

AS TO THE ADMISSIBILITY OF

Application No. 22729/93
by Mehmet KAYA
against Turkey

The European Commission of Human Rights sitting in private on
20 February 1995, the following members being present:

MM. C. A. NØRGAARD, President

H. DANELIUS

C.L. ROZAKIS

S. TRECHSEL

A.S. GÖZÜBÜYÜK

A. WEITZEL

J.-C. SOYER

H.G. SCHERMERS

Mrs. G.H. THUNE

Mr. F. MARTINEZ

Mrs. J. LIDDY

MM. L. LOUCAIDES

M.P. PELLONPÄÄ

B. MARXER

M.A. NOWICKI

I. CABRAL BARRETO

B. CONFORTI

I. BÉKÉS

J. MUCHA

D. SVÁBY

E. KONSTANTINOV

G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 September 1993
by Mehmet KAYA against Turkey and registered on 1 October 1993 under
file No. 22729/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of
the Commission;
- the observations submitted by the respondent Government on
11 April 1994 and the information and observations in reply
submitted by the applicant on 6 June and 7 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in
1949 and lives at Lice/Dolanay. He is represented before the Commission
by Professor Kevin Boyle and Ms. Françoise Hampson, both university
teachers at the University of Essex. The applicant states that he is
bringing the application on his own behalf and on behalf of his
deceased brother.

The facts as submitted by the parties may be summarised as
follows.

A. The particular circumstances of the case

The applicant states that the following occurred:

On 25 March 1993 at around 8.00, the applicant's brother A. Menaf Kaya was going to the fields 300-400 metres from Çiftlibahçe, four kilometres from Dolanay village, together with Hikmet Aksoy. At that time, a military operation was starting in Boyunlu, Dolanay, Çiftlibahçe and Ormankaya villages. Soldiers participating in the operation took Hikmet Aksoy into custody. Seeing this, A. Menaf Kaya started to run towards a village. The soldiers opened fire. A. Menaf Kaya was injured but ran the remaining 300-400 metres to Çiftlibahçe village where he hid in the bushes. The soldiers found him there and, according to eye-witnesses, fired over 100 bullets into his body. The witnesses then left the village, being frightened of the security forces and the intimidation to which they would be subjected if they spoke out publicly.

The security forces planted a firearm on A. Menaf Kaya and took photographs. They did not want to give his body to the villagers. The villagers insisted, saying, "This man is from a neighbouring village; he is not a terrorist or anything". Someone else said "He is my uncle". They also said, "You have killed him; at least give us the body". Finally, the soldiers gave the body to the villagers. Hikmet Aksoy was detained for six days but was released following interrogation.

There was an autopsy report, which is currently in the hands of the Public Prosecutor. The applicant has asked for the report but has not been able to obtain it.

Later, the commander of the military unit is alleged to have threatened the inhabitants of two villages with the destruction of their villages.

Most of those who came to give their condolences on the death of A. Menaf Kaya suffered abuse of various kinds. Fifteen persons in a minibus from Dibek village were taken into custody together with the village imam. They suffered various abuses and were beaten up. The village imam was removed from his position.

The respondent Government state as follows.

Security forces conducting a field search at Lice, Dolunay village came under fire from 500 metres east of the field. There was an exchange of fire for some time. When the firing came to an end, the search continued. A body was found, identity unknown at that time, a Russian made automatic assault weapon and ammunition by its side.

Photographs were taken of the body and an official field report made by the security forces.

An official autopsy was conducted on the body on 25 March 1993 and the report indicated that death was caused by bullet wounds.

The identity of the deceased as A. Menaf Kaya, was established and a preliminary investigation was initiated by the Diyarbakir public prosecutor. He found that he had no jurisdiction and sent the case to be dealt with by the public prosecutor at the Diyarbakir State Security Court, where it is still pending.

According to the statement of 9 March 1994 of the Lice Community Gendarme Commander, Hikmet Aksoy was not taken into custody as alleged and he is currently sought by the authorities as being a member of the PKK (Kurdish Workers' Party - an armed separatist movement).

B. Relevant domestic law and practice

The Turkish Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

Article 49 of the Criminal Code provides for the defence of self-defence: in its second paragraph, it states (translation):

"No punishment shall be imposed if the perpetrator acted...

