CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32270/96
by Ülkü DOĞAN and Others
against Turkey

The European Court of Human Rights, sitting on 14 March 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mr A. KOVLER, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 8 July 1996 and registered on 17 July 1996,

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 observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ülkü Doğan, Celal Yalçıtaş and Servet Çolak are Turkish nationals, who were born in 1964, 1968 and 1968 respectively and were living in Adana at the time of the incidents giving rise to this application. They are represented before the Court by İbrahim Ergün, a lawyer practising in Istanbul.

A. The circumstances of the case

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

According to intelligence gathered by Adana Police Headquarters, members of an illegal organisation called 'Ekim' (October) were going to distribute posters and put up banners in protest against redundancies and price rises. The police felt that these activities were intended to provoke the public and informed its anti-terrorist department. This department planned an operation to apprehend members of Ekim and also to seize organisational documents. According to official documents in the file, the operation started at 12.30 a.m. on 12 May 1996.

According to the applicants, however, they were all arrested at 11.00 p.m. on 11 May 1996. Ülkü Doğan, the first applicant, was arrested by members of the anti-terrorist department when he was on his way home, Celal Yalçıtaş, the second applicant, was arrested at a house in Adana and the third applicant, Servet Çolak, was arrested at a friend's house. A large number of documents, containing articles protesting against issues such as torture in police custody, disappearances and unequal division of income, were also seized during these arrests.

According to the official reports of the apprehension and seizure, drawn up and signed by the police officers who conducted this operation, these arrests were effected on 12 May 1996. Also according to these reports, neither the second nor the third applicant put up any resistance at their arrests.

On 13 May 1996, the chief of the anti-terrorist department of Adana police asked the Adana public prosecutor to authorise the applicants' detention in police custody for a period of 15 days. On the same day, the prosecutor, pursuant to Article 9 of Law No. 2845 and Article 30 of Law No. 3842, acceded to this request.

The applicants submit that in the course of their police custody they were subjected to various types of torture. In particular, they were hung from their arms, given electric shocks to various parts of their bodies, kept naked under or on big slabs of ice, beaten up, hosed with cold water, insulted, prevented from sleeping and threatened with death.

On 23 May 1996 the applicants were taken to the Adana branch of the Forensic Medicine Institute, where they were examined and medical reports were drawn up. In the medical report relating to the first applicant, cuts which had formed scabs were observed on both wrists and on the right ankle. The medical report drawn up in relation to the second applicant states that there were cuts on both arms as well as a cut below the left knee all of which had healed. The third applicant's medical report states that there was a cut below the right knee and two cuts in the vertebral region, all of which had healed.

On the same day, 23 May 1996, the applicants were brought before the Adana public prosecutor, who sent them to the Fourth Chamber of the Criminal Court of Peace in Adana. Before the Justice of the Peace of that Chamber, the applicants denied the accusations against them and complained that they had made their statements under torture. They were detained on remand, under Article 104 of the Code of Criminal Procedure, on the grounds of the state of the evidence and the nature of the offence of which they stood accused, which could be classified as a serious crime. The applicants were not represented by a lawyer before the Justice of the Peace.

On 3 June 1996 the Chief Prosecutor of the National Security Court in Konya prepared an indictment submitting that the applicants and five other persons were guilty of membership of the armed terrorist organisation Ekim pursuant to Article 168 § 2 of the Turkish Criminal Code and also Article 5 of Law No. 3713.

During the proceedings before the Konya National Security Court the applicants informed the Court that they had been tortured in custody.

On 26 November 1996 the National Security Court in Konya held that the applicants had aided Ekim by making propaganda and it sentenced them to ten months' imprisonment and a fine of 41,666,666 Turkish Liras. Taking into account the time they had already spent in detention, they were immediately released.

The applicants appealed against this judgment. The Ninth Chamber of the Criminal Division of the Court of Cassation upheld the decision of the Konya National Security Court on 4 March 1999.

