AS TO THE ADMISSIBILITY OF

Application No. 21895/93
by Ramazan CAGIRGA
against Turkey

The European Commission of Human Rights sitting in private on 19 October 1994, the following members being present:

MM. C.A. NØRGAARD, President
A. WEITZEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 10 February 1994 and the observations in reply submitted by the applicant on 12 April 1994;

- additional material submitted by the applicant on 15 August, 23 September and 4 and 10 October 1994;

- additional material submitted by the Government on 4 and 7 October 1994;

- the parties' oral submissions at the hearing on 19 October 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish national born in 1961, lives in the city of Cizre.

He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

A. The particular circumstances of the case

The facts of the present case are in dispute, particularly as regards the authors of the damage of which complaint is made by the applicant.

The applicant recounts the following version of the events in question:

On the evening of 7 November 1992, at about 19.00 hours when the applicant was at home with the other members of his family, there was a sound of detonation in the neighbourhood. This was apparently caused by a mine which had exploded under a police tank or panzer. After about 20 minutes the electricity went out all over the city and the sound of intensive firing started all over the place. When the family went outside to see what was happening, they saw an armoured car firing at houses in the area. They went into the cellar to avoid harm.

The sound of cannons started. According to the applicant, the statements of some witnesses indicate that the sound of rockets came from where there were military tank battalions and the central gendarmes station.

Two cannon-balls landed on houses nearby. Immediately afterwards there was a big explosion in the applicant's house. Seven members of the applicant's family were killed, and seven others were seriously injured. The applicant and a guest visiting the house survived. An uninjured child, Yusuf, was sent for help, but none was forthcoming because of the firing in the four corners of the city.

There were three or four hours of sustained military assault on Cizre, directed particularly at the Cudi neighbourhood. There was no clash or fire-fight with terrorist groups; it was a one-sided assault. This is reflected in Government written records which state that police in the panzer hit by the mine were treated for minor injuries. No other casualties were sustained amongst the security forces or amongst a purported terrorist adversary.

According to the applicant, a witness states that the cannon-ball which fell on the applicant's house was fired by State forces. He points out that no one else has cannons. The same witness states that the cannon-ball in question measured 105mm.. Pieces of it were lying on the ground. It is therefore believed that the missile was of cannon or artillery origin. The PKK does not have the means to use heavy artillery in city centres, unlike the security forces.

According to another witness who lives near the applicant, neighbours tried several times to go out into the street to help the applicant's family, but were unable to do so on account of intensive fire from the State forces. Later, the witness's brother telephoned Security Headquarters and explained the incident. He asked that the firing cease and that he should have permission to go and help. The State forces did not stop firing. The neighbours were therefore unable to help the applicant promptly.

When the firing stopped, the applicant and his neighbours took the wounded to hospital by car. The dead amongst the applicant's family were Haci (father), Leylâ (mother), ismail and Nadiv (brothers), Sinem and Fatma (sisters) and Henif (nephew). Meryem (sister or sister-in-law) was wounded in the eye and the hand. Emine (sister or sister-in-law) was deafened by the sound of the explosion. Musa (brother) had a piece of shrapnel extracted from his stomach during an operation. Sivan, Vedat, Bahrem and Abdulvahap (nephews) were injured.

The State forces did not investigate claims which did not accuse the PKK of responsibility for the events. There was anyway no immediate inquiry and that which was conducted nearly two years later, in time

for the hearing before the Commission, was after much of the damage had been repaired, and the forensic evidence lost.

The Government submit the following different account:

On 7 November 1992 around 19.00 hours, three armoured personnel carriers belonging to the security forces of Cizre were making a routine patrol in the Cudi quarter of Cizre. One of the carriers hit a mine which had been laid by PKK militants. Several policemen in the vehicle were injured. Then all three carriers came under attack by PKK terrorists and quickly moved away.

The electricity in the city was cut off by the terrorists who started firing with heavy weapons at official buildings in the city centre and several other quarters, as a result of which 12 policemen suffered injury. The security forces retaliated and the firing ended around 22.30 hours. No terrorist casualties were recorded. The assailants could not be apprehended and investigations are continuing.

According to Government experts, the applicant's house was hit by a missile fired by the PKK from an RPG 7, which could have misfired or which could have been aimed at the armoured vehicles about 150 m. away, but ricocheted off one of them. Seven members of the applicant's family were killed and seven others injured as a result.

