Application No. 22057/93
by Siyamet KAPAN
against Turkey

The European Commission of Human Rights sitting in private on 13 January 1997, the following members being present:

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

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 May 1993 by Siyamet KAPAN against Turkey and registered on 14 June 1993 under file No. 22057/93;

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 25 October and 16 November 1994 and the observations in reply submitted by the applicant on 28 December 1994;

- the parties' oral submissions at the hearing on 19 October 1995 in Strasbourg;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born on 1962, is a Turkish national of Kurdish origin. At the time of the introduction of the application, he lived

in Mazdagi, department of Mardin. Letters of authority were submitted in the application indicating his representatives before the Commission to be Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

A. Particular circumstances of the case

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

According to the applicant, on 18 November 1992, at around 18.00, he and his cousin left the applicant's house in order to go to his uncle's house for dinner. When they left, three people with their faces masked followed them. As they approached the uncle's house, the three masked people hid in a corner and started indiscriminate firing with automatic weapons. The applicant says that their aim was to kill his cousin, who was a journalist. His cousin was killed and three of the bullets hit the applicant in the lungs and stomach.

The applicant's brother and uncle came to the scene and took the applicant to Diyarbakir State Hospital. The applicant was in intensive care for 13 days, after which he was taken to the State Hospital Chest-Surgery Clinic. He stayed there for seventy days. He has had operations on his stomach and intestines and received medical treatment. He still needs another operation.

The said attack was carried out in the Gürdogan suburb. In the same area and at around the same time, Rahime Adsay (52) and her son Ismet (18) were killed by the same people. The applicant believes that State authorities are responsible for both attacks since at the time another son of Rahime Adsay was known to be fighting in the mountains as a PKK militant. Furthermore, his cousin's house had previously been attacked and his cousin threatened. His cousin was a correspondent for the newspaper Hürriyet in Mazdagi.

The applicant and his family received a letter from a woman, Mülkiye Dogan, who stated that the action had been perpetrated by special team agents at Mardin, forces for which the State is responsible. She gave the name of one of these agents and detailed a number of extra-judicial executions carried out by the group on persons, including the applicant's cousin and Rahime and Ismet Adsay. It was stated that Rahime Adsay was targeted because one of her sons was a guerilla and Ismet Adsay was killed since he saw the attackers.

The respondent Government have submitted the following facts.

The Government state that an investigation was begun into the incident by the public prosecutor at Mazdagi. This investigation is still pending. They refer to statements dated 24 May 1993, 6 August 1994 and 5 September 1994 signed by the applicant from which it appears that his signature is different from that appearing on the documents submitted to the Commission on his behalf. A statement of 5 October 1994, apparently signed by the applicant, states that he has not authorised an application to be made in his name to the Commission.

A statement taken by the public prosecutor on 1 June 1995 signed by the applicant expressed the view that the incident in which he was shot was targeted against his relative Hatip Kapçak who was a member of KUK (Kurdish National Liberation Organisation). The attack thus probably had ideological motives. A further statement taken by the public prosecutor signed by the applicant on 5 June 1995 stated that the applicant had not signed the declaration of means submitted by his purported representatives,that he had not made any application to the European Commission of Human Rights nor give any power of attorney to Kevin Boyle and Françoise Hampson. It further stated that he wished to make formal complaint against those two persons for falsifying those documents. The signatures did not belong to him.

The Government state that Mülkiye Dogan was killed on 12 April 1993.

B. Relevant domestic law and practice

The Turkish Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450). The Turkish Criminal Code also 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).

For 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.

Compensation for illegal acts committed by State officials may be requested in the administrative courts. Article 2 of the Administrative Judgment Procedure Code (No. 2577, dated 6.1.82) provides inter alia: "Full compensation cases may be filed by those whose personal rights have directly been damaged by administrative acts or actions."

COMPLAINTS

Complaints have been made on behalf of the applicant, alleging violations of Articles 2, 3, 6, and 14 of the Convention.

