DECISION

AS TO THE ADMISSIBILITY OF

Application No. 22535/93
by Mahmut KAYA
against Turkey

The European Commission of Human Rights sitting in private on 9 January 1995, the following members being present:

MM. H. DANELIUS, Acting President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. M. DE SALVIA, Deputy 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 20 August 1993 by Mahmut KAYA against Turkey and registered on 26 August 1993 under file No. 22535/93;

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 23 June 1994 and the observations in reply submitted by the applicant on 5 July, 7 July and 2 August 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1958 and resides at Elazкğ. At the present time he is in Switzerland. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex. The applicant states that he is bringing the application on his own behalf and on behalf of his deceased brother, Dr. Hasan Kaya.

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

A. The particular circumstances of the case

The applicant states that the following occurred:

Hasan Kaya was born in 1966 and practised medicine since May 1992 at Poyraz Health Clinic in Elazкğ province. Prior to that, between November 1990 and May 1992, he practised medicine in the province of Şкrnak.

Hasan Kaya was threatened for treating demonstrators wounded as a result of firing by State forces during the Newroz celebrations in 1992. When he attended the funeral of a journalist who had been killed, the Şкrnak Chief of Security told him that his end would be like that of the journalist. He belonged to no political organisation.

Hasan Kaya had been a friend of Metin Can, an advocate and the Director of the Elazкğ Human Rights Association. Metin Can had conducted the defence of Kurdish political prisoners in Elazкğ prison. He had made public the poor conditions and ill-treatment in the prison.

On 21 February 1993, Metin Can received a telephone call at home. Two persons whose identities were unknown to him asked to meet him. They later came to his house and asked for help with the treatment of someone who had been injured. Metin Can telephoned Hasan Kaya and the Secretary of the Elazкğ Human Rights Association, Şerafettin Özcan. The two unknown persons left the house, having arranged to meet later at 19.00.

Metin Can and Hasan Kaya left the house together at 19.00 to "treat the wounded". Metin Can's wife, Fatma, and the Secretary of the Human Rights Association waited for them at Can's home.

On 22 February 1993, Mrs. Can received a telephone call from an unknown person who said, "We have killed them both". Mrs. Can called the police. Later on the same day the police received information that an ownerless parked car had been found, the registration number being that of the car which Hasan Kaya had been using.

On 23 February 1993, Mrs. Can received another telephone call from an unknown person who said, "They are both in our hands". Later on the same day, sounds of torture and music were played over four telephone calls at half-hourly intervals to the home of Hasan Kaya. Towards the evening the shoes of Metin Can were found by relatives and handed over to the police who said mockingly, "His trousers will come tomorrow".

On 26 February 1993, the applicant and his family heard that two persons had died at Tunceli Security Headquarters. The information was passed on to the Elazкğ police. A judge and a police officer have made statements during a conversation with an advocate to the effect that Metin Can and Hasan Kaya had been taken to Tunceli Security Headquarters. The police authorities showed no interest in the report and simply said that the information was groundless.

On 27 February 1993, it was learnt that two bodies had been found under the Dinar Bridge, about 15 kilometres from Tunceli city. The applicant identified one of the bodies as being that of his brother. The other body was that of Metin Can. Near the bodies empty cartridges were found, but there was no blood on the ground and no mud on the victims' socks, which may suggest that they had been killed elsewhere and the bodies then dumped by the river. The bodies were taken to Elazкğ where an autopsy was made. It was established that Metin Can and Hasan Kaya had been shot and had died on 26 February 1993 at about 22.00. There were no bullets in their heads. Their hands had been bound. It has been suggested that their feet had been in water and snow for a long period, but this is not clear. Another suggestion has been that the condition of their feet was due to torture. A surgeon has stated that the post mortem examination was very badly performed and that it was probably deliberately vague in order to focus the attention on the head injury only.

In the applicant's opinion, his brother had been tortured. When he briefly saw his brother's body to identify it, he noticed a bruise on the forehead; marks on the nail beds of the fingers; an open wound on the knee; marks of a sharp instrument around the left ankle and the condition of the feet referred to above.