The technical investigation revealed smoke of the kind generated by a shaped charge such as that used by the RPG. An RPG (rocket propelled grenade) is a Russian made anti-tank weapon. It can be shoulder-fired, like a bazooka, and has a range of up to 900 m.. It is frequently used by terrorist groups such as the PKK. The armoured personal carriers were not equipped with heavy weapons and, anyway, it would have been impossible for a moving armoured vehicle to have launched the missile in question. These carriers were only equipped with small arms such as machine-guns. The crew in the armoured vehicles stated that the carriers were hit several times by missiles fired from rockets and other terrorist small arm weaponry, according to the sound of impact.

As regards the applicant's allegation that his house could have been hit by other arms used by the security forces such as a 105mm. tank gun, or by artillery or mortar shelling, the Government state that the tank battalion was located 1,825 m. north-east of the house. If a tank had fired the shot, the cannon-ball would have entered by the roof on the eastern side, passing through the first floor. However, according to witnesses and the forensic evidence, the house was hit from a frontal, ground level, westerly direction. A cannon-ball from a tank gun would have caused more damage to the target, not only on the western side of the house, but to all rooms in the building.

Moreover, given the density of the surrounding housing, it would have been impossible to avoid damaging other property if such firing had occurred, but there was no damage to neighbouring residences. Long range weapons like tank guns cannot be used in such operations with security forces and civilians around. Finally, tanks in that battalion could not have fired at that hour because of their limited visibility in the dark.

An investigation regarding the events has been instituted by the public prosecutor attached to the State Security Court of Diyarbakir.

According to a forensic pathologist's report submitted to the Commission by the applicant's representatives, the Government's ricochet theory is implausible because the angle of impact diagnosed by the Government's experts would not have sent the missile in the direction of the applicant's house. The applicant's expert stated that the only logical conclusion was that the missile had been fired from the armoured personnel carrier.

B. The relevant domestic law and practice

The Government have submitted that the following domestic law is relevant to the case:

Article 125 of the Turkish Constitution provides as follows:

(translation)

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on a 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.

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

A claim for compensation may be lodged with the courts against the acts and decisions of the Regional Governor of the State of Emergency.

The Turkish Constitution guarantees rights comparable to those found in the Convention (cf. Chapters II and III, Articles 17 to 74 of the Constitution). Constitutional and conventional rights may be enforced by the domestic courts, if raised by the litigants.

An appeal against a ministerial decision, together with a claim for just satisfaction, may be lodged with the local administrative court.

Complaints by victims of criminal offences may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts.

Proceedings against the Administration may be brought before the administrative courts, whose proceedings are in writing.

Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

The applicant points to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme:

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

According to the applicant, this Article grants impunity to the Governors.

COMPLAINTS

The applicant complains, in his own name and on behalf of his dead and injured relatives, that they have been the victims of the following violations of the Convention:

1. A violation of Article 2 of the Convention is alleged on account of

- the intentional deprivation of life not attributable to any of the purposes set out exhaustively in paragraph 2 of this Convention provision;

- alternatively, the deprivation of life attributable to a use of lethal force disproportionate to any lawful ground on which such force could be used;

- the deprivation of life attributable to the use of a degree of force more than was "absolutely necessary" to achieve any legitimate purpose;

- the failure adequately to protect the right to life by initiating legal proceedings to determine whether or not those responsible for the deaths acted lawfully;

- the inadequate protection of the right to life in domestic law; and

- the fact that only Turkish citizens of Kurdish origin are regularly subjected to unlawful killings (an allegation in respect of which the applicant also invokes Article 14 of the Convention).

2. A violation of Articles 3 and 14 is alleged on account of an administrative practice of discrimination on grounds of people's Kurdish origin.

3. A violation of Article 6 of the Convention is alleged on account of

- the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killings and injuries, as a result of which the applicant cannot bring civil proceedings arising out of those events. The applicant claims that he is therefore denied effective access to court.

- the breakdown of the investigation and prosecution system in relation to the acts of the security forces only arises on a systematic basis in South-East Turkey. Only in the Kurdish region of Turkey is there therefore the knock-on effect of a denial of access to court. This allegation is brought under a combination of Articles 6 and 14 of the Convention.

4. A violation of Article 13 is alleged on account of

- a lack of any independent national authority before whom these complaints can be brought with any prospect of success; and

- the fact that only Turkish citizens of Kurdish origin are affected by the wholesale breakdown of the system of "effective remedies" (an allegation in respect of which the applicant also invokes Article 14 of the Convention).