As to Article 2 it is claimed that the applicant was the victim of a life-threatening attack by agents of the State, or that the State failed in its obligation to protect his right to life. It is alleged that the force used was more than "absolutely necessary" for the achievement of any legal legitimate purpose. Complaint is made 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 it is maintained that the violations of the Convention of which the applicant is a victim arise not out of geography, but out of his race. It is submitted that the Kurds are an indigenous racial group in Turkey. The ill-treatment, to which the discrimination on grounds of race is said to give rise, is of such a nature and severity as to constitute independent violations of the Convention.

As to Article 6 complaint is made of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killings and injuries, as a result of which the applicant cannot bring civil proceedings arising out of the attack against him.

As to Article 13 it is alleged that there is a lack of any authority before whom his complaints can be brought with any prospect of success.

As to Article 14 complaint is made of discrimination in the enjoyment of his rights under Articles 2, 6 and 13 of the Convention. Allegations are made of an administrative practice of discrimination on account of race or ethnic origin.

As to the exhaustion of domestic remedies it is submitted that no remedies are effective in South East Turkey against the acts of the security forces.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 May 1993 and registered on 14 June 1993.

On 9 May 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 25 October and 16 November 1994, after the expiry of one extension in the time-limit on 30 September 1994. The applicant submitted observations in reply on 28 December 1994 and invoked Article 25 of the Convention in respect of the arrest of Mr. Mahmut Sakar, a lawyer who had been involved in working on his application.

On 2 March 1995, the Commission considered the state of proceedings and put questions to the parties concerning a number of issues. It was drawn to the attention of the applicant's representatives that a delegation of the Commission would be in Diyarbakir on 13-14 March 1995 and in Ankara on 12-14 April 1995.

On 29 March 1995, the Government replied to the questions and the applicant's representatives submitted comments by letter of 2 April 1995.

On 10 April 1995, the Commission decided to invite the parties to an oral hearing on the admissibility and merits. The applicant was invited to attend. A letter confirming that invitation was addressed and sent to the applicant on 1 August 1995.

By letter dated 5 and 19 May 1995, the applicant's representatives made further submissions. The Government provided further material by letter dated 15 June 1995.

On 11 July 1995, the Commission granted the applicant legal aid.

On 31 July 1995, the Government provided further documents.

On 19 October 1995, at the hearing held in Strasbourg, the parties were represented as follows. The Government were represented by Mr. Özmen as Government Agent, Dr. Alpaslan and Dr. Akçay as advisers. The applicant was represented by Ms. Hampson as counsel, Ms. Reidy, assistant, Mr. Yildiz, adviser and Mr. Ergin, advocate. The applicant did not attend. The hearing was adjourned after argument had been heard on certain preliminary procedural points.

On 26 October 1995, the Commission considered the state of proceedings. It decided to invite the applicant's representatives to contact the applicant with a view to securing confirmation of his intentions with regard to his application. It was drawn to the attention of the applicant's representatives that a delegation of the Commission would be present in Diyarbakir in November 1995.

On 19 April 1996, the Commission examined the state of proceedings. It decided to request the applicant's representatives to submit further written evidence that they acted on behalf of the

applicant, such evidence to be submitted to the Commission by 31 October 1996. In the absence of further evidence, the Commission indicated that it would consider whether it should continue its examination of the application.

By letter of 31 October 1996, the applicant's representatives informed the Commission that they were not in a position to provide the information at that time but that every effort was being made to trace the applicant who had moved residence. An extension in the time-limit of one month was requested but not granted. The applicant's representatives were informed that it would be for the Commission to decide whether to take into account any further information which was submitted before its session in January 1997.

No further information concerning the applicant has been received from the applicant's representatives.

REASONS FOR THE DECISION

The Commission notes that there is a dispute concerning the validity of the application introduced on behalf of the applicant by Mr. Boyle and Ms. Hampson.

