CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38587/97
by Hamail BAYRAM and Şekir YILDIRIM
against Turkey

The European Court of Human Rights, sitting on 29 January 2002 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 17 September 1997 and registered on 13 November 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Commission's decision of 19 October 1998,

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

The applicants, Hamail Bayram and Şekir Yıldırım, are Turkish nationals, who were born in 1958 and 1945 respectively and live in Uzungeçit, a village attached to the district of Uludere in Şırnak Province. They were represented before the Court by Mr Tahir Elçi, a lawyer practising in Diyarbakır.

A. The circumstances of the case

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

On 26 April 1994 the first applicant's husband and the second applicant's son were, along with other passengers, set out from Uludere by a vehicle. On their way to Şırnak their vehicle hit a mine placed on the road. All the people in the vehicle died as a result of the explosion.

The Şırnak Public Prosecutor initiated an investigation into the incident.

On 16 May 1994 the Şırnak Public Prosecutor issued a decision to the effect that he had no jurisdiction (*görevsizlik kararı*) in the matter. The prosecutor considered that the mine, which caused the death of three people, was placed on the road by the members of the PKK. In view of the nature of the offence and the existing evidence, the investigation into the incident fell within the competence of the prosecutor's office at the Diyarbakır State Security Court. The decision declining jurisdiction named the suspects as unidentified members of the PKK.

On 9 September 1997 the applicants lodged a petition with the office of the public prosecutor attached to the State Security Court in Diyarbakır and requested the public prosecutor to be informed about the activities undertaken in the investigation. The public prosecutor replied on the same day that the investigation was ongoing without stating any further information as to the details of this investigation. Since then the applicants have not received any information about the investigation.

B. Relevant domestic law and practice

1. Criminal law and procedure

The Turkish Criminal Code (*Türk Ceza Kanunu*), as regards unlawful killings, has provisions dealing with unintentional homicide (Articles 452 and 459), intentional homicide (Articles 448) and aggravated murder (Article 450).

Pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure (*Türk Ceza Muhakemeleri Usulü Kanunu*; hereinafter referred to

as "CCP"), complaints in respect of these offences may be lodged with the public prosecutor. The complaint may be made in writing or orally. In the latter case, such a complaint must be recorded in writing (Article 151 CCP). The public prosecutor and the police have a duty to investigate crimes reported to them (Article 153 CCP).

If there is evidence to suggest that a deceased has not died of natural causes, the police officers or other public officials who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152 CCP). Pursuant to Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty shall be liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts by conducting the necessary inquiries to identify the perpetrators (Article 153 CCP). The public prosecutor may institute criminal proceedings if he or she decides that the evidence justifies the indictment of a suspect (Article 163 CCP). If it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, the public prosecutor may close the investigation. However, the public prosecutor may decide not to prosecute if, and only if, the evidence is clearly insufficient.

Insofar as a criminal complaint has been lodged, a complainant may file an appeal against the decision of the public prosecutor not to institute criminal proceedings. This appeal must be lodged within fifteen days after notification of this decision to the complainant (Article 165 CCP).

2. Administrative liability

Article 125 §§ 1 and 7 of the Turkish Constitution provides as follows:

> "All acts and decisions of the administration are subject to judicial review ...The authorities shall be liable to make reparation for all damage caused by their acts or measures."

This provision is not subject to any restriction even in a state of emergency or war. The second paragraph does not require proof of the existence of any fault on the part of the administration, whose responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as the theory of "social risk". Thus the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

3. Civil action for damages

Pursuant to Article 41 of the Civil Code, anyone who suffers damage as result of an illegal act or tort act may bring a civil action seeking reparation for pecuniary damage (Articles 41-46) and non-pecuniary damage. The civil courts are not bound by either the findings or the verdict of the criminal court and the issue of the defendant's guilt (Article 53).

COMPLAINTS

The applicants complain under Article 2 of the Convention that the security forces acted negligently and failed to protect the lives of their relatives because they did not observe the security measures required for the national roads.

The applicants complain under Articles 6 and 13 of the Convention in conjunction with Article 2 of the Convention that the national authorities failed to conduct an effective investigation into the death of their relatives.