The public prosecutor has not taken any action with regard to the applicants' claims brought forward in the proceedings before the Justice of the Peace, that they were tortured during custody.

B. Relevant domestic law and practice

Article 17 of the Turkish Constitution provides:

"...

No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity.

..."

Article 243 of the Criminal Code provides:

> "A President or member of a court or official body or any other public official who, in order to extract a confession of guilt in respect of a criminal offence, tortures or ill-treats any person, or engages in inhuman conduct or violates human dignity, shall be punished by up to five years' imprisonment and disqualified from holding public office temporarily or for life."

Article 245 of the Criminal Code provides:

> "Civil servants charged with the forcible execution of an order and police officers and any other officials charged with enforcement who, either of their own accord or on the orders of their superiors, enforce the order concerned in an unlawful manner or who, in doing so, ill-treat, strike or cause bodily harm to another, shall be punished by between one and three years' imprisonment and temporarily disqualified from holding public office."

For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure (the CCP) with the public prosecutor or the local administrative authorities. A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed, is obliged to investigate the facts by conducting the necessary inquiries to identify the perpetrators.

A public prosecutor institutes criminal proceedings if he or she decides that the evidence justifies the indictment of a suspect (Article 163 CCP). Only if it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, may the public prosecutor close the investigation (Article 164 CCP).

With regard to offences falling within the jurisdiction of the National Security Courts, any arrested person had to be brought before a judge within forty-eight hours at the latest, or, in the case of offences committed by more than one person, within fifteen days, pursuant to Article 30 of Law No. 3842 in force at the time the applicants' detention period was extended by the prosecutor.

Article 30 of Law No. 3842 has been amended by Law No. 4229 of 6 March 1997. According to Law No. 4229, persons arrested for collective offences must be brought before a judge within 48 hours. This period can be prolonged to a maximum of four days by a written order of the public prosecutor owing to difficulties in the finding of evidence or to the number of perpetrators, or for similar causes. If the investigation is not concluded within this period, it can be prolonged to a maximum of seven days upon the request of the public prosecutor and the decision of the judge.

Pursuant to Article 9 (a) of Law No. 2845 on the Procedure before the National Security Courts, public prosecutors are deprived of jurisdiction in cases of alleged terrorist offences in favour of a separate system of National Security prosecutors and courts established throughout Turkey. Only these

courts are competent to try cases involving the offences defined in Articles 168 and 169 of the Criminal Code.

Article 168 of the Criminal Code provides:

> "1. Any person who, with the intention of committing the offences defined in Articles ..., forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.
>
> 2. The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment."

COMPLAINTS

1. The applicants complain firstly that they were subjected to various types of torture in the course of their police custody in breach of Article 3 of the Convention.

2. Invoking Article 5 § 3 of the Convention, the applicants complain that they were not brought before a judge until 13 days after their arrests.

3. They further argue that contrary to Article 5 § 4 of the Convention, they were unable to challenge the lawfulness of their excessive detention since this was in conformity with domestic law.

4. Invoking Article 6 of the Convention, the applicants complain that they were deprived of their right to legal assistance both in the course of their detention in police custody and in the proceedings before the Fourth Chamber of the Criminal Court of Peace in Adana.

5. Finally, the applicants submit that they were subjected to discrimination on the ground of their political activities in breach of Article 14 taken together with the above-mentioned Articles.

THE LAW

The applicants complain that they were subjected to torture whilst in police custody, that they were not brought promptly before a judge, that they were unable to have the lawfulness of their detention determined, that they did not have access to legal representation and that they were discriminated against. They invoke Articles 3, 5, 6 and 14 of the Convention, the relevant provisions of which provide as follows:

Article 3

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

Article 5

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

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

"3. 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.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

..."

Article 6

"...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

Article 14

"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."