The Government have submitted that the applicant has never introduced an application before the Commission nor signed any letter of authority authorising any representatives to do so on his behalf. They refer in particular to his signed statements of 5 October 1994 and 5 June 1995 in which he states that he did not sign any application or letter of authority and has made no application to the European Commission of Human Rights. They dispute the authenticity and validity of this application and point to a number of discrepancies in the documents purportedly submitted on behalf of the applicant, including differences in signatures.

The applicant's representatives submit that the statement submitted in introducing the application and the letter of authority were both signed by the applicant and have supplied a signed statement from the lawyer who took down that statement. They refer to two unsigned statements dated 12 April 1995 in which an unnamed person who had spoken with the applicant stated that he wanted to proceed with his case but that he was frightened for his safety - he had been called to the police station many times and harassed to withdraw his application though he had not signed any documents there. Consequently, they submit that a valid application was introduced and subsequent statements relied on by the Government were obtained by intimidation in the form of raids on his house and being called to the public prosecutor to be questioned about his application. They stated at the oral hearing in Strasbourg that the applicant wished to attend the hearing but after talking with his family he informed the lawyer Mr. Mahmut Sakar on 9 October 1995 that he could not do it, that he was afraid and that he and his family were being persecuted. In these circumstances, the applicant's representatives argue that clear doubts are raised as to the voluntary nature of any purported withdrawal of the application and that it would defeat the purposes of the Convention to permit such a withdrawal.

The Commission views with considerable disquiet the contradictory statements of intention which are purportedly emanating from the applicant in this case. The Commission accepts the submissions of the applicant's representatives as regards the dangers of allowing the retraction of applications where there is doubt as to the voluntariness of the withdrawal on the part of the applicant. It has underlined this point in a number of cases (see eg. Kurt v. Turkey, No. 24276/94, dec. 22.5.95 and Aranacak and Matyar v. Turkey, No. 23423/94, dec. 13.5.96). However, the Commission recalls that the system of applications provided for by Article 25 of the Convention is based on the right of individual petition, namely, the exercise by the individual of the

right of complaint to the Commission. The Commission may not examine cases of its own motion or by way of "actio popularis".

While it is essential for the efficacy of the system that Contracting States comply with their obligation not to hinder the applicant in the exercise of the right of individual petition, the individual nonetheless bears the responsibility of co-operating with procedures flowing from the introduction of his complaints. The Commission is aware that this may not always be an easy task. However where factual issues arise which may only be resolved by the applicant's personal participation in the proceedings, the Commission may find itself unable to continue with the examination of the case in the absence of that clarification.

In the present case, there is material before the Commission which casts doubt on whether an application has ever been validly introduced and whether the applicant wishes it to continue. It does not doubt the bona fides of the applicant's representatives but cannot exclude the possibility that there may be circumstances in which an applicant is not properly aware of the significance of signing "petitions" or may change his mind or lose interest in pursuing a complaint.

The Commission has provided the applicant's representatives with opportunities for the applicant to appear personally before it, formally at a hearing or informally by entering into contact with its delegations in Turkey. It has allowed considerable time to the applicant's representatives with a view to the provision of a handwritten and signed statement of the applicant's intentions. The Commission has noted the reports from the applicant's representatives that the applicant is afraid and under pressure.

Nonetheless, the Commission relies heavily not only on the good faith of Contracting States but also on the ability and willingness of applicants to maintain and support the applications purported to be introduced on their behalf. It cannot continue the examination of an application where the latter is not forthcoming. This is particularly the case where, following any decision of admissibility, it would not be likely that any facts could effectively be established without the applicant being prepared to appear before its Delegates or provide further written clarifications. Furthermore it is apparent that the applicant's representatives have not been able to contact the applicant for some time, since he has changed his address.

The Commission has therefore concluded that, in these circumstances, the applicant's representatives have not sufficiently shown their competence to act on behalf of the applicant. The Commission finds that it is no longer justified to continue the examination of the petition.

For these reasons, the Commission, unanimously,

DECIDES TO STRIKE THE APPLICATION OUT OF ITS LIST OF CASES.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission