AS TO THE ADMISSIBILITY OF

Application No. 24560/94
by ilhan DiKEN
against Turkey

The European Commission of Human Rights sitting in private on 20 January 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 17 May 1994 by Ilhan Diken against Turkey and registered on 7 July 1994 under file No. 24560/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen and a doctor, was born in 1960 and lives in Diyarbakir. He is represented before the Commission by Senal Sarihan, a lawyer practising in Ankara.

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

On 10 September 1992 a person N.Ü., who introduced himself as a friend of the applicant's brother, visited the applicant in his surgery. He asked the applicant to come with him to his home to examine a patient. The applicant told him to come back later.

Later that day N.Ü. went back to the applicant's surgery. The applicant went out with him. Then a taxi stopped beside them. N.Ü. told the applicant that the taxi driver knew where the patient was. He asked the applicant to get in the taxi and left. The applicant was then driven to a house where he met a person with an injured wrist (N.Ö.). The applicant examined the patient and told him that he should have his wrist X-rayed. The taxi driver (Y.A.) gave the applicant his telephone number and asked him to call him if it would be possible to X-ray N.Ö.'s wrist.

The next day the applicant called Y.A. and asked him to bring N.Ö. to the Diyarbakir Paediatric Hospital where he was working as a medical practitioner. At about 8.00 p.m. on the same day the applicant X-rayed N.Ö.'s wrist. After examining the X-ray he recommended the necessary treatment.

On 7 October 1992 the applicant was taken into police custody. On the same day his house was searched by the police and certain PKK publications were seized.

In his statement to the police, it was recorded that the applicant accepted that he was a supporter of the PKK and that he also admitted having known that N.Ö. was a PKK member when he examined him.

On 20 October 1992 the applicant was questioned by the Public Prosecutor at the Diyarbakir State Security Court. In his questioning he denied the statement he had made to the police. He stated that he had signed the statement under duress. He asserted that the publications found in his home did not belong to him. He also asserted that he had never met N.Ö. before, nor had he known that he was a PKK member.

After being questioned by the Public Prosecutor, the applicant was brought before a judge at the Diyarbakir State Security Court. He reiterated the statement he had made to the Public Prosecutor. The judge, having regard to the evidence already available, placed the applicant in detention on remand.

The applicant was charged with assisting an armed organisation, the PKK, with the aim of committing an offence. The charge was based on Article 169 of the Turkish Criminal Code which stipulates that whoever knowingly gives shelter, assistance, provisions, arms or ammunition to an armed organisation or band or facilitates its actions shall be punished by heavy imprisonment for three to five years. N.Ö., Y.A. and four other persons were indicted along with the applicant for various offences.

At his trial before the Diyarbakir State Security Court, the applicant denied the charges. He reiterated, inter alia, the statement he had made to the Public Prosecutor and the judge. He asserted that it was his obligation as a doctor to treat any patient. He argued that at the time of the incident, he did not know that N.Ö. was a PKK member. Even assuming that he had known, he was under an obligation, as a doctor, not to denounce him to the security forces, because he was a patient who needed treatment.

In a final opinion to the court, the Public Prosecutor requested that the applicant be acquitted.

In a decision dated 21 June 1993, the court found the applicant guilty of the offence with which he was charged. The applicant was convicted and sentenced to three years and nine months' imprisonment. The court referred to the police statement made by the applicant and his co-accused. The court noted, however, that the applicant, although he was not on duty on the date of the incident, had X-rayed N.Ö.'s wrist and entered a false name in the hospital records. Having regard also to the accused's evasive replies during the trial and the

particular circumstances of the incident, the court held that the applicant's attitude could not be regarded as an ordinary doctor-patient relationship.

The applicant and the Public Prosecutor appealed.

On 2 February 1994 the Court of Cassation dismissed the appeal. It upheld the cogency of the State Security Court's reasoning and its assessment of the evidence.

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that during his police custody he was held incommunicado, and that he was sworn at and insulted.

2. The applicant also complains that he was held in police custody for 13 days without being brought before a judge, contrary to the requirements of Article 5 para. 3 of the Convention.

3. The applicant complains lastly under Article 7 para. 1 of the Convention that he was convicted and sentenced for performing his obligations as a doctor, i.e., treating a patient, and therefore that he was held guilty of an act which did not constitute a criminal offence under national or international law.
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THE LAW

1. The applicant complains that he was held in police custody for 13 days without being brought before a judge, contrary to the requirements of Article 5 para. 3 (Art. 5-3) of the Convention. The Article reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The applicant also complains that during his police custody he was held incommunicado. In this context he invokes Article 3 (Art. 3) of the Convention which provides as follows:

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

However, concerning the above complaints, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of these provisions, as Article 26 (Art. 26) of the Convention provides that the Commission may only deal with the matter within a period of six months from the date on which the final decision was taken.

The Commission refers to its case-law according to which when an act of a public authority is not open to any effective remedy, the six-month period runs from the date on which the act took place (No. 8007/77, Dec. 10.7.78, D.R. 13 p. 85, at p. 153).

The Commission observes that in the present case the applicant's police custody was effected pursuant to the Law on the Procedures of State Security Courts and that he had no domestic remedy against this procedure.

The Commission notes that the situation complained of ended on

20 October 1992 whereas the application was submitted to the Commission on 17 May 1994, that is more than six months after that date.

It follows that this part of the application has been introduced out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant further complains under Article 3 (Art. 3) of the Convention that during his police custody he was sworn at and insulted.

The Commission may leave open the question whether the applicant has exhausted the domestic remedies in this respect as his complaint must in any event be rejected for the following reasons.

The Commission recalls that ill-treatment must attain a minumum level of severity to fall within the scope of Article 3 (Art. 3). The assessment of this minumum level is, in the nature of things, relative; it depends on all the circumstances of the case and, in particular, on the nature and context of the treatment, the duration, physical or mental effects thereof (Eur. Court H.R., Ireland v. United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162; Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, paras. 29-30).

The Commission also recalls that under certain circumstances it can be difficult to prove ill-treatment during imprisonment, but that the applicant must at least submit a beginning of a sufficient proof concerning the alleged treatment (No. 17126/90, Öner v Turkey, Dec. 30.8.1994, unpublished).

In the present case the Commission observes that the applicant did not specify in what kind of language and in which circumstances he had been sworn at and insulted during his police custody. His allegation is of a general nature and it does not appear that he specified the acts complained of before the domestic authorities.

Consequently, in the present case the Commission has not been presented with any materials which substantiate the applicant's allegations of ill-treatment or with any details which would allow it to assess the character and gravity of the alleged abusive language used against him.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains that he was convicted and sentenced for performing his obligations as a doctor, treating a patient, and therefore that he was found guilty of an act which did not constitute a criminal offence under national or international law. He invokes Article 7 para. 1 (Art. 7-1) of the Convention which provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

However, the Commission observes that the applicant has been convicted for assisting a PKK member in an illegal manner. It notes that the domestic court held in its reasoning that there was sufficient evidence to indicate that the applicant's attitude could not be regarded as normal for a doctor. The court especially noted that although the applicant had not been on duty on the date of the incident, he had taken the patient to hospital and had entered a false name in the hospital records.

The Commission also observes that the applicant did not deny the events which constituted the basis of the domestic court's statement of facts. The Commission finds no element which would allow it to conclude that the court interpreted the law or established the facts in an arbitrary or unreasonable manner. Therefore, there is no appearance that the applicant's conviction was not in conformity with Article 7 (Art. 7) of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission