AS TO THE ADMISSIBILITY OF

Application No. 23180/94
by Mizgin OVAT
against Turkey

The European Commission of Human Rights sitting in private on 3 April 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 20 December 1993 by Mizgin OVAT against Turkey and registered on 7 January 1994 under file No. 23180/94;

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 5 December 1994 and the observations in reply submitted by the applicant on 13 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin, born in 1973 and resident at Diyarbakir. She is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of the University of Essex, England.

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

A. Particular circumstances of the case

The applicant states that the following occurred.

Early in the morning of 24 June 1993, 500-600 soldiers connected to Lice and Diyarbakir Gendarme Stations performed a raid on the 200 household village of Pecar in Lice district, Diyarbakir province. The raid was in apparent response to an armed attack which had been carried out the day before by PKK guerillas on Ücdamlar Gendarme Station in Ücdamlar hamlet in Pecar village.

When the soldiers came to the village on 24 June - some on foot and some in armoured cars - they first set fire to a lorry owned by a villager. At about 08.00, they blockaded the whole village. They ejected the applicant and her family from their house. They poured petrol over the house and set fire to it. They fired indiscriminately right and left. The soldiers ill-treated the men in the village. They collected the whole village, i.e. women, girls, children etc., next to the water channel which runs through the centre of the village and started to burn down the houses. Women and children started to cry and were threatened by the soldiers. They threw themselves into the water channel from fear and waited there for hours.

The applicant's family consists of seven persons (father, mother, one sister, three brothers and the applicant herself). Their house was burned down on 25 June 1993. After the house had been burned down, the applicant and her family were told by the soldiers to leave the village. They fled to another village and from there to Lice. They now live in Diyarbakir. They were able to save two cows from their animals, whereas one goat and nearly twenty chickens of theirs were slaughtered and eaten by the soldiers.

The respondent Government state as follows.

No armed clash took place between the security forces and the PKK on 23-24 June 1993 and no attack was launched by the PKK on the gendarmerie station in Ücdamlar on 23 June 1993. What occurred was this. On 24 June 1993 at about 09.00 a team of gendarmes climbing the hill known as Gildiris, were ambushed by the PKK and one gendarme was killed. The PKK fled when armoured vehicles went to the assistance of the gendarmes. After a search, one of the terrorists was found dead.

The Government further state that they have been informed by the mayor of the village of Güldiken that Mizgin Ovat is currently wanted for evading military service which would indicate that he is a man, not a woman as stated in the application.

The Government submit that the authorities report that a number of villages in this area have been deserted as a result of intimidation by terrorists and of the impact on conditions of life by terrorist activity, which, for example, obstructs public works and public utilities.

COMPLAINTS

The applicant complains of violations of Articles 3, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

As to Article 3, she submits that the subjection of herself, her mother, sister and father to threats of being killed, their witnessing of the deliberate destruction by fire of their home and possessions, the experience of seeking refuge in the water channel and their forced flight amount to a form of collective punishment and to inhuman and degrading treatment.

As to Article 6, she complains of the absence of any procedure by which she may pursue a claim for compensation before an independent and impartial tribunal.

As to Article 8, she submits that the deliberate destruction of home and possessions constitutes an interference with the right to respect for home and private and family life, for which there is no justification under paragraph 2 of Article 8.

As to Article 13, she complains of the absence of any effective remedy and refers to the arguments presented in application No. 21895/93, Cagirga v. Turkey.

As to Article 14, she considers that she and her family have been subjected to discrimination on grounds of race or ethnic origin in the enjoyment of their rights under Articles 3, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1, since the violations of their rights occurred because of their Kurdish origin.

As to Article 18, she submits that the destruction of her home and family life, her possessions and livestock, and the forced expulsion of her and her family from the Pecar village occurred for purposes which are alien to the Convention (intimidation of villagers in order to prevent them from offering support to the PKK).

As to Article 1 of Protocol No. 1, she complains of the deliberate setting fire to the family home and possessions and the destruction of livestock.

As to the exhaustion of domestic remedies, the applicant considers that she is released from any obligation to pursue a domestic remedy under Article 26 of the Convention because no remedy in the circumstances could possibly prove adequate or effective.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 December 1993 and registered on 7 January 1994.

On 9 May 1994 the Commission decided to communicate the application to the Turkish Government who were invited to submit their observations on its admissibility and merits before 8 August 1994. At the Government's request, this time-limit was subsequently extended until 30 September 1994.

By letter of 24 October 1994, the Commission's Secretary informed the Government that their request for a further extension had been refused by the President of the Commission on the ground that five months had elapsed since the application had been communicated. It was added that the application would be considered by the Commission at its session commencing on 9 January 1995.

