

AS TO THE ADMISSIBILITY OF

Application No. 22880/93
by Gülten AYTEKIN
against Turkey

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

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
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
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÍRSAN

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 22 October 1993
by Gülten AYTEKIN against Turkey and registered on 5 November 1993
under file No. 22880/93;

Having regard to the report provided for in Rule 47 of the Rules
of Procedure of the Commission;

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 5 December 1994 and the information and
observations in reply submitted by the applicant on
21 September 1994 and 10 and 13 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, Gülten Aytekin, is a Turkish citizen of Kurdish origin, born in 1969 and living in Istanbul. She states that she brings the application on behalf of her deceased husband Ali Riza Aytekin. She 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.

The particular circumstances of the case

The applicant gives the following account.

The applicant's husband, Ali Riza Aytekin, was the assistant general manager and partner in a building firm with its office at Diyarbakir. On 24 April 1993, he, his brother, Feyzullah Aytekin, and his cousins, Salih and Resul Aytekin, travelled in a private car to check the construction of two bridges near the district of Sason. Ali Riza Aytekin was under an official contract from the State authorities in connection with the construction work. He was the driver of the car.

At about 13h.30, as the vehicle was passing the Yanikkaya Gendarmerie station, he was signalled to pull over and stop by a soldier on duty outside. According to the testimony of his brother, the car was travelling very slowly since there were concrete speed bumps outside the station.

Ali Riza Aytekin stopped the vehicle as directed and then, according to the statement of Feyzullah Aytekin, who was travelling in the back seat of the car, the soldier who had ordered them to pull over fired an aimed shot at the car from behind. The bullet entered through the rear window and Ali Riza Aytekin was killed by the bullet which entered his skull before exiting through the front window. The skull was smashed by the bullet and he died instantly. Nothing was done by the occupants of the car to justify the shooting. None were armed. The vehicle had stopped. According to the deceased's brother, they had nothing in the vehicle except the tools of their trade, a map and a calculator. They were a party of building workers on route to their work.

As the three other men got out of the car, the gendarme who had fired raised his weapon as if to fire at them, but when other gendarmes, about thirty in all, came out of the station and surrounded the vehicle he changed his mind and came towards the vehicle. The survivors, deeply shocked, began to shout and curse the gendarme. The three survivors were taken to the vicinity of the station and held there for several hours. They were not arrested or accused but were not able to attend to the body.

At some point a senior officer, a Lieutenant Colonel, arrived at the scene from Batman. A State prosecutor also arrived and the applicants made statements in which they stated that there had been no warning shot and that the gendarme was guilty.

An autopsy was carried out by a doctor and a medical certificate was issued at the gendarme station. A burial certificate was also issued. The vehicle in which the deceased had been killed was inspected by the prosecutor.

The three men sought strenuously to have the authorities supply an ambulance to convey the body to hospital in Diyarbakir. This was refused. They had to bring the body themselves in another vehicle, procured from local villagers. A villager drove their own car behind with its smashed windows still full of fresh blood and bits of brain as one of them describes it. The vehicle was seen by representatives of the Human Rights Association in Diyarbakir, who confirmed the

trajectory of the bullet and the condition of the vehicle.

Feyzullah Aytekin and his spouse petitioned the prosecutor over the killing. On 26 April 1993, they sent telegrams to the Presidency, the Chairmanship of the Grand National Assembly of Turkey, the leadership of several political parties and the Chairmanship of the Offices of the General Chief of Staff. A reply was received from the Prime Minister's office and the Grand National Assembly, both to the effect that the information had been passed onto the appropriate authorities. No other replies to the telegrams were received.

An investigation has been opened but only when the application was lodged, and Gülten, Feyzullah, Salih and Resul Aytekin have been unable to obtain any details about the proceedings.

A report from Dr. Christopher Milroy gives the opinion that it is implausible that the applicant's husband was struck by a ricocheting bullet due to the angle and point of impact of the bullet in the car and also since an exit wound would not have been expected.

The respondent Government state as follows.

The public prosecutor of the Kozluk district commenced a preliminary investigation into the incident under file no. 1993/112. On 8 June 1993, he issued a decision of no jurisdiction and the file was transferred to the military authorities to carry on the investigation.

According to the preliminary opinion of the gendarme commander given in the context of the investigation, the gendarme who opened fire, Tuncay Deniz, did not display any deliberate or unruly action. The applicant's husband had driven his car as if deliberately trying to break through the check point and the gendarme who opened fire was barely able to prevent himself being crushed by the car. As the car passed, the gendarme who had been signalling the car to stop, opened fire shooting first into the air and then into the tyres. One bullet however ricocheted and hit the deceased's head.

The Government have provided a sketch of the incident from which it appears that the distance between where the shot was fired and where it struck the car was 55 metres and the distance from the speed bumps to where bullet hit the car was 40 metres which indicates, in their view, that the applicant's husband had driven through the checkpoint. Moreover they state that there was a sign "Stop Gendarme" 65 metres before the speed bumps. They refer to the witness statements of three other persons at the gendarme station as supporting this version of events.

The investigation has not yet terminated.

COMPLAINTS

The applicant complains of a violation of Article 2 of the Convention in that the killing of her husband was a deliberate and unlawful act which could not be justified under that Article.

The applicant also invokes Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 October 1993 and registered on 5 November 1993.

On 27 June 1994, 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 5 December 1994 after the expiry of the time-limit set for that purpose. The applicant's observations in reply were submitted on 13 February 1995.

THE LAW

The applicant complains of the killing of her husband by a gendarme at a check point. She invokes Article 2 (Art. 2) (right to life) and Article 13 (Art. 13) (right to effective national remedies for Convention breaches).

Exhaustion of domestic remedies

The Government argue that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention since the investigation by the military authorities is still pending.

The applicant refers to the length of time which the investigation is taking. She also disputes the efficacy of an investigation which is being carried out by the body which is alleged to be responsible for the violation.

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).

While the Government refer to the pending investigation by the military authorities, the Commission notes that the incident occurred on 24 April 1993 and the investigation has not yet concluded more than two years later. The Commission is not satisfied in view of the delays and the serious nature of the alleged crime that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention, in particular having regard to the circumstances of this case where the relevant evidence would appear to be easily accessible to the authorities. No explanation has been given as to any obstacles in the way of bringing the investigation to a conclusion.

The Commission finds therefore that in the circumstances of this case the applicant is not required to pursue any legal remedy separate to the investigation commenced by the public prosecutor and referred to the military authorities (see eg. No. 19092/91, *Yagiz v. Turkey*, Dec. 11.10.93, D.R. 75). The Commission concludes that the applicant may 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 state that the gendarme opened fire on the car when it appeared deliberately to drive through the check point despite warnings and signals and that it endangered the life of the gendarme. They state that the gendarme fired into the air and then at the tyres, and that a bullet ricocheted into the back of the car killing the applicant's husband. Having regard to the widespread and violent terrorist attacks which take place in the area, they submit that the response of the gendarme cannot be deemed to be unexpected or

excessive.

The applicant disputes that the bullet could have ricocheted in the manner alleged, or that the witness statements submitted by the applicant substantiate this version in any convincing manner. She refers to the absence of any statement from the gendarme who fired the shots and the absence of any reference by the Government to the statements taken from the others in the car. She disputes the genuineness or thoroughness of the investigation conducted by the military, who appear to have prejudged the cause of the incident and she argues that the shooting was unjustifiable. Further, the applicant submits that the right to life under the state of emergency in South East Turkey is not adequately protected by law.

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)