CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32581/96
by Mehmet KOÇAK
against Turkey

The European Court of Human Rights (First Section) sitting on 2 March 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 3 October 1995 by Mehmet KOÇAK against Turkey and registered on 8 August 1996 under file no. 32581/96;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1965, is a Turkish citizen of Kurdish origin who is currently being held in prison in the Bayrampaşa district of Istanbul. He is represented before the Court by Mrs Bedia Buran and Mrs Naciye Kaplan, lawyers practising in Istanbul.

The facts of the case, as presented by the applicant, may be summarised as follows.

A. The particular circumstances of the case

On 12 December 1993 the applicant was arrested by policemen and taken to the Anti-Terror branch of the Istanbul Security Directorate.

On the same day the Head of the Security Directorate requested the authorisation of the Public Prosecutor at the Istanbul State Security Court to grant permission to keep the applicant in police custody for fifteen days.

On 18 December 1993 the Public Prosecutor granted permission to detain the applicant in custody until 24 December 1993.

On 22 December 1993 the applicant was placed in a cell in order to be questioned by policemen. He was blindfolded and made to listen to the cries of other detainees being tortured with the purpose of forcing him to sign a confession statement. He was charged with membership of and involvement in the PKK terrorist organisation. He was threatened with torture and requested to admit to the charges. As he denied the charges, the applicant was stripped naked, hosed with cold water and beaten with a truncheon on his body and the soles of his feet. He was then made to walk on a salt-strewn floor. His hands were tied with a blanket and he was strung up by his arms and subjected to a form of torture known as "Palestinian hanging". While he was hanging, electric shocks were administered to his genitals, his fingers and feet. He was subsequently obliged to sign papers in which he confessed that he had been involved in the PKK. During his detention the applicant was kept in a cell, denied food and liquids and prevented from sleeping.

On 23 December 1993 the Public Prosecutor prolonged the applicant's detention in police custody until 27 December 1993 at the request of the Head of the Security Directorate.

On 27 December 1993 the applicant was seen by a doctor at the Istanbul Forensic Medical Institute. A medical report was prepared which stated that the applicant bore ecchymosis measuring 2 and 3 cm on both sides of his hip and allergic dermatosis on his right hand. The doctor who prepared the report noted that these findings were not life-threatening but would prevent the applicant from working for one day.

On the same day the applicant was brought before the Public Prosecutor at the Istanbul State Security Court. He denied the charges against him. The statements which he had made at the police station were read to him. The applicant alleged that he had made those statements under duress and that he had only signed two of the three pages of the minutes of the statements.

On 27 December 1993, after having been questioned by the Public Prosecutor, the applicant was brought before the Istanbul State Security Court. He denied the charges against

him and pleaded not guilty. The applicant's statements which he had made at the police station and at the Public Prosecutor's office were read to him. The applicant stated that his statements at the Public Prosecutor's office were true, but his statements at the police station were untrue as they were made under duress. The court subsequently ordered him to be detained on remand.

On 30 December 1993 the applicant petitioned the Istanbul State Security Court, complaining that he had been tortured during his detention in police custody. He further stated that he had signed the minutes of the statements under torture. He asked the court to order his release.

On 14 January 1994 the applicant was seen by a doctor at the Forensic Medicine Institute in Eyüp district of Istanbul. The doctor drew up a medical report and noted the presence of pain on the applicant's shoulders, neck and armpits, a yellow coloured eccymosis on the right armpit, an ecchymosis measuring 3 by 2 cm over the right arm, widespread abrasions and eccymosis around the wrists and arms, hyperaemic lesions measuring 3 by 2 cm on the right hand and 2 cm long on the left hand, widespread yellow coloured ecchymosis over the loins, an echymosis over the groin, pain in the testicles, swellings over the right leg and foot, swellings and yellow coloured ecchymosis on the sole of the feet and bruises on various parts of the body. The doctor further noted that these findings were not life threatening but would prevent the applicant from working for up to seven days.

On 4 February 1994 the Public Prosecutor filed a bill of indictment with the Istanbul State Security Court charging the applicant with membership of the PKK. The charges were brought under section 168(2) of the Turkish Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).

