EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 53829/10
Haydar BAŞKAYA and others
against Turkey

The European Court of Human Rights (Second Section), sitting on 5 December 2017 as a Chamber composed of:

Robert Spano, *President,*
Julia Laffranque,
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar.*

Having regard to the above application lodged on 22 June 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix.

2. The Turkish Government ("the Government") were represented by their Agent.

The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 5 October 2003 the applicants' son and brother, Celal Başkaya, who was a student at a public university in Konya at the material time

("Selçuk University"), drowned in the university's Olympic swimming pool.

5. Soon after the incident police officers arrived at the swimming pool and examined the accident site together with the deputy manager of the pool, T.S. According to the information provided by T.S., Celal Başkaya was taken to the Konya Numune Hospital following initial medical assistance administered beside the pool. The police drew up a sketch map of the scene of the incident, showing that the victim had drowned in the middle of the pool, where the water depth was 220 centimetres. Another report prepared by the police on the same day indicated that a diabetic ID card had been found amongst the belongings recovered from victim's changing room locker.

6. Still on 5 October 2003, the police questioned four suspects in respect of the incident: the lifeguards employed at the pool, B.Y. and C.A., the medical officer at the pool, M.Ö., and the deputy manager of the pool, T.S.

7. B.Y. told the police that when he and his colleague, C.A., who had been positioned on the other side of the pool at the material time, noticed a person drowning in the middle of the pool, they jumped in and rescued him. When they first took him out, the young man was unconscious, but still had a pulse. They immediately performed the relevant first aid procedures with the assistance of the medical officer M.Ö., and ten minutes later an ambulance arrived and took the man to the hospital. B.Y. stated that it was only after the incident that they learned that the victim was diabetic. B.Y. also claimed that before sinking under water, the victim had not called for help in any way, nor had he made any movements suggesting that he was in danger of drowning.

8. The other three suspects, C.A., M.Ö. and T.S., gave similar statements to that of B.Y.'s.

9. On the same day, the police also questioned two eye witnesses, who gave statements along the same lines as the suspects.

10. The autopsy carried out on the same day confirmed the cause of death as drowning.

11. On 8 October 2003 the Konya public prosecutor's office filed a bill of indictment with the Konya Assize Court against the two lifeguards, B.Y. and C.A., the medical officer at the pool, M.Ö., and the deputy manager, T.S., for causing the death of Celal Başkaya by their failure to take the necessary safety measures at the swimming pool.

12. The applicants joined the proceedings before the Konya Assize Court as civil parties not seeking compensation. In the petition which he submitted to the assize court, the first applicant, Haydar Başkaya (the victim's brother), claimed that the lifeguards had failed to pay attention to his brother's initial calls for help and had intervened too late.

13. Before the Konya Assize Court, the defendants repeated their previous police statements. The lifeguard C.A. informed the assize court

that there had been approximately seventy-five to eighty people at the swimming pool at the material time. At the start of the proceedings, the defendants' lawyer challenged the autopsy report as being incomplete, given that it had not been established during the autopsy whether the victim − who had suffered from diabetes mellitus − had died because he had lapsed into a diabetic coma in the swimming pool. The lawyer requested from the court another autopsy to establish whether he had died of diabetes-related causes. The matter was brought before the Forensic Medicine Institute, which informed the assize court that blood samples taken after death would not be indicative of the glucose levels preceding death.

14. At the subsequent hearings the assize court heard statements from witnesses who confirmed that the victim knew how to swim and had drowned without making any noise or movements. The assize court also conducted an on-site examination of the university swimming pool in the presence of the defendants, the applicants' lawyer, and two experts (one expert lifeguard and one physician from the Provincial Directorate of Youth and Sports).

15. In his report dated 10 December 2004 the expert lifeguard stated that according to the information in the case file the victim, who apparently knew how to swim, had drowned without any attempts to attract attention. There was, moreover, no evidence to suggest that the lifeguards had neglected their rescue duties in any way. In these circumstances, the expert found that there were no grounds to hold the lifeguards accountable in connection with the death of Celal Başkaya.

16. In his report dated 31 January 2005 the medical expert found that at the time of the incident there were two lifeguards and one medical officer on duty at the swimming pool, which showed that the necessary safety measures had been in place. The evidence in the case file suggested that the victim knew how to swim, that he had drowned without calling for help or showing any other signs of distress, and that the lifeguards had intervened as soon as they noticed the victim at the bottom of the pool. Without expressing any view as to whether the victim's death had been related to his diabetes, the expert stated that strenuous physical activity could cause glucose levels to drop, which could in turn lead to loss of consciousness. If the victim had experienced such a hypoglycaemic attack while under water and had, as a result, lost consciousness, it was possible that the lifeguards or other people in the pool might not have realised right away that there was a problem. In the light of all this information, the medical expert stated that the defendants had no responsibility in connection with the victim's death.

17. On 4 May 2005 the Konya Assize Court requested another expert report from the Istanbul Forensic Medicine Institute regarding the liability of the defendants in respect of the death of Celal Başkaya.