1. Exhaustion of domestic remedies

The Government maintain that the application is inadmissible as the applicants have failed to exhaust domestic remedies within the meaning of Article 35 § 1 he Convention. In this regard, they rely on the applicants' failure to avail themselves of the various civil and administrative remedies in Turkish law.

a. Article 3 of the Convention

The Government argue that the applicants could have applied to civil courts or to administrative courts in order to obtain compensation for their claims of torture and ill-treatment. The Government refer to a domestic court decision in which the Fourth Civil Chamber of the Court of Cassation overturned the decision of the first instance court which had rejected the compensation claim by the plaintiff who claimed to have been tortured, on the grounds that the defendants had already been acquitted by the criminal courts for lack of evidence. The Court of Cassation held that a judge in a civil court is independent of the criminal court judge who decides on the merits of the case according to the principles of criminal law. By applying a lower standard of proof, the Court of Cassation annulled the decision in favour of the plaintiff (File No. 1986/4898, Decision of 1986/7786 of 17.11.1986).

In their observations submitted to the former Commission the Government undertook to inform the Commission immediately when an investigation into the allegations of torture and ill-treatment had been instigated by the public prosecutor of the Konya Security Court or directly by the National Security Court. To date, no information has been received from the Government in this respect and the proceedings before the Konya National Security Court were concluded in 1996, i.e. one year before the Government submitted their observations.

The applicants argue that they should be considered as absolved from the obligation to exhaust any of the remedies referred to by the Government since these remedies cannot be regarded as effective in their case. They submit that they have brought their allegations to the attention of the public prosecutor, the Justice of the Peace and finally the judges of the National Security Court, i.e. the authorities who are responsible for taking action in cases of torture committed by public agents, pursuant to Article 153 of the Code of Criminal Procedure. They maintain that no action appears to have been taken, and that they have not received any information or response from the public prosecutor with regard to their criminal complaints. According to the applicants, it is impossible to obtain compensation before first establishing in criminal courts that the act complained of indeed took place. They argue that the Government, by referring to a sole domestic court decision, have failed to show that compensation could successfully have been claimed from civil courts.

As regards the civil and administrative remedies referred to by the Government, the Court refers to its Ogur v. Turkey judgment of 20 May 1999 (*Reports* 1999-III, § 66), where it held that the applicant was not required to bring the civil and the administrative proceedings relied on by the Government. It noted first of all that a plaintiff in a civil action for redress concerning damage sustained through illegal acts or patently unlawful conduct on the part of State agents had, in addition to establishing a causal link between the tort and the damage sustained, to identify the person believed to have committed the tort. In the present case, however, there has been no investigation into the applicants' allegations of torture and therefore those responsible for the acts complained of by the applicants remain unknown.

Secondly, as regards the administrative-law action provided in Article 125 of the Constitution, the Court noted in the Ogur judgment that this was a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification was not, by definition, a prerequisite to bringing such an action. However, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, 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 in the Convention", requires by implication that there should be an effective official investigation. This obligation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see Assenov v. Bulgaria, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102). The Court sees no reason to depart from those conclusions in the instant case and consequently it concludes that the applicants were not required to bring the civil and administrative proceedings suggested by the Government.

b. Article 5 §§ 3 and 4 of the Convention

The Government maintain that pursuant to Law No. 466 the applicants had the possibility of obtaining compensation which is payable to persons unlawfully arrested or detained once they are acquitted of charges by the National Security Court.

The applicants contest the Government's arguments. They contend that they could not invoke Law No. 466 since it is applicable only to damage suffered as a result of unlawful detention. They submit that the long period of custody they underwent was lawful under domestic law and accordingly they were unable to claim compensation.

