



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

SECOND SECTION

DECISION

Application no. 16838/08  
Khzir Aslan BABAKIR and others against Turkey  
and 7 other applications  
(see list appended)

The European Court of Human Rights (Second Section), sitting on  
25 June 2013 as a Chamber composed of:

Guido Raimondi, *President*,

Danutė Jočienė,

Peer Lorenzen,

András Sajó,

Işıl Karakaş,

Nebojša Vučinić,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to the above applications lodged on 4 April 2008, 16 June  
2008, 3 November 2008 and 23 March 2009 respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicants are all Iraqi nationals (see Appendix). They were  
represented before the Court by Ms C. Vine, Mr K. Yıldız, Mr M. Muller  
QC, Mr T. Otty QC, Mr M. Ivers, Mr E. Grieves, Mr X. Zror Asad, and  
Mr A. Ibrahim, lawyers practising in London.

### **The circumstances of the cases**

2. The facts of the cases, as submitted by the applicants, may be summarised as follows.

#### *1. Background to the events in question*

3. During the 1990s the Turkish Government conducted cross-border military operations against militants of the PKK (Kurdistan Workers' Party, an illegal organisation) in northern Iraq. However, with the invasion of Iraq by the United States forces in 2003, Turkey's ability to pursue the group diminished as cross-border bombardments could have created a diplomatic incident. In Turkey's view, Massoud Barzani, the leader of the Kurdish region in northern Iraq, and the United States forces did not do enough to combat the PKK and secure the Iraqi-Turkish border, causing tension between the Iraqi and Turkish Governments. This tension escalated during the second half of 2003 due to increasing attacks by the PKK inside eastern Turkey.

4. On 17 October 2007 the Turkish Grand National Assembly adopted a motion authorising the Government "to send Turkish Armed Forces to northern Iraq and contiguous regions where PKK terrorists are based and to implement a cross-border operation with the aim of eliminating the threat of terrorism and terrorist attacks targeting our country" as part of its ongoing "struggle against PKK terrorism".

#### *2. The aerial bombing of the applicants' villages*

5. On 13 October 2007, at approximately 10.50 p.m., Turkish military forces launched cross-border aerial attacks in northern Iraq. These attacks included bombing of the Kurdish village of Gonde Aerdna (which is the subject of application no. 16838/08) in the district of Sersenk, which is situated in Amediye Province, within the Governate of Dohuk. The Chaldean Christian village of Einshgx (the subject of application no. 17397/08), in the same district, was also bombed. A fact-finding report prepared by the Iraqi Parliament stated that eighty-five shells were fired by the Turkish military on the border that evening.

6. In the early hours of 16 December 2007 Turkish military forces launched further cross-border military attacks in northern Iraq and bombed the village of Srterokan, in the Sengeser District in the Sulaymaniyah Governorate of northern Iraq (the subject of application no. 30278/08).

7. On the same date, 16 December 2007, bombs also fell on the villages of Lewce (application no. 30293/08) and Birede (application no. 30310/08), both also in the Sengeser District.

8. On 16 December 2007, bombs hit the village of Kalatuka, again in the Sengeser District (application no. 30283/08). Press reports estimated that the Turkish Government sent fifty warplanes to bomb areas of northern Iraq, accompanied by long-range artillery shelling. It was noted that ten villages in the Sengeser District were struck by these attacks, causing approximately 1,800 people (or 300-600 families) to flee their homes.

9. These aerial attacks which occurred on 13 October 2007 and 16 December 2007 caused all of the applicants severe psychological distress, a fear of the re-occurrence of such attacks and anxiety over the loss of their livelihoods, their living conditions and their inability to provide for their families. One of the applicants, namely Mr Muhammad Shekha, lost his wife as a result of the aerial bombing (application no. 30278/08). The applicants were not compensated for the loss of life, the destruction of their property and the severe trauma which they experienced as a result of this incident.

10. On 1 May 2008 the Turkish army launched a further cross-border attack in northern Iraq. As a result of the aerial and artillery attack on the village of Senaht, the husbands of the applicants Ms Saniya Ali Fetto and Ms Ktan Mohammed Resho were killed (application no. 53817/08). The applicants' husbands were in Senaht to look for edible fruits and plants to be taken to the local market. Their bodies were found on 10 May 2009.

