AS TO THE ADMISSIBILITY OF

Application No. 22876/93
by Semse ÖNEN
against Turkey

The European Commission of Human Rights sitting in private on 15 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
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
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

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 15 September 1993 by Semse ÖNEN against Turkey and registered on 4 November 1993 under file No. 22876/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations and information submitted by the respondent Government on 2 May 1994, 17 August 1994 and on 30 March 1995 and the information and observations in reply submitted by the applicant on 5 July and 21 September 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin. She was

born in 1969 and lives at the Karatas village, Mazidag/Mardin in South-East Turkey. She 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 she brings the application on her own behalf and on behalf of her deceased mother, Mome, her deceased father, Ibrahim, and her deceased brother, Orhan, as well as on behalf of ten other surviving brothers and sisters.

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:

On 16 March 1993, the applicant's father, mother, her brother, Orhan, her sisters, Mekiye and Melek, and her younger infant brother, Hamdullah, and herself were at home. The other younger members of the family were at boarding school, one, Ercan, was in Diyarbakir. Another brother, Ihsan, was undertaking his military service in Merzifon, Amasya Province.

The family members were sitting together in the inner room in their two room house at about 21.00. What happened next is explained by the applicant in her statement:

> "There was a knock on the door, and my father went towards the door saying "Who is there?". Those outside gave the reply: "We are soldiers, we've come for a search". When my father said: "If you are soldiers then come with the village mayor, or I will not open the door", the voice outside said: "The mayor isn't here, he has gone to Istanbul, don't be afraid of us, we are going to do a search and go away". When upon this my father opened the door ajar, they pushed the door suddenly and surged inside.
>
> One of them quickly opened the bedroom door and started shooting at my brother Orhan who was sitting in the room. On this a violent struggle broke out between my father and the others. On the other side, my mother was fighting with the person who had shot my brother. When my mother pulled the scarf from the face of the man she was fighting with, there was a commando's beret on his head ... When my father pulled the scarf from the face of the man he was struggling with, he recognised him. The person he recognised was Ali Ertas, a protector from Balpinar village. My father shouted out: "Ali Ertas is this how you kill people?". And before my mother died she was crying "It is Balpinar protectors who are shooting us, let every one know"."

There is also a tape-recording made by a BBC reporter who had had interviewed local people about the incident. The recording confirms in broad outline the account given by the applicant.

The applicant believes that the intruders, probably two in number, planned to kill only her brother Orhan. Her parents were shot, she believes, because they had recognised their assailants and had identified one by name. The applicant herself identified the other person involved in shooting, when she heard Ali Ertas, who had been unmasked by her father, call out to his companion "Run Orhan". Orhan Ertas is the nephew of Ali Ertas. Both were known by the applicant to be village guards from the neighbouring Balpinar village. She however did not see the faces of the attackers. Both men were dressed in army camouflage clothes. Her sister, Mekiye, had hidden under the bedclothes in fear throughout the incident and saw nothing.

The applicant states that this was not the first attack by village guards on the village or the Önen family. Earlier attacks had

been made on the village, during which the Önen family had been a particular target of attack. This is attributed to the refusal of the village of Karatas to join the village protector system, in which the Önen family had apparently figured prominently.

The applicant, although injured, followed the killers out of the house into the garden. She saw about ten other men similarly masked to those who had broken into the house who appeared to have been keeping watch. She states that one of those shouted: "Shall we kill this girl too ?" However some of the villagers who had arrived at the scene who had licensed weapons fired them in the air and the group made off. They fled the village in the direction of the local Gendarme station, known as Etibank Fosfat Gendarme station, which was situated one and a half kilometres away.

On the applicant's return to the house, the applicant's mother, Mome Önen, was seen to be still alive. Several neighbours (Tahir Önen, Gullu Korkmaz and Mahmut Akkus) set out in a minibus to drive her to the hospital in Diyarbakir. The villagers in the minibus recount the failure of local police to assist. Their vehicle broke down in front of the Etibank Gendarme Fosfat station. Tahir Önen got out to seek assistance and to explain what had happened. He asked for a vehicle to take the injured woman who was bleeding to hospital. The commander, whom the neighbours name as NCO Salih, told them that as it was night time and dangerous he could not give them a vehicle. As a result, Mome Önen remained in the vehicle bleeding for a further half hour before the driver managed to repair the minibus.

The group then drove a further 15 kilometres to the Central Gendarme station in Mazidag district capital where the ambulances were kept. They explained the emergency and asked for an ambulance but were refused by the station commander. He gave no reason. The group was forced to drive on towards Diyarbakir hoping to reach the hospital there. However when they had travelled a further 39 kilometres and reached Cinar district, Mome Önen died. The villagers turned back and returned to Karatas village.

The applicant herself meanwhile had been taken in another vehicle to Diyarbakir Medical Faculty hospital where she was examined and treated by a doctor. She was at the hospital for about half an hour before returning home. As a result of the gunshot wound she lost part of the two middle toes of her left foot. While she is able to walk, she complains of deafness induced by the attack and of psychological after-effects.

