

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

SECOND SECTION

CASE OF ATEŞOĞLU v. TURKEY

(Application no. 53645/10)

JUDGMENT

STRASBOURG

20 January 2015

FINAL

20/04/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Ateşoğlu v. Turkey,

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

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 December 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 53645/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Musa Ateşoğlu ("the applicant"), on 2 July 2010.

2. The applicant was represented by Mr O. Gündoğdu, a lawyer practising in Kars. The Turkish Government ("the Government") were represented by their Agent.

3. On 29 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1985 and lives in Kars.

5. On 27 April 2002 the applicant, who was seventeen years old at the time, was arrested by police officers in Kars, on suspicion of robbery. On the same day, he was examined by a doctor at the Kars State Hospital, and no signs of injury were reported.

6. At the police station, the applicant was allegedly forced to make self-incriminating statements. During his interrogation, the applicant claims that

the police officers pulled his ears and he was beaten and subjected to *falaka* (beating on the soles of his feet).

7. On 29 April 2002, following the complaint of the applicant's representative, the Kars Public Prosecutor went to the police station to see the applicant. According to his report, there were several widespread bruises on the soles of the applicant's feet and oedema behind his ears. The public prosecutor also noted that the applicant had stated that he had been ill-treated and that he could identify the police officers who had ill-treated him. The same day, the applicant identified the four police officers who had ill-treated him. Following his interrogation by the public prosecutor, the applicant was released.

8. The applicant was subsequently taken to the Kars State Hospital for a medical examination. According to the doctor's report, there were several scars on his left arm, bruises and oedema behind his left ear, and bruises on both of his palms and on the soles of his feet. It was noted that his injuries would heal in five days.

9. On 1 May 2002 the Kars Public Prosecutor initiated criminal proceedings against four police officers, accusing them of ill-treating the applicant under Article 245 of the former Criminal Code. The applicant joined the proceedings as a civil party.

10. On 9 May 2002 the Kars Criminal Court declared that it lacked jurisdiction, holding that the proceedings should be initiated before the Assize Court on account of torture under Article 243 of the former Criminal Code.

11. The proceedings therefore resumed before the Kars Assize Court. At the end of the trial, on 15 June 2010 the Kars Assize Court, on the basis of the evidence in the case file, found the police officers guilty of inflicting torture pursuant to Article 243 of the former Criminal Code. The court found it established that the police officers had intentionally ill-treated the applicant to extract a confession. It accordingly sentenced each of the police officers to one year imprisonment under Article 243 of the former Criminal Code, and banned them from public service for six months. Having regard to the good attitude of the police officers during the trial, the court then reduced their sentence to ten months' imprisonment and five months' ban from public service. It subsequently suspended the pronouncement of the judgment in accordance with Article 231 of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW

12. The suspension of the pronouncement of a judgment is regulated by Article 231 of the Code of Criminal Procedure (Law no. 5271), the relevant paragraphs of which read as follows:

"...

(5) If the accused, who had been tried on the charges against him, was sentenced to a judicial fine or to imprisonment of less than two years, the court may decide to suspend the pronouncement of the judgment ... The suspension of the pronouncement of the judgment entails that the judgment does not have any legal consequences for the offender.

(6) Suspension of the pronouncement of the judgment may be decided provided that;

a) the offender has never been found guilty of a wilful offence,

b) the court is convinced, taking into account the offender's personal traits and his behaviour during the proceedings, that there is little risk of any further offence being committed,

c) the damage caused to the victim or to society is repaired by way of restitution or compensation.

...

(8) If the pronouncement of the judgment is suspended, the offender will be kept under supervision for the following five years.

...

(10) If the offender does not commit another wilful offence and abides by the obligations of the supervision order, the judgment of which the pronouncement has been suspended will be cancelled and the case discontinued.

(11) If the offender commits another wilful offence or acts in violation of the obligations of the supervision order, the court imposes the sentence. Nevertheless, the court may evaluate the offender's situation and may decide that a certain part of the sentence, up to half of the total sentence, will not be executed. If the conditions so permit, the court may also suspend the execution of the imprisonment or commute it to other optional measures."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

13. The applicant alleged that he had been subjected to ill-treatment while in police custody. He also complained about the length of the criminal proceedings against the accused police officers and the suspension of the pronouncement of the judgment pursuant to Article 231 of the Code of Criminal Procedure. In respect of his complaints, the applicant relied on Articles 3, 6, 7 and 13 of the Convention.

14. The Court considers that these complaints should be examined from the standpoint of Article 3 of the Convention, which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

15. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

A. The substantive aspect of Article 3

16. The Government did not challenge the applicant's allegations of ill-treatment.

17. The Court recalls that where allegations of ill-treatment are made under Article 3 of the Convention, it must apply particularly thorough scrutiny. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Gäfgen v. Germany* [GC], no. 22978/05, § 93, ECHR 2010; *Derman v. Turkey*, no. 21789/02, § 25, 31 May 2011; and *Eski v. Turkey*, no. 8354/04, § 28, 5 June 2012).

18. In assessing the treatment to which the applicant was subjected by the police officers, the Court observes that after acquainting itself with the evidence in the case file, on 15 June 2010 the Kars Assize Court found that the applicant had been intentionally ill-treated by the accused police officers during his police custody. Accordingly, the domestic court found them guilty of inflicting torture, pursuant to Article 243 of the former Criminal Code (see paragraph 11 above). In the light of the foregoing, the Court also concludes that the injuries observed on the applicant must be attributable to a form of ill-treatment for which the domestic authorities bore responsibility.

