CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 55955/00
by Nizamettin BİÇ and Others
against Turkey

The European Court of Human Rights (Third Section), sitting on 2 December 2004, as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr R. TÜRMEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 17 January 2000,

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, Nizamettin Biç, Layihe Biç, Resul Biç, Zehra Biç and Hamdiye Biç, are Turkish nationals, who were born in 1966, 1962, 1982, 1984 and 1993 respectively. The first applicant is the brother, the second applicant is the wife and the third, fourth and fifth applicants are the children of İhsan Biç, who died on 9 October 1996. They live in the village

of Yukarıharım, attached to the province of Diyarbakır. Before the Court, they are represented by Mr S. Tanrıkulu, a lawyer practising in Diyarbakır.

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

On 13 October 1993 İhsan Biç was arrested by security forces in Bismil on suspicion of having participated in an attack on a military convoy, organised by the PKK. In his statement to the gendarmes, he confessed to being a member of the PKK and having participated in the attack against the military convoy.

On 8 November 1993 İhsan Biç was brought before the public prosecutor. In his interrogation, he denied the accusations against him and stated that he had signed his previous statement without being able to read its content. The same day he was brought before the investigating judge at the Diyarbakır State Security Court, who subsequently ordered his detention on remand. İhsan Biç was accordingly sent to Batman prison.

On 1 December 1993 the public prosecutor initiated criminal proceedings against İhsan Biç in the Diyarbakır State Security Court. In his indictment, he accused him of membership to an illegal organisation, of aiding and abetting the members of this organisation and of having participated in an attack that had been aimed against the security forces. He asked the court to sentence him under Article 125 of the Criminal Code.

On 19 September 1995 the Diyarbakır State Security Court concluded that there was insufficient evidence to prove that İhsan Biç had taken part in any armed attack, but found him guilty of membership to an illegal organisation. He was accordingly sentenced to twelve years and six months' imprisonment pursuant to Article 168 § 2 of the Criminal Code. The court further ordered his transfer to the Diyarbakır Prison.

On 25 September 1995 İhsan Biç appealed. He argued that he had been sentenced under a different article of the Criminal Code than the one which had been invoked by the public prosecutor. He also stated that he had not been given sufficient time to prepare his defence against the new accusation.

On 2 October 1996 the Court of Cassation quashed the decision of the State Security Court and sent the case file back for re-examination.

The proceedings recommenced before the Diyarbakır State Security Court. The first-instance court decided to keep İhsan Biç in detention on remand during the course of the trials. While the proceedings continued, İhsan Biç was operated twice on his stomach. At a later date, he was also diagnosed with hepatitis B.

İhsan Biç was hospitalised on 27 September 1999 and died in the hospital on 9 October 1999 due to liver cirrhosis. Following the death of İhsan Biç, the Diyarbakır Public Prosecutor initiated an *ex officio* investigation. An autopsy was conducted on the same day, which confirmed the cause of death as liver cirrhosis. On 13 October 1999 the public prosecutor delivered a decision of non-prosecution relying on the medical

reports and the autopsy report which confirmed the cause of death as liver cirrhosis. The decision of the public prosecutor was notified to the applicants on 26 November 1999. No appeal was filed.

The Diyarbakır State Security Court decided to discontinue the criminal proceedings against İhsan Biç after his death.

COMPLAINTS

The applicants allege in the first place that their relative, who had no health problems prior to his detention, fell ill due to prison conditions. They complain that as he was kept in detention during his illness, he was not able to receive proper medical treatment. Arguing that the State had a positive obligation to protect the life of those who are in detention, the applicants invoke Article 2 of the Convention.

The applicants further allege under Article 5 § 3 of the Convention that İhsan Biç was kept in detention on remand for a long time.

Under Article 6 § 1 of the Convention, the applicants state that the criminal proceedings against their relative were not completed within a reasonable time and that his case was not heard by an independent and impartial court.

THE LAW

1. The applicants allege under Article 2 of the Convention that the circumstances surrounding the death of İhsan Biç constitute a breach of his right to life. In this respect, they argue that their relative had fallen ill due to bad prison conditions, and by keeping him in detention despite his illness, the authorities deprived him of a proper medical treatment.

