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. 27305/95
by Mustafa KOKU
against Turkey

The European Court of Human Rights (First Section), sitting on 26 June 2001 as a Chamber composed of

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, *ad hoc judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 19 April 1995 and registered on 12 May 1995,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mustafa Koku, is a Turkish national, born in 1963 and living in London. The application is brought on behalf of himself as well as of his brother, Mr Hüseyin Koku, who allegedly disappeared in October 1994 and was later found dead in April 1995 in circumstances engaging the responsibility of the State. Mr Mustafa Koku is represented before the Court by Mr Philip Leach, a lawyer practising in London.

The facts surrounding the death of Mr Hüseyin Koku are disputed by the Parties.

A. The circumstances of the case

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

The applicant gives the following account.

In the local elections that were held in 1994, the applicant's brother, Mr Hüseyin Koku, was a candidate for the Municipal Assembly from DEP (*Demokrasi Partisi - Democracy Party*).

On 1 April 1994, accused of being a member of the PKK and helping and abetting the illegal organisation, Mr Hüseyin Koku was taken into custody and consequently placed in detention on remand. Criminal proceedings were initiated against him in the Malatya State Security Court and on 10 May 1994, he was released pending trial. On 17 May 1994 the court acquitted him for lack of evidence. It is alleged that Mr Hüseyin Koku had been subjected to ill-treatment during his detention and was still under medical supervision at the time of his disappearance due to the effects of this ill-treatment.

Later on the same year, Mr Hüseyin Koku became the Elbistan Chairman of HADEP (*Halkın Demokrasi Parisi- People's Democracy Party*), a pro-kurdish political party. During this time, he was constantly persecuted by the authorities, in particular by the Elbistan district governor, Mr Şükrü Görücü. It is alleged that the district governor accused Mr Koku of being a traitor against the State and threatened to kill him.

In mid september, Mr Hüseyin Koku called the applicant saying he expected to be killed any time. On 17 October 1994, he made a statement to the Özgür Gündem newsaper, protesting against the steps taken by the district governor who was filing information on all male inhabitants of the Cumhuriyet neighbourhood where the majority were of Kurdish origin.

On 18 October 1994 he was summoned by the Elbistan Mayor, who told him that he would be 'disappeared' if he insisted in continuing his political activities in the area. Mr Koku reported this meeting to the Elbistan HADEP administrative board members.

On 20 October 1994 around noon, as Mr Hüseyin Koku was walking along Malatya Street in Elbistan, he was taken away by plain-clothes policemen in a white Renault, from the corner on the opposite side of the Şahin Hotel.

On 21 October 1994 the applicant was contacted by Mrs Fatma Koku, the wife of Mr Hüseyin Koku, who told him that Hüseyin Koku had been taken into custody the day before. On the same day, Mrs Fatma Koku went to the Elbistan Security Department to get information about her husband. She was told that Mr Hüseyin Koku was not under custody.

On 1 November 1994, Mrs Koku further filed a complaint with the Elbistan Public Prosecutor about the disappearance of her husband and requested an investigation. The same night, there was a telephone call to Mr Hüseyin Koku's house, which was answered by his thirteen year-old daughter and during which she was made to listen to her father's voice under torture. Despite complaints, the public prosecutor refused to take steps to investigate the allegations.

On 3 November 1994 Mrs Fatma Koku made an application to the Kahramanmaraş Governor. In her petition she submitted that on 20 October 1994 around noon, her husband had been taken away by plain-clothes police officers in a Renault, while walking along Malatya Street. She asked for information about her husband's whereabouts.

On 27 April 1995 Mrs Fatma Koku was informed by the police that a body had been found in the Pötürge District. When three of the family members, including Mrs Fatma Koku, went to the military hospital to identify the body, they saw a decapitated body, separated into three or four pieces and most of it in a state of decomposition. Mrs Fatma Koku was able to identify the body as that of Hüseyin Koku, only from his clothes and some documents found on the body. Following identification, the body was sent to Istanbul Forensic Insititute for an autopsy.

On 23 August 195 the body was handed over to the legal representative of the Koku family.

The applicant further refers to a statement by Mr Mustafa Yeter, Deputy President of HADEP. According to the applicant, Mr Yeter stated that on 18 January 1995 his house had been raided by the police and he had been taken for interrogation. During his questioning, he had been told to cooperate with the police if he did not want to share the fate of Hüseyin Koku.

The Government submits the following account.

The authorities maintain that they were informed about the disapearance of Mr Hüseyin Koku on 3 November 1994 through Mrs Fatma Koku's application to the Kahramanmaraş Governor. Upon this complaint, the vice-governor requested information from relevant authorities. On 7 November 1994 the Elbistan Gendarmes and Police Headquarters declared that Hüseyin Koku was not in their custody.

On 11 November 1994 the Elbistan Police Headquarters drafted a report on the Mrs Fatma Koku's allegations. They stated that the allegations were unfounded because unsubstantiated by evidence and concluded that the allegations had been made to dishonour the security forces.

On 26 April 1995 the Tepehan Gendarmes Unit found a body in a river bed in the forest area. The district gendarmes commander notified the Pötürge Public Prosecutor, who commenced an *ex officio* investigation under file no. 1995/42.

