CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28632/95
by Mahmut SÜNNETÇİ
against Turkey

The European Court of Human Rights (First Section), sitting on 28 March 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr B. Zupančič,
Mr T. Panţîru,
Mr R. Maruste, *judges*,
Mr F. Gölcüklü, ad hoc *judge,*
and Mr E. Fribergh, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 18 July 1995 and registered on 21 September 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 Commission's partial decision of 13 January 1997,

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 is a Turkish national, born in 1967 and living in Diyarbakır.

He is represented before the Court by Mr Sezgin Tanrıkulu, a lawyer practising in Diyarbakır.

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

A. Particular circumstances of the case

On 22 August 1994 the applicant was taken into custody in Diyarbakır on suspicion of membership of the PKK.

On the same date the applicant was seen by a doctor at the Diyarbakır State Hospital who noted in his report that there were no signs of beating or injuries consistent with the use of force on his body.

By a letter dated 30 August 1994 the Diyarbakır Police Headquarters informed the Diyarbakır State Hospital that the applicant was suffering from bad health and that he must be examined by a doctor.

In a medical report prepared by Dr Serda Ballı in the Diyarbakır State Hospital on the same date it is noted that the applicant was suffering from fever and nausea.

On 31 August 1994 the applicant was interrogated by police officers. During his interrogation he confessed in detail to his involvement in the illegal activities of the PKK such as bombings, producing explosives and organising the sub-committees of the organisation. The applicant alleges that he was severely tortured during the interrogation.

On 31 August 1994 at 3:00 p.m. three guardians who were in charge from 30 August 1994, 7:00 p.m. to 31 August 1994, 8:00 a.m. prepared a document which stated that it has been observed that the applicant, after having complained of the warmth in the cell, had taken off his shirt and had rubbed his back against the edge of the fixed concrete bed and thus bruises had occurred on his back.

On 1 September 1994 the applicant was transferred to the Dicle University Medical Hospital due to his serious condition.

On 2 September 1994 the applicant gave a statement in the hospital to the public prosecutor nr. 25111 in the Diyarbakır State Security Court. The applicant denied the allegations against him. He stated that he was tortured to sign a statement drafted by the policemen when he was blindfolded. He further stated that he had no health problems before he was taken into custody. The prosecutor noted, with regard to the applicant's medical report, that the applicant was suffering from acute renal insufficiency (*akut böbrek yetmezliği*).

On 2 September 1994 the applicant was detained on remand by the Diyarbakır State Security Court judge.

On 13 September 1994 the public prosecutor in the Diyarbakır State Security Court filed a bill of indictment with the same court. The prosecutor gave the account of the illegal acts in which the applicant allegedly involved such as providing explosives to the other members of the PKK, establishing the provincial committee of the organisation, bombings of premises of banks and of a political party. Having considered the statement of the applicant the prosecutor requested that the applicant be convicted and sentenced under Article 125 of the Turkish Criminal Code (*Türk Ceza Kanunu*).

In two hearings before the Diyarbakır State Security Court on 1 May 1995 and 6 July 1995 the applicant's representative stated that the applicant was subjected to torture while he was in custody. He further stated that the court, as an evidence of torture, should consider the fact that the prosecutor questioned the applicant in the hospital. He pointed out that torture was an illegal act under Turkish law and according to the international conventions Turkey had ratified. He finally requested the court to initiate an investigation into the applicant's allegation of torture pursuant to Articles 151 and 152 of the Code of Criminal Procedure. In these two hearings the court decided that it would consider the applicant's allegation of torture when the court delivers its final decision.

In a letter of 12 April 1997, in which reference is made to the applicant's application to the European Commission of Human Rights, the Ministry of Justice, International Law and Foreign Relations Directorate (*Adalet Bakanlığı, Uluslararası Hukuk ve Dış İlişkiler Genel Müdürlüğü*) requested the public prosecutor at the Diyarbakır State Security Court to initiate an investigation into the applicant's allegation of torture, in case such an investigation had not already been conducted.

On 26 February 1998 the Commission of Prosecution of Civil Servants in the Diyarbakır province (*Diyarbakır Valiliği Memurin Muhakematı Komisyonu*) decided that concerning the applicant's allegation of torture no prosecution should be brought against the police officers Mustafa Bölük and Hasan Koçak. It is noted in the decision that there existed no evidence to substantiate that the police officers had committed the alleged crime.

On 11 August 1998 the applicant filed an appeal with the Supreme Administrative Court (*Danıştay*) against the decision of the Commission of Prosecution of Civil Servants. The applicant reiterated his allegation of torture. He maintained that he was hospitalised as a result of the torture in police custody.

On 22 December 1998 the Diyarbakır State Security Court acquitted the applicant. The court held that there existed no evidence to convict the applicant other than the statement he gave while he was in police custody.

B. Relevant domestic law and practice

i. *Criminal law and procedures*

Article 17 of the Turkish Constitution provides:

"...

No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity.

...”

Article 243 of the Criminal Code (*Türk Ceza Kanunu*) provides:

“A President or member of a court or official body or any other public official who, in order to extract a confession of guilt in respect of a criminal offence, tortures or ill-treats any person, or engages in inhuman conduct or violates human dignity, shall be punished by up to five years' imprisonment and disqualified from holding public office temporarily or for life.

...”

Article 245 provides:

“Civil servants charged with the forcible execution of an order, police officers and any other officials charged with enforcement who, either of their own accord or on the orders of their superiors, enforce the order concerned in an unlawful manner or who, in doing so, ill-treat, strike or cause bodily harm to another shall be punished by between one and three years' imprisonment and temporarily disqualified from holding public office.”

