CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 24669/94
by Seher KARATAŞ and Güven BOĞA
against Turkey

The European Court of Human Rights (First Section) sitting on 14 September 1999 as a Chamber composed of

Mrs E. Palm, *President*,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr B. Zupančič,
Mr T. Pantiru,
Mr R. Maruste, *Judges*,

with Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 July 1994 by Seher Karataş and Güven Boğa against Turkey and registered on 22 July 1994 under file no. 24669/94;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 3 July 1996 and the observations in reply submitted by the applicants on 7 October 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Turkish citizens, born in 1971 and 1963 respectively and residing in Istanbul. They are both journalists. They are represented before the Court by Kamil Tekin Sürek, a lawyer practising in Istanbul.

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

A. Particular circumstances of the case

As the facts are disputed between the parties, the facts as submitted by each party are set out separately.

The applicants state that the following occurred.

Events on 5 and 6 February 1994

Both applicants are journalists with “Gençliğin Sesi Dergisi” (*The Voice of Youth Magazine*)”, the first applicant being the editor and owner of this publication.

On 5 February 1994 the applicants went to the Kocatepe Cemetery in Ümraniye, Istanbul, in order to report on and to take photographs of the funeral of Hüseyin Boral, a member of the "Türkiye Devrimci Komünist Partisi” (*Revolutionary Communist Party of Turkey*, hereinafter referred to as TDKP).

During the funeral some participants began demonstrations. The police intervened and the demonstrators resisted the police intervention. The applicants who had been taking photographs of the incident were beaten by the police and their films were seized. They were subsequently taken into police custody.

The applicants were brought to Ümraniye central police station for interrogation.

In his statement to the police the second applicant stated that he had been to the cemetery as a journalist and that during the funeral some people had begun chanting slogans and displaying banners. He added that when the police had intervened, people had thrown stones to the police but he had been unable to recognise those people. He also denied allegations of having chanted slogans, having attacked the police by throwing stones and having disseminated separatist propaganda.

After midnight on the same day the applicants were taken to Haydarpasa Numune Hospital for a medical examination. The preliminary medical reports mentioned the presence of various lesions on their bodies. The reports indicated the necessity of an examination by a surgeon and concluded that the final reports would have to be drawn up by the Forensic Medical Institute.

On 6 February 1994 the applicants were brought before the public prosecutor of Üsküdar.

During the questioning of the first applicant by the public prosecutor, her legal representative was also present. The first applicant stated that she had been to the cemetery to report on the funeral and to take photographs. She stated that she had been beaten by the police at the funeral, in the police car on the way to the police station and while she had been kept in police custody. She added that she had no idea about the identity of the policemen who had beaten her because she had been blindfolded. She requested that criminal proceedings be instituted against the policemen for ill-treatment. She also denied having chanted slogans, having displayed banners or having committed the offence of contumacy.

In his statement the second applicant declared that he had also been beaten by the police at the funeral and asked the public prosecutor to institute criminal proceedings against the policemen responsible.

Proceedings before the domestic authorities

On 15 February 1994 the Forensic Medical Institute issued the final medical reports on the basis of the preliminary examinations conducted in Haydarpasa Numune Hospital.

The medical report concerning the first applicant indicated that bilateral-periorbital ecchymotic lesions existed on her body and ecchymotic lesions on the front part of her right shoulder. The report concluded that these lesions did not constitute a danger to life but would prevent the first applicant from carrying out her work for one week.

The medical report concerning the second applicant mentioned the presence of a cut of one centimetre on his nose, a superficial abrasion of two centimetres on the back of his left ear, a haematoma 3 x 3 centimetres in size on his occipital region and an ecchymosis on his left scapular region. The report concluded that these injuries did not constitute a danger to life but would prevent the second applicant from carrying out his work for one week.

On 16 February 1994, the Üsküdar public prosecutor M. Cemal Ünsal decided that no prosecution should be brought against the police officers of Ümraniye central police station. According to the public prosecutor, a group of people, including the applicants, had placed a flag of the TDKP on the coffin during the funeral and had demonstrated against the Turkish Republic and the police by displaying banners and chanting slogans. When the police had tried to intervene, the group had thrown stones and had attacked the police. When the demonstrators had resisted their arrest, the police had used force resulting in the wounds indicated in the medical reports. The public prosecutor concluded that the use of force had been lawful under the provisions of the Law on the Duties and Responsibilities of the Police.

