

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

SECOND SECTION

CASE OF DELİBAŞ v. TURKEY

(Application no. 34764/07)

JUDGMENT

STRASBOURG

14 November 2017

This judgment is final but it may be subject to editorial revision.



In the case of Delibaş v. Turkey,

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

Julia Laffranque, *President,*
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 17 October 2017,

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

PROCEDURE

1. The case originated in an application (no. 34764/07) 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 Mehmet Delibaş ("the applicant"), on 3 August 2007.

2. The applicant was represented by Ms A. Şenol Can, a lawyer practising in Düzce. The Turkish Government ("the Government") were represented by their Agent.

3. On 5 July 2013 the application was communicated to the Government under Article 2 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1945 and lives in Manisa.

5. On 17 August 1999 the applicant's daughter, Nesrin Delibaş, lost her life following the collapse of the building where she resided in Düzce as the result of an earthquake (see *M. Özel and Others v. Turkey*, nos. 14350/05 and 2 others, § 16, 17 November 2015 for further details regarding that earthquake). According to official records, fourteen other people lost their lives as a result of the collapse of the same building.

A. Criminal proceedings

6. Shortly after the incident, criminal proceedings were brought against the contractor (H.E.) and the architect (S.D.) of the building in question. On 27 August and 31 August 1999 H.E. and S.D. were questioned by the police

and the Düzce public prosecutor, respectively. They denied all accusations in respect of the collapse of the building.

7. During an expert examination of the remains of the building on 26 August 1999, certain problems were noted with the building's reinforcing rods. It was also noted that the metal brackets had not been properly fastened to the girders. Apart from H.E. and S.D., against whom charges had already been brought in connection with the collapse of the building, the experts also identified the involvement of T.A., a civil engineer, and İ.Ö., the Head of Technical Services of the Municipality of Düzce ("the Municipality"), in the preparation and authorisation of the respective construction project.

8. On 31 August 1999 the police questioned İ.Ö., the Head of Technical Services of the Municipality. He denied all accusations in respect of the collapse of the building.

9. According to another report dated 7 September 1999, the expert examination of the collapsed building revealed that the granulometry of the concrete used in the building was very poor, that the concrete contained a very high proportion of pebbles, that the water-to-cement ratio in the concrete mix was not appropriate and had resulted in the formation of pores in the concrete, and that the ironwork had worked loose from the concrete because the metal brackets had corroded.

10. On 14 September 1999 the applicant asked to join the proceedings as a civil party. He added that he wished to lodge a criminal complaint against all individuals who had been involved in the construction of the defective building in their different capacities, including the public officials who had authorised its construction and occupation.

11. On 23 September 1999 the Düzce public prosecutor disjoined the investigation against the Head of Technical Services of the Municipality (İ.Ö.) from those against H.E. and S.D. in view of the special judicial procedures that had to be followed in respect of the prosecution of civil servants under the Law on the Prosecution of Civil Servants and Public Officials (Law no. 4483).

12. On 24 September 1999 the Düzce public prosecutor's office filed a bill of indictment with the Düzce Assize Court against H.E. and S.D. in respect of the deaths caused by the collapse of the building in question on 17 August 1999. The public prosecutor accused them of endangering the lives of others by carelessness, negligence or inexperience under Article 383 § 2 of the Turkish Criminal Code in force at the material time (Law no. 765), emphasising in particular the structural shortcomings in the building noted by the experts (see paragraph 7 and 9 above).

13. At the hearing held on 21 October 1999 the applicant requested the investigation of all municipal officials who had authorised the construction and occupation of the building despite its failure to comply with the relevant

technical regulations. Over the course of the criminal proceedings, the applicant repeated this request at least ten times.

14. According to an expert report added to the criminal case file on 29 April 2001, the following people had responsibility for all private construction undertaken within the municipal boundaries: (i) the contractor, who was responsible for the realisation of the project in compliance with the technical and work safety standards; (ii) the project engineer, who was responsible for all technical aspects of the project, including compliance with all relevant rules and regulations; (iii) the municipal representative, who was responsible for examining the calculations and the plan prepared by the project manager, verifying the compatibility of the project with the regulations in force, and authorising the project; and (iv) the technical implementation officer, who was in charge of inspecting the construction work on behalf of the Municipality. On this basis, the experts concluded that H.E. and S.D. bore 25% and 37.5% responsibility for the collapse of the building. The experts stated that they could not, however, offer opinions on the responsibility of anyone other than the two defendants in the case (H.E. and S.D.).

15. On 21 June 2001 the Düzce Assize Court held that the statutory period during which H.E. and S.D. could be held criminally liable in connection with a collapse of the building had started running in 1985 – when the last official licence for the building was obtained – and had already expired by the date of the earthquake. The case was accordingly discontinued for having become time-barred. The applicant appealed.