11. On 25 September 2008 the Turkish military forces conducted another cross-border attack in northern Iraq. The bombs which fell on the applicants' village of Birede completely destroyed the homes and household property of the applicants (application no. 16979/09).

## COMPLAINTS

12. The applicants complained of a violation of Articles 2, 3, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

13. The applicants alleged under Article 2 of the Convention that their lives had been seriously threatened when they were subjected to the indiscriminate bombing and shelling of their villages by the Turkish military between 13 October 2007 and 25 September 2008. Furthermore, the wife of the sixth applicant in application no. 30278/08 and the husbands of the applicants in application no. 53817/08 had lost their lives as a result of the aerial attacks. The applicants submitted that the Turkish authorities had failed to carry out an effective and adequate investigation of the events in question.

14. The applicants maintained under Article 3 of the Convention that Turkey had breached Article 3 of the Convention on account of the severe anguish and distress that they had suffered in connection with the massive

bombings, the death of three of the applicants' relatives, injuries to themselves and their relatives, the loss of their food supplies, damage to property and the poor living conditions which ensued as a result of the bombings.

15. The applicants asserted under Article 6 of the Convention that the failure to conduct an investigation had effectively deprived them of the right to obtain compensation for their losses caused by the deaths, personal injuries, destruction of their houses, farmland and livestock and for the severe anguish and distress that they have suffered.

16. The applicants asserted that the deliberate destruction of their houses, farmland and livelihoods by the Turkish military had constituted violations of both Article 8 of the Convention and Article 1 of Protocol No. 1.

17. The applicants complained under Article 13 that there had been no remedy available to them which was accessible or capable of providing redress in respect of their complaints.

18. The applicants also alleged a violation of Article 14, in conjunction with Articles 2, 3, 6, 8 of the Convention and Article 1 of Protocol No. 1, because they had been targeted by the Turkish military on the grounds of their Kurdish origin.

## THE LAW

19. Given the similarity of the applications, as regards both fact and law, the Court deems it appropriate to join them.

20. The applicants alleged that the indiscriminate bombing and shelling of their villages by the Turkish military between 13 October 2007 and 25 September 2008 had caused the death of their relatives and destruction of their property in violation of Articles 2, 3, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

21. Relying on the Court's established case-law relating to the exceptional circumstances capable of extending jurisdiction extraterritorially, the applicants asserted that the events in question had come within the jurisdiction of the Turkish Government and that the Government should therefore be held accountable for the violations of their Convention rights and freedoms (they cited, among other authorities, *Pad and Others v. Turkey* (dec.), no. 60167/00, 28 June 2007; *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004; and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII).

22. The applicants also claimed that it would have been “pointless” for them to attempt to use a domestic remedy in the circumstances of their cases, as there had been no domestic remedies open to them which were capable of remedying their Convention grievances. In this connection, with reference to the Court’s findings in cases involving human rights violations in south-east Turkey (see, among many others, *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, and *Orhan v. Turkey*, no. 25656/94, 18 June 2002), the applicants claimed that the extreme reluctance of State security forces to accept accountability was considered a barrier to effective redress within the domestic judicial or administrative systems. The applicants also alleged that even if remedies had theoretically been available to them in Turkey, the financial and practical difficulties of conducting such litigation would have been insurmountable in their cases.

23. The Court considers that it is not required to determine whether at the material time the applicants came within the jurisdiction of Turkey as a result of the alleged cross-border operations carried out by Turkish armed forces in northern Iraq, as these applications are in any event inadmissible for the following reasons.

24. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to first use the remedies provided by the national system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others*, cited above, § 65, and the cases cited therein). It is also established that mere doubt as to the prospects of success is not sufficient to exempt an applicant from submitting a complaint to the competent court (see *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002).

25. In the present case, the Court notes that the applicants have not raised any of these complaints before the competent domestic authorities of the respondent Government. The applicants rather claimed that it would have been “pointless” for them to attempt to exhaust domestic remedies which were not available and effective in the light of the Court’s previous findings in Turkish cases (relying on *Akdivar and Others*, and *Orhan*, both cited above).

