AS TO THE ADMISSIBILITY OF

Application No. 22491/93
by Ö.A.
against Turkey

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

MM. C. A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYUK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

Mr. H.C. KRÜGER, 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 9 August 1993 by Ö.A. against Turkey and registered on 23 September 1993 under file No. 22491/93;

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 30 March 1994 and the observations in reply submitted by the applicant on 12 May 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1976 and lives at Çinarönü Köyü, Savur district, Mardin province. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

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:

The applicant and his cousin S.A. were grazing the animals 1-2 kilometres from the village of Çinarönü on 14 February 1993. At around midday, about 50 soldiers from Savur Gendarme Station Command Headquarters came upon them.

The applicant believes that they were on their way from and/or to an operation. He thinks that this accounts for what he regards as the large number of soldiers.

The soldiers asked which way the terrorists had gone. The applicant and his cousin said that they had not seen them, whereupon the soldiers stripped the applicant and his cousin completely naked and began to beat them up. The soldiers also used abusive gestures and abusive language and threatened them with sexual violence. The beating lasted 20-30 minutes. The soldiers kept saying "You will show us where the terrorists are", even though the applicant believes that, in fact, they knew where they were. When the applicant and his cousin said that they did not know, they were beaten.

The soldiers left. The applicant and his cousin were in a state of shock from the beating. When they had got over the shock, they put their clothes back on and went back to the village.

The applicant and his cousin came up in bruises where they had been beaten and the applicant developed bronchitis. He saw a specialist doctor in Diyarbakir, Dr. Bedrettin Alyamaç. He did not tell the doctor that he had been beaten up, through fear of the consequences. He was told that the bronchitis could recur any time in cold weather.

The applicant feels insecure because whenever the soldiers are in the area, they allegedly ask people about the applicant and his cousin and abuse them.

On account of the lack of witnesses and fear of the consequences, the applicant has not filed a complaint.

The Government submit that an investigation was commenced into the complaints by the Savur Public Prosecutor in 1993 (exact date unspecified). This investigation is still pending but, the Government state, there exists no evidence in respect of the alleged incident.

COMPLAINTS

The applicant complains of violations of Articles 3 and 13 of the Convention.

As to the Article 3, he complains of having been subjected to severe physical ill-treatment including severe beating, of having been stripped naked in the cold, threatened with sexual violence and verbally abused. He states that he will seek to obtain a medical report on his condition at the time he was seen by the doctor. He maintains that his ill-treatment amounted to torture or constituted inhuman treatment.

As to the Article 13, he complains of the lack of any adequate and effective remedies against the alleged actions of security forces and police officers in the South-East of Turkey.

The applicant maintains that there is no requirement that he pursue alleged domestic remedies. In his opinion 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 torture, inhuman or degrading treatment at the hands 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.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 August 1993 and registered on 23 September 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 30 March 1994 after one extension in the time-limit. The applicant submitted observations in reply on 12 May 1994.

THE LAW

The applicant alleges that he and his cousin were beaten and severely ill-treated by soldiers. He invokes Article 3 (Art. 3) (prohibition on inhuman and degrading treatment) and Article 13 (Art. 13) (the right to effective national remedies for Convention breaches).

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 (Art. 26) of the Convention before lodging an application with the Commission.

The Government point out that there is an investigation by the public prosecutor at Savur into the allegations which is still pending.

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 carried out by soldiers, agents of the State. He refers to an administrative practice 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 ill-treatment or torture. He states that he is frightened of the consequences if he makes a complaint, having been told that security forces in the region have asked people about him and his cousin.

The Commission recalls that Article 26 (Art. 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 notes that while the Government refers to the pending inquiry by the public prosecutor into the complaints, almost two years have elapsed since the incident 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 alleged, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

The Commission also considers that it cannot be said at this stage that the applicant's fear of reprisals if he complained is wholly without foundation.

The Commission finds 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, 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 (Art. 26) of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the merits

The Government make no comment on the substance of the applicant's allegations beyond commenting that there exists no evidence in relation to the alleged incident.

The applicant maintains his submissions.

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 (Art. 27-2) 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.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)