5. A violation of Article 1 of Protocol No 1 is alleged on account of

- the destruction of the applicant's home; and

- the fact that only the property of Turkish citizens of Kurdish origin is subjected to such destruction (an allegation in respect of which the applicant also invokes Article 14 of the Convention).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 May 1993 and registered on 18 May 1993.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 30 August 1993. It decided, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of the application to the respondent

Government and to invite the parties to submit written observations on admissibility and merits. The Government's observations were submitted on 10 February 1994, after an extension of the time limit fixed for that purpose, to which the applicant replied on 12 April 1994.

On 27 June 1994 the Commission decided to invite the parties to make oral submissions on the admissibility and merits of the application at a hearing fixed for 19 October 1994. Prior to the hearing the parties submitted additional material: the applicant on 15 August, 23 September and 4 and 10 October 1994 and the Government on 4 and 7 October 1994.

At the hearing on 19 October 1994, the Government were represented by Mr. B. Çaglar, Agent, Mr. S. Alpaslan, Mr. M. Özmen, Ms. D. Akçay and Mr. H. Golsong, all counsel, and Ms. i. Boivin, Mr. i. Kovar, Mr. A. Kurudal, Mr. F. Erdogan, Mr. Y. Kizilkaya, Mr. C. Duatepe and Ms. S.B. Ersöz, all experts. The applicant was represented by Professor K. Boyle and Ms. F. Hampson, both counsel, Mr. S. Aslantas, legal adviser from the Diyarbakir Bar, and Mr. M. Yildiz, assistant.

THE LAW

1. The application concerns an event which took place in Cizre on 7 November 1992. On that occasion, an explosive device hit the applicant's house. It killed seven members of the applicant's family and injured seven others. The applicant alleges that the device was fired by Turkish Government forces. He complains in his own name, and on behalf of his dead and injured relatives, of violations of Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (freedom from inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 13 (Art. 13) (the right to effective remedies for Convention breaches), and Article 14 (Art. 14) (freedom from discrimination in the securement of Convention rights) of the Convention, as well as Article 1 of Protocol No. 1 (P1-1) to the Convention (the right to property).

2. The Government deny the applicant's allegations and provide a different account of events. They claim that the explosive attack on the applicant's family and home was the work of the PKK.

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition; and

iii. the application is anyway manifestly ill-founded.

3. Exhaustion of domestic remedies

The Government submit that the applicant has failed to comply with the requirement under Article 26 (Art. 26) of the Convention to exhaust domestic remedies before lodging an application with the Commission.

The Government rely on

- the investigation by the public prosecutor attached to the Diyarbakir State Security Court;

- the possibility of an appeal against a ministerial decision before the Cizre administrative court; and

- the possibility of a claim for compensation against the Regional Governor of the State of Emergency.

The Government assert that these remedies are effective and that

Turkish law envisages the enforcement of constitutional and Convention rights before the domestic courts. The Government assert that there is no administrative practice or official tolerance of the type of acts alleged by the applicant, which acts are anyway denied. The aforementioned remedies represent nothing extraordinary and are accessible and effective before independent judicial authorities. Any suggestion that people expose themselves to risk if they pursue these normal remedies can only be qualified as abusive, fallacious and wholly devoid of credibility.

The applicant maintains that there is no requirement that he or his family pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective for the following reasons:

- the limitations on rights and remedies created by the state of emergency;

- an administrative practice of unlawful killings and destruction of property;

- the lack of genuine investigations by public prosecutors and other competent authorities;

- even if an investigation is made, the lack of effective action being taken afterwards;

- the absence of any significant case-law showing the payment of adequate compensation in circumstances comparable to the present case (which is unsurprising given the systematic blame placed by the Government on the PKK for such acts);

- the absence of successful cases against the Regional Governor for compensation under the State of Emergency Law;

- an official attitude of legal unaccountability towards the security forces;

- the positive discouragement of those who do wish to seek remedies;

- an administrative practice of not respecting the rule under Article 13 (Art. 13) of the Convention which requires the provision of effective domestic remedies; and

- whether or not there is an administrative practice, domestic remedies were ineffective in this case, owing to the failure of the legal system to provide redress.

The applicant added that, in order to be able to use a remedy, the individual needs to be able to seek and obtain legal advice and the lawyers need to be able to pursue appropriate remedies without fear of the consequences. He alleged, however, that several lawyers who have dealt with cases of this kind have been subjected to detention and ill-treatment. At present 16 are facing criminal charges, which include drawing up documents belittling the Turkish State and faxing them to human rights organisations in Europe. This is demonstrated in other cases pending before the Commission.

