



Investigation into whether law-enforcement director and governor of Istanbul contributed to Berkin Elvan's death was ineffective

In today's **Chamber** judgment¹ in the case of [Elvan v. Türkiye](#) (application no. 64937/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 (right to life / procedural aspect) of the European Convention on Human Rights.

The case concerned the death of Berkin Elvan at the age of 15 following a wound sustained by a grenade launcher during the "Gezi events" in Istanbul.

The Court found in particular that there had been a failure on the part of the Turkish authorities to fulfil their procedural obligation, under Article 2 of the Convention, to conduct an effective investigation into any part that Istanbul's law-enforcement director and/or governor might have played in relation to the death of Berkin Elvan.

Principal facts

The four applicants are the parents of Berkin Elvan (Sami and Gülsüm Elvan) and his sisters (Gamze and Özge Elvan), Turkish nationals born in 1969, 1972, 1996 and 1998 respectively. They live in Istanbul.

Events leading to the death of Berkin Elvan

Between May and September 2013, a series of demonstrations were held to protest against a development plan to build a shopping centre over Gezi Park, one of Istanbul's green spaces. Initially led by environmentalists and local residents who were opposed to the removal of the park, the protest spread in June and July of that year to many other towns in Türkiye, resulting in clashes.

On 16 June 2013, between 7.15 a.m. and 7.20 a.m., a police officer from an elite team known as "Zet" fired in the direction of Berkin Elvan, who was near the junction of Gaziler and Mithatpaşa streets while, according to his relatives, he was going to fetch bread. He was hit in the head by the grenade capsule and was immediately taken into the care of civilians present at the scene, at 7.37 a.m., and taken to hospital, where he remained in a coma for 269 days. He died on 11 March 2014 of skull fractures resulting in a brain haemorrhage.

Investigation and criminal proceedings

On the day of the event, the Istanbul public prosecutor's office opened a criminal investigation of its own motion. A few days later the first and second applicants, Sami and Gülsüm Elvan, lodged two formal complaints against the police officers and their superiors involved in the operation.

In December 2016 the prosecutor's office charged a police officer with causing Berkin Elvan's death with "possible intent". In addition, the prosecution took the decision to drop charges against 42

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

other police officers. The first applicant, Sami Elvan, lodged an individual application with the Constitutional Court in respect of the decision not to prosecute and the application was dismissed.

In June 2012 the police officer who had been prosecuted was sentenced by the Istanbul Assize Court to 16 years and eight months' imprisonment. The officer and the applicants appealed against that judgment. Those criminal proceedings are currently still pending before the Istanbul Court of Appeal.

Other proceedings

In 2013 the first applicant, Sami Elvan, lodged a complaint against the then Prime Minister (R.T.E.), the Minister of the Interior (M.G.), Istanbul's law-enforcement director (H.Ç.) and Istanbul's governor (H.A.M.), accusing them of having provoked and orchestrated the violence against the Gezi Park demonstrators and of having been complicit in the death of his son. Ten days later the prosecution discontinued the criminal proceedings against the Prime Minister and the Minister of the Interior, finding that they were immune from prosecution while in government. As regards the complaint against H.Ç. and H.A.M., which fell under a procedure introduced by the Prosecution of Civil Servants Act (Law no. 4483), the Ministry decided in 2014 not to allow the prosecution of those officials. The Supreme Administrative Court dismissed a challenge by a member of parliament against that decision.

In 2014 the applicants Sami and Gülsüm Elvan took their case to the Turkish National Assembly, complaining of alleged shortcomings in the investigation and requesting that steps be taken to clarify promptly the circumstances of their son's death. They criticised H.Ç., H.A.M. and the other law-enforcement officials for deliberately delaying and obstructing the investigation into the death. The request was forwarded to the special investigation department of the Istanbul public prosecutor's office, which concluded that the investigation carried out to date had been effective and, in December 2014, decided to take no further action in response to the complaint.

In 2015 the applicants lodged an individual application with the Constitutional Court, alleging a violation of Article 2 (right to life) of the Convention and arguing that Berkin Elvan's death had been the result of a combination of factors and not an isolated act by a single police officer. They complained in particular, of the impunity of H.Ç. and H.A.M. in their capacity as decision-makers at the top of the police hierarchy. In 2019 the Constitutional Court dismissed that application.

Also in 2015 the applicants brought an action in the Istanbul Administrative Court, claiming compensation for the pecuniary and non-pecuniary damage that they alleged to have sustained. In 2017 the Administrative Court decided to stay the proceedings until the final conclusion of the accused police officer's trial, finding that the issue before it depended on the outcome of the criminal proceedings that were still pending.

Complaints, procedure and composition of the Court

Relying in particular on Article 2 (right to life), the applicants complained of Berkin Elvan's death and of the investigation into the circumstances of his death.

The application was lodged with the European Court of Human Rights on 29 November 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn Bårdsen (Norway), *President*,
Egidijus Kūris (Lithuania),
Pauliine Koskelo (Finland),
Saadet Yüksel (Türkiye),
Lorraine Schembri Orland (Malta),
Frédéric Krenc (Belgium),
Diana Sârcu (the Republic of Moldova),

and also Hasan Bakırcı, *Section Registrar*.

Decision of the Court

Article 2: admissibility

As regards the role of the Prime Minister and the Minister of the Interior, the Court found that the applicants' original application did not contain any complaint concerning them.

