

Application No. 10308/83

Cemal Kemal ALTUN

against

FEDERAL REPUBLIC OF GERMANY

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REPORT OF THE COMMISSION

(adopted on 7 March 1984)

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REPORT

Drawn up in accordance with Rule 54 of the Commission's Rules of Procedure  
(striking an application off its list)

THE PARTIES

1. This report deals with the application brought by Mr Cemal Kemal ALTUN against the FEDERAL REPUBLIC OF GERMANY and registered under File No. 10308/83.

The applicant was represented before the Commission by Mr Wolfgang Wieland, a lawyer practising in Berlin. He was assisted at the hearing of 2 May 1983 by Mr Saraffettin Kaya, a lawyer practising in Kiel and by Mr Nazim Alfatli, an interpreter.

The Government of the Federal Republic of Germany was represented by Mrs Irene Maier, Federal Ministry of Justice, Agent, who was assisted at the hearing by Dr Erich Corves, Federal Ministry of Justice, and Mr Peter Hugler, Principal Officer in The Federal Office for the Recognition of Foreign Refugees, Advisers.

STATEMENT OF THE FACTS

2. The applicant, a Turkish national was born in 1960 in Samsun. When he brought his application, he was in detention in the Moabit prison in Berlin pending his extradition to Turkey.

3. The applicant has lived in Ankara since 1974 where he attended a secondary school until 1978. In 1978 and 1979 he was enrolled in the political science faculty of that city. To pay for his studies, the applicant also worked for the Forestry Ministry in a subsidiary of "Koy-Koop", a co-operative in Ankara. As a child, he was partly brought up by his brother, Ahmet Altun, after the death of their father. This brother was elected a member of parliament in 1977 for the constituency of Samsun. He was a member of the Popular Republican Party and was President of Koy-Koop. He is now living in France where he has political refugee status.

The applicant has also been involved in politics, starting with his brother's election campaign. He founded with others the "Ankara Liseli Devrimci Genclik Dernegi" (Association of Revolutionary Secondary Students) in 1978. Membership of this association ended automatically when the applicant enrolled in university. After a boycott of lectures, the association was prohibited in March 1979. The applicant joined an association of students and the association for the unity and solidarity of civil servants. He was also a member of the DEV-GENC federation, which had been in existence since 1970 but was prohibited by the Demirel Government. At the beginning of 1980 proceedings were instituted against the applicant because he was a founding member of the Association of Revolutionary Secondary Students. He then decided to leave Turkey. Passing through Rumania, Bulgaria, Hungary and Czechoslovakia, he reached the Democratic Republic of Germany. On 10 January 1981, he went without a visa by the underground from East to West Berlin, where he was met by his sister, Sultan Dursun (née Altun).

4. On 7 September 1981, the applicant lodged with the Berlin Chief of Police (Polizeipräsident) a request for political asylum (for the follow-up to this request, cf. para. 10 below).

5. In a message dated 28 June 1982, Ankara Interpol requested the German authorities to place the applicant in detention pending his extradition. The applicant was then wanted for instigating the murder of the Customs Minister in May 1980. The German authorities were informed that the Turkish Ministry of Justice would subsequently be sending a request for extradition, in accordance with Article 16 (4) of the European Convention on Extradition.

On 5 July 1982, the applicant was arrested. He was brought on the same day before the permanent judge of the District Court (Amtsgericht) of Tiergarten. On 6 July 1982 the prosecuting authorities applied to the Berlin Court of Appeal (Kammergericht) to place the applicant in detention pending extradition. On 22 July 1982 the Court of Appeal made such an order.

6. In a memorandum dated 19 July 1982 the Turkish Embassy sent an application request based exclusively on the charges of harbouring criminals and suppression of evidence relating to the murder of the Customs Minister on 27 May 1980 in Ankara.

On 9 September 1982, the Court of Appeal decided to place the applicant in detention pending extradition. In decisions dated 8 November 1982, 16 December 1982, 10 February and 11 April 1983 the Court of Appeal extended this detention.

On 16 December 1982, the Court of Appeal authorised the applicant's extradition to Turkey. It held that the extradition request complied with the requirements of the European Convention on Extradition. The applicant was charged with having concealed the murder of the Customs Minister, Gun Sazak, and having kept the weapon used in the crime, which under German law constituted the offences of interference with the course of criminal justice (Strafvereitelung, para. 258 of the German Criminal Code) and harbouring criminals, and under Turkish law, suppression of evidence (para. 296 of the Turkish Criminal Code). The Court found that there was no obstacle to extradition. It held that there was no political offence in this case, that the applicant had not established that the charges brought against him by the Turkish authorities were merely a pretext to ensure the applicant's return for political reasons. Nor did the fact that the applicant had requested political asylum, on which no decision had yet been taken, constitute an obstacle to extradition.

The applicant brought a constitutional appeal against this decision by the Court of Appeal. On 1 February 1983, three judges of the Federal Constitutional Court rejected this appeal on the ground that it was partly inadmissible and that the remainder did not have a sufficient chance of success.

7. The Government of the Federal Republic granted the applicant's extradition and informed the Turkish Embassy thereof in a memorandum dated 21 February 1983. In this memorandum the Government stated that according to the documents produced by the Turkish authorities, the extradition request was based exclusively on offences that did not carry the death penalty under Turkish law. With reference to an exchange of memoranda in December 1981 concerning the interpretation of the European Convention on Extradition by the Turkish Government, the Government of the Federal Republic of Germany stated that the imposition of the death penalty on the applicant was excluded.

The applicant brought a constitutional appeal against this decision by the Federal Government. On 16 March 1983 three judges of the Federal Constitutional Court dismissed the appeal on the ground that it did not have sufficient chance of success. The Court held that it could not leave open the question of the admissibility of the appeal, as it found no violation of the applicant's fundamental rights, in this case in particular those laid down in Article 16 (2) of the basic law ("no German shall be extradited abroad. Persons being persecuted on political grounds shall be entitled to asylum"). The Court further held that the question whether the person to be extradited was in danger of political persecution had to be examined on the merits by the Court of Appeal, which decided whether the

extradition should be authorised. The constitutional appeal brought by the applicant against the decision of the Court of Appeal was rejected on the ground that the Federal Constitutional Court was not competent to examine decisions taken by the Berlin courts and authorities. The Constitutional Court considered therefore that it was not necessary to rule on the question whether, going beyond the Court of Appeal's decision, it was entitled in the context of a constitutional appeal brought against an extradition decision taken by the Federal Government, to reconsider the merits of the reasons given by the applicant concerning the right of asylum. The Federal Government has, leaving aside the legal questions that have to be decided by the Court of Appeal, wide discretion on foreign policy. Furthermore, the Federal Government ascertained that the applicant did not risk the death penalty in the event of extradition to Turkey. Finally, and subject to what has been stated above as regards the competence of the Federal Constitutional Court, the latter considered that there were no serious grounds for doubting that fears of political persecution were not sufficiently taken into account.

8. On 19 March 1983, the applicant applied to the Court of Appeal for a new decision on the extradition order and to suspend the execution thereof.

On 14 June 1983, the Court of Appeal rejected the application and decided to extend the applicant's detention pending extradition.

9. In a memorandum dated 26 April 1983 the Turkish Embassy assured the Ministry of Foreign Affairs of the Federal Republic of Germany that in the event of the applicant's extradition the principle of speciality would be complied with, in accordance with the European Convention on Extradition.

The Government of the Federal Republic informed the Turkish Government of the state of proceedings before the Commission, indicating that the Commission had to decide at its session of July 1983 whether or not to maintain the instructions given to the parties in accordance with Rule 36 of the Commission's Rules of Procedure (cf. para. 13 below). The Government of the Federal Republic stated that the Turkish Government's assurances that in the event of the applicant's extradition a representative of the Germany Embassy in Ankara could visit the applicant without supervision at frequent intervals, could be useful for proceedings before the Commission and would be taken into consideration when reaching a decision on the enforcement of the extradition order.

On 8 July 1983, the Turkish Government informed the Government of the Federal Republic that it had decided to apply the relevant regulations to enable a representative of the German Embassy in Ankara to visit the applicant in the event of his extradition.

10. Following his request for political asylum dated 7 September 1981 (cf. para. 4 above), the applicant was heard on 22 March 1983 for the first time by the Federal Office for the Recognition of Foreign Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge).