16. On 21 October 2002 the Court of Cassation quashed the judgment of the first-instance court. It held that the statutory time-limit was to be calculated from the date on which the building collapsed, that is to say from 17 August 1999, the date on which the offence in question had been committed.

17. On 14 August 2003 an additional indictment was filed against T.A., the civil engineer who had taken part in the construction of the building in question (see paragraph 7 above). It was noted in the indictment that T.A. had obtained licences to secure the illegal extension of the building subsequent to its construction.

18. On 11 December 2003 the Düzce Assize Court convicted H.E., S.D. and T.A. as charged and sentenced each of them to 10 months' imprisonment and a fine, but decided to suspend execution of the sentences under Section 6 of the Execution of Sentences Act (Law no. 647). The applicant appealed against this judgment and once again requested an investigation into the responsibility of the relevant municipal officials in relation to the collapse of the building.

19. On 6 July 2004 the Court of Cassation once again quashed the first-instance court's judgment, this time as the court had not taken any

decision as regards the applicant's request to join the proceedings as a civil party in respect of the case subsequently brought against T.A.

20. On 5 October 2004 the Düzce Assize Court commissioned a new expert report from the Yıldız Technical University in Istanbul. The expert report subsequently released on 21 April 2005 found that the building in question had collapsed on account of the structural problems noted in the earlier expert reports, as well as its illegal extension subsequent to its construction. It was also stated in the report that the defendants jointly bore 75% of the responsibility for the collapse of the building. The remaining 25% responsibility lay with the Municipality officials on account of their failure to duly inspect the building before issuing it with the necessary permits for occupation.

21. On 7 June 2005 the Düzce Assize Court convicted H.E., S.D. and T.A. as charged, and sentenced each of them, once again, to 10 months' imprisonment and a fine. Execution of the sentences was suspended pursuant to Article 51 § 1 of the new Criminal Code (Law no. 5237). Relying on the findings of the later expert report as regards the responsibility of the municipal officials for the collapse of the building, it also decided that a criminal complaint should be filed against the relevant officials with the Düzce public prosecutor's office. The defendant H.E lodged an appeal against this judgment.

22. On 5 December 2005 the Court of Cassation quashed the judgment for the third time. It found that the assize court had failed to evaluate the case in the light of the new Criminal Code (Law no. 5237) which had entered into force on 1 June 2005.

23. On 21 February 2007 the Düzce Assize Court decided to discontinue the criminal proceedings in respect of all three of the defendants as the prosecution of the offence in question had become time-barred.

24. On 23 October 2007 the Court of Cassation held firstly that the decision of the first-instance court, in so far as it concerned S.E. and T.A., was null and void, since the earlier judgment of 7 June 2005 had already become final in their regard as they had not lodged an appeal. It then went on to uphold the decision to discontinue the proceedings in respect of H.E. only.

B. Administrative proceedings

25. On 16 August 2000 the applicant, along with his wife and other daughter, instituted compensation proceedings before the Sakarya Administrative Court against the the Ministry of Public Works and Settlement (*Bayındırlık ve İskan Bakanlığı*), the Düzce governor's office and the Municipality of Düzce, in respect of the death of their daughter Nesrin Delibaş. The applicant and his wife each claimed 2,000 Turkish liras (TRY) in respect of pecuniary damage and TRY 1,000

in respect of non-pecuniary damage. Their daughter claimed TRY 500 in respect of non-pecuniary damage only.

26. On 29 December 2005 the Sakarya Administrative Court commissioned an expert report to determine responsibility on the part of the administration for the collapse of the building.

27. As regards the findings in the reports adduced to the criminal case file, the experts noted that the quality of the concrete used in the construction and certain structural elements of the building had been below the required standard. The building had, moreover, been illegally extended after its construction. The municipal officials had failed to duly inspect the building during its construction phase or before issuing the necessary permit for its occupation. They had also failed to carry out a soil survey in the area and to identify the potential "disaster zones" in the event of an earthquake, with a view to limiting the height of buildings in such areas. The experts concluded that, in view of such failures, the Municipality had been 50% responsible for the collapse of the building in question. On the other hand, it found that the other two defendants had not been at fault.

28. Relying on that expert report, on 27 June 2007 the Sakarya Administrative Court partially accepted the applicant's claims against the Municipality, and awarded him TRY 1,000 in respect of non-pecuniary damage in accordance with his request, plus interest. It also awarded his wife and daughter TRY 1,000 and TRY 500, respectively, in respect of non-pecuniary damage. It rejected their claims in respect of pecuniary damage as being unfounded.

29. On 14 September 2007 the applicant and his family received a total of TRY 11,371.80 (approximately 6,455 euros (EUR) at the material time) from the Municipality as compensation. In the meantime, the Municipality appealed against the judgment of the Sakarya Administrative Court.