The security forces did not come to the scene of the shootings until the following morning. It is the applicant's belief that the local gendarme commander knew that the attack was planned, if indeed it was not instigated by him or by other gendarmes. The basis of this belief is two previous attacks on the village and the applicant's home by the security forces. At the very least, she submits, the noise of the gunfire must have been heard at the gendarme station one and half kilometres away. In any event, the gendarmerie had been told about the shootings by the neighbours who drove Mome Önen to hospital.

Commander Salih with eight or nine soldiers arrived at the village at 5.00h. on 17 March 1993. This officer, according to the applicant's account, looked at the bodies and asked if the attackers were known. The applicant named the village protectors who had been identified as having done the killings. The commander made no comment but left an hour later having made no effort to investigate the incident.

Later that morning, the Mazidag State prosecutor, Yekta Cobanoglu, arrived along with a doctor and assistants. The applicant and others showed the prosecutor cartridges which they had collected from the house after the shooting. He declined to receive them,

stating that he had already taken some cartridges from the scene of the crime which would be sent for ballistic examination. The prosecutor did not undertake any on-site investigation. Nor did he interview anyone about the killings. A neighbour did show him a beret that had fallen from one of the attackers before throwing it into a stove.

The medical doctor accompanying the prosecutor, Dr. Bedat Isci, conducted a medical examination of the bodies and the post mortem report confirms that the three deceased died of gunshot wounds. A burial certificate was then issued to the relatives. The opening paragraph of the post mortem report states that the security forces knew of the killings the previous night at 20.00h.. (There is uncertainty about times since the applicant recalls the shooting incident as having occurred at 21.00h.) It is not clear if the gendarmes heard the shooting or if they learned of the incident only when informed by the relatives who sought a vehicle from the station in which to bring the applicant's mother to hospital. The report states that "because of security reasons they [gendarmes] could not go out by night".

On 20 March 1993, four days after the incident at around 9.00h, a group of five gendarmes came to the village and accompanied the applicant, her sister, Mekiye, and her brother, Ercan, along with several other relatives to Mazidag Gendarme station. There both Mekiye and she made statements which they both signed. The statements were taken by the Mazidag State prosecutor and by the station commander. In the applicant's statement, she repeated her accusation against the two village guards from Balpinar, whom she named.

However while they were at the station, the two protectors against whom she had laid the complaint, Ali Ertas and Orhan Ertas, were brought in. According to the applicant, they kissed the hand of the station commander, and turning to her and her sister, said in Kurdish: "Go and give this statement to the muhtar (village mayor), Muhittin Arac, who taught you this statement. This statement of yours is not valid here". After greeting the commander again the protectors then left. They were asked no questions in the presence of the applicant. Nor were the applicant or her sister asked a single question about the killings. Their statements were taken without comment except that the prosecutor stated, in answer to the applicant's query, that inquiries were continuing.

After several months, concerned that the family had heard nothing about a prosecution, the local village mayor, Muhittin Arac, sought and was granted an interview with the Minister for Justice, Mr. Seyfi Oktay, in Ankara. He cannot however recall the date of the meeting. The mayor explained the circumstances of the murders to the Minister and that two named village guards had been identified as the killers. The Minister stated that this was his first knowledge of the case and in the mayor's presence called the Mazidag State prosecutor on the telephone. He heard the Minister ask about the prosecutor's investigation and inquire what stage it had reached. After the telephone conversation had ended, the Minister without further explanation said to him: "We will deal with it."

However neither the mayor nor the family has heard anything further from the Minister about the case.

On 7 May 1993 at about 15.30h., the applicant's brother Ercan called at the offices of Mr. Yakta Cobanoglu, the Mazidag state prosecutor. His purpose was to inquire as to progress in the investigation of the murders. When he inquired about the case, the prosecutor told him: "I think your file is lost at the gendarme station because I have not received it. I don't know of developments." He also said to Ercan Önen: "Don't put too much pressure on me. I cannot push this incident too far." Ercan Önen was left with the impression from this conversation that the prosecutor may have been

threatened.

On 19 May 1993, the newspaper Özgür Gündem published a story about the failure to prosecute in the case of these murders and included a statement from unnamed relatives (not the applicant or her siblings), which named again the two protectors who had been accused by the applicant in her statement to the prosecutor. The prosecutor, when approached by the newspaper for comment, stated that he was not permitted to speak to the press and according to the news story added: "Don't put me in a difficult position."

The respondent Government state as follows.

On the morning of 17 March 1993, the public prosecutor of Mazidag arrived at the village and carried out an on-site investigation. On 7 July 1993, the public prosecutor issued a decision of lack of jurisdiction and sent the file to the State Security Court at Diyarbakir.

On 6 January 1994, the public prosecutor at the State Security Court filed an indictment against Ali Ertas and Orhan Ertas relating to the killing of the applicant's parents and brother.