On 6 June 1983 the Federal Office decided to grant the applicant political asylum. This decision was to the following effect:

The question whether the applicant was in danger, in the event of his return, of being prosecuted on political grounds, could be left open. In any case, the applicant could not then be required to return to his country because of circumstances occurring after his departure. The media widely reported the applicant's case - even quoting his full name contrary to normal practice - although the applicant took no direct part in this publicity. The Turkish Authorities were aware of this. The measures which the applicant must expect from the Turkish state could at the very least be termed political persecution. As a result the Office was convinced that in the event of his return to Turkey the applicant would very probably be the subject of a prosecution relating to the right of asylum (asylverhebliche Verfolgung).

The Federal Government's agent for asylum matters (Bundesbeauftragter für Asylangelegenheiten) brought an application before the Berlin Administrative Court.

On 25 August 1983, a hearing was held before the Berlin Administrative Court in the presence of the applicant. This hearing was due to resume on 30 August 1983. On that day, the applicant, having been led into the courtroom by the guard, who had taken off his handcuffs, was seated beside his lawyer and an interpreter waiting for the court personnel to enter. He then rushed over towards an open window and threw himself out. Having fallen from the sixth floor where the courtroom was situated, he died shortly afterwards in an ambulance sent to the spot.

11. Before the Commission, the applicant made the following complaints:

- he stated that in the event of extradition to Turkey he was in danger of treatment contrary to Article 3 of the Convention, which provides that "no one shall be subject to torture or to inhuman or degrading treatment or punishment".

The applicant complained that the decisions of the Berlin Court of Appeal authorising his extradition could not be examined by the Federal Constitutional Court. He invoked Article 13 of the Convention which guarantees the right to an effective remedy before a national authority.

As mentioned below (cf. para. 14), the first complaint was declared admissible and the second inadmissible (cf. also in the appendix the LAW part of the decision on admissibility).

#### PROCEEDINGS BEFORE THE COMMISSION

12. The application, dated 12 March 1983, reached the Secretariat of the Commission on 14 March 1983 and was registered on the same day.

On 15 March 1983, the Secretary informed the respondent Government of the lodging of the application and its purpose, in accordance with Rule 41 of the Commission's Rules of Procedure.

13. On 17 March 1983 the President of the Commission informed the respondent Government in accordance with Rule 36 of the Rules of Procedure that it seemed desirable in the interests of the parties and the normal conduct of proceedings before the Commission to postpone the applicant's extradition to Turkey until the Commission could examine the application at its next session, beginning on 2 May 1983.

On 18 March 1983, the respondent Government requested the Commission by telex to hold an extraordinary session as a matter of urgency.

On 21 March 1983, the President spoke with the Government Agent. The latter lodged a memorial dated 17 March 1983 in which she set out the reasons supporting her request for an extraordinary session. On the same day, the President decided to communicate the application to the Government, in accordance with Rule 42 (2) (b) and Rule 48 (3) of the Rules of Procedure.

On 22 March 1983, the President, acting in accordance with Rules 28 (3) of the Rules of Procedure, decided:

- to deal with the application as a matter of priority in accordance with Rule 27 in fine of the Rules of Procedure;
- not to follow up the request for an extraordinary session;



- to fix the oral hearing on the admissibility and merits of the application for 2 May 1983;
- to maintain his order to 17 March 1983;
- to inform the applicant, in accordance with Rule 36 of the Rules of Procedure, that it was desirable, in the interests of the parties and the normal conduct of proceedings, that in the event of his release, he should remain at the disposal of the German authorities pending the decision which the Commission could take at its session beginning on 2 May 1983.

This order was communicated to the Government and the applicant on 23 and 24 March 1983 respectively.

On 25 March 1983, the Secretary to the Commission received a memorial from the applicant dated 21 March 1983 in which he pursued his application.

14. On 2 May 1983, the Commission held a hearing on the admissibility and merits of the application. The parties were represented as follows at the hearing:

For the Government:

- Mrs Irene MAIER, Federal Ministry of Justice, Agent.
- Dr Erich CORVES, Federal Ministry of Justice, Adviser.
- Mr Peter HUGLER, Principal Officer in the Federal Office for the Recognition of Foreign Refugees, Adviser.

