

AS TO THE ADMISSIBILITY OF

Application No. 23530/94
by Ramazan BEYAZ
against Turkey

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

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTIL
G. JÖRUNDSSON
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
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BİRSAN
P. LORENZEN

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 9 February 1994
by Ramazan BEYAZ against Turkey and registered on 24 February 1994
under file No. 23530/94;

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
1 March 1995 and the observations in reply submitted by the
applicant on 15 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin, born in
1964 and resident at Lice, Diyarbakir province. He is represented
before the Commission by Professor Kevin Boyle and Ms. Françoise

Hampson, both of the University of Essex, England.

A. Particular circumstances of the case

The facts of the present case, which are in dispute between the parties, may be summarised as follows.

The applicant states that the following occurred.

On 10 August 1993 an incursion by an armed group of the PKK occurred in the village of Cumar, which is a neighbouring village of the applicant's village Sisi. A clash ensued which was apparently ended by soldiers threatening to kill nine villagers unless the PKK stopped shooting. The PKK then stopped the firing.

As an act of vengeance for the PKK raid, the security forces then attacked the applicant's village on the same day at about 17.00 to 17.30 hours. At least thirty military vehicles (armoured cars, jeeps, tanks, armed personnel carriers) arrived at the village. The villagers, including the applicant and his family, had already fled the village. They watched from a distance while the village was razed to the ground. This operation of destruction apparently occupied two days.

When the applicant returned to the village after these two days, almost all of the 60 household village had been burnt and destroyed. No habitable houses were left in the village.

Some of the villagers rented houses at Lice, went to the village in the morning and returned in the evening. Some of them either put up tents in their fields or sheltered in huts they made from tree branches. The applicant and his family have moved into a prefabricated house at Lice. They go to the village in the mornings, look after their fields and orchards and return to Lice in the evenings.

The cash crop of the village is tobacco and the villagers fear that the soldiers will return to destroy it after it is harvested for drying, because a military commander made such an explicit threat to some of the villagers at the time of the destruction of the village.

The applicant's family consists of nine people (wife, children, brothers and their children), and their house had two storeys. They used the lower floor as a stable and lived in the upper storey themselves. Their four goats and two unweaned calves died, burnt inside the stable, and no usable goods remained in the house.

The applicant has not received any explanation for the alleged destruction of his home, his possessions, his village and his family life. Nor has he been interviewed by the prosecutor or any other authority in connection with this destruction or received any assistance whatsoever arising from this military attack.

In response to the Government's allegations to the contrary, the applicant submits that following the alleged events he has frequently petitioned the authorities, including the appointed mayor, over his loss. He has submitted oral and written petitions seeking compensation. He has had a lawyer draw up a written petition for submission to the authorities but they refused to accept his petition. The applicant has not, so far, supplied the Commission with any documentary evidence of these attempts to obtain compensation or redress.

The respondent Government state the following.

A report submitted by the Government and drawn up on 25 November 1994 by two provincial gendarme colonels, and in its turn based on a report by the Lice District Gendarme commander, states that the gendarme logbook does not contain any mention of security force activity on 10 August 1993 in the villages named by the applicant.

The applicant's village of Sisi has indeed been abandoned by its inhabitants but as a result of the economic hardship suffered through the activities of the PKK in the area rather than as a consequence of any action on the part of the security forces. Following the departure of the villagers the houses deteriorated and, given that their roofs were made of mud, collapsed. Some people returned and removed the timber of roofs to sell as firewood in Diyarbakir.

Following the communication of the present application to the Turkish Government in May 1994 the public prosecutor of Lice district commenced a preliminary investigation into the incident under file no. 1994/128 . On 21 February 1995 he issued a decision of no jurisdiction and the file was transferred to the District Administrative Board under the special procedure for the prosecution of public officers, where an investigation is still pending.

B. Relevant domestic law and practice

The Government have submitted that the following domestic law is relevant to the case:

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(translation)

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to make an unlawful search of someone's home (Articles 193 and 194),
- to commit arson (Articles 369, 370, 371, 372) or aggravated arson if human life is endangered (Article 382),
- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or
- to damage another's property intentionally (Article 526 et seq.).

For all these offences, complaints may be lodged, pursuant to Articles 151, 152 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative boards. The local board decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

Articles 13 to 15 of the Constitution provide for substantial limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in the areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative boards.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant complains of violations of Articles 3, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

As to Article 3, he submits that his and his family's subjection to the experience of being forced to flee from armed military incursion

and to abandon their home, and to witness its destruction, constitutes inhuman treatment.

As to Article 6, he submits that the attack on his home and possessions interferes with his civil rights, that his right to compensation is effectively determined by the outcome of criminal proceedings, and that, since there will be no prosecution of those responsible, he is being denied access to court to vindicate his rights.