26. It is true that the Court has previously held that the way in which the criminal law was enforced in respect of unlawful acts allegedly carried out with the involvement of the security forces in south-east Turkey in the first half of the 1990s was deficient, and that the defects found in the investigatory system in force in that region undermined the effectiveness of the protection of the criminal law during that period. The practices involved

permitted or fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see, among many others, the following cases concerning the right to life: *Güleç v. Turkey*, 27 July 1998, §§ 63-83, Reports 1998-IV; *Kılıç v. Turkey*, no. 22492/93, § 75, ECHR 2000-III; *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, ECHR 2000-III; and the following cases relating to the destruction of property: *Selçuk and Asker v. Turkey*, 24 April 1998, § 98, Reports 1998-II; *İpek v. Turkey*, no. 25760/94, § 203, ECHR 2004-II (extracts); *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000; and *Yöyler v. Turkey*, no. 26973/95, § 96, 24 July 2003).

27. However, in the Court's opinion, the present applications differ from those applications where the applicants successfully contended in cases against the respondent State that they were dispensed from the requirement to exhaust such remedies on account of the existence of special circumstances in south-east Turkey at the relevant time.

28. In this connection, the Court notes that south-east Turkey was governed under a state of emergency at the material time. The state of emergency was declared to be over on 30 November 2002 (see *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, § 79, ECHR 2004-VI (extracts)), long before the events complained of in the present applications. Moreover, in all those previous cases the applicants first complained to the administrative or prosecuting authorities before submitting their applications to the Strasbourg Court (see, for example, *Doğan and Others*, cited above, §§ 15 and 29; and *Ipek*, cited above, §§ 26 and 30). In the present cases the applicants failed to report any of their complaints to the administrative or prosecuting authorities in Turkey.

29. That being so, the Court does not find any special circumstances dispensing the applicants from the obligation to exhaust domestic remedies in Turkey. Furthermore, in so far as the applicants sought to justify their failure to exhaust local remedies with reference to the financial and practical difficulties of conducting such litigation (see paragraph 21 above), the Court would note that, given their ability to instruct lawyers in the United Kingdom, they cannot claim that the judicial system in Turkey, a neighbouring country, was physically and financially inaccessible to them (see *Pad and Others*, cited above, § 69).

30. Consequently, the Court finds that in the circumstances of these cases the applicants cannot be considered as having complied with the requirement of exhaustion of domestic remedies rule laid down in Article 35 of the Convention. The applications must therefore be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court by a majority

*Decides* to join the applications;

*Declares* the applications inadmissible.

Stanley Naismith  
Registrar

Guido Raimondi  
President

**APPENDIX**

<b>No</b>	<b>Application No</b>	<b>Lodged on</b>	<b>Applicant - Date of birth</b>
<b>1.</b>	<b>16838/08</b>	04/04/2008	<b>Khzir Aslan BABAKIR - 01/07/1934</b> <b>Abdulrahman Khizr ASLAN - 01/05/1973</b> <b>Salih Khizr ASLAN - 03/02/1972</b> <b>Sadiq Abdulqadir MUHAMMED - 01/07/1947</b> <b>Ahmed Mirza YAHYA - 01/07/1953</b>
<b>2.</b>	<b>17397/08</b>	04/04/2008	<b>Majid Yusif AYLIYA - 08/08/1969</b> <b>Samir Batras HANNA - 04/07/1951</b> <b>Andrious Chabo MERKHYA - 01/01/1934</b> <b>Matti Jajjo NONA - 23/02/1948</b> <b>Zaheer Shamaaoon SHABU - 28/04/1971</b> <b>Uxena Usiv ZEYA - 01/01/1934</b> <b>Kuryl Yusif ZYAH - 15/06/1946</b>
<b>3.</b>	<b>30278/08</b>	16/06/2008	<b>Sefer Hassan AHMAD - 01/07/1992</b> <b>Sumaya Hassan AHMAD - 01/07/1991</b> <b>Khidir Ahmad KHAFa KHIZR - 01/07/1966</b> <b>Hassan Ahmad HASSAN - 01/07/1969</b> <b>Ismael Hassan ISMAEL - 01/07/1965</b> <b>Muhammed Shekha SHEKHA - 01/07/1951</b> <b>Muxlis Mohamad SHIEKA - 01/01/1983</b>



