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

SECOND SECTION

DECISION

Application no. 5809/13
Mustafa KARACA
against Turkey

The European Court of Human Rights (Second Section), sitting on 12 March 2019 as a Chamber composed of:

Robert Spano, *President,*
Paul Lemmens,
Işıl Karakaş,
Julia Laffranque,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 12 December 2012,

Having regard to the declaration submitted by the respondent Government on 21 March 2018 requesting the Court to strike the application out of the list of cases,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr Mustafa Karaca, is a Turkish national who was born in 1963 and lives in Diyarbakır. He was represented before the Court by Ms Rehşan Bataray Saman, a lawyer practising in Diyarbakır.

2. The Turkish Government ("the Government") were represented by their Agent.

3. On 30 May 2007 the applicant's son, Nedim Karaca, who was 16 years old at the time, was shot by a number of village guards. He died in hospital the following day. The village guards were put on trial and were

subsequently acquitted on the grounds that they had acted in self-defence, using proportionate force.

4. The Government were given notice of the application.

THE LAW

5. The applicant complained that the killing of his son and the ensuing criminal proceedings concerning the killing had been in breach of Article 2 of the Convention.

6. After the failure of attempts to reach a friendly settlement, the Government informed the Court by a letter of 21 March 2018 that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

The declaration read as follows:

> "The Government regret the occurrence of individual cases of death resulting from the use of lethal force, as in the circumstances of the present case, notwithstanding existing Turkish legislation and the resolve of the Government to prevent such actions.
>
> The Government admit that the use of lethal force resulting in the death of the applicant's son and the investigation conducted into the death did not meet the standards enshrined in Article 2 of the Convention. The Government undertake to adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future.
>
> The Government of Turkey declare that they offer to pay to the applicant Mustafa Karaca, with a view to securing a unilateral declaration of the above-mentioned case pending before the European Court of Human Rights, EUR 60,000 (sixty thousand euros) to cover any and all non-pecuniary damage, plus any tax that may be chargeable.
>
> These sums will be converted into Turkish liras at the rate applicable on the date of payment, and will be payable within three months from the date of notification of the decision taken by the Court to strike the case out of its list of cases. In the event of failure to pay these sums within the said three-month period, the Government undertake to pay simple interest on them, from expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points. The payment will constitute the final resolution of the case."

7. On 26 March 2018 the unilateral declaration was forwarded to the applicant, who was invited to submit any comments he wished to make in reply by 23 April 2018. When he failed to do so, the applicant was requested on 5 July 2018 to submit his comments by 3 August 2018. The applicant has not submitted any comments on the unilateral declaration submitted by the Government.

8. The Court reiterates that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under paragraph 1 (a), (b) or (c) of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "... for any other reason established by the Court, it is no longer justified to continue the examination of the application".

9. The Court also reiterates that in certain circumstances it may strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

10. To this end, the Court has examined the declaration in the light of the principles emerging from its case-law, and in particular from the *Tahsin Acar* judgment (see *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, §§ 75-77 and 84, ECHR 2003-VI; see also *Jeronovičs v. Latvia* [GC], no. 44898/10, 5 July 2016).

11. The Court notes that the subject matter of the present application concerns, firstly, the member States' obligation to ensure that their law-enforcement personnel resort to the use of potentially lethal force only when it has become absolutely necessary to do so and that the force used is strictly proportionate to the achievement of the aims set out in the sub-paragraphs of Article 2 § 2 of the Convention (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 148-49, Series A no. 324). Secondly, the case concerns the obligation under Article 2 of the Convention to carry out an effective investigation when individuals have been killed as a result of the use of force (see, *inter alia*, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 169, 14 April 2015, and the case cited therein). In this connection the Court has examined a large number of cases in which lives were lost as a result of the use of lethal force by law-enforcement personnel in Turkey, and the effectiveness of the investigations into those killings (see, most recently, *Karataş and Others v. Turkey*, no. 46820/09, 12 September 2017; *Güler and Tekdal v. Turkey*, no. 65815/10, 10 October 2017; and *Mihdi Perinçek v. Turkey*, no. 54915/09, 29 May 2018). With particular reference to the subject matter of the present application, the Court reiterates that it has expressed misgivings as regards the use of civilian volunteers such as village guards in a quasi-police function (see, amongst other authorities, *Seyfettin Acar v. Turkey*, no. 30742/03, § 34, 6 October 2009, and the cases cited therein, and *Avşar v. Turkey*, no. 25657/94, § 414, ECHR 2001-VII (extracts)).

