CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38595/97
by Chriso KAKOULLI and Others
against Turkey

The European Court of Human Rights (Third Section), sitting on 4 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 19 March 1997 and registered on 13 November 1997,

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, Chriso Kakoulli, Andreas Kakoullis, Martha Kakoulli and Kyriaki Kakoulli are Cypriot nationals, born in 1944, 1969, 1972 and 1970 respectively. The first, third and fourth applicants reside in Avgorou and the second applicant resides in Paralini.

The first applicant is the widow and the other applicants are the children of Petros Kyriakou Kakoullis, a Greek Cypriot who died on 13 October 1996.

They are represented before the Court by Mr Papacharalambous, a lawyer practising in Nicosia.

A. The circumstances of the case

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

The applicants submit as follows.

In the early hours of 13 October 1996, Petros Kyriakou Kakoullis (P.K.) and his daughter's fiancé, Panikos Hadjiathanasiou (P.H.), drove to an area called "Syridjeris", situated near the Achna roundabout in the British Sovereign Base Area of Dhekelia, to collect snails. After a time, they separated and agreed to meet up at about 7.30 a.m. to return to their village.

A villager from Avgorou, Georgios Mishis (G.M.), who was also collecting snails on the north side of the main road, saw the victim standing in a field approximately 70 metres away from him. He also saw a Turkish soldier approximately 10 metres from P.K. pointing his rifle at him and a second Turkish soldier approaching him. G.M. heard P.K. ask the first soldier, in Greek, whether he spoke Greek, to which there was no response. At that moment, the two soldiers caught sight of G.M. and one of them pointed a weapon at him. G.M. then backed away.

At this moment G.M. saw a Sovereign Base Area (SBA) police patrol vehicle on the road and told the driver, Constable Pyrgou, what he had seen. Constable Pyrgou immediately reported the incident to Sergeant Serghiou of the SBA police at Ayios Nikolaos.

Shortly after G.M. had seen P.K. surrounded by Turkish soldiers, P.H., who was searching for P.K., saw him at a distance of approximately 400 metres inside the northern Cyprus territory. P.H. then heard the soldiers' issue a command in Turkish to stop. Upon hearing these words, P.K. remained still and raised his hands above his head. P.H. saw two Turkish soldiers in combat uniform drop to battle positions on the ground approximately 40 metres from the victim and aim their rifles at him. Immediately afterwards, P.H. heard a shot and saw P.K. fall down. P.H. heard a second shot immediately after the first.

A few minutes later, while P.K. was still lying on the ground, P.H. saw one of the Turkish soldiers move and fire a third shot at him from a distance of about 7 to 8 metres from where he was lying.

Following the orders from Sergeant Serghiou of the SBA police, Constable Duru Chorekdjioglou (a Turkish-Cypriot member of the SBA police) and Constable Petros Kamaris (a Greek-Cypriot member of the SBA police) arrived at the Achna roundabout, where they met P.H. who explained what had just happened.

Constable Duru Chorekdjioglou spoke to a Turkish lieutenant who told him that a Greek Cypriot had entered the territory of northern Cyprus and had been shot by Turkish soldiers. The officer said that the Greek Cypriot was dead.

The officer allowed Constable Duru Chorekdjioglou to see the body of the deceased though not to touch or examine it. Constable Duru Chorekdjioglou reported that P.K. appeared to be dead.

Sergeant Engin Mustafa of the SBA police (a Turkish Cypriot) together with two Turkish soldiers also visited the scene of the killing and saw the body. The Turkish soldiers told Sergeant Engin Mustafa that P.K. had been shot because he had entered "their area" and had refused to obey warnings to stop.

Divisional Commander R.H. Weeks of the SBA police, together with Sergeant Engin Mustafa, entered northern Cyprus and spoke with a Turkish officer who told him that Turkish soldiers had shot and killed P.K. because he had entered the territory of northern Cyprus and refused to stop.

The same day, Superintendent Mathias Cosgrave and Inspector Richard Duggan of the Irish civil police (IR CIV-POL), part of the United Nations Forces in Cyprus (UNFICYP) visited the scene, accompanied by Sergeant Engin Mustafa. They found an investigating team from the Turkish forces already present.

Superintendent Anastasiou, Inspector Christou, Sergeant Zonias and Constable Hadjiyasemis of the Republic of Cyprus police visited the area, although not the exact spot where the killing had occurred.

Sergeant Xenofontos and Constables Kapnoullas and Aristidou of the Republic of Cyprus police visited the area and prepared a draft location plan.

