



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

FOURTH SECTION

Application no. 21470/10
Derya ERCAN and Others
against Bulgaria
lodged on 24 March 2010

STATEMENT OF FACTS

THE FACTS

The applicants, Ms Derya Ercan, Miss Kardelen Ercan, Ms Nazmiye Ercan, Mr Zeki Ercan, Ms Nurcan Taçar, Ms Fatma Tutuk, Mr Ali Ercan, Mr Engin Ercan and Mr Zayim Ercan are Turkish nationals who were born in 1982, 2001, 1936, 1961, 1971, 1963, 1959, 1970, and 1965 respectively and live in Kırklareli, Turkey. Their application was lodged on 24 March 2010. They were represented before the Court by Mr Mustafa Demir, a lawyer practising in Istanbul.

The circumstances of the case

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

Yalçın Ercan was the first applicant's husband, the second applicant's father, the third applicant's son and the remaining applicants' brother. He was working as a fisherman in his village of Beğendik, which is located on the seafront at the north-westernmost point of Turkey, next to the border with Bulgaria.

At 6.35 a.m. on 17 April 2008 Yalçın Ercan went to sea to catch fish in the *Ömer Reis-2*, a two-metre-wide and six-metre-long fishing vessel. He was accompanied by two of his brothers, Engin and Zayim Ercan, who are the eighth and ninth applicants respectively.

Shortly after they set sail a Bulgarian coastguard boat approached the fishing vessel. The fishermen on the fishing vessel heard the police officers on the coastguard boat shouting at them in a language they did not

understand. The police officers then opened fire in the direction of the fishing vessel.

Subsequently four armed Bulgarian police officers boarded the fishing vessel and Yalçın Ercan tried to defend himself with a stick. Two of the police officers subdued Yalçın Ercan and laid him face down on the deck of the fishing vessel. Although in that position Yalçın Ercan could not have escaped or hurt anyone, one of the police officers, Mr Mihail Tzonkov, fired four shots into Yalçın Ercan's body. Three of the bullets entered his back and the other bullet entered his head. He died on the way to hospital.

The police officers then attacked the applicants Engin and Zayim Ercan and beat them up severely. The fishing vessel was then towed to a harbour in Bulgaria. Yalçın Ercan's body was handed over to the authorities in Turkey after a post-mortem examination was performed in Bulgaria.

On 19 June 2008 police officer Mihail Tzonkov was formally accused of the offence of causing death by acting recklessly and negligently in the execution of his duties, as defined in section 123 § 4 of the Bulgarian Criminal Code.

On 16 October 2008 the Sliven Regional Military Prosecutor's Office decided to close the investigation. The military prosecutor noted that the fishing vessel had entered Bulgarian waters at 6.39 a.m. on 17 April 2008. At 7.22 a.m. officers from the Border Police had shouted warnings in Bulgarian and English and asked the fishermen to stop. The fishermen had ignored the warnings and attempted to escape by leaving Bulgarian waters. The police officers had then fired warning shots at the bow of the fishing vessel before approaching it further. Afterwards the police officers closed the safety catches of their pistols and attached them to their life vests. They had not been able to take their holsters with them.

Subsequently the police officers boarded the fishing vessel. When officer Tzonkov tried to arrest Yalçın Ercan he behaved in an unruly manner and physically resisted arrest. Officer Tzonkov managed to corner Yalçın Ercan on the deck, put him face down, and handcuffed his right wrist. During the scuffle the police officer's pistol was touching the deck and had on occasions got entangled in the fishing nets. Yalçın Ercan had also managed to get hold of the officer's pistol a few times but the officer had managed to get it back. Unbeknown to officer Tzonkov, the safety catch of the pistol had moved to the "open" position in the struggle.

When Tzonkov afterwards tried to comply with the orders given by his superior to remove the handcuffs, he was pushed backwards by Yalçın Ercan and lost his balance. Officer Tzonkov then tried to get close to Yalçın Ercan but his pistol had got caught in the fishing nets and went off, firing three rounds. It was not until officer Tzonkov stood up that he saw that Yalçın Ercan had been shot and that his pistol had been caught in the fishing nets. All attempts to save Yalçın Ercan's life were unsuccessful and he died on the boat.

In view of the above the military prosecutor concluded that the incident had not been foreseeable for officer Tzonkov, and a number of chance events within the meaning of section 15 of the Criminal Code had intervened, thereby breaking the chain of causation.

An objection to the military prosecutor's decision lodged by the applicants' legal representative in Bulgaria was rejected by the Sliven Military Court on 3 November 2008.