The Government deny the allegations. They submit in the first place that the applicants' complaint under Article 2 of the Convention be rejected for non-exhaustion of domestic remedies. In this respect, the Government refer to the applicants' failure to appeal against the non-prosecution decision of the Diyarbakır Public Prosecutor. The Government further submit that İhsan Biç was taken regularly to the hospital for medical treatment and maintain that the authorities did everything they could to help him.

The Court observes that in cases concerning loss of life, the Turkish legal system provides for an investigation to be carried out by the public prosecutor, who on the basis of evidence decides whether or not to initiate a prosecution against the alleged perpetrators. In the event of a decision of not to prosecute, the complainant has the right under Article 165 of the Code of Criminal Procedure to appeal against the decision in the nearest assize court.

The Court observes from the case file before it that the Diyarbakır Public Prosecutor initiated an *ex officio* investigation following the death of İhsan Biç. On the basis of the evidence before him, namely the medical reports and the autopsy report, on 13 October 1999 the public prosecutor concluded that the cause of death was clearly established as liver cirrhosis. Accordingly, he delivered a non-prosecution decision. This decision was notified on the applicants on 26 November 1999 however no appeal was filed.

The Court does not find it established that such an appeal would have been devoid of any chance of success. In this context there are precedents indicating that appeals against decisions of public prosecutors not to prosecute have been successful and subsequently prosecutions were brought (see, *mutatis mutandis*, *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002, *Keçeci v. Turkey* (friendly settlement), no. 38588/97, § 19, 26 November 2002, and *Fidan v. Turkey* (dec), no. 24209/94, 29 February 2000).

Furthermore, the applicants have failed to substantiate the existence of specific circumstances which might have prevented them from conveying their concerns about the real cause of İhsan Biç's death to the public prosecutor.

Against this background, the Court concludes that, in the circumstances of this case, the applicants cannot be considered as having exhausted the domestic remedies in respect of their Article 2 complaint.

It follows that this part of the application should be rejected for non-compliance with the exhaustion of domestic remedies rule pursuant to Article 35 §§ 1 and 4 of the Convention.

2. The applicants allege under Article 5 § 3 of the Convention that İhsan Biç was held in detention on remand for a long time. They further maintain under Article 6 of the Convention that the criminal proceedings against their relative were not concluded within a reasonable time and that he did not have a fair trial by an independent an impartial court on account of the presence of a military judge on the bench of the court which tried him.

(a) Victim status

The Government maintain in the first place that the applicants cannot be considered as victims within the meaning of Article 34 of the Convention. They state that complaints relating to length of detention and length and fairness of criminal proceedings were closely linked with the litigants and the applicants were not directly or indirectly affected by the proceedings complained of.

(i) In respect of the first applicant

In the instant case, the Court does not find any element in the case file which indicates that the first applicant, who is the brother of İhsan Biç, was

in any way affected by the length of İhsan Biç's detention or the length or fairness of the proceedings brought against him.

The Court therefore considers that İhsan Biç's brother cannot claim to have himself a sufficient legal interest to justify further examination of the application on his behalf.

In the light of the foregoing, the Court accepts the preliminary objection and concludes that the first applicant cannot claim to be a victim within the meaning of Article 34 of the Convention regarding to his complaints raised under Articles 5 and 6 of the Convention.

(ii) In respect of the remaining applicants

The Court decides to join to the merits the question on the "victim" status of the second, third, fourth and fifth applicants, who are the wife and the children of İhsan Biç.

(b) Merits

As regards the substance of complaints raised under Articles 5 and 6 of the Convention, the Court considers, in the light of the parties' submissions, that these complaints raise complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaints under Articles 5 and 6 of are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established.

For these reasons, the Court

by a majority,

Decides to join to the merits the Government's objection based on the victim status of the second, third, fourth and fifth applicants in respect of Articles 5 and 6 of the Convention;

Declares admissible, without prejudging the merits, the second, third, fourth and fifth applicants' complaints concerning Articles 5 and 6 of the Convention;

unanimously,

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President