For the Applicant:

- Mr Wolfgang WIELAND, Lawyer practising in Berlin,  
assisted by:
- Mr Saraffettin KAYA, Lawyer practising in Kiel and
- Mr Nazim ALFATLI, Interpreter.

The report prescribed in Rule 40 of the Rules of Procedure was presented by the Rapporteur at the conclusion of the hearing. Having deliberated on 2 and 3 May 1983, the Commission delivered a decision (cf. the LAW part in the appendix)

- declaring the application admissible, without prejudice to the merits, insofar as it related to the question whether the applicant's extradition would constitute inhuman treatment within the meaning of Article 3 of the Convention.
- declaring the application inadmissible as to the remainder.

15. The parties were invited to submit any supplementary observations on the merits of the application and any observations on the procedure to be followed before 24 June 1983. The Commission recalled that it was at their disposal with a view to reaching a friendly settlement. Finally, the parties were informed that the Commission had decided to maintain until the end of the following session (15 July 1983) the indications given to the parties in accordance with Rule 36 of the Rules of Procedure, namely (to the Government) to postpone the applicant's extradition to Turkey and (to the applicant) to remain at the disposal of the German authorities in the event of release.

16. On 16 June 1983, the applicant submitted a memorial informing, inter alia, the Commission that the Federal Office for the Recognition of Foreign Refugees had granted the applicant political asylum (cf. para. 10 above). The applicant made the following proposal for a friendly settlement:

- the Government would cancel its decision granting extradition;
- the police authorities would decide to expel the applicant, granting him one month after his release;
- the Public Prosecutor's Department would apply to have the arrest warrant cancelled as extradition was no longer envisaged;
- the applicant would waive his rights resulting from the asylum proceedings and would leave the Federal Republic within the time allowed.

17. The applicant's observations were communicated to the Government which was invited to inform the Commission whether the applicant's proposal could be regarded by the government a basis of discussion for the purpose of reaching a friendly settlement.

On 23 June 1983, the Agent of the Government informed the Commission that the Court of Appeal had extended the applicant's detention on 14 June 1983 (cf. para. 8 above) and that the next examination of the applicant's detention would take place on 15 August 1983. Moreover, the Agent reserved the right to submit other observations subsequently.

18. On 13 July 1983, the Agent of the Government sent the Commission a memorial requesting it to cancel the indications given to the parties in accordance with Rule 36 of the Rules of Procedure on the ground that the Turkish Government had given the Government of the Federal Republic an assurance that in the event of the applicant's extradition, the principle of speciality would be observed and that a representative of the German Embassy in Ankara could visit the applicant in prison (cf. para. 9 above). Consequently, the Government considered that it had done everything necessary to ensure that the applicant would not be exposed to treatment in Turkey contrary to Article 3 of the Convention. On account of the visits by an Embassy representative who would be able to verify the applicant's state of health, and discuss any questions of fact or of law relating to his application with him, the Government considered that this fact guaranteed the applicant the possibility to pursue his application before the Commission. The fact that the Embassy representative could attend the hearing before the court was an additional guarantee.

19. On 14 July 1983 the applicant replied to these observations. He considered that the assurances mentioned by the Government were insufficient. In the past, information given by the Ministry of Foreign Affairs concerning the situation in Turkey had been criticised as being contradictory. He referred to a question raised in the Bundestag and to judgments by the Administrative Courts and the Federal Constitutional Court.

20. The Commission examined the state of the proceedings on 14 and 15 July 1983 and decided not to maintain the indications, given to the parties in accordance with Rule 36 of the Rules of Procedure. The Commission took account of the undertakings given by the government of the Federal Republic based on assurances given by Turkey which were intended to safeguard the applicant's position after his extradition to Turkey.

When informing the parties of this decision the Commission noted that it was based on the idea that the discussions envisaged between a representative of the German Embassy in Ankara and the applicant in prison would take place in the absence of third parties. The Commission requested the Government to inform it about the possible execution of extradition and, in this event, to keep it informed of the applicant's situation as regards his conditions of detention and criminal proceedings. Finally, the Government was asked to state its position on the applicant's proposal for a friendly settlement.

