether the force used was or was not justified in the circumstances, as well as to the identification and punishment of those responsible.

62. In this connection, the Court reiterates that it is sensitive to the subsidiary nature of its functions 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 domestic authorities, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those authorities (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, §§ 29-30, Series A no. 269).

63. 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).

64. As for the planning of the operation, the Court observes that Yılmaz Özcan was wanted by the authorities in relation to an offence of a non-violent nature (see paragraph 5 above). There has never been any suggestion that he would be armed or that he would pose a danger to the life or limb of anyone, including the soldiers who went to his village to arrest him. In fact, the decision to arrest him was taken and the operation was planned and conducted without Yılmaz Özcan having had an opportunity to surrender to the authorities, because the local prosecutor had issued the arrest warrant without first inviting him to surrender (see paragraph 29 above). The Court thus has serious misgivings as to whether a military operation of that scale was really necessary to arrest Yılmaz Özcan without waiting for him to surrender to the authorities and without trying other, non-life-threatening methods of arresting him for the minor offence in question.

65. As for the investigation into the killing, the Court observes at the outset that the initial and critical phases of the investigation were carried out by members of the military unit who were responsible for Yılmaz Özcan's death. The same soldiers also secured the crucial evidence, such as the spent bullet cases found in the area (see paragraph 13 above). When the applicants informed the prosecutor that Yılmaz Özcan had been killed in the garden

and his body dragged down the hill, the same soldiers then searched the area in question and told the prosecutor that the applicants' allegations were baseless. The trial court, which considered that there were “no legal reasons to disregard the investigation” carried out by those soldiers, relied on that investigation in reaching its conclusion that Yılmaz Özcan had not been killed as alleged by the applicants.

66. Furthermore, some two months after the incident, when members of the criminal court visited the area in question, they were assisted by the same soldiers who were being tried as defendants before that same criminal court for the killing of Yılmaz Özcan. Although some of the applicants drew the investigating authorities' attention to the inappropriateness of the soldiers' involvement in the investigation, the authorities' response was to arrest those applicants and detain them in prison (see paragraph 32 above). The Court considers that allowing the same soldiers involved in the fatal arrest operation to take such an active part in the investigation is not only so serious as to taint the independence of the entirety of the criminal proceedings (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 339-341, ECHR 2007-...), but also entailed the risk that crucial evidence implicating the soldiers in the killing would be destroyed or ignored.

67. Secondly, first lieutenant Muhammet Sevinç, who was accused by the applicants as the person who had killed Yılmaz Özcan, was not questioned until three days after the operation (see paragraph 20 above). This was despite the fact that the same prosecutor had been informed about the allegations against the first lieutenant within hours of the killing (see paragraph 13 above). For the Court, a delay of three days to question a main suspect in an investigation into a killing did not disclose the necessary diligence required by Article 2 of the Convention. As well as creating an appearance of collusion between the judicial authorities and the military, the failure to question first lieutenant Sevinç promptly is also conducive to leading 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 officer in a timely fashion, coupled with the fact that he continued in the meantime to work as the commander of his military unit, created the risk of collusion between the first lieutenant and the soldiers under his command (see, *mutatis mutandis*, *Ramsahai and Others*, cited above, § 330).

68. In this connection the Court also observes that when the investigating authorities failed to question the applicants – who were eyewitnesses to the events and who informed the prosecutor of their allegations within hours of the killing – until some nine days after the killing (see paragraph 22 above), the trial court used that failure to substantiate its conclusion that the applicants had not witnessed the killing

themselves and that they had made those allegations in order to blame the State. The same failure on the part of the national authorities also led the trial court to conclude that the statements given by the eyewitnesses to the events which supported the applicants' version of the killing could not be relied on in evidence (see paragraph 40 above). By contrast, the statement taken from the first lieutenant three days after the killing was considered by the trial court to be credible.

69. Thirdly, the Court is unable to concur with the trial court that the conclusion reached by the Forensic Medicine Institute discredited the applicants' allegation that Yılmaz Özcan had been killed in the garden by the first lieutenant and that his body had then been dragged by the soldiers. Contrary to the trial court's conclusion, the Court considers that the detailed report drawn up by forensic experts working for the Forensic Medicine Institute (see paragraph 35 above), in which it was established that the injuries on Yılmaz Özcan's body had been caused shortly before or close to the time of death by hard objects such as stones, sticks, rifle butts or boots worn by military personnel, and that the lesions on the back of the body had been caused by dragging the body along the ground, clearly supports the applicants' version of the events and their allegations.

70. It is also to be observed that the same report is unequivocal in its conclusions that the injuries could not have been caused by jumping from a window or by falling down while running. The Court notes with regret, however, that the trial court disregarded this important evidence, which was based on detailed scientific examinations. Instead, it preferred to rely on the "experience of the judiciary" when concluding that the injuries had been caused by Yılmaz Özcan falling down the hill while he was trying to escape and by soldiers who were trying to apprehend him (see paragraph 41 above).