The Court notes that in proceedings before the National Security Courts at the material time, the length of detention in police custody could be extended to 15 days by order of the prosecution. The length of pre-trial detention challenged by the applicants did not therefore exceed the maximum time-limit provided for in domestic law. According to Law No. 466, cited by the Government and subject of previous examination by the Court and the former Commission (see Sakık and Others v. Turkey, judgment of 26 November 1997, Reports 1997-VII, p. 2626, § 60; Commission's Report of 23 May 1996, p. 2637, § 73 and Demir and others v. Turkey, judgment of 23 September 1998, Reports 1998-VI, p. 12, § 36), an action against the authorities could only be brought for compensation for damage suffered as a result of unlawful deprivation of liberty or where persons who had been lawfully detained had not subsequently been committed for trial, or were acquitted or discharged after standing trial. Since in the present case the applicants' conviction was upheld at last instance by the Criminal Division of the Court of Cassation on 4 March 1999, the Court finds that Law No. 466 offered them no possibility of obtaining compensation.

c. Article 6 § 3 of the Convention

The Government, without making specific references to the admissibility of the applicants' complaint under Article 6 § 3 of the Convention, argue that the criminal proceedings against the applicants are still pending.

The Court notes that the criminal proceedings against the applicants ended on 4 March 1999 when the Ninth Chamber of the Criminal Division of the Court of Cassation upheld the judgment of the Konya National Security Court convicting the applicants. It thus appears that the criminal proceedings have been concluded and there is nothing to prevent the Court from examining their fairness.

In the light of the foregoing, the Court concludes that the application cannot be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

2. Merits

a. Complaint under Article 3 of the Convention

The applicants submit that in the course of their detention in police custody, they were subjected to various types of torture. In particular, they were hung from their arms, given electric shocks to various parts of their bodies, kept naked under or on big slabs of ice, beaten up, hosed down with cold water, insulted, prevented from sleeping and threatened with death.

The Government argue that the allegation that the applicants were tortured and ill-treated is a scenario insistently carried out with the aim of

bringing into disrepute the active forces struggling against terrorism. It is, the Government claim, highly peculiar that in spite of the applicants' allegations of extreme methods of torture, the doctor was able only to detect two or three wounds which had healed. According to the Government, the injuries recorded in the medical reports might have come about as a result of some of the applicants' resistance to arrest.

The applicants refer to the medical reports drawn up and signed by the Adana branch of the Forensic Medicine Institute according to which all the applicants had cuts on various parts of their bodies. In addition, given that neither the second nor the third applicant put up any resistance at their arrest, as is borne out by the arrest reports, these injuries could not have been caused at that time.

In the light of the Court's established case-law and the parties' submissions, the Court considers that this part of the application raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. Consequently, this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 of the Convention. No other grounds for declaring it inadmissible have been established.

b. Complaint under Article 5 § 3 of the Convention

The applicants complain that they were kept in custody for 13 days without being brought before a judge. This period, the applicants claim, was unreasonable and was incompatible with the purpose of a lawful detention.

The respondent Government base their first objection in respect of this complaint on their derogation under Article 15 of the Convention relating to Article 5 of the Convention and detentions effected in the provinces where the state of emergency was in force.

Secondly, the Government maintain that the applicants' detention was lawful in the light of the evidence collected by the authorities and personally disclosed by the applicants. The period of detention was well within the limits of the rules applicable at the time relating to offences falling within the jurisdiction of the National Security Courts. The Government submit at this point that the custody periods were shortened by Law No. 4229 of 12 March 1997, which amended Law No. 2845. The new regulations provide that persons arrested for collective offences must be brought before a judge within 48 hours. This period can be prolonged to a maximum of four days by written order of the public prosecutor owing to the difficulties in collecting evidence or to the number of perpetrators, or for similar reasons. If the investigation is not concluded within this period, it can be prolonged to a maximum of seven days by decision of a judge upon the request of the public prosecutor.

The applicants reply that the derogation relied on by the Government would only apply to detentions within the Emergency Region and would not

extend to other regions. Adana province, where they were arrested, was not within the Emergency Region.