As to Article 8, he complains that the deliberate destruction of his home, where he lived with his family, constitutes an invasion of his rights to home and to family life without any possible justification under paragraph 2 of Article 8.

As to Article 13, he submits that the destruction of his village is an example of a deliberate administrative practice for which no redress can be obtained. He recalls that over 800 villages in the region have been destroyed in 1993 alone. As to Article 14, he submits that the violation of Articles 3, 6 and 8 of the Convention and Article 1 of Protocol No. 1 occurred because the village was Kurdish and he complains about violations of Article 14 in conjunction with these Articles. He recalls that all villages destroyed in South-East Turkey by military action, including his own, are Kurdish villages.

As to Article 18, he submits that the violations of which he complains represent restrictions of his rights imposed for purposes incompatible with the Convention.

As to Article 1 of Protocol No. 1, he states that the damage to his home and goods and to his capacity to conduct his farming activities constitute a gross violation of his property rights for which no possibility of compensation exists.

As to the exhaustion of domestic remedies, the applicant submits that there are no effective remedies available.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 February 1994 and registered on 24 February 1994.

On 9 May 1994 the Commission decided to communicate the application to the Turkish Government who were invited to submit their observations on its admissibility and merits before 19 August 1994.

At the request of the Government, the time-limit for the submission of their observations was extended to 30 September 1994.

By letter dated 11 October 1994 the Government requested that the examination of the application be adjourned pending the investigation by the public prosecutor in Lice which had commenced following the communication of the application.

On 3 December 1994 the Commission refused the adjournment and invited the Government to submit their observations by 23 January 1995.

By letter of 13 February 1995 the Commission's Secretary pointed out to the Government that the period for the submission of the Government's observations had expired and that no extension of that time-limit had been requested. It was added that the application was being considered for inclusion in the list of cases for examination by the Commission at its February session.

Observations were submitted by the Turkish Government on 1 March 1995. The applicant replied on 15 May 1995, also after an extension of the time-limit.

THE LAW

The applicant alleges that a raid was carried out by the security forces on his village, in the course of which his house and possessions were destroyed. He invokes Article 3 (Art. 3) (the prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (the right to respect for family life and the home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (the prohibition on discrimination) and Article 18 (Art. 18) (the prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention, as well as Article 1 of Protocol No. 1 (P1-1) (the right to property).

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 has failed to complain to the competent judicial authorities and point out that the investigation by the District Administrative Board is still pending.

The applicant maintains that there is no requirement that he pursue domestic remedies. Neither the remedies suggested by the Government nor the pending investigation by the District Administrative Board could be regarded as effective remedies, in the applicant's view, since the Government have already rejected security force involvement in the alleged events, relying on reports drawn up by the gendarmes, while the data contained in these reports do not support such a conclusion.

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).

In this respect the Commission refers to its findings in Application No. 21893/93, *Akdivar and others v. Turkey* (Dec. 19.10.94), which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact that there has been destruction of villages in South-East Turkey with many people displaced as a result. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it significant that, although the destruction of houses and property had been a frequent occurrence in South-East Turkey, the Government had not provided a single example of compensation being awarded to villagers for damage like that suffered by the applicants. Nor had relevant examples been given of successful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers. The Commission considered that it seemed unlikely that such prosecutions could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to effect the permanent or temporary evacuation of villages, to impose residence prohibitions or to enforce the transfer of people to other areas. It further had regard to the vulnerability of dispossessed applicants, under pressure from both the

security forces and the terrorist activities of the PKK, and held that it could not be said at this stage that their fear of reprisal if they complained about acts of the security forces was wholly without foundation.

The Commission concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the present case, the Government have not provided any additional information which might lead the Commission to depart from the above conclusions.

While the Government refer to the pending investigation by the District Administrative Board, the Commission notes that the alleged events occurred on 10 August 1993 and the investigation has not yet been concluded two years later. The Commission is not satisfied in view of the delays and the serious nature of the alleged crimes 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 fact that the Government have already dismissed any possibility of security force involvement.

The Commission finds therefore that in the circumstances of this case the applicant is not required to pursue any further legal remedy concerning his complaints (see eg. No. 19092/91, *Yagiz v. Turkey*, Dec. 11.10.93, D.R. 75).

The Commission concludes that this application cannot be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As regards the merits

The Government reject the applicant's allegations that there is an administrative practice to violate human rights in conjunction with discrimination against Turkish citizens of Kurdish origin. The equality of all Turkish citizens whatever their ethnic origin is reflected throughout Turkish society.

The Government further contend that the abandonment of the applicant's village of Sisi is not the result of any act by the security forces. They allege that it appears from gendarme records that no security force operation took place in Cumar or Sisi on 10 August 1993.

The applicant maintains his account of events. He furthermore submits that the gendarme records relied on by the Government are not conclusive.

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, by a majority,

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

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(S. TRECHSEL)