71. In this connection the Court notes the Government's submissions that the injuries on the body were caused "before" the death. This, in the Government's opinion, discredited the applicants' allegation that Yılmaz Özcan had been killed in the garden and his body then dragged down the hill. The Court is unable to accept these submissions. It notes that, according to the forensic report in question – and contrary to what was suggested by the Government – the injuries on the body were caused before or "close to" (see paragraph 35 above) the time of death, meaning that the lesions on the back of the body, which the Forensic Medicine Institute considered to have been caused by dragging the body, could have been caused shortly after the death, as alleged by the applicants.

72. The Court equally regrets that the report prepared by the Ministry of Justice's inspector, in which a number of serious defects in the investigation were detailed, did not spur the trial court to take additional steps in its examination of the case. In particular, no attempt appears to have been made to eliminate the contradictory information which the soldiers provided to the

national authorities (see paragraphs 21 and 26 above). Moreover, having regard to the consistency of the applicants' and a number of other villagers' eyewitness accounts, the Court agrees with the inspector that the applicants' allegations concerning the killing of Yılmaz Özcan were credible and deserved a further and detailed examination (see paragraph 31 above). The expert appointed by the Şebinkarahisar Assize Court also drew attention to the defects in the investigation and stated that the applicants had been consistent when showing him the place where they claimed Yılmaz Özcan had been killed (see paragraph 26 above). Nevertheless, as set out above, the applicants' allegations were cursorily discarded by the trial court on the ground of the national authorities' own failure to question the applicants in a timely manner.

73. In view of the above, the Court considers that the investigation and trial conducted at the domestic level were manifestly inadequate and left so many obvious questions unanswered that it is unable to rely on the conclusion that Yılmaz Özcan was killed as described in the judgment adopted by the trial court (see paragraph 42 above). Thus, as the investigation and the trial did not prove capable of leading to the accurate establishment of the cause of death and to a determination of whether the force used was justified in the circumstances, the Court cannot conclude that the conviction of private Fatih Yılmaz deprived the applicants of their victim status, as suggested by the Government (see paragraph 52 above). Noting that no other obstacle to its admissibility exists, the Court declares the complaint admissible and finds that there has been a violation of Article 2 of the Convention due to the Government's failure to discharge their burden of proof that the killing had been justified.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

74. The applicants alleged that Yılmaz Özcan had been severely beaten before he was killed, in violation of Article 3 of the Convention which provides as follows:

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

75. The Government contested that argument.

76. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

77. The Government were of the opinion that the injuries on Yılmaz Özcan's body had been caused while he was trying to escape in bare feet and during the scuffle he had had with expert sergeant Akyol and private Yılmaz.

78. The Court observes at the outset that it is not disputed that the injuries on Yılmaz Özcan's body were caused while he was in the hands of

the soldiers. It follows, therefore, that the Government should bear the burden of providing a plausible explanation for the cause of those injuries (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

79. The Court observes that, according to the report prepared by the Forensic Medicine Institute, the injuries on Yılmaz Özcan's body were caused by hard objects such as stones, sticks, rifle butts or boots worn by military personnel. The Court also notes that the injuries were very extensive and serious. Having regard to their nature and location, such as the head, chest, back, arms and legs, the Court considers that they are not likely to have been caused accidentally.

80. In this connection the Court observes that the Government's explanation for the injuries (see paragraph 77 above) is not supported by either the above-mentioned forensic report or by the conclusions reached at the end of the domestic investigation and the trial. The forensic report conclusively rules out that the injuries found on Yılmaz Özcan's body had been caused by falling down. Furthermore, having regard to the defects and inconsistencies detailed above, the Court cannot accept the conclusions reached as regards the injuries in the investigation and the trial.

81. In light of the foregoing, and having regard to a lack of a plausible explanation from the Government, the Court concludes that the Government failed to prove that the injuries on the body of Yılmaz Özcan had been caused while he was trying to escape in bare feet and during the scuffle he had had with the soldiers. Having regard to the Government's failure to discharge their burden of proof, the Court considers that these injuries must be considered attributable to a form of ill-treatment for which the authorities were responsible (see *Süheyla Aydın v. Turkey*, no. 25660/94, § 194, 24 May 2005). The Court finds, therefore, that there has been a breach of Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicants claimed 500,000 euros (EUR) in respect of pecuniary and EUR 750,000 in respect of non-pecuniary damage. The applicants claimed that, following his death the family had been deprived of Yılmaz

Özcan's financial support. According to the documents submitted by the applicants, Yılmaz Özcan worked as a carpenter and a gunsmith.

84. The Government argued that the claim in respect of the pecuniary damage was not supported by any documentary evidence. Furthermore, they considered the claim in respect of non-pecuniary damage to be excessive and submitted that, if awarded, it would lead to unjust enrichment.

85. The Court's case-law has established that there must be a clear causal connection between the damages claimed by the 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, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C). The Court has found (see paragraph 73 above) that the authorities were accountable under Article 2 of the Convention for the death of the applicants' close relative. It also notes that the applicants' submission that Yılmaz Özcan had been providing for his family 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 applicants' loss of the financial support provided by Yılmaz Özcan.