21. On 30 August 1983, the Commission was informed by the representatives of the Government and the applicant that the applicant had committed suicide, although proceedings relating to his request for asylum were still pending and further discussions between the Federal Ministry of Justice and the applicant's lawyer concerning extradition were in progress.

22. On 8 October 1983 the Commission examined the state of the proceedings and decided to ask the representatives of the Government and the applicant what conclusions they drew from the applicant's death, as regards the proceedings before the Commission. In accordance with the Commission's practice, the lawyer representing the deceased applicant was asked to state whether the persons claiming through him wished to pursue the application, and if so, on what grounds.

23. The reply by the applicant's lawyer dated 8 November 1983 contained the following:

On behalf of those claiming through the applicant, his brother Ahmed Altun instructed Mr Wieland to ask the Commission to pursue the proceedings. Mr Ahmed Altun took this decision after consulting his parents in Turkey. He is resident in France where he enjoys the right of asylum. It was necessary to request the continuation of the proceedings because the Federal Republic had still not finally severed its extradition relations with the Turkish military régime. There was therefore a risk that similar cases might occur. Furthermore, the applicant's family had an interest in counteracting the false information and defamation in the Turkish press following the applicant's death.

24. The reply by the Agent of the Government dated 11 November contains the following:

In July and August 1983 discussions concerning the applicant's extradition took place between the Federal Ministry of Justice and the applicant's lawyer. On 29 July it was proposed that the lawyer travel to Turkey with an objective observer to consult the file in the criminal proceedings instituted against the applicant. The Government would have

tried to facilitate this trip as much as possible and to obtain the agreement of the Turkish authorities. The Government considers that the applicant's lawyer must therefore have been assured that his client would not be extradited before this trip. The Government assumes that the lawyer notified the applicant thereof, especially as on 9 August he informed the court where asylum proceedings were pending, adding that a new situation affecting the applicant had arisen. On 17 August he asked questions concerning the applicant's defence in Turkey to which the Ministry replied on 29 August. On account of the applicant's death the trip envisaged did not take place.

The Government produced the translation of a judgment which the Second Military Tribunal of Ankara had delivered on 6 April 1983 concerning three of the applicant's co-accused. This judgment constituted evidence in the asylum proceedings pending before the Berlin Administrative Court. According to the Government, this judgment confirmed the suspicions hanging over the applicant which were the subject of the extradition proceedings.

The Government is convinced that it did not violate the Convention and did everything possible to ensure that in the event of his extradition, the applicant would not be subjected to any treatment contrary to Article 3. Consequently, and in view of the other cases pending before the Commission in which relevant questions may be examined, the Government leaves it up to the Commission to decide in this case whether to proceed with the application or strike it off its list. In any event, the Government considers that the Commission should reject the suggestion, raised in their opinion by the decision on admissibility, that a violation might have occurred.

To avoid any misunderstanding as regards the guarantees requested of and obtained from the requesting State, the Government states that this is an exception where the requesting and the requested States are bound by agreements. What was referred to as the "Swiss practice" at the hearing before the Commission concerns two countries with whom Switzerland had not concluded agreements (Dubai and Sri Lanka). The Federal Republic of Germany also adopts this practice in the absence of agreements. As the Federal Republic and Turkey are Contracting Parties to the European Convention on Extradition, there was no need in principle to request specific undertakings. In this case, additional guarantees as regards compliance with the speciality rule were however obtained at the request of the Commission.

The Government states yet again that the fact that the right to asylum was granted did not have a direct bearing on extradition proceedings. Pending interstate cases against Turkey do not prevent extradition. These cases concern the internal situation in Turkey and not automatically the situation of a presumed criminal under the particular protection of the requested State.

In conclusion, the Government leaves it to the Commission to decide whether to pursue the application or to strike it off its list.

25. The Commission requested the representatives of the Government and the applicant to submit any comments on the observations made by the other side before 2 December 1983.

26. Only the applicant's adviser submitted a memorial dated 1 December 1983 which includes the following:

He confirms that a proposal to go to Turkey was made to him. Had the authorities not given their consent, the investigations could have been carried out by a Turkish lawyer selected by the applicant. In this event, it was necessary to obtain an assurance that this lawyer could act without fear of his personal safety. If the two proposals had been refused, a lawyer chosen by the German Embassy should have tried to obtain permission to consult the file. On account of the confidential nature of these negotiations, only the Administrative Court and the applicant were informed thereof.