Concerning the proceedings against the police officer and the administrative compensation claim, the Court first noted that the investigation had led to the officer's conviction by Istanbul Assize Court no. 17 for homicide with possible intent to kill. The applicants, arguing that the police officer should have been convicted of the more serious offence of murder, appealed against that judgment. Those proceedings were still pending. The Court could not therefore prejudge the decision of the Istanbul Court of Appeal or, if the case went further, that of the Court of Cassation. In fact there was currently no reason to dispense the applicants from ultimately using the individual remedy available in the Constitutional Court. The same consideration also applied to the administrative compensation claim brought by the applicants in the Istanbul Administrative Court. In conclusion, the applicants had not yet exhausted the criminal, administrative and constitutional remedies in respect of this part of their application.

As regards the alleged responsibilities of Istanbul's law-enforcement director and governor, the Court declared that part of the application admissible and proceeded to examine the merits of the complaint.

Article 2: merits of complaint about Istanbul's law-enforcement director and governor

The Court explained that it would not attach any weight to the Government's argument that the general situation during the Gezi events had been dangerous, or to the idea that Berkin Elvan had participated in any particular activity in that context, since it had been established (by both the public prosecutor's office and Istanbul Assize Court no. 17) that from 7 a.m. on the relevant day there had been no protest action or active demonstrator at the scene.

Further to the complaint lodged by the first applicant Sami Elvan against Istanbul's law-enforcement director H.Ç. and governor H.A.M., the case file had been transmitted to the Ministry of the Interior for the purpose of obtaining authorisation to prosecute as required by Law no. 4483. The Ministry had refused on 14 March 2014 to authorise prosecution.

The Court pointed out that it had systematically criticised and repeatedly found against the regime imposed by Law no. 4483 on account of the lack of independence of the investigative bodies called upon to implement it, the impossibility for individuals to participate effectively in the related investigations and the inadequacy of the judicial review carried out by the Supreme Administrative Court in respect of those bodies' decisions. There were no specific circumstances in the present case which would lead the Court to rule otherwise. According to the Court's case-law², there was a systemic problem which in itself amounted to a breach of the procedural obligations at stake in the present case.

The Court further noted that the applicants had lodged a petition with the Turkish National Assembly in which they had accused the two senior officials in question of obstructing justice. This accusation had been brought to the attention of the Istanbul public prosecutor's office, which had

² *Aydoğdu v. Turkey* (no. 40448/06, § 90, 30 August 2016); *Asma v. Turkey* (no. 47933/09, § 86, 20 November 2018); *Mehmet Ulusoy and Others v. Turkey* (no. 54969/09, § 97, 25 June 2019).

decided on 25 December 2014 to discontinue the proceedings. The applicants had challenged that decision before the Constitutional Court, extending the scope of their previous petition to the National Assembly in that they now also criticised the law-enforcement director H.Ç. and the governor H.A.M. (taking the view that they had failed to inform police officers that they had a duty to act in accordance with the law and in the interests of public safety) for having deliberately incited police officers to use excessive force against the demonstrators.

In particular, the Constitutional Court had confined itself, in its judgment of 9 May 2019, to finding that "... the applicants [had] not produced tangible proof that the order to intervene sought to ensure that the police exceeded their power; accordingly, the applicants' complaints [could] not be regarded as arguable since they [were] not based on evidence which [was] beyond reasonable doubt".

The Court did not find this approach satisfactory because it was based exclusively on a reversal of the burden of proof. It considered that the applicants could not be expected to be in a position to submit – in support of their complaint that the law-enforcement director H.Ç. and the governor H.A.M., in their capacity as police chiefs, had incited the police to commit acts of violence – any more tangible evidence than they had done, in order to call into question the legality of any strategic orders given to the police force. Such information, if it existed, could only have been in the possession of the highest authorities responsible for law-enforcement in Türkiye. In any event, the law-enforcement director H.Ç. and the governor H.A.M. had certainly been the first to know how the police had intervened in the Gezi events and the authorities to which they were accountable were the only ones to have access to information capable of corroborating or refuting the applicants' allegations.

Furthermore, the Constitutional Court could not have been unaware that, according to the Court's case-law, where a respondent government were called upon to account for the death of a civilian, the examination of the measures taken in the course of an investigation served not only to determine whether the investigation had been conducted in accordance with the procedural requirements, but also to decide whether the government were able to "discharge the burden of proof". Where it was not disputed that death resulted – as in the present case – from the use of lethal force by State agents, the burden of proof would be on the respondent government, which had to rebut the applicant's allegations by appropriate and convincing means; this was particularly true in the case of persons who were injured or died while under the control of the authorities or agents of the State, for example during police or military operations, in which situations those authorities or agents were deemed to have exclusive access to relevant information capable of corroborating or refuting the allegations made against them by the victims.

The Court could not remedy this shortcoming by attempting to speculate as to what the outcome of the Constitutional Court proceedings might have been had the above-mentioned issues been duly examined. It could only conclude that in the present case the fact that it was unable to reach definitive findings of fact in respect of this part of the application was the result of the lack of an adequate response by the investigative bodies under the questionable regime provided for by Law no. 4483 and, ultimately, by the Constitutional Court.

Consequently, the Court found that there had been a breach of the respondent State's procedural obligation under Article 2 of the Convention to carry out an effective investigation into any part that Istanbul's law-enforcement director H.Ç. and/or governor H.A.M. might have played in relation to the death of Berkin Elvan.

[Just satisfaction \(Article 41\)](#)

As the applicants had not made any claim for just satisfaction, the Court did not make any award.

The judgment is available only in French.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Inci Ertekin (tel.: + 33 3 90 21 55 30)

Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)

Denis Lambert (tel.: + 33 3 90 21 41 09)

Neil Connolly (tel.: + 33 3 90 21 48 05)

Jane Swift (tel.: + 33 3 88 41 29 04)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.