AS TO THE ADMISSIBILITY OF

Application No. 23184/94
by K.S.
against Turkey

The European Commission of Human Rights sitting in private on 3 April 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 15 December 1993 by K.S. against Turkey and registered on 11 January 1994 under file No. 23184/94;

Having regard to :

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

- the observations submitted by the respondent Government on 27 September 1994 and the observations in reply submitted by the applicant on 23 November 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, born in 1939, lives in Diyarbakir. She is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

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

A. The particular circumstances of the case

The applicant claims that the following events occurred.

The applicant resided at Islam village, Kulp District, Diyarbakir Province. On or about 16 June 1993, at around 07.00 or 08.00, approximately 400 soldiers under the control of the Kulp Gendarme Commander, Recep Cömert, made a raid on the 100 household village. First the house of H.I.A. was set on fire together with all his goods. The soldiers later came to the applicant's house and ejected her together with her two children. They gathered all the goods in one room, poured petrol over them and set them on fire. Recep Cömert, after having waited for the house to burn down completely, turned to the villagers who had gathered around the applicant's house and said: "if you don't leave this village we'll burn all your houses without blinking an eye, and we will make you perish inside them".

On or about 26 June 1993, the soldiers returned and burnt down other houses. They also burnt down the only mill of the village which was owned by the applicant and three other villagers. When the villagers tried to put out the fires they were beaten by the soldiers with clubs and truncheons. The applicant was not present on this occasion but was told of events by her partner in the mill.

Following the destruction of her house, the applicant was forced to move away from the village and is now living with a married daughter in Diyarbakir.

The Government indicate that on communication of the application by the Commission in April 1994 the public prosecutor of Kulp district initiated a preliminary investigation into the alleged raids, which investigation is still pending. On 21 June 1994, the applicant made a statement to the public prosecutor pursuant to his request.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(translation)

"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."

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

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. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to deprive someone unlawfully of his or her liberty (Article 179

generally, Article 181 in respect of civil servants),

- to oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to make an unlawful search of someone's home (Articles 193 and 194),

- to commit arson (Articles 369, 370, 371, 372) or aggravated arson if human life is endangered (Article 382),

- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or

- to damage another's property intentionally (Article 526 et seq.).

For all these 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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

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.

Emergency measures

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant alleges violations of Articles 3, 5, 6, 8 and 13 of the Convention, and Article 1 of Protocol N° 1, all combined with violations of Article 14 of the Convention. In addition, she alleges that the respondent Government is in violation of Article 18 of the Convention.

The applicant states that she has not sought to exhaust local remedies because the raid in question in this case was executed by the security forces and that on the facts as alleged by her no remedy could be effective or adequate for the purposes of Article 26 of the Convention. She notes that H.I.A., another villager whose house has been burnt down, did make an application and complaint to the Kulp District Governor but his complaint has remained unanswered.

The applicant invokes and relies on the arguments in support of the claims of violations of the Convention advanced in Applications Nos. 21893/93, Akduvar v. Turkey, and 21895/93, Cagirga v. Turkey (both declared admissible on 19 October 1994). She also invokes and relies on the arguments made in these two applications concerning the question of domestic remedies and Article 26 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 December 1993 and registered on 11 January 1994.

On 5 April 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 27 September 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 23 November 1994.

On 8 December 1994, the Commission refused the Government's request to adjourn the examination of the case pending the investigation by the public prosecutor and requested them to submit any further observations which they might wish to make by 23 January 1995.

THE LAW

The applicant alleges that on or about 16 June 1993 State security forces attacked her village, destroying her house with its contents, and that on or about 26 June 1993 soldiers returned and destroyed other houses, including a mill owned by the applicant and other villagers. She further alleges that, in connection with these events, she and other villagers were forced to evacuate the village. She invokes Article 3 (Art. 3) of the Convention (the prohibition on inhuman and degrading treatment), Article 5 (Art. 5) (the right to liberty and security of person), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (the right to respect for family life and the home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition against discrimination) and Article 18 (Art. 18) (the

prohibition on using authorised Convention restrictions for ulterior purposes), as well as Article 1 of Protocol No. 1 (P1-1) to the Convention (the right to property).

Exhaustion of domestic remedies

The Government submit 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 contend that the applicant has failed to complain to the competent judicial authorities and point out that there is a pending investigation before the public prosecutor of Kulp district.

The applicant maintains that there is no requirement that she pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. None of the remedies suggested by the Government could be regarded as effective, in the applicant's view, because the scale of destruction of villages, as well as the expulsion and creation of internal refugees, is so great in South-East Turkey that this must be considered high-level Government policy - an administrative practice - in regard to which all remedies are theoretical and irrelevant.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences if they pursue remedies; the lack of genuine investigations by public prosecutors and other competent authorities; the absence of any cases showing the payment of adequate compensation to villagers for the destruction of their homes and villages, or for their expulsion; and the lack of any prosecutions against members of the security forces for the alleged offences connected with the destruction of villages and forcible expulsions.

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 does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that she had at her disposal adequate remedies under the state of emergency to deal effectively with her complaints.

The Commission refers to its findings in Application No. 21893/93, Akduvar and others v. Turkey (Dec. 19.10.94) which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact that there has been destruction of villages in South-East Turkey with many people displaced as a result. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it significant that, although the destruction of houses and property had been a frequent occurrence in South-East Turkey, the Government had not provided a single example of

compensation being awarded to villagers for damage like that suffered by the applicants. Nor had relevant examples been given of successful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers.

The Commission considered that it seemed unlikely that such prosecutions could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to effect the permanent or temporary evacuation of villages, to impose residence prohibitions or to enforce the transfer of people to other areas. It further had regard to the vulnerability of dispossessed applicants, under pressure from both the security forces and the terrorist activities of the PKK and held that it could not be said at this stage that their fear of reprisal if they complained about acts of the security forces was wholly without foundation.

The Commission concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the present case, the Government have not provided any additional information which might lead the Commission to depart from the above conclusions. This application cannot, therefore, be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As regards the merits

The Government have not presented any observations on the merits of the case.

The Commission 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 application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)