The applicant's lawyer was not informed of the guarantees which the Turkish authorities gave for the purposes of the projected trip. Extradition was therefore still a possibility but the lawyer hoped that he would be informed beforehand. On contacting the Ministry of Justice on 17 August 1983 the lawyer implicitly understood that the second alternative (investigations by a Turkish lawyer) had been agreed to by the Turkish authorities.

At the hearing of 25 August 1983 the Administrative Court investigated the possible trip by the applicant's lawyer to Turkey. As the reply had not been provided in time, the Court directed on 29 August that a supplementary hearing be held on 15 October in order to clarify the facts fully.

The applicant's lawyer challenges the Government's opinion that the judgment of the Ankara Military Tribunal of 6 April 1983 confirmed the suspicions hanging over the applicant.

27. On 10 December 1983, the Commission examined the state of the proceedings.

28. On 7 March 1984, the Commission resumed its examination of the application, the following members being present:

MM. C.A. NØRGAARD, President  
G. SPERDUTI  
J.A. FROWEIN  
F. ERMACORA  
J.E.S. FAWCETT  
S. TRECHSEL  
M. MELCHIOR  
J. SAMPAIO  
A.S. GÖZUBUYUK  
A. WEITZEL  
H. DANELIUS

and decided to adopt this report.

#### DECISION OF THE COMMISSION

29. The Commission notes that the applicant died on 30 August 1983 and that his brother informed the Commission that he wished to pursue the proceedings instituted by Cemal Kemal Altun on behalf of those claiming through him.

30. The Commission has in certain cases taken account of a similar wish expressed by the heirs of a deceased applicant (cf eg No 4427/70, Rec. 38, p 39).. The European Court of Human Rights did likewise in the Deweer Case (cf judgment of 27 February 1980, Series A, No. 35, para.37)..

However, the heirs of a deceased applicant cannot claim a general right to have the examination of the application introduced by the deceased person continued by the Commission. Admittedly the Commission has already recognised that the heirs could claim to be the direct or indirect victims of the violation alleged by a deceased applicant (cf eg No. 7467/76, D.R. 8, p 220 and No. 8003/77, D.R. 17, p 80). The Commission considers however that in this case it can leave this question undecided. The essential point here is whether the particular nature of the applicant's complaint may under the circumstances of the case be regarded as transferable, ie whether the heirs may be regarded as having acquired the applicant's initial interest in having the alleged violation of the Convention established by the Commission (cf Application No. 8261/70, Kofler v. Italy, Report of the Commission of 9 October 1982, to be published in Decisions and Reports 30).

31. In this case, the subject of the application, in so far as it was declared admissible, is the allegation that in the event of the applicant's extradition to Turkey, he would risk inhuman treatment in that country within the meaning of Article 3 of the Convention.

The Commission finds that the decision to extradite the applicant has lapsed. Furthermore, it considers that the grounds relied on by the applicant's brother to pursue the application in his own name have no direct relation to the subject of the application. The Commission considers consequently that the applicant's brother, who was not associated with the application instituting the proceedings, cannot now in the circumstances of the case claim to have a sufficient legitimate interest to justify proceeding with an examination of the application on his behalf.

32. In accordance with its practice, the Commission has also examined whether any question of a general character affecting observance of the obligations of the High Contracting Parties requires that it continue its examination of the case. This might be so in particular where not only an individual case but also legislation, or a legal system or practice were at issue.



The Commission finds that it is in a position to examine the problem raised by the application in other cases pending before it. Indeed it declared admissible on 6 December 1983 Applications Nos. 9940/82 - 9944/82, lodged by France, Norway, Denmark, Sweden and the Netherlands against Turkey relating inter alia to the allegation that during the period 12 September 1980 to 1 July 1982 there was an administrative practice of torture or ill-treatment of prisoners in Turkey.

Consequently, there is no reason of a general character to justify proceeding with the examination of this application.

For these reasons, the Commission

Having regard to Rules 44 (1), 49 and 54 of its Rules of Procedure,

Decides to strike the application off its list, to transmit for information this report to the Committee of Ministers and the representatives of the Parties and to publish it.

The Secretary  
to the Commission

The President  
of the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)