The applicant and his family have obtained further information about what had happened. Metin Can and Hasan Kaya were seen by people in Yazкkonak village, where the car which Hasan Kaya had been driving was found. The witnesses, who do not wish their names to be revealed, saw Metin Can and Hasan Kaya being forced into another

vehicle by people using walkie-talkies. The two men were resisting. Fuel was bought for the vehicle from a petrol station by the side of the road. The attendant knew Metin Can and asked him where they were going. Can answered that they were going somewhere with the officers.

The applicant has obtained information from a policeman indicating that the murders of Metin Can and Hasan Kaya were carried out by State forces. There has also been information in the daily Tercüman newspaper as to how the murders were carried out.

Some time after the murders, there was a television programme where the Director General of the Human Rights Association, Akin Birdal, said to the Deputy Prime Minister Erdal Inönü that the killers of Metin Can and Hasan Kaya were contraguerillas. Inönü denied that there were any contraguerillas in Turkey. A person by the name of Yusuf Geyik, who was watching the programme in the Pertek Beerhouse in the Pertek district of Tunceli, reacted to the statement by Inönü by saying, "You are lying. We killed Metin and Hasan." In view of the unrest which followed, he made a call to the Pertek District Commander on his walkie-talkie, introducing himself as a "mobile team agent" and leaving shortly afterwards with a gendarme.

Mrs. Can and Serafettin Özcan would recognise the two persons who called on Metin Can and Hasan Kaya, claiming to seek treatment for someone who had been wounded.

Serafettin Özcan is currently in Germany as he has no guarantee of safety. The applicant has submitted the application rather than his mother and father, because of the risk that their lives would be threatened if they were to open such a case. As he has no guarantee of safety, the applicant is currently in Switzerland.

On 18 May 1993, the applicant's father made complaint to the Tunceli-Pertek public prosecutor and the Tunceli chief public prosecutor. He addressed a further request for investigation to be made to the chief public state prosecutor on 13 April 1993 and to the Elazig chief public prosecutor on 14 February 1994. In the request dated 14 February 1994, the applicant's father referred to newspaper reports in which a Major Ersever, a former State of Emergency Gendarme Intelligence leader, revealed details of a contraguerilla undercover force and identified the leader of the contraguerilla force who killed the applicant's brother and Metin Can as Mahmut Yildrim, code-named Yesil, an official agent working for the interests of the police. The applicant's father requested that the alleged perpetrator be arrested. A state prosecutor in Elazig is alleged to have said to the applicant's father that "this investigation is above our powers".

The Government state that the investigations into the killings of Dr. Hasan Kaya and Metin Can are being carried out by the Erzincan State Security Court prosecutor which has taken over the two separate investigations in Tunceli and Elazig (where the kidnapping took place).

They submit that the advocate who allegedly told the applicant that the two kidnapped men had been taken to Tunceli police headquarters denied that he had had any information as to the whereabouts of the men.

The Government have stated further:

Hasan Kaya and Metin Can were found killed under a bridge at Dinar, 12 kilometres from Tunceli on the Tunceli-Elazig state road. There was one shot on each body directed to their skull with a 9 mm shotgun. Necessary investigations were carried out at the State Hospital with the attendance of a doctor. Two 9 mm shells were recovered at the area and were collected as evidence.

When the bodies were brought to Elazig, an autopsy was carried out. The autopsy showed that Hasan Kaya had been shot from the oxipital area of the head and had died due to brain damage, and that Metin Can had also been shot in the head and had died of brain damage. There were no other injuries on their bodies.

The bullets were evaluated forensically and it was found out that they had been fired from the same weapon and that the weapon had also been used in other terrorist incidents.

A watchman by the name of Ihsan Denizhan found two pairs of shoes close to a shoe shop across the Social Democratic People's Party building at Elazig Cakir Police Headquarters. When he searched the contents of a handbag, he found the shoes, and a person passing by said that they belonged to his missing brother Metin Can. The watchman kept the shoes as evidence and gave them to the headquarters. There the shoes were shown to Hasan Kaya's brother and Metin Can's brother who could not identify the shoes, as reported in their written testimony of 24 February 1993.

