

AS TO THE ADMISSIBILITY OF

Application No. 22276/93
by Burhan KARADENİZ
against Turkey

The European Commission of Human Rights sitting in private on
3 April 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
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATSA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 6 July 1993 by
Burhan KARADENİZ against Turkey and registered on 19 July 1993 under
file No. 22276/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of
the Commission;
- the observations and information submitted by the respondent
Government on 10 March 1994 and 12 January 1995 and the
information and observations in reply submitted by the applicant
on 15 November 1993, 13 April 1994, 11 and 24 May 1994, 2 June
1994 and 29 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in
1973 and lives in Istanbul. He is represented before the Commission by
Professor Kevin Boyle and Ms. Françoise Hampson, both university
teachers at the University of Essex.

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

A. The particular circumstances of the case

The applicant started working as a journalist in Istanbul in 1990 for the weekly newspaper "Yeni Ülke". He then joined a daily newspaper "Özgür Gündem" (Free Agenda), which started publishing on 31 May 1992. The applicant was assigned a temporary post in the Diyarbakir office of this paper. He covered both general news and news concerning the State Security Court.

The applicant claims that the following events occurred.

When he was living in Diyarbakir, the applicant and his colleagues (eight persons working in the Diyarbakir office) were subjected to continuous harassment. The applicant, for example, was taken into police custody four times, and his camera smashed on two occasions, but has never been charged with any offence. His colleagues working in the office were frequently threatened by letter and by telephone. People associated with the newspaper as distributors or vendors were also subject to attacks.

The applicant states that he was under surveillance. For a period of about three weeks before the attack, he was followed and there was a car parked in front of the bakery across the road from his house. That car was not there for three days before the attack. The applicant recognised those following him as plainclothes police officers.

On 5 August 1992 before going to work, at about 8.30h, the applicant looked out over the balcony of his home. He noticed three people outside the teashop diagonally opposite his house, on the left. He did not notice what they looked like. The applicant set off on foot to go the 300 metres to the newspaper office. He had walked about 50 metres and was stepping onto the pavement at the side of the road, when he heard the sound of a pistol behind him. The teashop was behind him at that point. He turned round and, as he did so, he fell on the ground. He could not see the person shooting at him.

The street was busy at the time of the shooting, with civil servants going to work, street traders and children. Many people saw the incident. The applicant was subsequently told by local residents, who witnessed the attack, that one person fired at him. His assailant was estimated to be 19-20 years of age and was wearing a denim suit.

The applicant was conscious at this time. He was on the ground for some time. During this period, no security forces came. The people who gathered round put the applicant in a taxi. He was taken to the Diyarbakir hospital. The police wanted to take his statement before he received medical attention. The applicant refused.

The bullet had entered the applicant's spine and came out of the front of his neck membrane. His wounds were stitched up and dressed. He did not require surgery.

The applicant alleges that he was aware of policemen attempting to interfere with him as he lay half-conscious in the hospital but his own effort to gain attention and the hospital staff interrupted them. S.Y., a lawyer who arrived at the hospital on news of the shooting noted a heavy presence of police at intensive care and witnessed their threatening behaviour to medical staff and the applicant's relatives. S.Y. alleges that a doctor stated that they would be unable to ensure the applicant's safety at the hospital and on another occasion referred to a patient wounded by unknown assailants who died following tampering with the serum being administered.

On 6 August 1992 a policeman came to the hospital and took a cursory statement.

It was intended due to the severity of the applicant's condition to transfer him for treatment to Ankara. The transfer was obstructed

by the police and airport authorities for three days and it appears that on one occasion the applicant was removed from the plane and returned to the hospital.

In September 1992 a month after the incident, the applicant went to Germany for medical treatment. He stayed there for about three months. He is still paralysed from his chest down and has to move round in a wheelchair.

After his return to Turkey, the applicant's statement was taken by two policemen at his home in or about December 1993/January 1994. During the taking of the statement, the police made the leading suggestions and claimed, for example, that the PKK had shot the applicant.