THE LAW

The applicants complain that the security forces acted negligently and failed to protect the lives of their relatives because they did not observe the security measures required for the national roads. They further complain that the national authorities failed to conduct an effective investigation into the death of their relatives. They rely on Articles 2, 6 and 13 of the Convention.

The Government submit that the applicants have not exhausted domestic remedies within the meaning of Article 35 of the Convention. They have not filed any criminal complaint with the prosecution authorities in relation to the death of their relatives. The Government further submit that the applicants did not exercise any of the ordinary administrative and civil remedies that were available under Turkish law and were effective. The Government submit various examples of cases in which administrative courts have awarded compensation to the families of the persons who have died at the hands of State officials. Moreover, in cases where the administration has exceeded its powers, it is possible to take civil proceedings in order to seek compensation. The Government submit that the applicants have not availed themselves of any of these options.

The Government argue that a criminal investigation has in fact been opened *ex officio*, in the course of which various effective investigative measures have been taken in a diligent manner in order to identify the

perpetrators. These criminal proceedings are still pending as, so far, no final judgment has been handed down.

In case it would be found that the above remedies cannot be regarded as effective, the Government submit that the application has been lodged out of time in that the applicants' relatives died in April 1994 whereas the applicants only applied to the Court on 17 September 1997, which is more than six months later. In the Government's submissions it is striking that the applicants lodged a petition with the office of the public prosecutor at the Diyarbakır State Security Court shortly before they lodged their application with the Commission. According to the Government, this constituted an abuse of the right of petition.

In reply the applicants submit that the criminal investigation cannot be regarded as adequate or effective. According to them no investigative measures have been taken by the authorities after the incident took place. They maintain that the national authorities concluded, without carrying out an effective criminal investigation, that the members of the PKK had placed the mine on the road.

As regards the administrative and civil remedies suggested by the Government, the applicants submit that these remedies cannot be regarded as effective in their case.

As to the Government's argument that the application has been filed out of time, the applicants submit that, before applying to the European Commission of Human Rights in September 1997, they have first attempted to obtain information from the competent public prosecutor about the criminal investigation. When it was clear to them that their efforts remained without effect, they decided to file an application with the European Commission of Human Rights.

The Court observes that it is not required to decide whether or not the applicants have exhausted domestic remedies as the application is inadmissible for the following reasons stated below.

The Court recalls in the first place that the purpose of the six-months' rule is to promote security of law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time. Furthermore, it ought also to protect the authorities and other persons concerned from being under any uncertainty for a prolonged period of time (see application no. 23654/94, Commission decision of 15 May 1995, Decisions and Reports (DR) 81, p. 76).

The Court further recalls that if no remedies are available or if they are judged to be ineffective, the six-months' time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of (see application no. 23413/94, Commission decision of 28 November 1995, Decisions and Reports (DR) 83, p. 31).

However, special considerations could apply in exceptional cases where an applicant avails himself or relies on an apparently existing remedy and

only subsequently becomes aware of circumstances which render the remedy ineffective, it is appropriate to take as the start of the six month period the date when he first became aware or ought to have become aware of those circumstances (see Edwards v. the United Kingdom decision, application no. 46477/99, unpublished).

In the present case the Court observes that the event complained of by the applicants took place on 26 April 1994, whereas the applicants petitioned the Diyarbakır Public Prosecutor on 9 September 1997, which is almost three and a half years later the event took place. The applicants argue that they became aware of the ineffectiveness of the domestic remedies following the unsatisfactory reply of the Diyarbakır Public Prosecutor.

The Court is of the opinion that, assuming that there were no effective remedies in the present case, the applicants must be considered to have been aware of the lack of any effective criminal investigation long before they petitioned the public prosecutor. If, as the applicants alleged, they had not become aware of this situation until 9 September 1997, the Court considers that that was due to their own negligence. Furthermore, the applicants have failed to substantiate the existence of specific circumstances which might have prevented them from observing the time-limit laid down in Article 35 § 1 of the Convention.

The Court finds, therefore, that the application has been introduced out of time and is inadmissible under Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President