On 21 March 1994 the applicants filed an objection (*takipsizlik kararına itiraz)* with the Kadıköy Assize Court (*Kadıköy Ağır Ceza Mahkemesi)*. They alleged a lack of investigation by the public prosecutor who had not heard any witnesses and had based his decision on the presumption that the applicants had resisted the police. They also asserted that the decision of the public prosecutor had not addressed any of the applicants' allegations relating to ill-treatment to which they had been subjected when being transported to the Ümraniye police station.

On 21 April 1994 the Kadıköy Assize Court dismissed the applicants' objections. The Court referred to the criminal proceedings instituted against the applicants and nineteen other persons for having resisted the policemen on duty at the funeral. It also upheld the cogency of the Public Prosecutor's reasoning in rejecting the applicants' complaints.

The criminal proceedings instituted against the applicants, in which they have been charged with the offence of contumacy, are still pending before the Üsküdar Criminal Court of First Instance.

The Government submit as follows.

On 5 February 1994 a convoy composed of three buses and two minibuses transported the coffin of Hüseyin Boral, a TDKP member, to the Kocatepe cemetery.

When the convoy reached the cemetery, some persons attending the funeral replaced the religious cover on the coffin with the flag of the TDKP.

The applicants, together with some other people, displayed a banner which read, "The martyrs of the revolution are immortal".

Police issued warnings by megaphone. When this had no effect the police intervened at which point the demonstrators began chanting slogans such as "The martyrs of the revolution are immortal", "Damn the fascist dictatorship", "The martyrs shall not die", "The police are murderers", "The police is fascist", and "Damn the Turkish Republic", began throwing stones and attacked the police.

Statements had been taken from two men who were also among the demonstrators.

In his statement Nevzat Yılmaz said that he had been to the cemetery to take pictures for the newspaper Aydınlık. He stated that during the funeral some people had begun chanting slogans and displaying banners. He added that when the police had intervened, people had thrown stones to the police. He concluded that when the stones had hit him he had tried to run away.

In his statement Ismail Aksoy said that he had chanted slogans in the funeral with his friends and when the police intervened he and his friends had thrown whatever they had found to the police.

COMPLAINTS

The applicants complain under Article 3 of the Convention that on 5 February 1994 they were ill-treated by the police at the time of their arrest at the funeral, in the police car while they were being taken to the police station, and later in police custody. They assert that the police beat them because they had taken photographs at the funeral after the police had started to use force against the people who had gathered there.

B. Relevant domestic law and practice

i. Criminal law and procedures

Article 17 of the Turkish Constitution provides:

"...

No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity.

..."

Article 243 of the Criminal Code (*Türk Ceza Kanunu*) provides:

"A President or member of a court or official body or any other public official who, in order to extract a confession of guilt in respect of a criminal offence, tortures or ill-treats any person, or engages in inhuman conduct or violates human dignity, shall be punished by up to five years' imprisonment and disqualified from holding public office temporarily or for life.

..."

Article 245 provides:

"Civil servants charged with the forcible execution of an order, police officers and any other officials charged with enforcement who, either of their own accord or on the orders of their superiors, enforce the order concerned in an unlawful manner or who, in doing so, ill-treat, strike or cause bodily harm to another shall be punished by between one and three years' imprisonment and temporarily disqualified from holding public office."

Article 135/a of the Turkish Code of Criminal Procedure (*Türk Ceza Muhakemeleri Usulü Kanunu*) provides:

"The statement of the accused should be based on his free will. The accused shall not be subjected to physical or mental interference such as torturing, medication by force, fatigue, deceit, use of physical force and hardness and other use of devices which will result in the obstruction of his free will.

No unlawful benefit shall be promised.

The statements that are extracted from the accused by using the unlawful ways described above cannot be considered as evidence even if the accused does not challenge their lawfulness."

Additional Article 6 of the Law on the Duties and Powers of the Police (*Polis Vazife ve Selahiyet Kanunu*) provides:

"In cases of resistance by persons whose arrest is necessary or by groups whose dispersal is necessary or of their threatening to attack or carrying out an attack, the police may use violence to subdue these actions.

Use of violence refers to the use of bodily force, physical force and all types of weapons specified in the law and it gradually increases according to the nature and level of resistance and attack in such a way as to restore calm.

