

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

SECOND SECTION

CASE OF İNCİN v. TURKEY

(Application no. 3534/06)

JUDGMENT

STRASBOURG

9 January 2018

FINAL

28/05/2018

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



In the case of İncin v. Turkey,

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

Robert Spano, *President,*
Julia Laffranque,
Işıl Karakaş,
Nebojša Vučinić,
Paul Lemmens,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 5 December 2017,

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

PROCEDURE

1. The case originated in an application (no. 3534/06) 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 fifteen Turkish nationals ("the applicants") on 27 December 2005.

2. The applicants, whose names, dates of birth and places of residence are set out in the attached table, were represented by Mr Cemal Demir, a lawyer practising in Van. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged, in particular, that the investigation and the trial concerning the killing of their relative in June 1995 had been in breach of the procedural obligation inherent in Article 2 of the Convention.

4. On 10 November 2015 the complaint under Article 2 of the Convention concerning the effectiveness of the investigation and trial conducted after 22 March 2005 was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Habibe İncin, is the wife of Kerim İncin; the second to seventh applicants are his children; the eighth applicant is his mother and the remaining seven applicants are the siblings of Kerim İncin.

6. On 22 March 2005 the applicants Halima İncin and Hazım İncin, with the assistance of their lawyer, submitted a petition to the Hakkari prosecutor. In their petition the two applicants alleged that after severe military clashes had taken place in the vicinity of their village, in 1994 they and their family members had left Turkey and moved to live with their relatives in Iraq. In June 1995 Kerim İncin had gone back to their village in Turkey to collect a sum of money he was owed. While he was having dinner in the village headman's house, village guards had arrived and taken him to the nearby Geçimli military station. While at the military station Kerim İncin had been questioned and subjected to ill-treatment. After having detained him at the station for a week, the soldiers had taken him back to the village, where they had shot him and buried him.

7. In the petition the lawyer representing the applicants stated that the applicant Hazım İncin had recently returned to Turkey from Iraq and wanted to lodge an official complaint concerning the killing of his father. In their petition the two applicants also gave the prosecutor the names of a number of people who they alleged had witnessed the incident in question. They asked the prosecutor to carry out an investigation, to identify and question all the eyewitnesses, to exhume the body of Kerim İncin and to find and punish those responsible for the killing.

8. The prosecutor started an investigation into the applicants' allegations immediately. In the course of the investigation, between 2005 and 2006 the prosecutor questioned the applicants and other members of their family. During the same period the prosecutor also identified, summoned and questioned a large number of witnesses and members of the military who had lived or worked in the region at the time of the events but who, in the years that had elapsed since the killing, had moved to different parts of the country. A number of witnesses told the prosecutor that they had seen Kerim İncin being taken away from the village by the soldiers and added that shortly afterwards a large-scale military operation had been conducted in the area and they had heard that Kerim İncin had been killed in the course of that operation.

9. Some members of the military forces told the prosecutor during their questioning that they had no recollection of the events while others stated that no such incident had taken place.

10. As a result of the questioning the prosecutor found it established that Kerim İncin had indeed been killed and that his body had been buried in Taşbaşı village cemetery.

11. On 26 May 2006 the prosecutor asked the Hakkari Gendarmerie Command whether there would be any security concerns if he were to visit that cemetery with a view to exhuming a body. The prosecutor was informed in reply that it was not a good idea to do so because the security forces conducted spontaneous operations in the area during the summer months.

12. The prosecutor continued to request security updates from the military until 2009 and sent approximately twenty letters requesting that the military inform him as soon as it was possible to visit the village. In respect of the requests made during winter months the military informed the prosecutor that it would not be safe to go to the area because of adverse weather conditions. In their replies during spring, summer and autumn months, the soldiers informed the prosecutor that it was not a good idea to go to the area in question because a military operation could be conducted there at any time.

13. Finally, on 11 June 2009 the prosecutor informed the military of his intention to go to the cemetery on 18 June 2009 and instructed the military to take the necessary security measures for his planned visit.

14. On 18 June 2009 the prosecutor went to the cemetery in question and a body was exhumed from a grave in his presence. It was subsequently established by DNA analysis that it was the body of Kerim İncin. Forensic examinations showed that there were ten holes in the clothes in which Kerim İncin had been buried and that the cause of death had been numerous firearms injuries inflicted on his body and skull.

15. On 25 March 2010 the prosecutor took a decision not to prosecute ten of the suspects who had been working as members of the military at the time of the events, for lack of evidence. The following day the prosecutor prepared an indictment and charged Y.K. − who had been the commander of the Geçimli military station where Kerim İncin had allegedly been taken at the time of the events − with the offence of murder.

16. The trial before the Hakkari Assize Court started on 12 April 2010. The two applicants who had introduced the complaint with the prosecutor on 22 March 2005 (see paragraph 6 above), namely Halima İncin and Hazım İncin, joined the criminal proceedings as interveners. In the course of the trial a total of twenty hearings were held. On 27 November 2014 the Hakkari Assize Court acquitted Y.K. for lack of evidence. The same day the applicants appealed against the judgment acquitting Y.K. and the proceedings before the Court of Cassation are still pending.