The applicant has referred to a Helsinki Watch report according to which 12 journalists were assassinated in Turkey in 1992 while a further 4 were killed in the first seven months of 1993. These included 6 journalists from the "Özgür Gündem": Musa Anter killed in 1992, Hafiz Akdemir who was shot on 8 June 1992 in Diyarbakir, Yahya Orhan who was shot and killed in the street in Gerçus near Batman on 31 July 1992, Hüseyin Deniz shot on 9 August 1992 in Ceylanpınar and died from injuries, Kemal Kilic ambushed and killed on 18 February 1993 and Ferhat Tepe, kidnapped by persons unknown and his body found on 3 August 1993 (Helsinki Watch "Free Expression in Turkey 1993: Killings, Convictions, Confiscations", August 1993, Vol. 5 Issue 17 and see also Amnesty International report "Turkey: walls of glass" November 1992, AI Index Eur 44/75/92).

The respondent Government state that pursuant to Art. 156 of the Code of Criminal Procedure, the police investigated the crime which had been committed. The investigation was completed on 17 December 1993 when Mustafa Gezer was arrested in respect of the shooting of Abdurrahman Bakir and his gun was found from ballistic examination to have been used in 9 other incidents including that of the applicant. Gezer and 16 others who are alleged to be members of an illegal terrorist organisation Hizbullah were included in a written indictment made by the public prosecutor on 3 February 1994. The accused are awaiting trial in the Diyarbakir State Security Court. The indictment charges the accused with the offence of being a member of the illegal Hizbullah organisation and being involved in activities aimed at separating part of the territory of the country from state sovereignty. The indictment includes a list of 10 attacks and killings carried out by Mustafa Gezer, one of which is stated to be the armed attack on the applicant.

The applicant has not introduced any claims for compensation in the civil or administrative courts.

The applicant refers to the doubts as to the independence of Hizbullah as an armed force. He cites the report of Amnesty International which states:

"there have been persistent doubts about the independence of Hizbullah as an armed force - doubts which have been fuelled by the striking degree of coincidence between the targets of killings attributed to Hizbullah, and the targets of police harassment, arbitrary detention, ill-treatment and torture."

The Hizbullah are described by Amnesty International as "a shadowy organisation which was established in 1987 in Batman and belongs to the Sunni branch of the Islamic faith... The group is committed to the establishment of a fundamentalist Islamic state in Turkey." (Disappearances and Political Killings, 1994, Chapter 5 p. 60)

On 10 November 1993, the applicant was granted refugee status by the relevant authorities in Germany.

B. Relevant domestic law and practice

Pursuant to Art. 41 of the Civil Code, an injured person may file a claim for compensation against the alleged perpetrator:

"Every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation."

Pursuant to Art. 46, any victim of an assault may claim material damages:

"The person who has been injured is entitled to compensation for the expenses as well as for the losses resulting from total or partial disability to work due regard being had to the detriment inflicted on the economic future of the injured party."

Moral damages may also be claimed under Art. 47:

"...the court may, taking into consideration the particular circumstances, award adequate general damages to the injured..."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 10, 13 and 14 of the Convention.

As to Article 2 he claims that he was the victim of a life-threatening attack by agents of the State, or that the State failed in its obligation to protect his right to life. He complains of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3 he maintains that the risk of life-threatening attack, particularly against Kurdish journalists, is very much greater in South East Turkey than elsewhere in Turkey and that such discrimination on grounds of race or ethnic origin violates Article 3.

As to Article 6 he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the life-threatening attack, as a result of which the applicant cannot bring civil proceedings arising out of the attack.

As to Article 10 he maintains that he was attacked because he is a journalist of a specific paper, *Özgür Gündem*. He claims a violation of this Article on account of threats and an attack designed to deter the lawful exercise of freedom of expression. He alleges that there is an administrative practice in this respect, referring to the attacks made on journalists, distributors and sellers as well as raids and arson attacks on newspaper kiosks and editorial offices.