2. in immediate necessity to repel an unjust assault against his own or another's person or chastity."

Article 23 of the State of Emergency Act (25 October 1983) provides with regard to the use of weapons by the security forces (translation):

"After the declaration of the State of Emergency security forces and special forces on duty and members of the armed forces while carrying out their duties are empowered to use their weapons under circumstances as stipulated in relevant acts.

Under the conditions when the State of Emergency is declared according to art. 3 section b of this act - (in the event of the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms or serious deterioration of public order because of acts of violence, as stated in art. 120 of the Constitution) - those security forces empowered to use weapons are to open fire and shoot directly without hesitation at the target in cases where a surrender command is not obeyed or is met by counter fire or where security forces are left in a self-defence situation."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he complains of the unlawful killing of his brother by soldiers in circumstances in which it was not necessary to open fire and the force used was disproportionate. Alternatively there was a violation of Article 2 on account of the killing of his brother in violation of the State's obligation to protect his right to life. Moreover, Article 2 was violated on account of the lack of any effective system for ensuring protection of the right to life and on account of the inadequate protection of the right to life in domestic law.

As to Article 3, he complains of discrimination based on race and/or ethnic origin, which constitutes degrading treatment.

As to Article 6, he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing, as a result of which he cannot bring civil proceedings arising out of the killing. He is thereby denied effective access to court.

As to Article 13, he complains of the lack of any independent national authority before which these complaints can be brought with any prospect of success.

As to Article 14, he complains of discrimination on the grounds of race and/or ethnic origin in the enjoyment of the rights guaranteed by Articles 2, 6 and 13 of the Convention.

The applicant maintains that there is no requirement that he

pursue alleged domestic remedies. In his opinion any alleged remedy is illusory, inadequate and ineffective because

- (a) there is an administrative practice of non-respect for the rule which requires the provision of effective domestic remedies (Article 13);
- (b) there is an administrative practice of unlawful killing at the hands of the Turkish security forces in South-East Turkey;
- (c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress;
- (d) whether or not there is an administrative practice, the situation in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 September 1993 and registered on 1 October 1993.

On 29 November 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 11 April 1994 after one extension in the time-limit. The applicant submitted further information and observations in reply on 6 June 1994 and 7 July 1994.

THE LAW

The applicant alleges that his brother was killed in circumstances for which the State is responsible. He invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches) and Article 14 (Art. 14) (prohibition on discrimination).

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention before lodging an application with the Commission.

The Government point out that there is an ongoing investigation by the public prosecutor at the State Security Court at Diyarbakir which is still pending.

Further, the Government submit, without giving detail, that the applicant has the possibility of introducing an action in the civil courts for compensation in respect of claims against State officials.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case

having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings or torture.

In respect of the investigation by the public prosecutor at the State Security Court at Diyarbakir, the applicant submits that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., *De Jong, Baljet and Van den Brink* judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, *Sargin and Yagci v. Turkey*, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

The Commission notes that while the Government refers to the pending inquiry by the public prosecutor into the death of the applicant's brother on 25 March 1993, almost two years have elapsed since the killing and the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the alleged crime, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

The Commission finds that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, *Yagiz v. Turkey*, Dec. 11.10.93, to be published in D.R.75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 (Art. 26) of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the merits

The Government deny that there is any administrative practice of unlawful killings by the State and assert that death incidents are usually terrorist acts carried out by illegal terrorist organisations operating within the area of State of Emergency. They refer in particular to the illegal organisation known as the PKK (Kurdish Workers' Party) which is carrying out a campaign of terrorism and intimidation in face of which the Government are striving to maintain security and order.

The Government submit that the applicant's brother was found in

possession of a lethal weapon and that the inquiry of the public prosecutor of Diyarbakir State Security Court indicates that security forces opened fire in self-defence and in compliance with the state of emergency rules on the use of their weapons.

The applicant maintains his submissions. He states that his brother, unarmed and posing no threat to the security forces, was shot as he ran away and that the arms found on his brother's body were planted there by the soldiers. In these circumstances, the use of lethal force cannot be justified as absolutely necessary within the meaning of Article 2 (Art. 2) of the Convention. Insofar as the state of emergency legislation authorises the opening of fire simply on account of a failure to stop or surrender, the applicant submits that this is in violation of Article 2 (Art. 2) of the Convention.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)