86. The Court notes that at the time of his killing Yılmaz Özcan was forty-two years of age (see paragraph 1 above), married and had eight children aged between three and twenty-four years.

87. The Court also notes that the applicants have failed to submit to the Court an itemised claim detailing the financial loss suffered by them. However, the fact remains that Yılmaz Özcan had been providing his family with a living and this has not been disputed by the Government. Having regard to the family situation of the deceased Yılmaz Özcan, his age and his professional activities which provided his wife and eight children with support, as well as taking into account the domestic award of compensation (see paragraph 45 above), the Court awards EUR 40,000 in respect of pecuniary damage to the third applicant Mrs Kadriye Özcan, who is the widow of Yılmaz Özcan, in her personal capacity and to be held by her for her children for whom she provides financially.

88. The Court observes that it has found that the authorities were accountable for the death of Yılmaz Özcan and also for the ill-treatment to which he was subjected prior to his death. The Court thus accepts that the applicants have suffered non-pecuniary damage. Noting the domestic award of compensation, and ruling on an equitable basis, the Court awards the applicants a total of EUR 81,000, to be divided amongst them as follows:

(a) EUR 2,500 each to the first and second applicants, that is the parents of the deceased Yılmaz Özcan;

(b) EUR 10,000 to the third applicant, that is the widow of Yılmaz Özcan;

(c) EUR 7,000 each to the fourth to eleventh applicants, that is the children of Yılmaz Özcan; and

(d) EUR 2,000 each to the twelfth to sixteenth applicants, that is the siblings of Yılmaz Özcan.

B. Costs and expenses

89. The applicants also claimed EUR 20,000 for the costs and expenses incurred before the Court. This sum included EUR 10,000 in respect of the fees of their lawyer, in support of which they referred to the Istanbul Bar Association's scale of fees.

90. The Government were of the opinion that the claims were not supported with adequate evidence, and invited the Court to reject them.

91. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicants have not substantiated that they have actually incurred the costs claimed. In particular, in support of their claim for the fees of their lawyer, they failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by their lawyer on the case. Accordingly, the Court makes no award in respect of the fees of their lawyer.

C. Default interest

92. 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 death of the applicants' relative Yılmaz Özcan;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the ill-treatment to which Yılmaz Özcan was subjected prior to his death;

4. *Holds*

(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, plus any tax that may be chargeable, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) to the third applicant, Mrs Kadriye Özcan, EUR 40,000 (forty thousand euros) in respect of pecuniary damage to be held by her for her *and her* children for whom she provides financially;

(ii) to each of the first and the second applicants, Hacı İbrahim Özcan and Fatma Özcan, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;

(iii) to the third applicant, Kadriye Özcan EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;

(iv) to each of the fourth to eleventh applicants, Ömer Özcan, Nermin Doğan, Zeynep Er, Ali Özcan, Ziynet Ateş, Davut Özcan, Niğmet Özcan and Kader Özcan, EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage; and

(v) to each of the twelfth to sixteenth applicants Sunay Doğanay, Cengiz Özcan, Mustafa Özcan, Arife Özcan and Susan Yayla, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(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

APPENDIX

List of applicants

1. Hacı İbrahim Özcan, who was born in 1932, lives in Istanbul and he is the father of Yılmaz Özcan.
2. Fatma Özcan, who was born in 1932, lives in Istanbul and she is the mother of Yılmaz Özcan.
3. Kadriye Özcan, who was born in 1958, lives in Sivas and she is the wife of Yılmaz Özcan.
4. Ömer Özcan, who was born in 1976, lives in Sivas and he is the son of Yılmaz Özcan.
5. Nermin Doğan, who was born in 1978, lives in Istanbul and she is the daughter of Yılmaz Özcan.
6. Zeynep Er, who was born in 1980, lives in Istanbul and she is the daughter of Yılmaz Özcan.
7. Ali Özcan, who was born in 1982, lives in Sivas and he is the son of Yılmaz Özcan.
8. Ziynet Ateş, who was born in 1983, lives in Sivas and she is the daughter of Yılmaz Özcan.
9. Davut Özcan, who was born in 1984, lives in Sivas and he is the son of Yılmaz Özcan.
10. Niğmet Özcan, who was born in 1988, lives in Sivas and she is the daughter of Yılmaz Özcan.
11. Kader Özcan, who was born in 1997, lives in Sivas and she is the daughter of Yılmaz Özcan.
12. Sunay Doğanay, who was born in 1964, lives in Istanbul and she is the sister of Yılmaz Özcan.
13. Cengiz Özcan, who was born in 1962, lives in Istanbul and he is the brother of Yılmaz Özcan.
14. Mustafa Özcan, who was born in 1976, lives in Istanbul and he is the brother of Yılmaz Özcan.
15. Arife Özcan, who was born in 1974, lives in Istanbul and she is the sister of Yılmaz Özcan.
16. Susan Yayla, who was born in 1962, lives in Istanbul and she is the sister of Yılmaz Özcan.