CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25070/02
by Faime BEDİR
against Turkey

The European Court of Human Rights (Second Section), sitting on 2 October 2007 as a Chamber composed of:

Mrs F. TULKENS, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr D. POPOVIĆ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 8 November 2001,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Faime Bedir, is a Turkish national who was born in 1954 and lives in Erciş. She was represented before the Court by Mr M. Mızrak, a lawyer practising in Van. The Turkish Government ("the Government") did not designate an Agent for the purpose of the proceedings before the Court.

A. The circumstances of the case

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

On 12 June 1996, at about 12.30 a.m., security forces and village guards carried out an operation in the Piyale meadow in the village of Topraklı in Erciş, with a view to apprehending two people who were suspects in an investigation of an attempted murder.

At the time of the operation, the applicant, her two daughters and two sons were in a tent in the meadow while her husband (N.B.) was outside, close to where they kept their animals.

At about 6 a.m., the applicant and her children came out of the tent after they heard noises. They saw N.B. walking with the sheep towards the mountain. He had with him his unlicensed Kalashnikov-type rifle and a plastic bag containing cartridge clips and bullets.

They then saw one of the soldiers (O.K.) get down on one knee and shoot N.B..

Following the incident, the commander of the team and seven of the soldiers who took part in the operation drew up an incident report.

After a while, the Erciş public prosecutor and a non-commissioned officer from the Erciş Gendarmerie Station, accompanied by several soldiers, arrived at the scene of the incident. They also drew up an incident report.

The public prosecutor took statements from eyewitnesses S.B., I.B. and M.B., who were the applicant's relatives and who were also living in tents near N.B. at the time of the incident.

On the same day, a post-mortem examination of the body was carried out by a doctor in the presence of the public prosecutor. In his report, the doctor concluded that death was clearly the result of internal bleeding caused by a bullet which had entered the left buttock and left the body just below the right-hand side of the chest. There was thus no need to conduct an autopsy.

An army lieutenant drew sketches of the topography of the scene of the incident and the relative positions of those involved. The gun and the plastic bag containing the cartridge clips and the bullets which had been found on N.B. were also logged.

The cartridge case recovered from the scene of the incident and O.K.'s gun were sent for a ballistics examination to the Gendarmerie Forensic Laboratory, which prepared an expert report on 20 June 1996. The report showed that the bullet which caused the death of N.B. had been fired from O.K.'s gun.

On the same day, the commander of the Deliçay Gendarmerie Station took statements from seventeen people, including the soldiers and village guards who had taken part in the operation. They stated for the most part that, when they were searching the tents, a man with a gun and a plastic bag

in his hand came out of one of the tents and started running across the valley. Some of the soldiers shouted “Stop, don’t run away, or we will fire” and fired four or five times in the air. The man then turned in the direction of O.K. and E.H. They also shouted at the man to stop just before five or six more gunshots were heard.

Between 12 and 15 June 1996 the Erciş public prosecutor took statements from the same seventeen soldiers and village guards.

On 24 June 1996 the public prosecutor took witness statements from the applicant and her daughter.

In their statements, made with the help of an interpreter, the applicant and her daughter stated that, when they came out of the tent, they saw that N.B. was walking along, with sheep, towards the mountain. They then saw O.K. get down on one knee and shoot N.B.. The soldiers did not shout a warning to halt; nor did they fire warning shots in the air. After N.B. had been shot, the other soldiers also fired in the same direction. The applicant stated that her husband had the Kalashnikov gun in order to protect the family, as one of their sons had become a village guard three or four years previously.

On 28 June 1996 the public prosecutor filed an indictment with the Erciş Assize Court accusing O.K. of the killing of the applicant’s husband. He relied on Article 448 of the Criminal Code.

The first hearing took place on 19 July 1996. O.K. told the court that during the operation he and E.H. had been positioned as lookouts on a hill in the meadow, while the commander of the team and other soldiers were searching the tents. After a while, one of the soldiers shouted to them “Hurry, the man is running”. He heard about ten shots coming from the direction of the tents. E.H. fired twice in the air and called on the man to halt. At the same time, O.K. saw an armed man running away, at about 200 metres distance. He also fired in the air and called on him to halt. However, the man did not stop and turned around. When he saw the man turning around, O.K. dropped to the ground for cover, at which point his gun went off as his finger was on the trigger. He saw that the man had also fallen down. He stated that he had not intended to kill the applicant’s husband and that his gun had gone off accidentally.

The court took further statements from the applicant as the complainant. She repeated the testimony she had given to the public prosecutor.

On the same day, the applicant’s brother-in-law applied to the court to intervene in the criminal proceedings as a third party.

At this and the following hearing, the court heard evidence from the village guards and the soldiers who took part in the operation. It took statements from the applicant’s relatives who were in the tents near the applicant’s on the day of the incident, from the non-commissioned officer attached to the Erciş Gendarmerie Station and from the soldiers who drew up an incident report that day. It took a further statement from the public

prosecutor, who had gone to the scene of the incident and drawn up an incident report which included the eyewitnesses' statements. The applicant's daughter, daughter-in-law and brother-in-law were also heard.