17. At the request of the Court, the Government stated that, in accordance with the applicable statute of limitations, the criminal proceedings against Y.K. would not become time-barred until 2025.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

18. Relying on Article 2 of the Convention the applicants complained that the right to life of their relative Kerim İncin had been breached. They

also alleged that, notwithstanding their statutory obligation to start an investigation, the authorities had not taken any steps to investigate the killing until the family lodged their official complaint in 2005. The investigation that was started after their complaint was received in 2005 had not been concluded for many years and that failure had entailed the consequence that, despite the abundance of evidence in the possession of the investigating authorities, the true circumstances surrounding the killing had not been established.

19. The Government contested that argument.

A. Admissibility

20. The Government invited the Court to declare the application inadmissible because they considered that the applicants had failed to exhaust domestic remedies for two reasons. Firstly, the Government argued that the applicants had not lodged an objection against the prosecutor's decision of 25 March 2010 not to prosecute the ten members of the military who had been working in the area at the time of the events (see paragraph 15 above). Secondly, as the proceedings were still pending before the Court of Cassation, the applicants still had the possibility of making an individual application to the Constitutional Court in Turkey.

21. As for the Government's argument that the applicants had failed to exhaust domestic remedies by not lodging an objection against the decision not to prosecute the ten military personnel, it must be reiterated that lodging objections against a prosecutor's decision to stop an investigation into a killing is regarded by the Court as an effective remedy in Turkish law (see, in particular, *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002). In the present case the Court observes, however, that the applicants do not specifically allege that it was those ten members of the military who had been responsible for the killing of their relative. Indeed, they do not accuse any particular individual of the killing, but assert that it was soldiers from the Geçimli military station who shot their relative. To that end, when the prosecutor charged the commander of the Geçimli station with the offence of murder, the applicants Halima İncin and Hazım İncin, that is the mother and the son of the deceased, joined the criminal proceedings as interveners (see paragraph 16 above) and when the commander was acquitted, they appealed against the trial court's judgment. Thus, in the circumstances of the present case, the Court finds that the applicants did not fail to comply with the requirement to exhaust domestic remedies by not lodging an objection against the prosecutor's decision not to prosecute the ten military personnel.

22. Concerning the Government's argument that the applicants failed to make an individual application to the Constitutional Court, the Court observes that it has already examined and dismissed similar objections

raised by the Turkish Government in comparable cases (see, in particular, *Şükrü Yıldız v. Turkey*, no. 4100/10, §§ 42-46, 17 March 2015; see also, more recently, *Mızrak and Atay v. Turkey*, no. 65146/12, § 47, 18 October 2016, and *Önkol v. Turkey*, no. 24359/10, §§ 68-69, 17 January 2017). The Court finds no particular circumstances in the instant case requiring it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's second objection to the admissibility of the application.

23. The Court observes that the application is not manifestly ill−founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

24. The applicants alleged that the authorities had not, of their own motion, instigated an investigation into the killing and had instead waited for the family to lodge an official complaint. Even after the family had lodged the complaint, the investigation and the trial had been conducted half-heartedly and had been very slow. For example, although their relative had been buried in a village with a civilian population, the military had told the prosecutor on many occasions that the area was not safe to visit and had thus attempted to prevent the prosecutor from investigating the killing.

25. The Government admitted that they were aware of the length of the investigation process but argued that the delays in the investigation and the trial had been due to the difficulties encountered by their authorities in identifying, locating and questioning a total of 163 witnesses and 11 suspects and in accessing the cemetery to exhume the body. As for the trial, the Government submitted that some of the hearings had had to be postponed on account of the failure of the lawyers representing the parties to attend the hearings and also on account of the difficulties in ensuring the attendance of a number of witnesses.

26. The Court points out at the outset that its examination of the applicants' complaints under Article 2 of the Convention will be limited to the steps taken in the investigation after the applicants lodged their official complaint on 22 March 2005, although it cannot lose sight of the fact that the applicants' relative had been killed in 1995. The complaints concerning the actual killing of the applicants' relative in 1995 and the effectiveness of the investigation conducted between the date of the killing and the lodging of the official complaint by the applicants on 22 March 2005 were declared inadmissible by the Court in its partial decision of 10 November 2015 on account of the applicants' failure to comply with the six-month time-limit set out in Article 35 § 1 of the Convention (see *İncin v. Turkey* (dec.), no. 3534/06, §§ 37-44, 10 November 2015). In the same decision the Court considered that the lodging of the complaint in 2005 and the subsequent

developments − such as the exhumation of the body, the diligence shown by the applicants and the steps taken in the investigation − had revived the obligation under Article 2 of the Convention to carry out an effective investigation into the killing (*ibid*., §§ 45-47).

27. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The investigation must be thorough, impartial and careful (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 161-63, Series A no. 324). In that connection, the Court points out, in particular, that a requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force 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 *McKerr v. the United Kingdom*, no. 28883/95, § 114, ECHR 2001-III and the cases cited therein; see also *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, §§ 316-325, ECHR 2014 (extracts); and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 169-182, 14 April 2015).