19. As to the seriousness of the treatment in question, the Court reiterates that, under its case-law in this sphere (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, §§ 96-97, ECHR 1999-V), in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture,

which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (see *Gäfgen*, cited above, § 90).

20. In this connection, the Court considers that it is sufficiently established with the judgment of the Kars Assize Court the treatment complained of by the applicant was inflicted intentionally by the police officers with the purpose of extracting a confession. In these circumstances, the Court finds that the acts complained of were particularly serious, cruel, and capable of causing severe pain and suffering (see *Salman v. Turkey* [GC], no. 21986/93, §§ 114 and 115, ECHR 2000‑VII; *Valeriu and Nicolae Roşca v. Moldova*, no. 41704/02, § 64, 20 October 2009 and further references therein; *Diri v. Turkey*, no. 68351/01, §§ 42–46, 31 July 2007; and *Mammadov v. Azerbaijan*, no. 34445/04, §§ 68 and 69, 1 January 2007). It therefore concludes that the ill-treatment in the present case amounted to torture within the meaning of Article 3 of the Convention.

21. There has therefore been a substantive violation of Article 3 of the Convention.

B. The procedural aspect of Article 3

22. The Government argued that the suspension of the pronouncement of the judgment against the police officers pursuant to Article 231 of Law no. 5271 could not be regarded as an amnesty law.

23. The Court recalls that where an individual makes an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). According to the established case-law of the Court, this means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts (see *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts), and *Derman*, cited above, § 27).

24. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public

confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)).

25. The Court also recalls that when an agent of the State is accused of crimes that violate Article 3, any ensuing criminal proceedings and sentencing must not be time-barred and the granting of amnesty or pardon should not be permissible. It further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted (see, *mutatis mutandis, Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004, and *Serdar Güzel v. Turkey*, no. 39414/06, § 42, 15 March 2011).

26. Turning to the facts of the present case, the Court observes that on 1 May 2002 the public prosecutor initiated criminal proceedings against the accused police officers. These proceedings were terminated on 15 June 2010, after almost eight years, a delay that runs contrary to the promptness required to punish those responsible. There is also no indication in the case file that the police officers were suspended from duty during that period. Nor did the authorities take any disciplinary action against them.

27. The Court further recalls its case-law according to which children, who are particularly vulnerable to various forms of violence, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see, *inter alia*, *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI). The authorities could have been expected to lend a certain weight to the question of the applicant's vulnerability. However, not only was there no concern to provide extra protection to the minor in question, but the impunity which ensued was enough to shed doubt on the ability of the judicial machinery set in motion in this case to produce a sufficiently deterrent effect to protect anybody at all, minor or otherwise, from breaches of the absolute prohibition enshrined in Article 3 (see *Okkalı*, cited above, § 70).

28. In this connection, the Court notes that the pronouncement of the judgment was suspended pursuant to Article 231 of the Criminal Procedure Code. In the Court's opinion, this shortcoming cannot be considered as compatible with the Convention standard of protection from ill-treatment. According to the Court's case-law, suspension of such sentences undeniably falls into the category of the "measures" which are unacceptable as its effect is to render convictions ineffective (see *Okkalı*, cited above, §§ 73-78, and *Zeynep Özcan v. Turkey*, no. 45906/99, §§ 40-46, 20 February 2007). In this respect, the Court notes that the suspension of the pronouncement of the judgment, regulated by Article 231 of the Code on Criminal Procedure (Law no. 5271), has a stronger effect than the deferral of the execution of the

sentence and results in the impunity of the perpetrators. That is because the former's application cancels the judgment with all its legal consequences, including the sentence, provided that the offender abides by the suspension order, whereas in the latter, neither the sentence nor the judgment ceases to exist (see para. 12 above). The Court considers therefore that the impugned court decision suggests that the judges exercised their discretion to minimise the consequences of an extremely serious unlawful act rather than show that such acts could in no way be tolerated (see *Eski*, cited above, § 36, and *Taylan v. Turkey*, no. 32051/09, § 46, 3 July 2012).

29. In the light of the foregoing, the Court considers that as a result of the shortcomings observed in the prosecution of the police officers, the Contracting State failed to fulfil its procedural obligation under Article 3 of the Convention.

30. There has accordingly been a procedural violation of Article 3 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

31. The applicant complained under Article 5 §§§ 1, 2 and 3 of the Convention about his police custody, which lasted between 27 and 29 April 2002.

32. The Court observes that the applicant's police custody ended on 29 April 2002, whereas the application was lodged on 2 July 2010. Consequently, this part of the application should be rejected for non-compliance with the six-month time-limit under Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

33. The applicant claimed 80,000 euros (EUR) in respect of non-pecuniary damage.

34. The Government contested the claim.

35. The Court finds that the applicant must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violation found and ruling on an equitable basis, it awards the applicant EUR 45,000 in respect of non-pecuniary damage.

B. Costs and expenses

36. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court.

37. The Government contested the claim.

38. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant did not submit any receipts or other vouchers on the basis of which a specific amount could be established. Accordingly, the Court does not make any award under this head.

C. Default interest

39. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive aspect in that the applicant was subjected to torture;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural aspect;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 45,000 (forty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement,
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President