The applicants, with the assistance of their legal representative in Bulgaria, lodged an objection to the Sliven Military Court decision. They argued in particular that the warning shots fired by the police had been aimed at the boat rather than into the air. Eight bullet holes had been observed on the boat during the subsequent investigations. This had showed that the police had acted in contravention of the regulations pertaining to the use of firearms and had thus risked the lives of those on the fishing boat. Furthermore, instead of keeping his pistol in its holster, as required by the regulations, the police officer had attached it to his life jacket when he boarded the fishing vessel.

The applicants also alleged in their objection that Zayim Ercan had seen the police officer standing over his brother with his pistol in his hand. Yalçın Ercan had then kicked the police officer and the police officer had fired four rounds. According to the autopsy report there were three bullet entry holes on the torso and one on the head.

The applicants referred to the conclusions reached by forensic and ballistic experts, and argued that the pistol could only have been fired by a finger pulling the trigger. Thus, in the applicants' opinion the conclusion reached by the military prosecutor and subsequently by the Sliven Military Court did not represent the truth.

The applicants also argued that the police officer had received the necessary training and, contrary to what was decided by the military prosecutor, he had thus been in a position to foresee the consequences of his failures to comply with the firearms regulations.

The applicants' objection was upheld by the Military Court of Appeal on 23 December 2008, and the case file was sent back to the military prosecutor to reopen the investigation. The Military Court of Appeal considered that the military prosecutor's decision had not been adequately reasoned, and observed that the Sliven Military Court, instead of sending the file back to the military prosecutor, had attempted to justify that prosecutor's decision by putting forward additional arguments. It further noted that the points raised by the applicants concerning the alleged shortcomings in the investigation had not been dealt with in the Sliven Military Court decision. In particular, the Sliven Military Court had not dealt with the evidence which contradicted the military prosecutor's decision. For example, it had been established by the ballistic and forensic examinations that the pistol could have gone off either if the trigger was pulled by a finger or if it was caught in the fishing nets. Nevertheless, the military prosecutor had accepted the scenario that the trigger had got caught in the fishing nets, and had not considered the other possibility, and the Sliven Military Court had not drawn attention to that failure.

The Military Court of Appeal considered that further ballistic examinations were necessary to establish whether, if the entanglement of the trigger in the fishing nets had caused the pistol, which was on continuous fire setting, to go off, this would have caused the bullets to be concentrated in one small part of the body, as had happened in the present case.

It appears that on a subsequent date the Sliven Military Prosecutor decided to close the investigation again, and that that decision was subsequently quashed by the Sliven Military Court.

On 13 November 2009 the Military Court of Appeal examined the appeal lodged by the military prosecutor against the Sliven Military Court decision. The Military Court of Appeal noted that a further investigation had been conducted by the military prosecutor and all contradictions and shortcomings highlighted in its decision of 23 December 2008 had been addressed. According to the Military Court of Appeal, it had been the fishermen themselves who had created a perilous situation by disobeying the police officers' orders. In such circumstances, blaming the police officer would mean vesting him with an objective responsibility, which was not permitted under domestic law.

The applicants argued that political pressure had been brought to bear on the judicial authorities by members of the Parliament, nationalist press and local politicians. For example, a Parliamentary commission had been set up by seven members of Parliament representing the Burgas constituency, with a view to stopping the prosecution against officer Tzonkov. A national collection of signatures in support of officer Tzonkov had been organised and he had been made an honourable citizen of the city by the Burgas Municipal Council. In support of their arguments the applicants submitted to the Court a number of newspapers cuttings and a report drawn up by the Bulgarian Helsinki Committee.

COMPLAINTS

The applicants complain that the circumstances in which their relative Yalçın Ercan was killed were in breach of Article 2 of the Convention.

Relying on Article 6 of the Convention, the applicants complain that a thorough investigation was not conducted by the national authorities.

QUESTIONS TO THE PARTIES

1. Has the applicants' relative's right to life, ensured by Article 2 of the Convention, been violated in the present case?

In that connection, have the authorities established that the circumstances in which the applicants' relative died were not in breach of Article 2 of the Convention?

2. Having regard to the procedural protection of the right to life (see paragraph 104 of *Salman v. Turkey* [GC], no. 21986/93, ECHR 2000-VII), was the investigation in the present case by the domestic authorities in breach of Article 2 of the Convention?

In this connection;

The Government are requested to submit to the Court a full copy of all documents of the investigation file.