28. Concerning the promptness in the present application of the criminal proceedings conducted after 2005, the Court reiterates that Article 2 of the Convention requires investigations to begin promptly and to proceed with reasonable expedition (see, *inter alia*, *McCaughey and Others v. the United Kingdom*, no. 43098/09, § 130, ECHR 2013, and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 237, ECHR 2016).

29. The Court observes that, after the applicants made the official complaint on 22 March 2005 the prosecutor immediately started an investigation and managed to locate a very large number of witnesses and military personnel who, in the years that had elapsed since the killing, had moved to different parts of the country (see paragraph 8 above). The prosecutor questioned those persons and, in the light of the information he obtained from them, found the place where the applicants' relative had been buried.

30. The Court observes, however, that the subsequent period of over three years – that is to say between 26 May 2006 and 11 June 2009 (see paragraphs 11-13 above) − was devoted exclusively to corresponding with the military and asking them whether the area was safe to visit and exhume the body. Having examined the correspondence between the prosecutor and

the military, the Court remains unconvinced that the concerns highlighted by the military about the safety of or the weather conditions in the area were so serious as to prevent the prosecutor's visit to a village with a civilian population for such an extended period of time (see paragraphs 9 and 24 above).

31. The Court observes that the trial of the commander of the Geçimli military station started on 12 April 2010 and the proceedings are still pending before the Court of Cassation (see paragraph 16 above). Other than arguing that some of the hearings had had to be postponed on account of the failure of the lawyers representing the parties to attend the hearings and on account of the difficulties in ensuring the attendance of a number of witnesses, the Government have not sought to justify the delays and have not, in particular, offered an explanation as to why the Court of Cassation, before which the matter was brought on 27 November 2014, has not yet examined the appeal lodged by the applicants.

32. The Court considers that the above-mentioned delays in the criminal proceedings, which have been ongoing for over 12 years since 2005, the death of the applicant's close relative having occurred 22 years ago in 1995, cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however it is organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of excessive delays in the investigation and the trial in the present case gives rise to the conclusion that the investigation was ineffective for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 of the Convention under its procedural aspect (see *Cerf v. Turkey*, no. 12938/07, § 81, 3 May 2016).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

34. The applicants claimed a total of 1,080,000 euros (EUR) in respect of pecuniary and EUR 1,080,000 in respect of non-pecuniary damage. They also asked the Court to make an award in respect of their costs and expenses incurred before the Court but they did not specify an amount.

35. The Government considered that there was no causal link between the claim for pecuniary damage and the alleged violations of the applicants' rights under the Convention. They also considered that the applicants' claim in respect of non-pecuniary damage was excessive.

36. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards EUR 16,800 jointly to the applicants Habibe İncin, Veysi İncin, Saniye İncin, Fevzi İncin, Faruk İncin, Hazım İncin and Hatice İncin, who are the wife and children of Kerim İncin, in respect of non-pecuniary damage. It also awards EUR 3,200 jointly to the applicants Halima İncin, Hedice İncin, Sabriye İncin, Delila İncin, Doğila İncin, Reşit İncin, Nuri İncin and Abdullah İncin, who are the mother and siblings of Kerim İncin, in respect of non-pecuniary damage.

37. 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, regard being had to the applicants' failure to quantify and document their costs and expenses, the Court rejects their claim for costs and expenses.

Default interest

38. 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 application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention in its procedural aspect on account of the failure to conduct an effective investigation and trial after 2005;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 16,800 (sixteen thousand eight hundred euros), plus any tax that may be chargeable, jointly to the applicants Habibe İncin, Veysi İncin, Saniye İncin, Fevzi İncin, Faruk İncin, Hazım İncin and Hatice İncin in respect of non-pecuniary damage;
      (ii) EUR 3,200 (three thousand two hundred euros), plus any tax that may be chargeable, jointly to the applicants Halima İncin,

Hedice İncin, Sabriye İncin, Delila İncin, Doğila İncin, Reşit İncin, Nuri İncin and Abdullah İncin in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President

APPENDIX

1. Habibe İNCİN, born in 1946, Mahmur Refugee Camp in Iraq
2. Veysi İNCİN, born in 1977, Mahmur Refugee Camp in Iraq
3. Saniye İNCİN, born in 1985, Mahmur Refugee Camp in Iraq
4. Fevzi İNCİN, born in1985, Mahmur Refugee Camp in Iraq
5. Faruk İNCİN, born in 1990, Mahmur Refugee Camp in Iraq
6. Hazım İNCİN, born in1986
7. Hatice İNCİN, born in 1994, Van
8. Halima İNCİN, born in 1926
9. Hedice İNCİN, born in 1950, Van
10. Sabriye İNCİN, born in 1944, Van
11. Delila İNCİN, born in 1952, Hakkari
12. Doğila İNCİN, born in 1955, Hakkari
13. Reşit İNCİN, born in 1956, Mahmur Refugee Camp in Iraq
14. Nuri İNCİN, born in 1966, Mahmur Refugee Camp in Iraq
15. Abdullah İNCİN, born in 1971