AS TO THE ADMISSIBILITY OF

Application No. 24565/94
by K.O.S.
against Turkey

The European Commission of Human Rights sitting in private on 4 December 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

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 29 June 1994 by K.O.S. against Turkey and registered on 7 July 1994 under file No. 24565/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 11 October 1994 to communicate the application;

- the observations submitted by the respondent Government on 1 March 1995 and the observations in reply submitted by the applicant on 24 April 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Kurdish born British citizen, was born in 1955 and resides at Waterlooville, Hampshire, England. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of the University of Essex, England.

A. Particular circumstances of the case

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

The applicant states that the following occurred.

On 29 December 1993 the applicant was returning from a visit to his family in Northern Iraq and was at Diyarbakir Airport, awaiting a flight to England. While in the control area of the airport, he was approached by airport and security officers, his passport was taken away, and he was rudely escorted to a room in the airport. Five other persons were also thus detained.

The applicant, along with the others, was then forced to empty his pockets of all money, tickets and other valuables. He was refused permission to telephone the British Embassy and was forced to sign a paper in Turkish, a language he can neither read nor speak. That evening the applicant and the five others were taken to a security police station, known as the "Aminiat".

All were detained there from 29 December 1993 to 1 January 1994. During these three days they were called one after the other to a room where they were beaten up. The applicant submits he was handcuffed, punched on the head and stomach, hit in the stomach with the butt of a Kalashnikov rifle and threatened with execution by having a gun put to his head.

The applicant's account is confirmed by the statement of two other detainees, T. A. and Z. B., who state that on the day they were brought to the "Aminiat" they were sworn at in Turkish, verbally abused and hit and kicked, at times with Kalashnikovs. The statement goes on to say that three days later the applicant and in particular N. M. were tortured.

It was not until the second day of his detention that the applicant was informed of the reason why he was being held, which was suspicion of robbery. However, no definite details of the alleged offence were forthcoming, and indeed the allegations by the police kept changing. These ranged from a claim of involvement in a $ 85 million raid on a bank to theft of DM 25,000 from a cashier's hand. No attempt was made to search for a large sum of money in the applicant's luggage until the last day of his detention at that station, i.e. 1 January 1994.

The applicant continually asked for an interpreter as he was unable to understand the questions he was asked in Turkish and his English was not understood either. However, it was not until 1 January 1994 at 11.00 hours that an English translator was brought, but this person spoke very little English. By that time the police had finished asking their questions and all the applicant was asked was his name, whether he had been to any bank in Diyarbakir and where he wanted to travel to. During the three days of investigation he and the other detainees were forced to sign a number of papers in Turkish.

On the same day, 1 January 1994, the detainees were taken to a hospital to sign a paper that they had not been harmed and had been treated well. On the way to the hospital the police threatened that the detainees' guts would be pulled out by hand if they complained of any ill-treatment before the doctor.

Also on 1 January 1994 the applicant appeared before a court. The detainees had been designated a Turkish lawyer to conduct their defence. However, the lawyer did not know either English or Kurdish and it is not clear how she could represent them. The applicant was merely asked what his name was and whether he had been to a bank. The applicant was then told by his lawyer that he would be released but that the judge was waiting for a fax to come from the border to confirm that he had entered Turkey on 29 December 1993. However, this appeared in any case from a stamp in the applicant's passport and, if confirmation was needed, a fax was only a matter of minutes.

On 1 January 1994 the applicant and the other detainees were detained in Diyarbakir main jail together with convicted criminals. He believes that they were only kept in prison in order for their bruises to disappear before their release.

At no time was the applicant offered access to a lawyer of his own choosing, nor was one offered for free. Instead he was designated a fee charging lawyer with whom he could not communicate and who asked him few relevant questions. The lawyer later demanded a fee of 8,000,000 Turkish Lira for each detainee but was eventually willing to accept an interim payment of 1,500,000 Turkish Lira.

The applicant was released on 4 January 1994 and left immediately for the United Kingdom. Upon his return he was still feeling the effects of the treatment, primarily feeling sick and dizzy and he consulted his doctor on 10 January 1994. Apart from a small bruise on the applicant's chest the doctor found no external marks but he did notice some anxiety and arranged for him to have three weeks off work in order to recover from his ordeal.

For the whole of his detention the applicant was not allowed to communicate with the outside world. As a result, his family had no knowledge of his whereabouts, or whether he was alive or dead. The applicant submits that they had no news from him from the moment on 29 December 1993, when he failed to arrive home, until his release on 4 January 1994, and they suffered anguish as a result. The above-mentioned statement of T. A. and Z. B. reports, however, that two of the detainees were released on 2 January 1994 and that they contacted the relatives of the others who were at that time still detained. Hereupon, the applicant's father in law contacted the British Foreign and Commonwealth Office. While the British Embassy in Ankara were making enquiries into the applicant's situation on 4 January 1995, his father in law was informed that he had been released.