G.M. was escorted back to the scene of the incident, where he pointed out the various locations, which were then photographed by Constable Aristidou.

A Turkish pathologist, Dr İsmail Bundak, carried out an autopsy on the body of P.K. at the Famagusta General Hospital. According to the Turkish pathologist, P.K. had a 5 cm. diameter wound situated in his chest, 21.5 cm. below his left nipple and 17 cm. from the collar bone, two wounds in his back and a wound on his side in line with his right elbow.

Dr Bundak concluded that death had occurred due to internal bleeding caused by a shot to the heart.

According to the report of Superintendent Cosgrave, during the removal of P.K.'s clothes, an object fell from his left boot which was described as a type of garrotte, consisting of two black metal handles attached to a length of wire. In addition, an object described as a bayonet in a scabbard was removed from the body's right boot. Following the autopsy, the body of P.K. was taken to the Larnaca Hospital under UN escort.

According to the first applicant's statement to the Republic of Cyprus police, her husband only had a red plastic bucket with him and he had no object such as a bayonet or a garrotte, nor any other kind of weapon.

On 14 October a second autopsy was conducted in the Larnaca Hospital by Dr Petros Vanezis. In his preliminary report Dr Vanezis stated that there were three sets of gunshot wounds to the body. The report stated the following:

> "An entry wound on the right side of the neck, just below the right ear, with an exit wound at the back of the neck. This bullet had left the body without causing any damage to vital organs; a second entry wound on the right side of the trunk and an exit wound on the right middle of the back. This bullet appeared to have caused soft tissue damage with minor injury to the lungs but was not fatal; a third entry wound on the left side of the trunk towards the back with a steep upward direction into the body. This bullet had exited from the left side of the front of the chest, causing a large exit wound. This wound was fatal, as it had caused severe damage to the left lung and the heart, resulting in severe internal haemorrhage".

Until the second autopsy was concluded in Larnaca hospital, IR CIV-POL had sole responsibility for the body. Before that, the body was in the sole custody of the Turkish forces.

On 15 January 1997 Dr Vanezis prepared a final report in Glasgow. He concluded that the second set of wounds had been inflicted by a shot fired while P.K. had his hand raised and that the third set of wounds were consistent with a shot fired into the body while P.K. was lying on the ground or crouching.

The Government give the following account.

The Government maintain that P.K. violated the cease-fire line and entered the "TRNC" territory. He was warned verbally and by hand gestures. However, he did not stop and continued to run towards the boundary. One of the soldiers approached him and fired warning shots in the air. P.K. took no notice of this shot and consequently a second shot was fired at the ground in order to stop him. As he continued to run away, a third round was fired at him below his waist which apparently caused the fatal wound. The Government refer to the United Nations Secretary-General's report which states that "in a serious incident that occurred on 13 October 1996, a Greek Cypriot was shot three times and killed by a Turkish-Cypriot soldier after crossing the Turkish force's cease-fire line".

The Government submit that neither the UN nor the British Sovereign Base authorities carried out an investigation of their own as the place of the incident was within the territory of the "TRNC". The Government further maintain that there are clear notices in Greek, Turkish and English that indicate the border of the "TRNC".

The Government find it essential to refer to the various violent incidents which took place in the border area and the cease-fire lines of the two sides between August and October 1996. They submit in this regard the United Nations Secretary-General's report to the Security Council, dated 10 December 1996, in which it is stated that the period under review saw an increase in the level of violence and tension along the cease-fire lines. The Government contend that tension rose in early August 1996 due to the Greek-Cypriot demonstrations at the border area and the cease-fire lines. Violent disturbances and riots took place on 11 and 14 August 1996 in the Dherinia area as well as in the vicinity of Ayios Nicolaos (Güvercinlik), along the British Sovereign Base Area (SBA). During these events, two Greek Cypriots were killed. On 8 September 1996 two Turkish soldiers on sentry duty were shot with automatic weapons fired from the SBA into the territory of the "TRNC". One of the soldiers died as a result and the other was seriously wounded.

The Government emphasise the fact that P.K. had crossed the Turkish-Cypriot cease-fire line into the territory of the "TRNC", in the same area where the two Turkish soldiers had been shot. The Government contend that there are strong reasons to believe that P.K., who was a retired fireman, would not have crossed into the "TRNC" territory by mistake, particularly at a location where there were signs in Turkish and Greek which indicated the border. The Government also maintain that P.K. was in possession of a garrotte and a bayonet at the material time, which constitutes a strong presumption that he had a sinister motive. They allege that his act of carrying a bucket apparently to collect snails was a cover for his real motive.

The Government state that the death of P.K. was not a delibarate act, but an attempt to maintain security in a highly tense environment. They underline the fact that the incident occurred during a period when tension at the border between the north and south of Cyprus was extremely high. They contend that, given the circumstances of the dangerous situation created by the Greek-Cypriot authorities, the Turkish soldiers were fully justified in taking all necessary precautions and using necessary force in order to remove danger and threats of violation of the cease-fire and to protect the lives of others.

COMPLAINTS

1. The applicants complain under Article 2 of the Convention about the death of Petros Kakoullis, a Greek Cypriot. In this respect, they allege that P.K. was shot by Turkish soldiers in Cyprus with the intention of killing him. In the alternative, they submit that the use of force, which caused the death of P.K., was more than absolutely necessary.

2. The applicants further allege a violation of their right to respect for their private and family life and invoke Article 8 of the Convention. In this respect, they maintain that the right to respect for one's family includes the right not to be arbitrarily separated from a member of one's family and further includes the right not to be deprived of a member of one's family through an act of arbitrary killing by agents of the State.

3. The applicants also complain of discrimination on grounds of racial, national and religious origin, contrary to Article 14 of the Convention in conjunction with Articles 2 and 8.

THE LAW

Preliminary Objections

A. Incompatibility ratione personae

The Government state that an applicant must be a person whose rights are directly affected by the matter or the violations complained of. In this respect, they submit that the applicants cannot be deemed victims of the alleged violations. According to the Government, the matter complained of in the present application is the death of P.K., who was a retired person at the time of his death. None of the applicants was in any way dependent on him and the circumstances are not such as to render the applicants indirect victims either. They allege that it cannot be maintained that the rights of the applicants were prejudiced as a result of his death.

The applicants submit that they were closely linked to the deceased and should be regarded as victims of the alleged violations.

The Court recalls that where a violation of the right to life is alleged, the Convention organs have accepted in the past applications from relatives of the deceased (For example applications were brought by the deceased's brother in the Yaşa v. Turkey, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-V p. 2429, § 66; the deceased's spouse in the Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII, p. 2807; the deceaseds' mother in the Çiçek v. Turkey judgment of 27 February 2001, no. 25704/94, to be published in ECHR-2001; the

deceased's father in the Hugh Jordan v. the United Kingdom judgment of 4 May 2001, no. 24746/94, to be published in ECHR-2001). In the light of the established case-law of the Court, the Court considers that the complaints introduced by the applicants in respect of the first applicant's spouse and the last three applicants' father constitute a valid exercise of the right of individual petition.

B. Turkey's responsibility

The Government contend that the acts complained of cannot be imputable to Turkey because no Turkish soldiers were involved in the incident. The soldiers involved in the incident were Turkish-Cypriot soldiers who were stationed at the border of the "TRNC". The Government submit that the Turkish-Cypriot security forces are under a separate and independent command from the Turkish troops stationed in northern Cyprus. The Government also maintain that it is not possible to invoke Turkish responsibility in respect of every alleged violation of the Convention in northern Cyprus or within the United Nations buffer-zone on the island, which runs between the cease-fire lines of the two sides, without taking into consideration the particular circumstances of each case.

In their observations, the Government give a detailed historical background about the separate status of the Greek and Turkish-Cypriot communities. They contend that the "TRNC" is an autonomous entity, with its own police and security forces. They conclude that the complaints of the applicants cannot be imputable to Turkey.

Referring to the Court's findings in the Loizidou v. Turkey case (judgment of 18 December 1996 (*merits*), *Reports* 1996-VI, p. 2223), the applicants maintain that, in principle, Turkey's jurisdiction within the meaning of Article 1 of the Convention extends to the occupied northern part of Cyprus and that Turkey is responsible for the acts of the "TRNC". They contend that it makes no difference whether the killing of P.K. was the work of Turkish soldiers or "TRNC" security forces since the acts of the latter are imputable to Turkey.

Accordingly, the applicants submit that the killing of P.K. was clearly an act within the jurisdiction of Turkey.

The Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory. Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of a military action - whether lawful or unlawful- it exercises effective control of an area

outside its national territory. The obligation, to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (Loizidou v. Turkey (*preliminary objections*), judgment of 23 March 1995, Series A No. 310, p. 23-24, § 62).

In case of Cyprus v. Turkey, the Court further found that having effective overall control over northern Cyprus, Turkey's responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's jurisdiction must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey (*Cyprus v. Turkey*, [GC], application 25781/94, § 77, to be published in ECHR-2001).