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

As to Article 14 he complains of discrimination in the enjoyment of his rights under Articles 2, 6, 10 and 13 of the Convention. He refers to an administrative practice of discrimination on account of race or ethnic origin.

The applicant refers also to the submissions made on behalf of the applicant in *Cagirga v. Turkey* No. 21895/93 (Dec. 19.10.94).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 July 1993 and registered on 19 July 1993.

On 11 October 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 10 March 1994 after one extension in the time-limit. The applicant submitted further information and observations in reply on 15 November 1993, 13 April 1994, 11 and 24 May 1994, 2 June 1994 and 29 July 1994 respectively.

The Government provided further information on 12 January 1995.

THE LAW

The applicant alleges that on 5 August 1992 he was shot and seriously injured in circumstances for which the State bears responsibility. The applicant 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 10 (Art. 10) (freedom of expression), 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 submit that the applicant has failed to comply with the requirement under Article 26 (Art. 26) of the Convention to exhaust domestic remedies before lodging an application with the Commission. They contend that the applicant's assailant has been identified and is now facing trial on criminal charges.

In respect of the injuries suffered by the applicant and the loss contingent upon those, the Government submit that the applicant has the possibility of introducing a claim for compensation against the person responsible in the civil courts.

The applicant contends that there are no effective or realistic remedies in respect of his complaints. He points out that the alleged assailant is not in fact charged with the attempted murder of himself. The applicant maintains his claim that the attack was carried out by or with the complicity of State agents, referring to the strong suspicion of connection between the Hizbullah and State authorities and to the circumstances of the incident. The remedy identified by the Government is not a remedy against the Government and cannot, in the applicant's submission, address the applicant's complaints. He also asserts that he has no effective remedies against the violations of the Convention for which the State is responsible on account of an administrative practice of ineffective remedies.

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). However, a mere doubt as to the prospect of success however is not sufficient to exempt an applicant from submitting a complaint to the competent court (see eg. No. 20357/92, Dec. 7.3.94, D.R. 76-A p.80).

The Commission notes that an investigation was carried out by the police pursuant to Art. 156 of the Code of Criminal Procedure and that

this investigation was concluded on 17 December 1993 when a suspect Mustafa Gezer was apprehended and a gun was found in his possession, which ballistics tests allegedly indicated had been used in number of shootings including the attack on the applicant. While as pointed out by the applicant, the pending criminal proceedings which subsequently indicted the alleged assailant, Mustafa Gezer, charged him with general offences of membership of the illegal Hizbullah group and of being involved in separatist activities, the Commission notes that the indictment lists as part of these offences the various assaults and shootings alleged to have been carried out by the suspect including the attack on the applicant.

The Commission notes that the trial of the suspect on the indictment described above is still pending before the Diyarbakir State Security Court. The domestic courts have therefore yet to be afforded an opportunity of examining the factual and legal issues arising in the case. In these circumstances, the Commission finds that it cannot be said with any certainty that the proceedings will fail to provide an effective mechanism for establishing the facts or attributing responsibility for the attack on the applicant.

As regards the applicant's argument that he was not required to pursue any remedies since there is an administrative practice in South-East Turkey which makes any remedies illusory, inadequate and ineffective, the Commission notes that the authorities have pursued an investigation to a conclusion and that criminal proceedings are now pending. Given that action has been taken and the courts now have jurisdiction over the results of the investigation, the Commission is not satisfied that the proceedings can be discounted as ineffective. Moreover, if there were no effective remedies, the applicant would have been required under Article 26 (Art. 26) of the Convention to lodge his application within six months from the date on which he was injured ie. on 5 August 1992. He did not do this, and the Commission will therefore proceed from the assumption that the investigation and its consequences constitute part of the process of exhaustion of domestic remedies.

Consequently, the Commission finds that in the circumstances of this case the applicant cannot be considered as having complied with the exhaustion of domestic remedies rule laid down in Article 26 (Art. 26) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)