30. On 23 May 2012 the Supreme Administrative Court upheld the judgment of the lower administrative court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

31. The applicant complained under Articles 1 and 6 of the Convention that the authorities had failed to conduct an effective criminal investigation against those who had been liable for his daughter's death. He contended that the criminal proceedings into the incident had lasted for an excessively long period of time, which had resulted in the discontinuation of the case.

32. The Government contested the applicant's arguments. They claimed in the first place that the applicant's complaints should be rejected for being

incompatible *ratione materiae* with the Convention, as he had confined his complaints to the effectiveness of the criminal proceedings. However, in the case of non-intentional death, the appropriate remedy was institution of civil proceedings. They also claimed that the applicant had lost his victim status as he had been awarded compensation for non-pecuniary damage by the Sakarya Administrative Court, as requested, and had received payment in that regard.

33. The applicant argued in response that receiving mere compensation for his damage did not remove the State's obligation to determine, by means of effective and deterrent criminal proceedings, the responsibility of any State authorities for his daughter's death.

34. The Court notes at the outset that the applicant's complaints should be examined from the standpoint of Article 2 of the Convention alone. It also considers that the preliminary objections raised by the Government are inextricably linked to the merits of the applicant's complaints. It therefore joins these issues to the merits (see, *mutatis mutandis*, *Codarcea v. Romania*, no. 31675/04, § 100, 2 June 2009, and *Oyal v. Turkey*, no. 4864/05, § 59, 23 March 2010). The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor are they inadmissible on any other grounds. They must therefore be declared admissible.

35. Turning to the merits of the case, the Court observes that the basic principles concerning a State's positive obligation to protect the right to life, including protection against non-intentional infringements of that right, were set out by the Grand Chamber in the case of *Öneryıldız v. Turkey* ([GC], no. 48939/99, §§ 89-96, ECHR 2004-XII) and further elaborated on in *Budayeva and Others v. Russia* (nos. 15339/02 and 4 others, §§ 128-145, ECHR 2008 (extracts)). In this connection the Court reiterates that the State's positive obligation to protect the right to life has also been found to arise in the context of deaths resulting from natural disasters (see, for instance, *Budayeva and Others*, cited above, §§ 128-130, and *M. Özel and Others v. Turkey*, nos. 14350/05 and 2 others, §§ 170-172, 17 November 2015).

36. The Court observes that the applicant has not complained about the absence of a regulatory framework in the respondent State governing construction activities and their inspection by State authorities in earthquake zones. He has rather confined his complaints to the effectiveness of the criminal investigation into the death of his daughter, complaining in particular of the absence of any investigation into the potential responsibility of public officials for her death. The Court will accordingly confine its examination to the effectiveness of the judicial response displayed by the relevant authorities in the aftermath of the death of the applicant's daughter during the earthquake of 17 August 1999.

37. The Court notes in this connection that, in the event of serious injury or death, the duty under Article 2 of the Convention must be considered to require an effective independent judicial system to be set up so as to secure legal means capable of establishing the facts, holding accountable those at fault, and providing appropriate redress to the victim. While this obligation does not necessarily require the provision of a criminal-law remedy in every case (see, for instance, *Ciechońska v. Poland*, no. 19776/04, § 66, 14 June 2011), when lives have been lost as a result of events occurring under the responsibility of public authorities in the context of "dangerous activities", Article 2 requires the authorities to conduct an official investigation (see *Öneryıldız*, cited above, § 93 and *Budayeva and Others*, cited above, § 188). The Court notes that, contrary to the Government's submissions in paragraph 32 above, the principles developed in relation to judicial response following incidents resulting from dangerous activities also lend themselves to application in the area of disaster relief where lives are lost as a result of events engaging the State's responsibility for positive preventive action (see *Budayeva and Others*, cited above, §§ 142 and 143, and *M. Özel and Others*, cited above, § 189 and 190).

38. In the present case criminal proceedings were brought against the three private individuals directly involved in the construction of the building that claimed the applicant's daughter's life. These proceedings, which began soon after the incident, ended on 23 October 2007 – some eight years later – with the conviction of only two of the accused, whose sentences were suspended. During that period, the Court of Cassation quashed the first-instance court's judgments three times, the last two on purely procedural grounds. The criminal proceedings against the contractor of the building (H.E.) were discontinued for having become time-barred, even though his responsibility for the collapse of the building had been established in the previous judgments of the first-instance court.

39. The Court stresses that the passing of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the complainants (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II). It is therefore of utmost importance to conduct such criminal proceedings with sufficient diligence and promptness. In the Court's opinion, the judicial authorities failed to show such diligence and promptness in the conduct of the criminal proceedings at issue.

