CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 42442/98
by Mahmut DAĞDAŞ
against Turkey

The European Court of Human Rights (Third Section), sitting on 22 June 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President,*
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN, *judges,*

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 19 June 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mahmut Dağdaş, is a Turkish national who was born in 1933 and lives in Elazığ. He was represented before the Court by Mr Yusuf Alataş, a lawyer practising in Ankara.

A. The circumstances of the case

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

1. The applicant's version of the facts

The applicant contended that his house, along with some other houses in his village, had been destroyed as a result of a military operation carried out on 25 and 26 August 1995.

On 30 August 1995 the mayors of Pamuklu and Balıcalı villages drafted two reports confirming that the applicant's house and belongings had been burnt.

Shortly after the alleged incident, the applicant applied to the Ministry of Interior requesting to be compensated. On 5 September 1995 the Ministry of Interior received the applicant's petition but did not respond within the 60-day statutory period.

The applicant also filed a petition with the Public Prosecutor's Office in Karakoçan. He requested that an investigation be carried out to identify the perpetrators.

The public prosecutor conducted an investigation and commissioned an expert report on the applicant's losses. By the time of the present application, the investigation was pending.

On 3 January 1996 the Ministry of Interior rejected the applicant's request for compensation. The Ministry concluded that the applicant, along with the other villagers, had voluntarily abandoned the village and that the applicant's property had gotten ruined due to lack of care throughout the years.

On 11 January 1996 the applicant applied to the Malatya Administrative Court requesting compensation for his losses. On 8 February 1996 the court rejected the request on the ground that the applicant had failed to comply with the time-limit for challenging the decision of the Ministry of Interior. The court pointed out that the applicant applied to the Ministry on 5 September 1995 and did not receive a reply within the 60 days thereafter. The court pointed out that the Ministry had tacitly rejected the request by not responding within the statutory period of 60 days. The court concluded that the 60-day time limit began to run from 4 November 1995 and ended on 3 January 1996.

On 23 December 1997 the Supreme Administrative Court dismissed the applicant's appeal.

2. The Government's version of the facts

The investigation carried out by the authorities indicated that the applicant had left his village of his own will. The security forces had not destroyed the applicant's village or forced him to leave their homes.

The official records indicated that there was no obstacle preventing villagers from returning to their homes and possessions in their villages. Persons who had left their villages as a result of terrorism had already started returning and regaining their activities in their villages.

On 14 July 2004 the Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism was passed by the Grand National Assembly and entered into force on 27 July 2004 ("Compensation Law"). That Law provided for a sufficient remedy capable of redressing the Convention grievances of persons who were denied access to their possessions in their villages.

In that connection Damage Assessment and Compensation Commissions were set up in seventy-six provinces. Persons who had suffered damage as a result of terrorism or of measures taken by the authorities to combat terrorism could lodge an application with the relevant compensation commission claiming compensation.

The number of persons applying to these commissions had already attained approximately 170,000. A further 800 persons, whose applications were pending before the Court, had also applied to the compensation commissions. Many villagers had already been awarded compensation for the damage they had sustained.

B. Relevant domestic law

A description of the relevant domestic law can be found in the Court's decision of *İçyer v. Turkey* (no. 18888/02, §§ 44-54, 12 January 2006) and in its judgment of *Doğan and Others v. Turkey* (nos. 8803-8811/02, 8813/02 and 8815-8819/02, §§ 31-35, ECHR 2004-VI)

COMPLAINTS

The applicant complained under Articles 2 and 8 of the Convention and Article 1 of Protocol No.1 that that the military operation and the destruction of his village had given rise to a violation of the right to life, right to respect for his family life and home, and right to respect for the peaceful enjoyment of his possessions.

He also maintained under Article 5 of the Convention that he and his family had been deprived of their security of person as they had been compelled to leave the village.

Under Article 6, he complained that the decision of the Malatya Administrative Court rejecting his challenge to the Ministry of Interior's refusal to grant him compensation was arbitrary. He further complained that the criminal investigation into the burning of his property had never been concluded.

The applicant also claimed under Article 13 of the Convention that he had no effective remedy in respect of his various Convention grievances.

He finally complained under Article 14 of the Convention, taken in conjunction with Articles 5, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1, that he had been discriminated against on account of his Kurdish origin.