12. In this connection the Court reiterates that, in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is prima facie evidence in the case file supporting allegations that the domestic investigation fell short of what is necessary

under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases (see *Tahsin Acar*, cited above, § 84, and the cases cited therein). Indeed, the Court has rejected unilateral declarations submitted by respondent Governments in cases in which there was no such undertaking to reopen the investigation, on the ground that respect for human rights required that the examination of the case be continued pursuant to the final sentence of Article 37 § 1 of the Convention (see *Mishina v. Russia*, no. 30204/08, §§ 23-30, 3 October 2017, and the cases cited therein; see also, *mutatis mutandis*, *Toğcu v. Turkey*, no. 27601/95, §§ 10-14, 31 May 2005).

13. The Court accepts, however, that there may be situations where it is *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators were acquitted and cannot be put on trial for the same offence, or in cases in which the criminal proceedings became time-barred on account of the statute of limitations set out in the national legislation. Indeed, the reopening of criminal proceedings that were terminated on account of the expiry of the limitation period may raise issues concerning legal certainty (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 145, ECHR 2000-VII) and may thus have a bearing on a defendant's rights under Article 7 of the Convention (see, *mutatis mutandis*, *Kononov v. Latvia* [GC], no. 36376/04, §§ 228-33, ECHR 2010). In a similar vein, putting the same defendant on trial for an offence for which he or she has already been finally acquitted or convicted may raise issues concerning that defendant's right not to be tried or punished twice within the meaning of Article 4 of Protocol No. 7 to the Convention (see *Marguš v. Croatia* [GC], no. 4455/10, § 114, ECHR 2014 (extracts)).

14. In addition to the examples of *de jure* impossibility mentioned in the preceding paragraph, the Court can likewise not overlook the possibility that if a long time has passed since the incident took place, evidence might have disappeared, been destroyed or become untraceable and it may therefore no longer be possible in practice to reopen an investigation and conduct it in an effective fashion.

15. Thus, whether a member State is under an obligation to reopen criminal proceedings, and consequently whether a unilateral declaration should contain such an undertaking, will depend on the specific circumstances of the case, including the nature and seriousness of the alleged violation, the identity of the alleged perpetrator, whether other persons not involved in the proceedings may have been implicated, the reason why the criminal proceedings were terminated, any shortcomings

and defects in the criminal proceedings prior to the decision to bring them to an end, and whether the alleged perpetrator contributed to the shortcomings and defects that led to the criminal proceedings being brought to an end.

16. Turning to the circumstances of the present case the Court notes that, although the unilateral declaration contains an express acknowledgement by the Government that the use of lethal force resulting in the death of the applicant's son and the investigation conducted into the death did not meet the standards enshrined in Article 2 of the Convention, it does not contain any undertaking by the Government to reopen the investigation into the killing. The question therefore remains whether, in the absence of such an undertaking, the Court can accept the Government's unilateral declaration.

17. It should be observed in this connection that a number of village guards were put on trial for the killing of the applicant's son and were subsequently acquitted on the grounds that they had acted in self-defence, using proportionate force (see paragraph 3 above). Under Turkish law, a trial which ends in a final judgment can only be reopened to the detriment of the person convicted or acquitted in the previous proceedings if at least one of the conditions set out in Article 314 of the Code of Criminal Procedure is satisfied, namely: if a document which is submitted during the trial in defence of the defendant or the convicted person and which has a bearing on the conclusion reached by the trial court was forged; if any of the judges who participated in the decision committed a fault while performing their duty, provided that the fault was in favour of the accused or the convicted person and that it was of a nature necessitating a criminal prosecution or a conviction; or if the defendant, after being acquitted, makes a reliable confession before a judge in relation to the offence. The Court observes that there is no information in the case file to suggest that any of these provisions is applicable to the village guards acquitted of the killing of the applicant's son in the present application. It is therefore *de jure* impossible to bring new criminal proceedings against them for the killing of the applicant's son.