B. Relevant domestic law and practice

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

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 fifteeen 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.

Civil action for damages

Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against the alleged perpetrator:

"every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation."

Pursuant to Article 46, any victim of an assault may claim material damages:

"The person who has been injured is entitled to compensation for the expenses as well as for the losses resulting from total or partial disability to work due regard being had to the detriment inflicted on the economic future of the injured party."

Moral damages may also be claimed under Article 47:

"...the court may, taking into consideration the particular circumstances, award adequate general damages to the injured..."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he complains that his brother was killed in circumstances suggesting that undercover agents of the State were involved, or that the killing took place in violation of the State's obligation to protect his right to life. He further complains 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, the applicant complains of his brother having been tortured. He considers that he is himself the victim of a violation of Article 3 as a result of his inability to discover what had happened to his brother. Finally, he alleges a violation of Article 3 on account of discrimination on grounds of race or ethnic origin.

As to Article 6, the applicant complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing, as a result of which the applicant cannot bring civil proceedings arising out of the killing. The applicant is therefore denied effective access to court.

As to Article 13, the applicant complains of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he complains of discrimination on the grounds of race and/or ethnic origin in the enjoyment of the rights guaranteed under Articles 2, 3, 6 and 13 of the Convention.

The applicant considers that there is no requirement that he pursue alleged domestic remedies, since any alleged remedy is illusory, inadequate and ineffective because

(a) there is an administrative practice of non-respect for the rule which requires the provision of effective domestic remedies (Article 13);

(b) there is an administrative practice of unlawful killing at the hands of undercover forces of the Turkish security forces in South-East Turkey;

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress;

(d) whether or not there is an administrative practice, the situation in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

The applicant also refers to the arguments raised in Application Nos. 21895/93 Cagirge v. Turkey, Dec. 19.10.94 and 22057/93, Kapan v. Turkey).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 August 1994 and registered on 26 August 1993.

On 29 November 1993, 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 10 March 1994 after two extensions in the time-limit. The applicant submitted further information and observations in reply on 5 July, 7 July and 2
August 1994.

THE LAW

The applicant alleges that his brother was killed in circumstances for which the State is responsible. He invokes Article 2 (the right to life), Article 3 (prohibition on

inhuman and degrading treatment), Article 6 (the right of access to court), Article 13 (the right to effective national remedies for Convention breaches) and Article 14 (prohibition on discrimination).

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

The Government point out that there is an ongoing investigation by the public prosecutor of Erzincan into the death of the applicant's brother. If the public prosecutor should reach a decision not to prosecute, the applicant would be able to challenge the decision within 15 days following the notification (Article 165 of the Code of Criminal Procedure). Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, the Government submit that the applicant has the possibility of introducing an action in the civil courts for compensation if the perpetrators of the killing are found.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings or torture.

In respect of the investigation by the public prosecutor of Erzincan referred to by the Government, the applicant submits that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need

to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

The Commission first notes the applicant's statement regarding the complaints which his father made to various prosecuting authorities but which apparently did not give any significant results.

Furthermore, while the Government refers to the pending inquiry by the public prosecutor into the death of the applicant's brother on 26 February 1993, the Commission notes that almost two years have elapsed since the killing and the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the crime, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

The Commission further considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

As regards the merits

The Government deny that there is any administrative practice of unlawful killings by the State and assert that death incidents are usually terrorist acts carried out by illegal terrorist organisations operating within the area of State of Emergency. They refer in particular to the illegal organisation known as the PKK (Kurdish Workers' Party) which has since the 1980's been carrying out an intensive campaign aimed at securing a part of Turkish territory for a proclaimed Kurdish state.

The applicant maintains his submission that the attack was carried out by, or with the complicity of, agents of the State.

The Commission 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 Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

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

Deputy Secretary to the Commission — Acting President of the Commission

(M. DE SALVIA) — (H. DANELIUS)