On 5 June 1995 the Istanbul Public Prosecutor issued a decision of non-prosecution in relation to police officer Reşat Altay on the grounds that there was insufficient evidence that he had ill-treated the applicant. The Prosecutor further noted that criminal proceedings were continuing against police officers Ömer Duman and Ümit Karabey, who had been charged with inflicting torture on the applicant.

On 29 June 1995 the applicant filed an objection with the Beyoğlu Assize Court against the decision of 5 June 1995.

On 4 August 1995 the Beyoğlu Assize Court dismissed the applicant's objection.

On 20 December 1995 the Istanbul Assize Court acquitted the police officers Ömer Duman and Ümit Karabey on the ground that there was insufficient evidence that they had inflicted torture on the applicant. The court stated, *inter alia*, that

> "... the accused denied the charges against them. In the medical reports submitted by the complainant [the applicant], there is no indication as to which of the accused caused the symptoms. The complainant stated that he had been blindfolded and tortured during questioning. A person who is blindfolded cannot identify the persons torturing him. Accordingly, there is insufficient evidence beyond the subjective allegations... ."

The judgment of 20 December 1995 became final as the Public Prosecutor had not lodged an appeal against it. The applicant could not appeal against the judgment as he had failed to intervene in the criminal proceedings against the police officers.

In the meantime, on 26 November 1996, the Istanbul State Security Court convicted the applicant of membership of the PKK and sentenced him to twelve years and six months' imprisonment. The applicant failed to appeal against the judgment of the Istanbul State Security Court.

B. Relevant domestic law and practice

1. Section 168 of the Turkish Criminal Code

<Translation>

"Any person who, with the intention of committing the offences defined in Articles ..., forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.

The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment."

2. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

Under section 3 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in section 168 of the Criminal Code is classified as a "terrorist" act. Pursuant to section 5 of Law no. 3713, penalties laid down in the Criminal Code as punishment for the offences defined in section 3 of the Act are increased by one half.

3. Section 365 of the Turkish Code on Criminal Procedure

<Translation>

"Any person who is injured by the offence may, at any phase of the investigation, intervene in the public prosecution.

Those so intervening in public prosecution may also submit their personal claims for adjudication."

COMPLAINTS

The applicant primarily alleges that he was tortured in violation of Article 3 of the Convention. He submits that the suffering he experienced, taken as a whole, amounted to torture. He claims that while in detention in the Anti-Terror branch of the Istanbul Security Directorate he was kept blindfolded during questioning, was suspended from his arms and subjected to a form of torture known as "Palestinian hanging", was given electric shocks which were exacerbated by throwing water over him, and was subjected to "bastinado", beatings, slapping and verbal abuse.

He maintains under Article 5 § 2 of the Convention that he was not informed promptly of the reasons for his arrest or of any charge against him.

He complains under Article 5 § 3 of the Convention that he was kept in detention in police custody for eighteen days without being brought before a judge.

He further submits under Article 5 § 4 of the Convention that he had no remedy under Turkish law allowing him to challenge the lawfulness of his detention.

The applicant alleges under Article 6 §§ 1 and 3 (c) of the Convention that he did not have a fair trial as he was deprived of his right to legal assistance during the questioning by the police officers, the Public Prosecutor and the judge who ordered his detention on remand. He maintains that the criminal proceedings were brought against him on the basis of the investigation conducted by policemen.

The applicant complains under Article 14 of the Convention, in conjunction with Article 5, that there is a difference between proceedings in State Security Courts and in ordinary criminal courts as regards the length of permissible police custody, which amounts to unlawful discrimination.

In his facsimile letter of 3 February 1999, the applicant contends under Article 6 § 1 of the Convention that the Istanbul State Security Court cannot be considered an independent and impartial tribunal due to the presence of a military judge on the bench. He claims in this respect that he should be considered to have exhausted domestic remedies as the filing of an appeal with the Court of Cassation, against the lack of independence and impartiality of the Istanbul State Security Court, would be a futile step.

