AS TO THE ADMISSIBILITY OF

Application No. 23657/94
by Izzet ÇAKICI
against Turkey

The European Commission of Human Rights sitting in private on 15 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

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 application introduced on 5 May 1994 by Izzet ÇAKICI against Turkey and registered on 9 May 1994 under file No. 23657/94;

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 2 January 1995 and the observations in reply submitted by the applicant on 8 March 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, born in 1953, resides at Diyarbakir. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex, England. He complains to the

Commission on his own behalf and on behalf of his brother, Ahmet Çakici, who has disappeared while he was held in custody.

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

A. Particular circumstances of the case

The applicant gives the following account.

On 8 November 1993 there was an operation in Çiftlibahçe village, Hazro district, Diyarbakir province, involving about 400 members of the security forces. The operation was carried out by soldiers connected to the Hazro district Gendarme Station and protectors connected to the same station. Houses in the village were burned, including that of the applicant's brother, Ahmet Çakici. Ahmet Çakici had moved to Diyarbakir about a week before these events but had returned to Çiftlibahce village to collect some of his possessions that were still in the village. He was taken into custody by the soldiers at the same time as three others, Mustafa Engin, Abdurrahman Al and Tahsin Demirbas. This event was witnessed by the villagers and it was also reported by the wife of Ahmet Çakici.

Ahmet Çakici was thrown into a car by the soldiers and protectors, together with Mustafa Engin and Tahsin Demirbas. Both of them saw Ahmet whilst they were in custody.

On 9 November 1993 Mustafa Engin was taken to the Diyarbakir police headquarters. He does not know where he was taken exactly as he was blindfolded. He was tortured. While being tortured, he was asked whether he knew Ahmet Cakici. Mustafa has known Ahmet since the latter was a child, and Mustafa's daughter is Ahmet's sister-in-law. Mustafa was asked questions about a visitor whom Ahmet had brought to the house. About six or seven days later, Mustafa was taken to the second floor of the building. When his blindfold was lifted, he saw Ahmet. Mustafa stayed in custody 24 days of which 16-17 days were spent in the same place as Ahmet. Ahmet told Mustafa that he had been tortured many times and intensively. He had been given electric shocks twice and one of his ribs was broken. A sum of 4.280.000 Turkish Liras which he had had in his pocket when he was caught had been taken by the first lieutenant.

After Mustafa was released, he informed Ahmet's family about his detention. On 22 December 1993, Ahmet's father, Tevfik, applied to the Prosecutor of the State Security Court in Diyarbakir for information as to his son's whereabouts, but the authorities did not accept that Ahmet had been taken into custody. The request for information about Ahmet Çakici was taken at the offices of the Chief Prosecutor but was returned to the applicant with the oral reply that Ahmet Çakici was not on their list of persons in custody and there was no need for the Chief Prosecutor to take his petition.

The respondent Government state as follows.

The custody record which lists the names of Tahsin Demirbas, Abdurrahman Al and Mustafa Engin contains no mention of Ahmet Çakici. The public prosecutor of Hazro has informed the chief public prosecutor at the State Security Court at Diyarbakir that Ahmet Çakici was never placed in custody or detained on remand. The State Security Court at Diyarbakir states that he has never been detained or questioned for a crime or offence entering within their competence, that there is no file concerning him in existence and that he is not detained by any authority under their jurisdiction.

The Government refer to a letter by the Commander of the Gendarmerie in the department which states that Ahmet Çakici is being sought by the authorities on the basis that he is considered as having

joined the terrorists and of having participated in the murder of five teachers in the village of Dadas on 23 October 1993.

B. Relevant domestic law and practice

Civil and administrative procedures

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."

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."

Proceedings before the administrative courts are in writing.

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

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject someone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450). Provisions also cover threats (Article 191), unlawful deprivation of liberty (Article 179 in general and Article 181 for civil servants), obliging someone through force or threats to commit or not to commit an act (Article 188).

In general, in respect of criminal offences, complaints 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 suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

Emergency measures

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.

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."

COMPLAINTS

The applicant complains of the following violations of the Convention:

Article 2

1. A violation of Article 2 because unacknowledged detention in the hands of the State in South-East Turkey, on account of the administrative practice of torture and the high incidence of deaths in custody, some apparently as a result of torture, is life-threatening.