Following written enquiries by the applicant the Foreign Office informed him on 1 February 1994 that the British Embassy in Ankara were awaiting a report concerning the applicant's detention from the Turkish Ministry of Foreign Affairs. The Foreign Office made it clear to the applicant that the British Government could not pursue compensation for him, but it did provide him with a list of Ankara-based lawyers able to correspond in English.

The respondent Government state the following.

Following a formal complaint made by the bank cashier A. B. and a witness statement that the applicant and two other persons had stolen an amount of German Marks from the cashier, the applicant was apprehended on 29 December 1993. He was identified by A. B. and four other bank clerks on 30 December 1993. On that day, an extension of the detention period was requested from the competent public prosecutor in order to complete the investigation. Leave for a further two days of detention was granted.

As soon as an interpreter was found, the applicant's statement was taken on 1 January 1994. Thereupon, a summary report of the police investigation was prepared and submitted to the public prosecutor. On

the same day the applicant was transferred to the State Hospital where he was examined by a doctor who put a mark on the referral note indicating that no sign of violence was found on the applicant's body.

Also on 1 January 1994, upon the request of the public prosecutor, the competent judge ordered the continued detention of the applicant and two of the other detainees.

The applicant signed a power of attorney for a lawyer to act as his representative on 3 January 1994. He was released on 4 January 1994.

Criminal proceedings were initiated against the applicant and two others by the public prosecutor on 5 January 1994. The applicant and the two co-defendants were acquitted by judgment of 18 May 1994 since there was not sufficient evidence to substantiate the charge against them. Moreover, in the judgment notice was given to the competent public prosecutor to consider initiating an investigation into the bank cashier A. B. with a view to criminal proceedings.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the Administration are subject to judicial review ...
>
> The Administration shall be liable for damage caused by its own acts and measures."

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts.

Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against the alleged perpetrator:

> "Every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation."

Pursuant to Article 46, any victim of an assault may claim material damages:

> "The person who has been injured is entitled to compensation for the expenses as well as for the losses resulting from total or partial disability to work due regard being had to the detriment inflicted on the economic future of the injured party."

Moral damages may also be claimed under Article 47:

> "... the court may, taking into consideration the particular circumstances, award adequate general damages to the injured..."

Article 2 of the Administrative Judgment Procedure Code (No. 2577, 6.1.82) stipulates in para. (b) that

> "... Requests for full compensation may be filed by those whose personal rights have directly been damaged by administrative acts and actions."

Proceedings before the administrative courts are in writing. Decisions of administrative courts can be appealed to the Council of State.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject someone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants), to threaten someone (Article 191) and to deprive someone unlawfully of his liberty (Article 179 in general and Article 181 when committed by civil servants).

In general, in respect of criminal offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings within fifteen days of being notified (Article 165 of the Code of Criminal Procedure).

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

COMPLAINTS

The applicant alleges violations of Articles 2, 3, 5, 6, 13, 14 and 18 of the Convention.

As to Article 2, the applicant complains of the life-threatening nature of the detention in the hands of the State in South-East Turkey, of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3, he complains of having been ill-treated while in detention and of discrimination on grounds of race or ethnic origin.

As to Article 5, he complains that his detention was not for any of the authorised purposes specified in Article 5, and he adds that the detention falls outside the terms of the derogation made by Turkey.

As to Article 6, he complains of the nature of the hearing before a local judge on 1 January 1994. He states that he was not informed promptly and in a language which he understood and in detail of the nature and cause of the accusation against him (para. 3 a). Nor was he given facilities or adequate time for the preparation of any defence to the allegations of robbery (para. 3 b). He was given no opportunity to address the court himself, since no adequate translation facility was provided, and he did not have access to a lawyer of his own choosing, nor was one provided free of charge (para. 3 c). Furthermore, he was not provided with the services of an interpreter (para. 3 e).

As to Article 13, he complains of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he considers that there has been discrimination on grounds of race or ethnic origin in the enjoyment of his rights under Articles 2, 3 and 5. In regard to Article 3 he considers that he has also been discriminated against on account of his membership of or association with a national minority.

As to Article 18, he states that the interferences in the

exercise of his Convention rights were not designed to secure the ends permitted under the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 June 1994 and registered on 7 July 1994.

On 11 October 1994 the Commission decided to communicate the application to the Turkish Government who were invited to submit their observations on its admissibility and merits before 6 January 1995.

By letter of 27 January 1995 the Commission's Secretary pointed out to the Government that the period for the submission of the Government's observations had expired and that no extension of that time-limit had been requested. It was added that the application was being considered for inclusion in the list of cases for examination by the Commission at its February session.

Observations were submitted by the Government on 1 March 1995.

On 2 March 1995 the Commission decided to adjourn the examination of the admissibility and to invite the applicant's representatives to respond to the Government's observations before 24 April 1995.

Observations in reply were submitted by the applicant on 24 April 1995.

