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

SECOND SECTION

DECISION

Application no. 2251/11
Hayri KAMALAK and others
against Turkey

The European Court of Human Rights (Second Section), sitting on 8 October 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
Dragoljub Popović,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 7 January 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicants were born in 1965, 1966, 1997 and 1992 respectively and live in Adana, Turkey. They are the father, mother and brothers of Volkan Kamalak ("V.K"), who shot and killed himself with his infantry rifle on 4 September 2009 while performing his compulsory military service in Ağrı 12th Mechanised Infantry Brigade. They are represented by S. Kılıç, a lawyer practising in Ağrı.

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

3. On 4 September 2009 during the firing practice at around 10.20 a.m. V.K.'s rifle jammed. His friend Y.Z. helped remedy the problem; he removed the magazine and reinserted it. Then, V.K. suddenly stood up. Y.Z. tried to hold his foot, asking what he was doing. V.K. went a few meters

down the shooting area, placed his G-3 infantry rifle under his chin, pointing at his head, and fired it.

4. He was immediately taken to the infirmary where he died.

5. At around 12.10 p.m. the military public prosecutor began the incident scene inspection.

6. On 5 September 2009 an autopsy was carried out by the Adana Forensic Medicine Institute. According to the post mortem examination report dated 15 April 2010, the gunshot wound by itself was lethal; it was a contact shot; the cause of death was skull fracture, qualified brain tissue damage and cerebral haemorrhage associated with gunshot wound. The toxicological examination revealed ethanol in the deceased's blood.

7. At the request of the military public prosecutor, the Adana Forensic Medicine Institute issued an additional expert opinion and concluded that the ethanol found in the deceased's blood amounting to 130 mg/dl had not been a factor in the incident of death.

8. The ballistic examination identified the spent bullet case fired from the rifle of the deceased among other spent bullet cases gathered from the incident scene, the shooting area.

9. Gunshot residue was detected in the swabs taken from the inner surfaces of both hands, from the dorsal surface of the left hand and from the face.

10. The military public prosecutor heard a number of witnesses and took note of the following witness statements.

11. According to the witness statement of one of the deceased's closest friends, Y.Z., V.K complained about the military service all the time. V.K. was obsessed with the delay in referring him to the Ağrı Military Hospital for his herniated disc. On the day of the incident, V.K. had pain in his shoulder. His shoulder had protruded while he had been on relocation leave. Since the military hospital had required a reference from his troop, he had had it fixed in a civil hospital. V.K. had once told him that he had been afraid of being brought before a military court for that. On the day of the incident, V.K. tried to give his cash cards, security id and a list of phone numbers to his friend A.T. As the latter did not want to take them, V.K. explained that he was not entitled to shopping leave whereas he had to send the money deposited in his cash accounts to his father. Y.Z. asked what the problem was and took them. At the shooting area, V.K. was very nervous when he took the shooting position lying flat on the ground. He gave his wallet to Y.Z. stating that it was bothering him. Following the order to fire, V.K. pulled the trigger several times but the rifle jammed. Y.Z. grasped his rifle, removed the magazine and turned the safety on. When Y.Z. pulled the lever a bullet came out of the barrel. Y.Z. reloaded the magazine and reinserted it. The problem was solved. V.K. took the shooting position once again. He suddenly stood up and leaned the rifle butt against the ground. Y.Z. clung to his foot asking what he was doing. V.K. pushed him with his

other foot and ran down the shooting area. He then stopped and turned slightly to his left; the barrel of the rifle was pointed at his throat. V.K. pulled the trigger.

12. According to the statement of an eyewitness to the very moment of suicide, E.U., V.K. got rid of his friend Y.Z. and then ran ahead. He put the barrel of the rifle under his chin and fired.

13. According to the witness statement of A.T., the deceased was a cheerful person. When they went together to the infirmary for a check, the deceased was suffering from his protruded shoulder as well as from a herniated disc. V.K. told him that he had difficulties at the trainings. The infirmary had referred him to the Ağrı Military Hospital but his admission had been delayed for one week to ten days. During this period V.K. became obsessed, complaining, impulsive and nervous. He complained about military service and questioned what he was doing there. On the day of the incident before the firing practice V.K. had wanted to talk to him but gave up when other conscripts joined them. V.K. was quite silent and reserved, different from other days. He took out his cash cards from his wallet and an address noted down on a paper and said that A.T. should send them home. A.T. asked why he was not sending them himself. In reply V.K. explained that his first shopping leave had been blocked. A.T. asked what had happened. At first V.K. avoided giving reasons. Then he said that the troop commander had warned him in the morning about his uniform.