THE LAW

1. The applicant alleges that he was tortured in violation of Article 3 of the Convention. He submits that the suffering he experienced, taken as a whole, amounted to torture. He claims that while in detention in the Anti-Terror branch of the Istanbul Security Directorate he was kept blindfolded during questioning, was suspended from his arms and subjected to a form of torture known as “Palestinian hanging”, was given electric shocks which were exacerbated by throwing water over him, and was subjected to “bastinado”, beatings, slapping and verbal abuse.

The applicant alleges under Article 6 §§ 1 and 3 (c) of the Convention that he did not have a fair trial, as he was deprived of his right to legal assistance during the questioning by the police officers, the Public Prosecutor and the judge who ordered his detention on remand. He maintains that the criminal proceedings were brought against him on the basis of the investigation conducted by policemen.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of its Rules of Procedure, to give notice of them to the respondent Government.

2. The applicant complains under Article 5 § 2 of the Convention that he was not informed promptly of the reasons for his arrest or of any charge against him.

He also maintains under Article 5 § 3 of the Convention that he was kept in detention in police custody for eighteen days without being brought before a judge.

He further submits under Article 5 § 4 of the Convention that he had no remedy under Turkish law allowing him to challenge the lawfulness of his detention.

The applicant finally complains under Article 14 of the Convention, in conjunction with Article 5, that there is a difference between proceedings in State Security Courts and in the ordinary criminal courts as regards the length of permissible police custody, which amounts to unlawful discrimination.

The Court notes that it is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 5 §§ 2, 3 and 4, either alone or in conjunction with Article 14 of the Convention, as Article 35 § 1 of the Convention provides that the Court "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

In the instant case the Court observes that the applicant was arrested pursuant to the Law on the Procedures of State Security Courts and that no domestic remedy was available in order to challenge the lawfulness and the length of his police custody (see, *mutatis mutandis*, the Sakık and Others v. Turkey judgment of 26 November 1997, *Reports of Judgments and Decisions* 1997-VII, § 53). The Court recalls that, according to the established case-law, when an act of an authority is not open to any effective remedy, the six-month period runs from the date on which the act took place (see, among other authorities, application no. 10389/83, decision of 17 July 1986, DR 47, p. 72).

The Court notes that the applicant's detention in police custody ended on 27 December 1993, whereas the application was introduced on 3 October 1995, that is more than six months after the detention of which complaint is made.

It follows that this part of the application has been introduced out of time and must be rejected under Article 35 §§ 1 and 4 of the Convention.

3. In his facsimile letter of 3 February 1999, the applicant contends under Article 6 § 1 of the Convention that the Istanbul State Security Court cannot be considered an independent and impartial tribunal due to the presence of a military judge on the bench. He claims in this respect that he should be considered to have exhausted domestic remedies as the filing of an appeal with the Court of Cassation against the lack of independence and impartiality of the Istanbul State Security Court would be a futile step.

In the instant case the Court notes that the applicant did not raise this particular complaint in his original application of 3 October 1995. He only submitted it in his letter of 3 February 1999.

The Court reiterates that an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article 35 § 1. The Court does not find it necessary to determine whether the applicant was dispensed from the obligation to file an appeal since, even supposing that it was probably destined to fail in the particular case,

the applicant would then have been required to submit his complaint to the Court within the six months from the date on which the act complained of occurred.

The Istanbul State Security Court's judgment of which the applicant complained was delivered on 26 November 1996, whereas this complaint was submitted to the Court on 3 February 1999. It is therefore clear that the applicant's above complaint under Article 6 § 1 of the Convention was not lodged within six months after the end of the situation of which complaint is made. Furthermore, the Court finds no indication of the existence of specific circumstances which might have prevented the applicant from observing the time-limit laid down in Article 35 § 1 of the Convention.

It follows that this part of the application has been introduced out of time and must be rejected under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court,

DECIDES TO ADJOURN the examination of the applicant's complaints that he was allegedly subjected to torture in the course of his detention in police custody and that he did not have a fair trial;

unanimously,

DECLARES INADMISSIBLE the remainder of the application.

Michael O'Boyle
Registrar

Elisabeth Palm
President