The applicant does not deny that the procedures identified by the Government are formally part of the Turkish legal structure, but he contends that the Government have not shown how such procedures could conceivably be effective for the specific circumstances of the present application. The purported remedies are ineffective in his case for the following reasons:

- the superficial nature of the investigation in the present case, being conducted too late after the event and being based

on the assumption that the damage was caused by the PKK;

- as far as the applicant is aware, the absence of any ministerial decision;

- the inadequacy of constitutionally guaranteed rights, such as Article 17 (Art. 17) of the Constitution which provides standards for the use of lethal force which are less strict than the standards of Article 2 (Art. 2) of the Convention; and

- the absence of any significant case-law demonstrating successful claims for compensation against the Regional Governor of the State of Emergency.

The Commission has noted the remedies put forward by the Government and the remarks of the applicant as to their theoretical and illusory nature.

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant because it agrees with him that it has not been established that he and his family had at their disposal adequate remedies under the state of emergency to deal effectively with their complaints. The Commission has formed this view for the following reasons:

The Commission notes that there is a pending inquiry into the events of the present case. However, it is unclear whether this inquiry may be considered effective in view of the delays involved (two years having gone by with no result), and the loss of essential forensic evidence after the completion of repairs. In this connection the Commission accepts that regard must be had to the time element involved in the present case, which seems to be of crucial importance to the applicant's complaint (cf. mutatis mutandis, Nos 15530/91 and 15531/91, Mitap and Müftüoglu v. Turkey, Dec. 10.10.91, D.R. 72 ; No 7990/77, Dec. 11.05.81, D.R. 24 p. 57).

The Commission also considers that it cannot be said at this stage that the applicant's fear of reprisal if he had complained more vigorously about the bombing of his home and family is wholly without foundation.

The Commission is, therefore, satisfied that, in the circumstances of this case, the applicant could rely on the public prosecutor's inquiry into the events of 7 November 1992 and was not required under Article 26 (Art. 26) of the Convention to pursue any separate legal remedy in this regard (cf. Nos. 16311/90, 16312/90 and 16313/90, N.H., G.H. and R.A. v. Turkey, Dec. 11.10.91, unpublished, and No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R. 75). The Commission concludes that the applicant may be said to have complied with the domestic remedies' rule laid down in Article 26 (Art. 26) of the Convention and, consequently, the application cannot be rejected under Article 27 para. 3 (Art. 27-3).

4. Abuse of the right of petition

The Government maintain that the application, being devoid of any sound judicial basis, has been lodged for the purposes of political propaganda against the Turkish Government. Accordingly the application constitutes an abuse of the right of petition which discredits the legal nature of the Convention control mechanism.

The applicant rejects the Government's submission and responds that his family's complaints relate exclusively to violations of the Convention which they suffered.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

5. As regards the merits

The Government submit that it is generally accepted in the comparative and international law on terrorism, authorising "certain adaptations of the liberal model", that restrictions on Convention rights will be deemed necessary in a democratic society threatened by terrorist violence, as being proportionate to the aim of protecting public order.

The threat posed to Turkey by the PKK and its affiliations is internationally recognised, as is the need to react firmly to it. Terrorism strikes at the heart of democracy, its fundamental rights and the judicial and political systems. This has been acknowledged by the Convention organs (Eur. Court H.R., Fox, Campbell and Hartley judgment of 30 August 1990, Series A no. 182, and Nos. 11209/84, 11234/84, 11266/84 and 11386/85, Brogan and Others v. the United Kingdom, Comm. Report 14.5.87 para. 106). It is not for the Convention organs to substitute their view on how a State should conduct the necessary fight against terrorism. In this respect the Government assert that the powers exercised by the police while the applicant was in their custody did not exceed the margin of appreciation conferred on States by the Convention.

The Government maintain that there is no evidence to substantiate the applicant's allegations against the security forces. They emphasise that the physical and material damage caused in the present case was not the work of any State agent but that of PKK terrorists.

Accordingly, the Government consider that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The applicant maintains that his account of events was accurate and that his Convention claims were substantiated. He contends that the Government's submissions on the restrictions which necessarily flow from the fight against terrorism are immaterial to the facts of the present case. The application concerns, inter alia, the use of lethal force in wholly unjustifiable conditions unrelated to a terrorist attack necessitating self-defence on the part of the security forces. There is, therefore, no scope to take into account the political situation in the region concerned.

The Commission considers, in the light of the parties' submissions, that the case raises 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 Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)