On 7 November 1996 the Erciş Assize Court concluded that the applicant's husband had started to run away when the security forces began a search of the tents, as he had an unlicensed gun in his possession. The security forces had shouted at him to stop. However, he had continued running. The soldiers had fired warning shots in the air, following which the applicant's husband had changed direction and started running in the direction of O.K. and E.H. They had also shouted at him to stop and fired warning shots; they were in pursuit when O.K. shot him.

On the same day, the court acquitted O.K. of the charge, observing that his act had been carried out in the course of his duty, and for that reason was not punishable pursuant to Article 49 § 1 of the Criminal Code. This decision became final as no appeal was lodged against it.

In the meantime, on 11 October 1996, the applicant and her children also brought an action for compensation before the Van Administrative Court against the Ministry of the Interior. The applicant stated that her husband was trying to hide his unlicensed gun from the soldiers when he was intentionally shot dead by O.K.

On 22 April 1998 the Van Administrative Court referred to the outcome of the criminal proceedings that were brought against O.K. and rejected the applicant's case on the ground that O.K. had acted in the course of duty. It accordingly found that the administration could not be held liable for his action. The court also considered that the administration could not be held liable on the basis of the doctrine of "social risk".

On 3 June 1998 the applicant appealed against the judgment, stating that the judgment of the criminal court should not affect the outcome of a case before an administrative court.

On 15 March 2001 the Supreme Administrative Court rejected the appeal and upheld the judgment of the first-instance court.

B. Relevant domestic law and practice

The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Kavak v. Turkey*, no. 53489/99, §§ 30-33, 6 July 2006; *Adalı and Others v. Turkey* (dec.), nos. 31137/96, 31152/96, 31153/96 and 31154/96, 31 August 2000; and *Bakan v. Turkey*[1], no. 50939/99, §§ 31-35, 12 June 2007.

[1] The judgment is not final yet.

COMPLAINT

The applicant complained under Article 2 of the Convention of the killing of her husband by the security forces.

THE LAW

The applicant submitted that the killing of her husband by security forces was in breach of Article 2 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone's right to life shall be protected by law...
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> ..."

The Government asked the Court to dismiss the application for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. In this respect, they pointed out that the applicant had failed to lodge an appeal against the decision of the Assize Court. The Government further maintained that the applicant had failed to comply with the six-month rule. In this connection, they submitted that the criminal proceedings concerning the killing of the applicant's husband had ended on 7 November 1996. As to the merits, the Government maintained that the force used against the applicant's husband had been no more than absolutely necessary in order to achieve the purpose of effecting a lawful arrest within the meaning of Article 2 § 2 (b) of the Convention and that an effective investigation had been carried out in the instant case.

The applicant maintained her allegations that her husband had been intentionally killed by security forces. She implied that this was because they were of Kurdish ethnic origin. The applicant also stated that since the Turkish legal system was dysfunctional, lodging an appeal against the decision of the Assize Court would have been a futile step to take.

The Court considers that it is not required to decide on the Government's first objection as to whether the applicant should have lodged an appeal against the decision of the Assize Court in order to exhaust domestic remedies since the application is inadmissible for the following reasons.

The Court has consistently held that, in the context of claims of intentionally or targeted killings under Article 2 of the Convention, an

action for compensation before administrative courts fails to provide an adequate and effective remedy which the applicants have to exhaust since it is based on the strict liability of the State and therefore does not lead to the identification and punishment of those responsible (see, for example, *Kaya and Others v. Turkey* (dec.), no. 4451/02, 4 October 2005, and *Kamer Demir and Others v. Turkey*, no. 41335/98, § 23, 19 October 2006). In such circumstances, recourse to the criminal law constitutes, in principle, an adequate domestic remedy (see, in particular, *Gömi and Others v. Turkey* (dec.), no. 35962/97, 29 April 2003). In accordance with the above principles and in the absence of any sufficient reason to the contrary, the Court finds therefore that, in the particular circumstances of the case, the administrative proceedings instigated by the applicant do not constitute an effective remedy for the purposes of the Convention and therefore do not affect the running of the six-month time-limit.

In light of the above and even assuming that the applicant was not required to appeal against the judgment of the first-instance court, the Court finds that the "final decision" within the meaning of Article 35 § 1 of the Convention was the Erciş Assize Court's decision of 7 November 1996. The Court is of the opinion that the applicant was aware of this judgment at the latest on 3 June 1998 when she lodged an appeal against the Administrative Court's decision. However, the application was lodged with the Court on 8 November 2001, more than six months later.

In these circumstances, the Court accepts the Government's objection that the applicant has failed to comply with the six-month rule. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention. It is appropriate, therefore, to discontinue the application of Article 29 § 3 of the Convention in the present case.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

F. TULKENS
President