With regard to the new law referred to by the Government, the applicants argue that as this came into force after their detention had already ended it is not relevant here. According to the applicants, the fact that it was considered necessary to amend these provisions supports their argument that the legislation authorising their detention was not compatible with the Convention.

In the light of the Court's established case-law and the parties' submissions, the Court considers that this part of the application raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. Consequently, this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 of the Convention. No other grounds for declaring it inadmissible have been established.

c. Complaint under Article 5 § 4 of the Convention

The applicants complain that they were unable to challenge the lawfulness of their excessive detention period as it was in conformity with domestic law.

The Government submit that, in cases of illegal detention, a request for compensation may be submitted within three months following the final decision of the trial court under the terms of Law No. 466 on compensation payable to persons unlawfully arrested or detained.

The applicants dispute the Government's arguments. They recall that their complaint relates to the length of their detention in police custody and its unlawful nature. They submit that a long period of custody by order of the public prosecutor is authorised under domestic law and accordingly there could be no claim for compensation in this respect.

In the light of the parties' submissions, the Court considers that this part of the application raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. Consequently, this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 of the Convention. No other grounds for declaring it inadmissible have been established.

d. Complaint under Article 6 § 3 of the Convention

The applicants submit that they were deprived of their right to legal assistance both in the course of their detention in police custody and in the proceedings before the Fourth Chamber of the Criminal Court of Peace.

The Government maintain that the applicants were not deprived of legal assistance before the Fourth Chamber of the Criminal Court of Peace. If the applicants had requested it they would have received legal assistance at the interrogation session before that court.

The applicants point out that the Government have not disputed that they were not provided with legal assistance while they were in detention in order to prepare their defence or when they were brought before the Criminal Court of Peace. They submit that offences falling within the jurisdiction of the National Security Courts are governed by Law No. 3842 which restricts an accused's right to legal assistance at the pre-trial stage, including the proceedings before the Criminal Court of Peace which, at the time, precluded the right to legal representation for a defendant charged with such an offence.

As regards the substance of the applicants' complaint concerning Article 6 § 3 of the Convention, the Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

e. Complaint under Article 14 of the Convention

The applicants complain that they were subjected to unlawful discrimination due to the fact that they were accused of having committed offences directed against the official policies of the State. Whereas according to the Code on Criminal Procedure, persons taken into police custody must be brought before a judge within a maximum period of four days, this period may be extended to a maximum of 15 days in accordance with Law No. 3842 when, as was the case here, an offence falls within the jurisdiction of the National Security Courts.

The Government claim that the applicants were not arrested in order to keep them away from their political activities but to prevent them from committing further terrorist acts.

The Court considers that this question relates to a detainee's right "to be promptly brought before a judge or other officer authorised by law to exercise judicial power" and should therefore be examined under Article 14 taken together with Article 5 § 3 of the Convention.

The Court reiterates that Article 14 is not concerned with all differences of treatment but only with differences having as their basis or reason a personal characteristic ("status") by which persons or group of persons are distinguishable from each other (see the Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment of 7 December 1976, Series A no. 23, p. 29, § 56).

The Court notes that in principle the aim of Law No. 3842 is to penalise people who commit terrorist offences and that anyone arrested and charged with an offence falling within the scope of that law will be treated less favourably with regard to the length of pre-trial detention than persons

arrested and charged with an offence under the ordinary law. In this regard, the Court considers that the distinction is made not between different groups of people, but between different types of offences, according to the legislature's view of their gravity (see, *mutatis mutandis*, *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999, unreported).

It therefore concludes that this practice does not amount to a form of "discrimination" contrary to the Convention.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Articles 35 § 3 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicants' complaints that they were subjected to treatment contrary to Article 3 of the Convention whilst in custody, that they were not brought promptly before a judge, that they were unable to challenge the lawfulness of their detention period and finally that they were denied the assistance of a lawyer during their pre-trial detention.

Declares inadmissible the remainder of the application.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President