2. A violation of Article 2 on account of the lack of any effective system for ensuring protection of the right to life.

3. A violation of Article 2 on account of the inadequate protection of the right to life in domestic law.

4. A violation of Article 14 in relation to each claim under Article 2.

Article 3

5. A violation of Article 3 in relation to his brother's disappearance.

6. A violation of Article 3 in relation to the applicant's inability to discover what has happened to his brother.

7. A violation of Article 14 in relation to each claim under Article 3.

8. A violation of Article 3 on account of discrimination on grounds

of race or ethnic origin, in relation to both the applicant and his brother.

Article 5

9. A violation of Article 5 in relation to his brother on account of his unlawful detention, of him not being informed of the reasons for his arrest, not being brought before a judicial authority within a reasonable time and not being able to bring proceedings to determine the lawfulness of his detention; these violations result in a complete lack of security of the person.

10. A violation of Article 14 in relation to each claim under Article 5.

Article 13

11. A violation of Article 13 on account of the lack of any independent national authority before which these complaints can be brought with any prospect of success.

Article 14

12. A violation of Article 14, in conjunction with Articles 2, 3 and 5, on account of an administrative practice of discrimination on grounds of race or ethnic origin.

Article 18

13. A violation of Article 18 because the interferences in the exercise of the Convention rights are not designed to secure the ends permitted under the Convention.

As to the exhaustion of domestic remedies, the applicant considers that there is no requirement that he pursue alleged domestic remedies. In his opinion, any alleged remedy is illusory, inadequate and ineffective because:

(a) his brother's detention was officially organised, planned and executed by the agents of the State;

(b) there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies (Article 13);

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress and the refusal of the State to admit that they are holding the applicant's brother in detention;

(d) alternatively, the applicant and his family have done everything they can do to exhaust domestic remedies by submitting a petition to the Prosecutor of the Diyarbakir State Security Court; the fact that it has yielded no result confirms the ineffectiveness of any alleged remedy.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 May 1994 and registered on 9 May 1994.

On 27 June 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the case.

The Government's observations were submitted on 2 January 1995 after the expiry of the extension in the time-limit on 4 December 1994.

The applicant submitted observations in reply on 8 March 1995.

THE LAW

The applicant complains of the taking into custody, the detention and subsequent disappearance of his brother. He invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (the prohibition on inhuman and degrading treatment), Article 5 (Art. 5) (the right to liberty and security of person), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (the prohibition on discrimination) and Article 18 (Art. 18) (the prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention.

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 contend that the applicant has not instituted any legal proceedings either by making a complaint to the public prosecutor, as opposed to a request for information, or by making a claim for damages in the administrative courts. They refer in the latter context to Article 125 of the Constitution, and to Article 1 of Law 2935 of the State of Emergency and Article 8 of Decree 430.

The applicant submits that he has brought his allegations to the attention of the public prosecutor and that no action has been taken. In light of the outright denial that his brother has been taken into custody or removed, he submits that any further action would be ineffective. He claims that any notionally available remedies are generally ineffective having regard, inter alia, to the lack of genuine and thorough investigations, no real attempt to prosecute those allegedly responsible for violations of the Convention or Turkish law and the attitude of legal unaccountability of the security forces. He also states that he is frightened of the consequences of initiating legal proceedings in South-East Turkey.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p.18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission notes that in the present case the applicant has approached the Chief Prosecutor in the State Security Court at Diyarbakir who, not finding the applicant's brother on the list, orally rejected the petition. While the Government point out that a request for information is not the same as a formal complaint, the Commission is not satisfied that, where the authorities deny that a person is in their custody, the further step of registering an official complaint of disappearance would serve any practical or effective function.

The Commission has had regard also to its finding in a number of other cases (eg. Akdivar and others v. Turkey, No. 21893/93, Dec. 19.10.94) that it cannot be said at this stage that the applicant's fear of reprisal if he pursues his complaints more vigorously is wholly without foundation.

The Commission consequently finds that in the circumstances of this case the applicant can be regarded as having brought his complaints before relevant and competent authorities and that, accordingly, he is not required under Article 26 (Art. 26) of the Convention to pursue any other 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, D.R. 75).

The Commission concludes that the applicant may therefore 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).

As regards the merits

The Government deny that the applicant's brother has been taken into custody or detained. They allege that he is a suspected member of the PKK and is wanted by the authorities in connection with the killing of five teachers.

The applicant maintains his account of events.

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)