The Government state however that ballistics examinations (report from the forensic police laboratory dated 29 April 1994) reveal that bullets were found from three guns and that none could have been fired from Ali Orhan's Kalashnikov assault weapon. They also refer to a statement made to the Ministry of the Interior by the applicant (which the applicant denies having made) which is dated 1 April 1994 and in which it is alleged that the applicant explained that the PKK had lent a taxi to her brother, Orhan, which he had used for his private benefit. The deduction drawn from this is that the applicant's brother's actions had rendered his family a target of the PKK. The Government also refer to alleged discrepancies between the statement made by the applicant to the gendarme commander on 5 April 1993 and the statement made in her application to the European Commission of Human Rights.

B. Relevant domestic law and practice

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject someone 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 fifteen 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, 8, 13 and 14 of the Convention.

As to Article 2, the applicant alleges that the killings on 16 March 1993 were carried out by armed members of the Balpinar village guards and were instigated by the Gendarmerie who had previously attacked the Önen family home in the company of village protectors. In any event, the State's responsibility is engaged, since the village guard is a part of the security system. The killings of the applicant's father and brother as well as the attempted killing of the applicant herself constitute violations of Article 2. So does the shooting of her mother who died later. The failure of the Gendarmerie Commander to offer assistance, when informed that a seriously wounded person was being carried in a vehicle, as well as the similar failure of the Commander in the Central Gendarme Station to supply an ambulance, constitute failure by agents of the State to protect life in violation of Article 2.

As to Article 3, the applicant alleges that the subjection of herself, her sisters and surviving brothers to the experience of an armed attack in their home, in which they witnessed their parents and brother mortally wounded by gunfire constitutes inhuman treatment in violation of Article 3.

As to Article 6, the applicant alleges that the failure to properly investigate, and to prosecute those against whom there is direct evidence of having carried out the killings, represents a violation of Article 6, since unless there is a successful prosecution, the surviving family members will be denied any possibility of compensation and thereby the right of access to a court.

As to Article 8, the applicant alleges that the attack on the family home constitutes an invasion of the rights to respect for the family life and home of the applicant and her siblings, which are protected by Article 8. Moreover, the surviving members of the family, including infants and children, have been deprived of the right to respect for family life as a result of the murder of their parents.

As to Article 13, the applicant alleges that there are no effective remedies before a national authority for the violation of the right to life and other fundamental Convention rights in South-East Turkey.

As to Article 14, the applicant alleges that she and her family

were victims of violations of human rights because they were Turkish citizens of Kurdish origin. Consequently, Article 14 has been violated in conjunction with Articles 2, 3, 6, 8 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 September 1993 and registered on 4 November 1993.

On 10 January 1994, 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 2 May 1994 after one extension in the time-limit. The applicant submitted observations in reply on 5 July 1994. The Government submitted further observations on 17 August 1994 and the applicant's further observations were submitted on 21 September 1994.

On 16 December 1994, the Commission examined the state of proceedings and the Government's request to adjourn the proceedings pending the outcome of the case before the State Security Court. It decided to request further information concerning the progress made in the criminal proceedings. The Government were requested to provide the information by 20 February 1995.

By letter dated 30 March 1995, the Government provided a number of reports and statements without specifying the state of proceedings in the case before the State Security Court.

THE LAW

The applicant alleges that her parents and her brother were killed in circumstances for which the State is responsible. She invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (the right to respect for family life and home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches) and Article 14 (Art. 14) (prohibition on discrimination) of the Convention.

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 are ongoing criminal proceedings before the State Security Court at Diyarbakir in which the two alleged assailants are indicted in relation to the killings of the applicant's parents and brother. In these proceedings, the applicant could intervene and, on any decision of acquittal, appeal to the High Court of Appeals.

Further, the Government submit that the applicant has the possibility of introducing an action in the civil courts against the alleged wrongdoers for compensation in respect of the killing of her parents and brother.

The applicant maintains that there is no requirement that she 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. She 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. She also refers to the delay in any action being taken by the authorities and the way that steps only appear to have been taken after the application was communicated to the Government by the Commission. She comments strongly on the innuendo cast by the Government alleging that her brother was involved with the PKK who killed him and finds this allegation incompatible with the fact that criminal proceedings are now brought against the two village guards.

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 she had at her disposal adequate remedies to deal effectively with her complaints.

The Commission recalls that the incident in which the applicant's parents and brother died occurred on 16 March 1993, more than two years ago, and that it appears that the assailants accused by the applicant were indicted in respect of the killings on 6 January 1994. Despite a request for information by the Commission about the progress of these criminal proceedings, no further clarification has been received. In the absence of any apparent progress having been made in the proceedings and in view of the delays involved and the serious nature of the crimes alleged, the Commission is not satisfied that these proceedings can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention. It also finds it curious that the village guards accused by the applicant are subject to an indictment whereas the Government allege that the forensic and other evidence is exculpatory and suggest that the PKK may be responsible for the attack.

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 investigation commenced by the public prosecutor and referred to the State Security Court (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 refer to the discrepancies in the applicant's statements and the contradictions between what she alleges and the facts collected by the authorities. They rely on the ballistics reports which indicate that three different weapons were used and that the weapon of one of the alleged assailants is shown not to be implicated. They submit that the preliminary investigation was thoroughly and seriously carried out.

The applicant maintains her 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 (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)