On 27 April 1995 the body was identified by Mrs Fatma Koku as that of her husband. The findings being insufficient to determine the cause of death, the body was sent to Istanbul Forensic Institute for a post mortem examination. The autopsy report of 29 June 1995 states that there were two bullet entry holes in the chest and one in the head.

During the investigations it was established that a complaint had been made in 1993 against Mr Hüseyin Koku for adultery. He had been accused of having an affair with a married woman (Cennet Elma). The complaint was brought by her husband, Mr Veli Elma. The Elbistan Public Prosecutor launched a preliminary investigation into the allegations and, on 10 December 1993, gave a decision of non-prosecution due to lack of sufficient evidence to institute criminal proceedings against Mr Hüseyin Koku.

On 28 April 1995, in connection with investigation made by the Pötürge Public Prosecutor, statements were taken from Mr Ahmet Güzel (Hüseyin Koku's brother in-law), Mr Oruç Güzel (Hüseyin Koku's father-in-law) and Mrs Fatma Koku (Hüseyin Koku's wife). In their statements, the three witnesses stated that they were aware that Hüseyin Koku had an affair with Mrs Cennet Elma.

The Government allege that there are strong reasons to believe that Hüseyin Koku was killed by a member of the Elma family for revenge. They further submit that the investigation into the death of Hüseyin Koku is still pending before the Pötürge Public Prosecutor.

B. Relevant domestic law

Criminal Procedures

Under the Turkish Criminal Code all forms of homicide (Article 448 and 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations in respect of conducting a preliminary investigation into acts and omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 and 153 of the Turkish Criminal Procedure Code. Offences may be reported to the authorities or to members of the security forces as well as to the public prosecutor's offices.

If there is evidence that death is not due to natural causes, members of the security forces who have been informed of the fact are required to advise the public prosecutor or a Criminal Court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the course of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution.

Civil Law Procedures

Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). 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).

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 6, 13 and 14 of the Convention.

As to Article 2, the applicant alleges, on his own behalf and on behalf of his brother, that they have been victims of a violation of Article 2 of the Convention on account of the intentional deprivation of life not attributable to any of the exhaustive list of purposes listed in paragraph 2. He also submits that the authorities failed to protect the Hüseyin Koku's right adequately, by not initiating legal proceedings to identify the persons responsible for his death. In this respect he submits that the investigation into the death of his brother, begun in 1995, is still pending and that no charges have been brought against anyone.

As to Article 3, the applicant submits that his brother was subjected to torture after his arrest by the police. He also refers to his own suffering as a result of his brother's disappearance and the inability to discover the circumstances in which his brother was killed.

As to Article 5, the applicant contends that his brother was unlawfully detained and was not brought promply before a judicial authority.

As to Article 6, the applicant complains of the failure to initiate proceedings, resulting in denial of effective access to court. He notes that under Turkish law the outcome of criminal proceedings instituted by the public prosecutor effectively determines his right to compensation.

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

As to Article 14 in conjunction with Articles 2, 3 and 6 he complains of an administrative practice of discrimination on grounds of race or ethnic origin.

THE LAW

A. Government's Preliminary Objection

The Government maintain that the application is inadmissible since the applicant has failed to exhaust domestic remedies within the meaning of Article 35 of the Convention. In this regard, they submit that the preliminary investigation, launched by the public prosecutor following the death of the applicant's brother, is still pending. They also state that when the public prosecutor establishes the identity of the perpetrators, he will bring a criminal case against the offenders and consequently the applicant will have a chance to take part in these proceedings as third party. The Government further submit that the applicant can initiate civil proceedings to request pecuniary and/or moral damage, once the public prosecutor concludes his preliminary investigation and brings a criminal case against the person responsible for Hüseyin Koku's death.

The applicant responds that the pending criminal investigation cannot be regarded as adequate or effective. The applicant further maintains that any purported remedy is illusory, inadequate and ineffective. 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.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to first use 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. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not 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, pp. 2275-76, §§ 51-52).

The Court notes that Turkish law provides civil and criminal remedies against illegal acts attributable to the State or its agents. It is the applicant's contention in the instant case that agents of the State were responsible for Hüseyin Koku's death.

With regard to criminal law remedies, the Court notes that there is a pending inquiry, commenced in April 1995, into the events of the present case. In assessing the effectiveness of the inquiry, the Court accepts that regard must be had to the time element involved in the present case, which is the central part of the applicant's complaint. The Court considers that the Government's preliminary objection as to the criminal procedure raises issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2432, §§ 76-78).

As regards a civil action for redress for damage sustained through illegal acts, the Court notes that pursuant to the Code of Obligations, a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, however, it is still unknown who was responsible for the acts of which the applicant complained.

Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the civil remedies.

It joins the preliminary objection concerning remedies in criminal law to the merits.

B. Merits

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 applications 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 by a majority

Decides to join to the merits the Government's preliminary objection based on the effectiveness of the criminal investigation into the death of Hüseyin Koku;

Declares the application admissible, without prejudging the merits of the case.

Michael O'BOYLE
Registrar

Elisabeth PALM
President