18. On 17 May 2005 the Forensic Medicine Institute rejected that request as being outside the scope of its duties. The Konya Assize Court

therefore ordered another expert report from three experts on occupational safety.

19. In their report dated 30 September 2005 the experts on occupational safety made the following findings:

– Considering that the victim knew how to swim, which was not contested, he must have experienced a health problem that caused him to lose consciousness and sink while halfway across the pool.

– Although it was not possible to determine with any certainty what type of health problem had brought about his drowning, the victim was diabetic. The possible outcomes of hypoglycaemia caused by strenuous physical activity had been outlined in the medical expert's opinion dated 31 January 2005 (see paragraph 16 above).

– It therefore appeared that the victim had silently sunk to the bottom of the pool without calling for help or showing other signs of drowning as a result of his underlying medical condition.

– Bearing in mind that the victim had been only one of the many swimmers in the pool, it could not be expected for the lifeguards to follow all the movements of all the swimmers at all times and to intervene despite the absence of any signs of distress.

– In these circumstances, the lifeguards, who had intervened as soon as they noticed the victim at the bottom of the pool, could not be held accountable for the victim's death.

20. Relying on all the evidence and the information in the case file, on 28 February 2006 the Konya Assize Court ordered the defendants' acquittal.

21. The applicants appealed against that judgment. They objected in particular to the findings in the expert report issued by the physician on 31 January 2005. They also argued that the expert report of 30 September 2005 had not been made available to them.

22. On 16 March 2009 the Court of Cassation quashed the judgment of the first instance court and decided to discontinue the proceedings as the prosecution of the offence in question had become time-barred. This decision, which was deposited with the registry of the first-instance court on 28 May 2009, was served on the applicants on 3 June 2010.

23. The applicants alleged, without submitting any supporting documents, that the lifeguards had been discharged from their duties in the aftermath of the incident. This information was neither confirmed nor contested by the Government.

COMPLAINTS

24. The applicants complained under Article 2 of the Convention that their son and brother Celal Başkaya's right to life had been violated on

account of the failure of the relevant State authorities (i) to put in place the necessary measures to ensure the safety of swimmers at the Selçuk University swimming pool; (ii) to employ competent, experienced and attentive lifeguards; (iii) to have in place the necessary warning and rescue equipment at the Selçuk University swimming pool; and (iv) to intervene in a timely manner to prevent drowning.

25. The applicants also argued under Article 6 of the Convention that the criminal proceedings had not been concluded within a reasonable time, which had led to their discontinuation for having become time-barred. The applicants complained that the defendants had therefore enjoyed impunity.

THE LAW

A. The parties' arguments

26. The applicants maintained their allegations as regards the merits of the case. They reiterated that the lifeguards had been dismissed from their jobs after the incident, which proved that they had acted negligently.

27. The Government argued that the applicants' complaints under Article 6 § 1 of the Convention concerning the length of the criminal proceedings had to be declared inadmissible for being incompatible *ratione materiae* with the provisions of the Convention in the light of the Court's findings in *Perez v. France* ([GC], no. 47287/99, § 70, ECHR 2004-I). They further argued that the applicants had failed to exhaust the available domestic remedies in relation to their complaints under Article 2, as they had not brought those complaints before civil and/or administrative courts, which would have been fully capable of establishing the facts and responsibility for the accident and providing adequate redress independent of the outcome of the criminal proceedings.

28. The applicants responded that it would have been futile for them to have applied to civil or administrative courts, as those courts would have followed the acquittal decision of the Konya Assize Court.

B. The Court's assessment

1. As regards the alleged violation of Article 6 § 1 of the Convention

29. The applicants complained of an infringement of their right to a fair trial on account of the length of the criminal proceedings at issue. They relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

30. The Court reiterates that the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence (see *Perez*, cited above). Therefore, the victim of an offence may only invoke his or her fair trial rights in connection with the criminal proceedings against the offender if he or she has joined those proceedings as a civil party to obtain damages or to otherwise protect his or her civil rights (see, for instance, *Hafikli v. Turkey* (dec.), no. 13394/12, 30 August 2016). The Court notes that while the Turkish Code of Criminal Procedure in force at the material time allowed civil parties to request compensation during criminal proceedings (see *Beyazgül v. Turkey*, no. 27849/03, §§ 36 and 39, 22 September 2009), there is no information in the case file to suggest that the applicants made such a request (see paragraph 12 above).

31. In these circumstances, and relying on its settled case-law on this matter, the Court concludes that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention (see *Hafikli*, cited above, and *Uykur v. Turkey* (dec.), no. 22879/10 and 2 others, §§ 18-19, 4 July 2017).

2. As regards the alleged violation of Article 2 of the Convention

32. The applicants complained that the State authorities had failed to protect Celal Başkaya's right to life. They relied on Article 2 of the Convention, the relevant part of which reads as follows:

> "1. Everyone's right to life shall be protected by law. (...)."