18. In this connection and in the circumstances of the present application the Court considers it to be relevant and important to take note of the fact that the identities of the persons who killed the applicant's son are not in dispute; the village guards were not acquitted because of doubts about whether or not they were the actual perpetrators of the killing of the applicant's son, but because it was held that they had acted in self-defence (see paragraph 3 above). Moreover, it was not alleged that other individuals had also been involved in the killing of the applicant's son. The Court therefore considers, like the Grand Chamber in *Tahsin Acar* (cited above), that further investigation of the facts either by domestic authorities or by the Court may be regarded as "less pressing". To that end it is important to note that in their unilateral declaration in the present application the respondent Government have also assumed liability for the killing under Article 2 of

the Convention and undertaken to adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future (see *Tahsin Acar*, cited above, § 82).

19. The Court notes that the fact that it may be *de jure* impossible to reopen proceedings in cases concerning complaints under Articles 2 and 3 of the Convention is not, in principle, an impediment to the closure by the Committee of Ministers of its examination of the case under Article 46 of the Convention. For example, following the Grand Chamber's finding of a violation of the procedural aspect of Article 3 of the Convention in the case of *Jeronovičs*, cited above, the applicant requested the national prosecutor to reopen the investigation into his allegations. His request was rejected on account of the expiry of the limitation period. In its Resolution concerning the Grand Chamber's judgment the Committee of Ministers considered that all the measures required by Article 46 § 1 of the Convention had been adopted, and decided to close its investigation (see Resolution CM/ResDH(2017)312).

20. The Court further considers it relevant and important to note that the amount of compensation proposed by the Government in their unilateral declaration in the present application, namely 60,000 euros (see paragraph 6 above), is comparable to the amounts awarded by the Court in similar cases (see, *inter alia*, *Gülbahar Özer and Others v. Turkey*, no. 44125/06, § 85, 2 July 2013; *Cangöz and Others v. Turkey*, no. 7469/06, § 173, 26 April 2016; and *Karataş and Others*, cited above, § 101).

21. Having regard to the facts of the case, the nature of the admissions contained in the Government's declaration, and the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)). The Court stresses that its decision is without prejudice to the possibility for the applicants to exercise any other available remedies in order to obtain redress (see *Jeronovičs v. Latvia* (dec.), no. 547/02, § 54, 10 February 2009, and, *mutatis mutandis*, *Jeronovičs*, cited above, §§ 116-18).

22. As in the above-mentioned judgment in the case of *Jeronovičs* (ibid., § 117), the Court deems it important to stress that the unilateral declaration procedure is an exceptional one. As such, when it comes to breaches of the most fundamental rights contained in the Convention, it is not intended either to circumvent the applicant's opposition to a friendly settlement or to allow the Government to escape their responsibility for such breaches. In the present case the Court has examined all the circumstances surrounding the killing of the applicant's son and the ensuing criminal proceedings into the killing in the light of the clear and extensive case-law on the topic, mentioned above (see paragraph 11).

23. In the light of the above considerations, and in particular given the clear and extensive case-law on the topic, referred to above, the Court is

satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*). In particular, the Court considers that the issues prevailing in Turkey in these kinds of cases, including the issue of organisation and control of operations by, *inter alia*, village guards which is the subject matter of the present application, have already been examined in a number of its judgments (see, *mutatis mutandis*, *Tahsin Acar*, cited above, § 81). Furthermore, the aforementioned issues in Turkey have been brought sufficiently to the attention of the Committee of Ministers and are being followed up under the terms of Article 46 § 2 of the Convention.

24. Finally, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the application could be restored to the list in accordance with Article 37 § 2 of the Convention (see *Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

25. In view of the above, it is appropriate to strike the case out of the list.

For these reasons, the Court, unanimously,

Takes note of the terms of the respondent Government's declaration under Article 2 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention.

Done in English and notified in writing on 4 April 2019.

Stanley Naismith
Registrar

Robert Spano
President