14. E.C., another witness, described the deceased as a cheerful but obsessive person who complained about military service all the time. On the day of the incident, he saw V.K. placing the gun under his chin in the shooting area.

15. I.K., another witness, submitted that the deceased had not had any problem as far as he knew but his mind had been preoccupied with even trivial things. On the day of the incident, V.K. had a problem with his rifle; then he stood up and ran a few metres ahead and put the rifle under his chin. He did not see V.K. pulling the trigger but observed the damage to his head after the gun had been discharged.

16. According to the witness statement of S.B., another close friend of the deceased, on the day of the incident in the morning the deceased was in good spirits. He saw V.K. placing the gun under his chin after having run a few metres. Since after that he closed his eyes, he did not see the very moment at which V.K. pulled the trigger. The previous day V.K. had told him that he was afraid of the noise of gunfire and of firing practice.

17. According to the witness statement of the troop commander, O.G., his team commander had been informed of the deceased's back pain. The infirmary had referred him to the military hospital as he had complained about his lower back pain there, too. The deceased had been attending the trainings for twelve days. The team commander had also been informed of his problem with his shoulder and, accordingly, had exempted him from

exercises such as crawling. No particular anomaly had been detected in respect of the deceased. On the day of the incident, during the control in the morning, when he noticed that the V.K.'s beret had been fastened with a pin, he told him to fix it. O.G. did not say anything like he would refuse his shopping leave. He just ordered Z.D., a non-commissioned officer, to inform the conscripts of the matter and to intervene.

18. Z.D. submitted that V.K. had stated that he did not have any problem and that the only complaint he had made related to his health. As his shoulder had protruded V.K. did not participate in some exercises. The deceased was a cheerful person. Z.D. pointed out that V.K. had been enthusiastic and successful at the trainings. On the day of the incident in the morning the troop commander warned V.K. about the pins attached to his beret and uniform.

19. The team commander, E.B., stated that V.K. had recently joined the team and he had been his supervisor. Aside from his health condition, he had not mentioned any other problem. Taking his condition into account E.B. had exempted him from some of the trainings. When E.B. asked him whether he had got used to military service, V.K. had answered that they were trying to adapt.

20. According to the statements of other conscripts, V.K. was a high-spirited, talkative and successful person but he exaggerated some things in his mind. Even V.K. complained about this aspect of his character. He was particularly concerned with the delay in his admission to hospital for his shoulder and back pain. He was exempted from difficult training due to his health problems.

21. None of the witnesses submitted or suggested that the deceased had been subjected to ill-treatment prior to his death.

22. According to the witness statements of the applicants, their son had not had any problem in Istanbul. However, after his arrival at Ağrı, particularly from 16 August 2009 on, he had started complaining about pressure. He had even told them that on his first home leave he would abscond. They added that their son's psychological condition was not normal after he had been sent to Ağrı. The deceased had said to a friend of his that he had had a discussion with a non-commissioned army officer. His family had talked to the deceased on the phone for the last time at 7.00 a.m. on 2 September 2009. They were aware that he was suffering from lower back pain and that he had an appointment at the military hospital. V.K. complained about intrigues inside the troop, very difficult sports, very hard conditions and heavy physical activities.

23. On 13 July 2010 the military public prosecutor gave a decision of non-prosecution, holding that there was no fault, negligence or incitement of anybody else in relation to the deceased's death. He observed that nobody had induced V.K. to commit suicide and that he had not been subjected to any kind of ill-treatment.

24. On 23 September 2010 this decision was upheld by the Military Criminal Court[1]. The pertinent parts of the decision read as follows:

> "1. A number of witnesses were heard by the military public prosecutor; some of them gave their statements at their discharge/home addresses; in line with the conclusions of the military public prosecutor, all of the witnesses stated that the deceased had shot himself at the shooting area with his G-3 infantry rifle. Therefore, the establishment of the facts cannot be held to be contradictory based on witness evidence;
>
> ...contrary to the allegation, according to the science of forensic medicine, one of the basic features of a contact shot is an entrance wound larger than the exit wound...
>
> The burnt surface around the entry wound shows that it was a contact shot in the photographs enclosed in the envelope, classified under the no. 221.
>
> It is established as a result of the autopsy that the deceased had drunk alcohol prior to the incident; however, taking into account his behaviour together with his conversations with his friends it is considered that he was fully conscious at the material time. Therefore it is of no significance whether the alcohol was consumed through the mouth or nose."

COMPLAINTS

25. Relying on Articles 2 and 13 of the Convention, the applicants complained that the death of their son and brother remained suspicious. According to them, the investigation carried out was neither adequate nor effective in that the authorities had failed to take a number of crucial steps in examining the facts. They alleged that the report of the Forensic Medicine Institute had not dealt with the type and qualification of the firearm used in the incident. They also alleged that out of eight spent bullet cases found at the incident scene, only the one which had been fired from the deceased's gun had been identified. According to them, it should also have been determined from which guns the other seven bullets had come. They further alleged that it should have been explained why the entry wound was bigger than the exit wound and why the so-called exit wound had inverted edges whereas the wound identified as the entry wound had everted edges. They pointed out that the rings around the gunshot wound had not been examined, that the photographs taken after the death and video recordings had revealed that there had been swellings and abrasions on the deceased's face. The applicants submitted that their son and brother had been under the influence of alcohol at the time he had committed suicide

1. Since the amendment came into force on 30 June 2010 (Law no. 6000) concerning the Law no. 353 on the Composition and Functioning of Military Courts, the Military Criminal Courts are composed of three military professional judges (compare with *Gürkan v. Turkey*, no. 10987/10, §§ 7, 8 and 13-20, 3 July 2012).

and asked how it might have happened during the holy month of Ramadan. They also submitted that the deceased had used his right hand although it had been established that he had shot himself using his left hand. In this connection, the applicants argued that the investigatory authorities had not been independent and impartial.

26. According to the applicants, even assuming that it was indeed a suicide, the State Party had failed to take preventive measures to protect the life of their son and brother. They claimed that the military authorities should have become aware of his anxiety and noticed that the deceased was inclined to suicide.

THE LAW

27. The Court first of all considers that the applicants' complaints fall to be examined under Article 2 of the Convention in its substantive and procedural aspects.

28. Though the Court is not bound by the findings of the domestic authorities, in normal circumstances, it requires cogent elements to lead it to depart from the findings of fact reached by such authorities (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, § 29-30, Series A no. 269). In the present case, the Court observes that there is no element which might give rise to doubts regarding the account of suicide provided by the domestic authorities.

29. The Court refers to the general principles set out in its settled case-law concerning positive obligations under Article 2 of the Convention in the context of deaths during the performance of compulsory military service (see, for example, *Kılınç and Others v. Turkey*, no. 40145/98, §§ 40-42, 7 June 2005 and *Abdullah Yılmaz, v. Turkey*, no. 21899/02, §§ 55-58, 17 June 2008). The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. In view of the unpredictability of human conduct, however, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court has found on a number of occasions that this applies where the risk to a person

derives from self-harm (*Keenan v. the United Kingdom*, no. 27229/95, § 90, ECHR 2001-III). In examining a case in light of the foregoing, the Court should also have regard to whether the fault attributable to the professionals involved went beyond a simple error of judgment or imprudence (*Abdullah Yılmaz,* cited above § 57).

30. Turning to the circumstances of the present case, the Court points out that the deceased's physical ability to perform military duty is not disputed by the applicants. The Court also notes that as far as it appears from the case file, the conscript's superiors were informed of his condition and, that accordingly, he was exempted from some physical exercises. Even assuming that a failure to deal with the conscript's allegedly inadequate physical condition, namely shoulder protrusion and lumbar disc herniation, in a timely manner affected and worsened his psychological state, his suicide resulting from such a failure would hardly be foreseeable (see, *Kızılkaya Karslı v. Turkey* (dec.), no. 12988/05, 17 April 2012). There were no factors, which, judged reasonably, rendered the risk of self-harm foreseeable in the specific circumstances. The conscript did not show any significant sign of psychological disorder or problem. As for his anxiety and resentment concerning his condition and the military service in general, the Court considers that they could not be considered as the forerunner of an imminent risk of suicide (see *Ayan v. Turkey* (dec.), no. 6376/10, 4 October 2011).

31. With regard to the procedural aspect of Article 2, the Court recalls that an independent and impartial investigation capable of leading to the establishment of facts and the liability of those responsible has, in the Court's case-law, been considered as an obligation inherent in Article 2 (see, among others, *Çiçek v. Turkey* (dec.), no. 67124/01, 18 January 2005). In this respect, the Court observes that the criminal investigation led to the establishment of a credible account of the circumstances surrounding the death of the conscript. The Court further observes that contrary to the applicants' allegations, the authorities did not fail to deal with any question or to take any step that might be considered as crucial for the determination of the case. In the Court's view, there was no deficiency that might allow the Court to call into question the adequacy and effectiveness of the investigation and the impartiality and independence of the investigatory authorities.

32. Therefore, the applicants' complaints are inadmissible for being manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President

APPENDIX

1. Hayri KAMALAK
2. Meliha KAMALAK
3. Rıza KAMALAK
4. İbrahim KAMALAK