33. The Court notes that the basic principles concerning a State's positive obligation to protect the right to life under Article 2, including against non-intentional infringements of that right, were set out by the Grand Chamber in the case of *Öneryıldız v. Turkey* ([GC], no. 48939/99, §§ 89-96, ECHR 2004-XII), and were subsequently elaborated on in many cases that followed (see, for instance, *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, §§ 128-145, ECHR 2008 (extracts); *Ciechońska v. Poland*, no. 19776/04, §§ 59-79, 14 June 2011; and *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, §§ 79-106, ECHR 2013).

34. The Court notes that in the instant case, the applicants did not complain about the absence of a legislative or regulatory framework governing the safety of swimmers in swimming pools, or of a structural deficiency resulting from a malfunctioning of the relevant legal or regulatory framework (see, for instance, *Aydoğdu v. Turkey*, no. 40448/06, §§ 62-64 and §§ 87-88, 30 August 2016). The Court further notes that the applicants did not claim that the death of Celal Başkaya had been caused

intentionally or that the circumstances in which the death had occurred were such as to raise suspicions in that regard. Nor did they argue that the death had resulted from the inaction of the authorities in the face of a real and immediate risk to the life of Celal Başkaya which they perceived or ought to have perceived (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-II), or that it had involved a dangerous activity which fell under the responsibility of the public authorities (see, for instance, *Öneryıldız*, cited above, § 93), or that it had been caused by negligence that went beyond a mere error of judgment or carelessness (see, for instance*, Mehmet Şentürk and Bekir Şentürk*, cited above). They rather complain under Article 2 that Celal Başkaya lost his life as a result of the failure of the responsible authorities to put in place the necessary safety measures at the swimming pool in question and the additional failure of the lifeguards to perform their rescue duties with the necessary diligence and care.

35. The Court notes that the applicants' complaints regarding the responsibility of the relevant individuals and authorities in respect of the death of Celal Başkaya were the subject of a criminal investigation, which culminated in the prosecution and trial of four people in connection with the incident. During the ensuing criminal proceedings, the Konya Assize Court heard all the defendants and witnesses, conducted an on-site inspection, and ordered three expert reports in order to establish the circumstances of the death and to determine liability as necessary. On the basis of all the information and evidence before it, the assize court eventually decided to acquit the defendants, although that decision never became final as the proceedings were subsequently discontinued by the Court of Cassation for having become time-barred.

36. The Court considers at the outset that the criminal proceedings in question appear to have been conducted thoroughly and effectively at the first-instance level, and it finds no appearance of arbitrariness in the judgment of the Konya Assize Court based on the material before it. The Court also notes, however, that those proceedings were eventually discontinued, mainly on account of the failure of the Court of Cassation to review the appeal request in a timely manner.

37. That said, the Court also notes that, apart from the aforementioned criminal proceedings, the Turkish legal system afforded the applicants the possibility of bringing an action for compensation before civil and/or administrative courts in connection with their substantive complaints concerning the negligence on the part of the State authorities for the death of Celal Başkaya (see *Güvenç v. Turkey* (dec.), no. 43036/08, § 40, 21 May 2013), which the applicants chose not to pursue. Taking into account its case-law arising from cases involving non-intentional infringements of the right to life (see, for instance, *Murillo Saldias and Others v. Spain* (dec.), no. 76973/01, 28 November 2006; *Anna Todorova v. Bulgaria*,

no. 23302/03, § 73, 24 May 2011; *Ciechońska*, cited above; and *Gençarslan v. Turkey* (dec.), no. 62609/12, §§ 19-22, 14 March 2017) and the applicants' particular complaints, the Court considers that civil and/or administrative-law remedies would have served to establish the facts and the responsibility of the authorities and of the swimming pool personnel for the accident in question and to provide redress, as appropriate. While the applicants claimed that they had no prospects of success before civil and/or administrative courts in view of the acquittal of the defendants by the Konya Assize Court, the Court reiterates that under Turkish law, civil courts are not bound by the verdict of a criminal court as to the acquittal of a defendant (see, for instance, *Mustafa Türkoğlu v. Turkey*, no. 58922/00, § 40, 8 August 2006; *Dikici v. Turkey*, no. 18308/02, § 25, 20 October 2009; *Güvenç*, cited above, § 40 and §§ 42-44; and *Sıdıka İmren v. Turkey*, no. 47384/11, § 64, 13 September 2016).

38. In the light of the foregoing, the Court considers that the applicants did not pursue all available remedies relevant to their complaints under Article 2 of the Convention (see, *mutatis mutandis*, *Hafikli*, cited above, and *Uykur*, cited above, §§ 20-25). It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 11 January 2018.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President

APPENDIX

1. Haydar BAŞKAYA is a Turkish national who was born in 1974, lives in Ankara and is represented by D. Kılıç
2. Cemal BAŞKAYA is a Turkish national who was born in 1938, lives in Çorum and is represented by D. Kılıç
3. Nezaket BAŞKAYA is a Turkish national who was born in 1936, lives in Çorum and is represented by D. Kılıç