Observations were submitted by the Turkish Government on 5 December 1994. Observations in reply were submitted on behalf of the applicant on 13 February 1995.

THE LAW

The applicant complains of violations of Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (respect for family life and home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition on discrimination) and Article 18 (Art. 18) (prohibition on using authorised Convention restrictions for ulterior purposes), as well as Article 1 of Protocol No. 1 (P1-1) to the Convention (the right to property), in respect of the raid in the course of which her home and possessions were destroyed.

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition.

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. They contend that the applicant had a number of remedies at her disposal which she did not try.

In respect of damage alleged to have been caused by the State, the Government submit that the applicant had the possibility of introducing an action for compensation before the administrative courts. They refer to the material submitted to the Commission in the applications of Akduvar and others v. Turkey (No. 21893/93, Dec. 19.10.94) and Çagirga v. Turkey (No. 21895/93, Dec. 19.10.94) which indicates in their view that the administrative courts issue judgments on the basis of "absolute" or objective liability of the administration or on the basis of faults or negligence of administrative agents. They submit that there is no basis for the applicant's assertion that there is no procedure for victims to pursue compensation and submit that the courts interpret the emergency provision (Art. 7 of decree no.285 as amended by decree no. 425 on 9 May 1990) as barring actions against the Governor of the emergency region only insofar as they seek the annulment of acts performed under the decree concerned.

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 the agents of the State. None of the remedies suggested by the Government could be regarded as effective, in the applicant's view, because the scale of destruction of villages, as well as the expulsion and creation of internal refugees, is so great in South-East Turkey that this must be considered high-level Government policy - an administrative practice - in regard to which all remedies are theoretical and irrelevant.

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 if they pursue remedies; the lack of genuine investigations by public prosecutors and other competent authorities; the absence of any cases showing the payment of adequate compensation to villagers for the destruction of their homes and villages, or for their expulsion; and the lack of any prosecutions against members of the security forces for the alleged offences connected with the destruction of villages and forcible expulsions.

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 refers to its findings in Application No. 21893/93, Akduvar and others v. Turkey (Dec. 19.10.94) which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact that there has been destruction of villages in South-East Turkey with many people displaced as a result. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it significant that, although the destruction of houses and property has been a frequent occurrence in South-East Turkey, the Government had not provided a single example of compensation being awarded to villagers for damage comparable to that suffered by the applicants. Nor had relevant examples been given of successful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers.

The Commission considered that it seemed unlikely that such prosecutions could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to effect the permanent or temporary evacuation of villages, to impose residence prohibitions or to enforce the transfer of people to other areas. It further had regard to the vulnerability of dispossessed applicants, under pressure from both the security forces and the terrorist activities of the PKK and held that it could not be said at this stage that their fear of reprisal if they complained about acts of the security forces was wholly without foundation.

The Commission concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the present case, the Government have not provided any additional information which might lead the Commission to depart from the above conclusions. This application cannot, therefore, be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

Abuse of the right of petition

The Government maintain that the application, which is defamatory and composed of hollow calumnies, abuses the right of individual petition.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government state that no armed clash took place between the security forces and the PKK in the village of Pecar on 23-24 June 1993 and that no attack occurred on 23 June 1993 on the gendarmerie station in Üçdamlar hamlet. They refer instead to an ambush on a team of gendarmes by the PKK which occurred on 24 June 1993 on the hill" Gildiris" in the course of which one gendarme and one terrorist were killed. They cast doubt on the authenticity of the application in that the mayor of the village Güldiken referred to Mizgin "Ivat" as being wanted by the authorities for evading military service, which would indicate that he is a young man not, as stated in this application, a

woman.

The Government reject as defamatory the allegation that the security forces carried out an attack on the village. They state that the authorities report that in this area a number of villages have been deserted because of the intimidation from terrorists and the worsening standards of living resulting from terrorist activities which obstruct public works and utilities.

The applicant maintains her account of the attack by security forces on the village and refers to statements made by the applicants in other applications concerning the same incident (eg. Dündar v. Turkey, No. 23182/94, Dec. 28.11.94). With regard to the alleged doubt as to her identity, she contests that she is a male and offers to clarify any confusion by submitting further confirmation.

The applicant further refutes the Government's claim that villages are being voluntarily deserted. She claims that the forced evacuation of villages has been well-documented by human rights organisations eg. Helsinki Watch report October 1994, Vol. 6, no. 12 "Forced Displacement of ethnic Kurds from southeastern Turkey."

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.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)