40. The Court firstly notes in this respect that it took the Düzce Assize Court almost two years to arrive at its initial, and apparently erroneous, decision that the prosecution of the offence in question had become time-barred (see paragraph 15 above). In the absence of any explanation from the Government, this delay remains unjustified. The Court secondly notes that the criminal proceedings at issue did not present any particular

complexities: it concerned the death of fifteen people following the collapse of only one building (compare with the circumstances in *M. Özel and Others*, cited above, §§ 17 and 195, where the criminal proceedings against the real estate developers concerned the death of 195 people following the collapse of some seventeen buildings). The defects and other factors leading to the collapse of the building in question, as well as the corresponding responsibilities, had been largely established by expert reports by the end of 1999. Nevertheless, it took the first-instance court another six years to deliver a final judgment in respect of S.D. and T.A., and the remaining defendant (H.E.) benefited from the statute of limitations. The Court finds it noteworthy that although the involvement of T.A. in the construction of the building in question had been identified as early as 26 August 1999, it was only on 14 August 2003 that he was included in the proceedings by way of an additional indictment. The Court cannot but observe in this connection that the second quashing of the assize court's judgment on 6 July 2004 was related to the procedural problems brought about by the subsequent inclusion of T.A. in the case as a defendant.

41. The Court furthermore notes that, although the responsibility of municipal officials for the incident had also been established in various expert reports and preliminary steps had been taken by the Düzce public prosecutor's office and the Düzce Assize Court, respectively, for the investigation of relevant municipal officials (see paragraphs 11 and 21 above), it appears from the information in the case file that those efforts did not result in an actual investigation against the municipal officials. This is despite the applicant's persistent requests for an investigation into the responsibility of the various public authorities in connection with the collapse of the building that claimed his daughter's life (see paragraph 13 above). Consequently, and contrary to the requirements of Article 2 as noted in paragraph 37 above, the responsibility of the relevant State authorities for the incident remained undetermined. The Court refers in this connection to the criticisms made in the case of *M. Özel and Others* (cited above, § 198) regarding the obstacles in Turkish law before the prosecution of civil servants.

42. In the light of the foregoing, the Court considers that the criminal proceedings at issue were not conducted with the diligence and promptness required by Article 2 of the Convention.

43. The Court notes that the applicant also brought an action against the administration before the Sakarya Administrative Court in connection with the death of his daughter. These proceedings resulted in the establishment of the responsibility of the Municipality of Düzce for the collapse of the building in question and the award of some compensation in respect of non-pecuniary damage. The Court reiterates that in the specific context of establishing a State's liability for the damage caused by a natural disaster, it has previously found that successful administrative proceedings could be

considered sufficient to deprive the applicant of his victim status (see *Murillo Saldias and Others v. Spain* (dec.), no. 76973/01, 28 November 2006, and *Budayeva and Others*, cited above, § 111). The Court considers, however, that in the present case the administrative proceedings were far from satisfying the requirements of Article 2 and removing the applicant's victim status, given that they lasted approximately twelve years (see, similarly, *M. Özel and Others*, cited above, § 199). The length of the administrative proceedings had therefore detracted from their capacity to provide the applicant with effective redress in respect of his grievance (see, *a contrario*, *Zaharieva v. Bulgaria* (dec.), no. 6194/06, §§ 70 and 83, 20 November 2012). The Court is aware that the applicant received his compensation payment approximately five years before actual finalisation of the compensation proceedings (see paragraphs 29 above); however, given the amount of time that had already passed before the date of payment, the Court maintains its conclusion in respect of the applicant's victim status and the ineffectiveness of the relevant proceedings.

44. The Court notes that similar circumstances led to a violation of Article 2 of the Convention in the case of *M. Özel and Others* (cited above, §§ 191-200). The Court sees no reason to depart from its conclusions in that case. Accordingly, and having regard to the foregoing, it rejects the Government's preliminary objections noted in paragraph 32 above and finds a violation of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. The applicant claimed 20,000 euros (EUR), for himself and his wife separately, in respect of non-pecuniary damage. He did not claim any other damages, nor did he claim any costs and expenses.

46. The Government contested that claim, deeming it unsubstantiated and excessive.

47. The Court notes at the outset that the applicant's wife was not an applicant in the present application. Her claim in respect of non-pecuniary damage cannot, therefore, be accepted. The Court, however, also considers that the applicant must have suffered some non-pecuniary damage, which cannot be sufficiently compensated for by the finding of a violation alone. Ruling on an equitable basis, and taking into account the type of violation found, the Court awards the applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* the Government's objections in relation to the applicant's victim status and the incompatibility *ratione materiae* of his complaints with the Convention to the merits of the complaint under Article 2 and *dismisses* them;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 2 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 15,000 (fifteen 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 14 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Julia Laffranque
Deputy Registrar	President