THE LAW

1. The applicant complains of violations of Article 2 (Art. 2) (right to life), Article 3 (Art. 3) (the prohibition of inhuman and degrading treatment), Article 5 (Art. 5) (the right to liberty and security of person), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (the prohibition of discrimination) and Article 18 (Art. 18) (the prohibition against using authorised Convention restrictions for ulterior purposes) of the Convention in connection with his detention by the Turkish authorities.

The Government argue that the applicant has failed to comply with the requirement under Article 26 (Art. 26) of the Convention to exhaust domestic remedies before lodging an application with the Commission.

They submit in particular that the applicant could have lodged a complaint concerning his alleged ill-treatment with the public prosecutor through the assistance of the lawyer who represented him at the trial. Furthermore, having regard to the notice given in the judgment of acquittal to the public prosecutor to consider initiating criminal proceedings against the bank cashier A. B., the applicant may pursue these proceedings and claim compensation for damages.

The applicant maintains that there is no requirement that he pursue domestic remedies. He submits that he was unable to pursue remedies while in Turkey, since upon his release from detention he was very frightened of further action that might be taken against him were he to make a complaint to the authorities. His fear should be seen against the background of the fact that while in detention he had been specifically warned not to speak to outsiders about his treatment. He submits that his fear was well-founded given the way in which others of Kurdish origin or affiliation have been treated in South-East Turkey. In this respect he refers to statements made in certain other cases pending before the Commission and to the report of 6 January 1994 of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/1994/31).

Aside from his fear of pursuing domestic remedies, the applicant

states that he cannot afford to pay to instruct a lawyer in Turkey directly or indirectly via a lawyer in the United Kingdom. He is not able to have legal aid for such a case, and his own income is not sufficient to pay lawyers' fees. In any event he considers that in this case any alleged remedy is illusory, inadequate and ineffective because there is an administrative practice of non-respect for the rule which requires the provision of effective domestic remedies. This claim is in his opinion strengthened by the fact that there is no indication that the request made by the acquitting court to the public prosecutor to consider a complaint against A.B. has made any progress.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission notes that the acts of which the applicant complains, the alleged unlawful deprivation of his liberty and the ill-treatment he suffered in the course of his detention, are prohibited by the Turkish Criminal Code and that it is not in dispute that, if such acts took place, this would have been in contravention of the criminal law to which the police are subject. The Turkish legal system provides in such instances for an investigation to be carried out by the public prosecutor who takes the decision whether or not to initiate a prosecution against the alleged perpetrators.

In the case of Aksoy v. Turkey (No. 21987/93, Dec. 19.10.94, unpublished), which also concerned allegations of ill-treatment during detention, the Commission noted that prior to the applicant's release from detention, he had a meeting with the public prosecutor, and the Commission found no reason to doubt that during their conversation there had been elements which should have made the public prosecutor initiate an investigation or, at the very least, try to obtain further information from the applicant about his state of health or about the treatment to which he had been subjected. The Commission was therefore satisfied that the applicant had availed himself of a proper remedy when appearing before the public prosecutor prior to his release and that he was not obliged to pursue in the circumstances any further remedies.

In the present case, there is no indication that the alleged ill-treatment has been the subject of any complaint or that information about it has been conveyed to the authorities competent to proceed to an investigation of the matter. Although the fear of reprisal which the applicant states prevented him upon his release from complaining of the alleged detention and ill-treatment might not at that time have been wholly unfounded, the Commission notes that the applicant has since left Turkey and gone home to the United Kingdom.

Furthermore, the Commission considers that the applicant has not substantiated his claim that he would be unable to afford to instruct a lawyer in Turkey. In this respect the Commission also notes that the applicant was provided with a list of Ankara-based lawyers able to correspond in English. It does not appear that the applicant has contacted one of these lawyers with a view to lodging a complaint and/or a claim for compensation.

The Commission finds that the situation in the present case is therefore to be distinguished from that obtaining in the Aksoy case.

Moreover, a doubt as to the effectiveness of a particular remedy is not a sufficient excuse under Article 26 (Art. 26) for not trying it.

Furthermore, an examination of the application by the Commission does not disclose the existence of any other special circumstances justifying, according to the generally recognised rules of international law, the failure in the present case to exhaust the available domestic remedies.

Consequently, the Commission finds that in the circumstances of the present case the applicant cannot be considered as having complied with the exhaustion of domestic remedies rule laid down in Article 26 (Art. 26) of the Convention.

This part of the application must therefore be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant further complains of a violation of his rights under Article 6 (Art. 6) of the Convention (the right to a fair trial and respect of the rights of defence) in relation to the criminal proceedings which were conducted against him in Turkey.

The Commission notes, however, that the applicant was finally acquitted by judgment of 18 May 1994. In this repect, therefore, the applicant can no longer be considered a victim of a violation of his Convention rights, within the meaning of Article 25 (Art. 25) of the Convention.

This part of the application is accordingly manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)