THE LAW

A. Complaint under Article 2 of the Convention

The applicant complained that the military operation that destroyed his property involved the bombing of his house at a time when he and his family were coincidentally out of home. In this regard, he argued that the destruction had given rise to a violation of Article 2 of the Convention which reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

In the present case, the alleged force used was not in the end lethal. This, however, does not exclude in principle an examination of the applicant's complaints under Article 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life (see *Erikan Bulut v. Turkey*, no. 51480/99, § 25, 2 March 2006; *İlhan v. Turkey* [GC], no. 22277/93, § 75, ECHR 2000-VII, and

Makaratzis v. Greece [GC], no. 50385/99, § 49, ECHR 2004-...). In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

However, the Court recalls that in order for the above outlined principle to apply, it must be established before all that there exists a use of force which could have resulted in the deprivation of life. The Court notes that the applicant's petitions with the domestic authorities complained only that the security forces had burnt his property, not bombed. Similarly, his petition with the prosecutor's office complained about damage to property only, not an attempted murder or use of potentially lethal force. Furthermore, the latter petition also stated that "for various reasons, he had left his village in 1994 and that he had learnt that his house had been burned in 1996 by unknown persons".

In view of the applicant's self-contradictory submissions, the Court does not find it established that the security forces used lethal force to destroy his house, which act he fortuitously survived. Accordingly, the Court concludes that Article 2 of the Convention is not applicable in the instant case.

It follows that this complaint must be rejected under Article 35 § 3 of the Convention for being incompatible *ratione materiae* with the provisions of the Convention.

B. Complaints under Articles 5 and 8 of the Convention and Article 1 of Protocol No. 1

The applicant complained that his forcible displacement and the destruction of his property as well as the refusal of the authorities to allow him to return to his home and land had given rise to breaches of Articles 5 and 8 of the Convention and Article 1 of Protocol No. 1, which, in so far as relevant, read as follows:

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law"

Article 8

"1. Everyone has the right to respect for his private and family life [and] his home...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

At the outset, the Court notes that the applicant was not deprived of his liberty falling under Article 5 (see *Jancova v. Slovakia* (dec.), no. 51233/99, 8 October 2002). Given that it is free, in the performance of its task, to attribute to the facts of the case a characterisation in law different from that given by the applicant (see *Camenzind v. Switzerland,* judgment of 16 December 1997, *Reports of Judgments and Decisions,* 1997-VIII, § 50), the Court considers it appropriate to examine the applicant's Article 5 complaint under Article 8 instead.

The Government raised an objection to the Court's jurisdiction, arguing that the applicant had failed to exhaust domestic remedies as he had not availed himself of the new remedy offered by the Compensation Law. In that connection they claimed that the mechanism which they had set up subsequent to the *Doğan and Others* judgment of 29 June 2004 was capable of providing redress in respect of the applicant's complaints and offered a reasonable prospect of success.

The Court observes that under the Compensation Law it is open to persons whose applications are pending before the Court, such as the applicant in the present case, to lodge until 3 January 2007 an application with local compensations commissions in order to claim compensation for the damage they had sustained as a result of their displacement, destruction of property and inability to gain access to their possessions in their villages in south-east Turkey.

The Court has already examined that remedy and found it effective in respect of complaints about the alleged forced displacement and denial of access to possessions in the villages in south-east Turkey. In particular, it considered that the new remedy was accessible and provided reasonable prospects of success (see *İçyer*, cited above, §§ 73-87).

In the light of the above, the Court considers that there are no exceptional circumstances capable of exempting the applicant from the obligation to exhaust domestic remedies.

It follows that these complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Complaints under Articles 6 and 13 of the Convention

The applicant complained that the decision of the Malatya Administrative Court was arbitrary and that the criminal investigation into the alleged incidents has never been concluded. He further complained that

there was no effective domestic remedy capable of providing redress for his Convention grievances. He relied on Articles 6 and 13 of the Convention, which provide:

Article 6

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court considers that these complaints collectively relate to the availability of effective remedies to the applicants within the meaning of Article 13. The Court reiterates its finding that the Compensation Law does provide applicants in these types of cases with an effective remedy in respect of their complaints concerning alleged forced displacement, destruction of property and/or denial of access to their property.

It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Complaint under Article 14 of the Convention

The applicant maintained that because of his Kurdish origin he had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 5, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1. Article 14 provides as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government did not address this issue.

The Court notes that in its *Doğan and Others v. Turkey* pilot judgment (cited above, §§ 118-133) it has examined a similarly framed complaint and found it unsubstantiated. It finds no particular circumstances in this case which would require it to depart from its findings in the aforementioned case.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President