No	Application No	Lodged on	Applicant - Date of birth
4.	30283/08	16/06/2008	<p>Mukhlis Khidr IBRAHIM - 01/01/1980</p> <p>Meer Ahmad MUSA - 01/07/1923</p> <p>Rejna Ahmad AWD - 01/01/1990</p> <p>Maneej Xidir IBRAHIM MANGOORI - 01/07/1968</p> <p>Fatma Xidir IBRAHIM MAMGOORI - 01/07/1960</p> <p>Siler Xidir IBRAHIM</p> <p>Hecic Xidir IBRAHIM</p> <p>Mahmud Sheikh MEHMUD MAULOOD - 01/07/1969</p>
5.	30293/08	16/06/2008	<p>Aman GAFUR</p> <p>Aziz Cevher GAFUR - 01/07/1970</p> <p>Bokan GAFUR</p> <p>Jalal Jawhar GHAFOOR</p> <p>Cemal Celal GAFUR</p> <p>Cevher GAFUR - 01/07/1928</p> <p>Cilan GAFUR</p> <p>Ciyan GAFUR</p> <p>Colan GAFUR</p> <p>Coman GAFUR</p> <p>Darawan GAFUR</p> <p>Feyzan GAFUR</p> <p>Kerwan GAFUR</p> <p>Leyla Ismail GAFUR</p> <p>Lezzan GAFUR</p> <p>Mamend Cevher GAFUR</p>

No	Application No	Lodged on	Applicant - Date of birth
			<p><b>Meydan GAFUR</b></p> <p><b>Misir Celal GAFUR - 01/07/1954</b></p> <p><b>Muhamed Cevher GAFUR - 01/07/1968</b></p> <p><b>Nuri Cevher GAFUR - 19/07/1963</b></p> <p><b>Saklawan GAFUR</b></p> <p><b>Sew Sivan Misir GAFUR</b></p> <p><b>Soran GAFUR</b></p> <p><b>Sozan GAFUR</b></p> <p><b>Suwara Misir Celal GAFUR - 30/08/1982</b></p> <p><b>Vicdan GAFUR</b></p> <p><b>Xalit Cevher GAFUR - 10/07/1960</b></p> <p><b>Aziz Hame Res IBRAHIM</b></p> <p><b>Emine Mahmut ISMAIL</b></p> <p><b>Haci Hamit ISMAIL - 01/05/1940</b></p> <p><b>Rojger Taha ISMAIL</b></p> <p><b>Sefik Refik ISMAIL - 01/07/1930</b></p> <p><b>Sores Hesen MECID- 01/07/1988</b></p> <p><b>Shayan Hassan MAJEED</b></p> <p><b>Mezingar Hasan NEBI</b></p> <p><b>Hacer Abbas RESUL</b></p> <p><b>Alan XIDIR</b></p> <p><b>Azad XIDIR</b></p> <p><b>Encam XIDIR</b></p> <p><b>Hesen Emed XIDIR - 01/10/1970</b></p> <p><b>Mahmud XIDIR</b></p>

No	Application No	Lodged on	Applicant - Date of birth
			<b>Sherzad SHEENA</b>  <b>Mustafa Cevher GAFUR - 01/07/1969</b>  <b>Goran GAFUR</b>  <b>Muhammed HASSAN RASUUL - 01/07/1973</b>
<b>6.</b>	<b>30310/08</b>	16/06/2008	<b>Othman Rasul ALI - 01/07/1956</b>  <b>Ali Hammad HAMMAD - 01/03/1965</b>
<b>7.</b>	<b>53817/08</b>	03/11/2008	<b>Sanya Ali FATO - 07/01/1967</b>  <b>Katan Mohamad RASHO - 07/01/1965</b>
<b>8.</b>	<b>16979/09</b>	23/03/2009	<b>Aziz Omar AHMAD - 01/07/1972</b>  <b>Hamadameen OMAR AHAMAD - 01/07/1970</b>  <b>Aula Hamad HAMAD - 01/07/1950</b>