In cases of intervention by group forces, the extent of the use of force and the equipment and instruments to be used are determined by the commander of the intervening force."

ii. Administrative liability

Article 125 §§ 1 and 7 of the Turkish Constitution provide as follows:

"All acts and decisions of the administration are subject to judicial review...
...
The authorities shall be liable to make reparation for all damage caused by their acts or measures."

This provision is not subject to any restriction even in a state of emergency or war. The second paragraph does not require proof of the existence of any fault on the part of the administration, whose responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as the theory of "social risk". Thus the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

iii. Civil action for damages

Pursuant to Article 41 of the Civil Code, anyone who suffers damage as result of an illegal act or tort may bring a civil action seeking reparation for pecuniary damage (Articles 41-46) and non-pecuniary damage. The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

PROCEEDINGS BEFORE THE COURT

The application was introduced on 11 July 1994 and registered on 22 July 1994.

On 4 December 1995, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 3 July 1996, after an extension of the time-limit fixed for that purpose. The applicants replied on 7 October 1997, also after an extension of the time-limit.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicants complain that they were ill-treated by the police. They invoke Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Exhaustion of domestic remedies

The Government submit that the applicants have failed to exhaust domestic remedies available to them within the meaning of Article 35 of the Convention. According to the Government, the injuries of the applicants were not so serious that the application of criminal law was necessary. They submit that there exist administrative and civil remedies in Turkish law capable of redressing the applicants' complaints and leading to the granting of compensation. The Government conclude that being able to obtain compensation constitutes an adequate and sufficient remedy in relation to the treatment contrary to Article 3 of the Convention.

The applicants argue that they have exhausted all domestic remedies available to them. They maintain that they filed an objection against the decision of non-prosecution but that this objection was dismissed by the Kadıköy Assize Court. The applicants furthermore state that ill-treatment is a criminal offence punishable under the Turkish Criminal Code. Referring to the medical reports, they refute the Government's argument that their injuries were not sufficiently serious for the application of criminal law.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 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 the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. However, Article 35 § 1 does not require that recourse should be had to remedies which are inadequate or ineffective (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, public prosecutor. 2275-76, §§ 51-52).

The Court notes that Turkish law provides civil, administrative and criminal remedies against illegal and criminal acts attributable to the State or its agents.

As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on part of State agents, the Court recalls that a plaintiff to such an action must, in addition to establishing a causal link between the tort and the damage he has sustained, identify the person believed to have committed the tort (cf. Yaşa v. Turkey

judgment, *Reports* 1998-VI, p. 2431, § 73) In the instant case, however, the applicants submit that they are unable to identify the police officers whom they allege ill-treated them. It does not appear, moreover, from the documents in the Court's case file that the officers involved have been identified by the Turkish authorities.

As to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability, the Court recalls that this remedy cannot be regarded as sufficient for a Contracting State's obligations under Article 3 of the Convention in cases like the present one, in that this administrative remedy is aimed at awarding damages rather than identifying and punishing those responsible (cf., Assenov and Others v. Bulgaria judgment of 28 October 1998, to be published in *Reports* 1998, § 102).

Insofar as remedies under criminal law are concerned, finally, the Court observes that by the Government's own admission these were of no avail to the applicants.

Consequently, the Court concludes that the applicants were not required to bring the civil and administrative proceedings suggested by the Government.

As regards the merits

The Government argue that the use of force by the police at the funeral was proportional under the Law on the Duties and Powers of the Police. They submit that the applicants' allegations have been examined by the competent domestic authorities and rejected on the ground that the alleged treatment did not reach the required level of severity. According to the Government, it is beyond doubt that the applicants were not acting as journalists but as demonstrators at the funeral. Statements taken from two men who were among the demonstrators and who were taken to the police custody with the applicants also reveal that during the funeral the participants displayed banners and threw stones at the police. The Government furthermore submit that there exists no written or oral evidence to prove that the applicants were ill-treated in police custody. The Government conclude that the police used force to prevent the violence and the aggression at the funeral.

The applicants claim that they were arrested because they were journalists. In their observations in reply they submit that they were subjected to ill-treatment when transported to the police station and whilst in detention.

As regards the substance of the applicant's 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 application 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,

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

Michael O'Boyle
Registrar

Elisabeth Palm
President