The Court also had regard to the special character of the Convention as an instrument of European Public Order for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, "to ensure the observance of the engagements undertaken by the High Contracting Parties". Taking into account the Cypriot Government's continuing inability to exercise their rights in northern Cyprus, any other finding would result in a regrettable vacum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in the proceedings before the Court (Cyprus v. Turkey judgment, cited above, §78).

In this connection, the Court notes that the respondent Government have acknowledged that the death of PK was a result of the acts of the Turkish-Cypriot soldiers.

The Court concludes, accordingly, that the matters complained of in the present application fall within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention.

C. Exhaustion of domestic remedies

The Government allege that the applicants have not even attempted to exhaust the remedies available and accessible to them in the judicial and administrative system of the "TRNC". In this respect, they submit that pursuant to Articles 135 and 136 of the "TRNC Constitution", an effective and independent judicial system exists in the "TRNC". The Government maintain that Article 152 of the "TRNC Constitution" provides for judicial review of administrative action on grounds of excess and/or abuse of power,

illegality or unconstitutionality. They further submit that according to Article 158 of the "TRNC Constitution", the Attorney-General is an independent officer of the State who is appointed by the Supreme Council of Law Officers. The Attorney-General has power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for any offence against any person in the "TRNC".

The applicants maintain that there are several reasons why there has been no failure on their part to comply with the requirements of Article 35 of the Convention in the present case. In the first place, they maintain that the "TRNC" courts are not properly established under the law applicable in northern Cyprus. They submit that these courts were established by the "TRNC" in the part of Cyprus which is under illegal Turkish occupation.

Moreover, they contend that the claim of the "TRNC" to statehood has been rejected not only by the United Nations Security Council but by every State in the world with the exception of Turkey. In the light of the foregoing, the applicants maintain that the courts to which the respondent Government refer in their observations were not properly constituted by the Republic of Cyprus. They consider that instituting proceedings in the "TRNC courts" would inevitably involve a degree of recognition by the applicants of the legitimacy of those courts and thus of the "TRNC" itself, which would amount to a denial of the sovereignty of the Republic of Cyprus over northern Cyprus. They contend that any such action would thus be in direct conflict with the applicants' status and duties as citizens of the Republic of Cyprus.

The applicants further maintain that even if there is in principle a duty to make use of any remedies which might exist in the "TRNC", the courts there do not offer a remedy which is effective and available to them. They submit that Greek Cypriots are not permitted to cross into northern Cyprus and therefore they have no access in practice to any remedies which might exist there.

Lastly, they submit that the exhaustion of domestic remedies rule does not apply where violation of the Convention stems from a legislative or administrative practice. According to the applicants, the shooting of Petros Kakullis was not an isolated incident but stemmed, like the other killings which occurred in the summer and early autumn 1996, from the practices of the Turkish forces in patrolling the cease-fire line.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be

brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate and ineffective (*see Ilhan v. Turkey* [GC], no. 22277/93, § 58, ECHR 2000-VIII; the Akdivar and Others v. Turkey judgment of 16 September 1996, Reports 1996-IV, p. 1210, §§ 65-67).

The Court recalls that in the case of Cyprus v. Turkey (cited above, § 102), it has found that, for the purposes of former Article 26 (current Article 35 § 1) of the Convention, remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and the question of their effectiveness is to be considered in the specific circumstances where it arises. In so deciding, the Court further stressed that this conclusion was not to be seen as in any way putting in doubt the view of the international community regarding the establishment of the "TRNC" or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus (ibid., §§ 14, 16 and 90).

The Court considers that this limb of the Government's preliminary objection raises issues that are closely linked to those raised by the applicants' complaints under Article 2 of the Convention.

Consequently, the Court joins the preliminary objection concerning exhaustion of domestic remedies to the merits of the applicants' complaints under Article 2.

Merits

The applicants maintain that P.K. was intentionally shot and killed by Turkish soldiers in Cyprus as he was collecting snails.

The Government maintain that P.K. crossed the border of the "TRNC" and, despite warnings, did not stop. Subsequently, the Turkish-Cypriot soldiers who were on duty fired warning shots, which caused his death. The Government contend that there were strong reasons to believe that P.K. had a sinister motive in crossing the "TRNC" border.

As regards the substance of the applicants' complaints, 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 applications as a whole. The Court concludes, therefore, that the application 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.

For these reasons, the Court unanimously

Decides to join to the merits the Government's preliminary objection concerning exhaustion of domestic remedies;

and by a majority

Dismisses the Government's remaining preliminary objections;

Declares the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President