For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure (*Türk Ceza Muhakemeleri Usulü Kanunu*, hereinafter CCP), with the public prosecutor or the local administrative authorities. 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 by conducting the necessary inquiries to identify the perpetrators (Article 153 CCP).

A public prosecutor may institute criminal proceedings if he or she decides that the evidence justifies the indictment of a suspect (Article 163 CCP). If it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, the public prosecutor may close the investigation. However, the public prosecutor may decide not to prosecute if, and only if, the evidence is clearly insufficient (Article 164 CCP).

Insofar as a criminal complaint has been lodged, a complainant may file an appeal with Assize Court (*Ağır Ceza Mahkemesi*) against the decision of the public prosecutor not to institute criminal proceedings. This appeal must be lodged within fifteen days after notification of this decision to the complainant (Article 165 CCP).

ii. *State of Emergency*

Since approximately 1985, serious disturbances have raged in the south-east part of Turkey between security forces and members of the PKK. This confrontation has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law no. 2935, 25 October 1983). The first, Decree no. 285 (10 July 1987), established a State of Emergency Regional Governorate in ten of the eleven

provinces of south-eastern Turkey, including the Province of Diyarbakir. Under Article 4(b) and (d) of the Decree, all private and public security forces and the Gendarme Public Peace Command are at the disposal of the Regional Governor.

The second, Decree no. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

<Translation>

> "No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damage suffered by them without justification."

iii. *Prosecution for terrorist offences and offences allegedly committed by members of the security forces*

Under section 3 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in Article 168 of the Criminal Code is classified as a "terrorist act". Under section 4, the offence defined in Article 169 of the same Code is classified in the category of "acts committed to further the purposes of terrorism".

Pursuant to section 9 (a) of Law no. 2845 on the Procedure in the State Security Courts, public prosecutors are deprived of jurisdiction in cases of alleged terrorist offences in favour of a separate system of State Security prosecutors and courts established throughout Turkey. Only these courts are competent to try cases involving the offences defined in Articles 168 and 169 of the CCP.

Public prosecutors are also deprived of jurisdiction with regard to offences alleged against members of the security forces in the State of Emergency Region. Article 4 § 1 of the Decree no. 285 provides that all security forces under the command of the Regional Governor shall be subject, in respect of acts performed in the course of their duties, to the Law on Proceedings on the Prosecution of Civil Servants.

Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must issue a decision of non-jurisdiction and, depending on the suspect's status, transfer the file to either the District or the Provincial Administrative Council (*İlçe* or *İl idare kurulu*). These councils are made up of civil servants and are chaired by the District or Provincial Governor. They conduct the preliminary investigation and decide whether or not to prosecute. These councils have been criticised for their lack of legal knowledge, as well as for being easily influenced by the District or Provincial Governors, who also head the security forces.

An appeal against a decision by a District Administrative Council lies with the Regional Administrative Court (*Bölge İdare Mahkemesi*). If a decision not to prosecute is taken, the case is automatically referred to that court. An appeal against a decision taken by a Provincial Administrative Council lies with the Supreme Administrative Court (*Danıştay*). If a decision not to prosecute is taken, the case is automatically referred to the Council of State.

If a decision to prosecute has been taken, the case is referred to the public prosecutor for further action.

iv. *Administrative liability*

Article 125 §§ 1 and 7 of the Turkish Constitution provide as follows:

"All acts or decisions of the administration are subject to judicial review…
…
The authorities shall be liable to make reparation for all damage caused by their acts or measures."

This provision is not subject to any restriction even in a state of emergency or war. The second paragraph does not require proof of the existence of any fault on the part of the administration, whose responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as the theory of "social risk". Thus the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

v. *Civil action for damages*

Pursuant to Article 41 of the Civil Code, anyone who suffers damage as result of an illegal act or tort may bring a civil action seeking reparation for pecuniary damage (Articles 41-46) and non-pecuniary damage. 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).

COMPLAINT

The applicant complains under Article 3 of the Convention that he was tortured while he was in police custody.

PROCEDURE

The application was introduced on 18 July 1995 and registered on 21 September 1995.

On 13 January 1997 the European Commission of Human Rights decided to communicate the applicant's complaint that he was subjected to torture in police custody to the respondent Government and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 20 June 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 8 August 1997.

On 23 January 1998 the Commission granted the applicant legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant complains that he was tortured in police custody. He invokes Article 3 of the Convention.

Article 35 of the Convention

The Government submit that the applicant has failed to exhaust domestic remedies within the meaning of Article 35 of the Convention.

The Government point out that the investigation of an alleged crime can be carried out in three different ways under Turkish law. Firstly, the victims of the alleged crime can lodge complaints with the public prosecutor's office. Secondly, if 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 by conducting the necessary inquiries to identify the perpetrators. Lastly, the Minister of Justice can request the competent public prosecutor to initiate an investigation.

They argue that, in the instant case, the applicant complained to the public prosecutor that he was tortured in police custody. However, he did not specify where and when he was subjected to torture and the identity of the police officers who allegedly tortured him. The Government, therefore, conclude that failing to do so the applicant cannot be considered to have exhausted domestic remedies.

The Government observe that after the application was communicated to the Government an investigation was initiated by the public prosecutor at the Diyarbakir State Security Court by the order of the Ministry of Justice. The applicant should have waited the outcome of these proceedings before lodging his complaint with the Commission.

In case it would be found that the above remedies cannot be regarded as effective, the Government submit that the application has been lodged out of time. They claim that the applicant should have lodged his application in six months after the act complained of.

The applicant contests the Government's submissions. He argues that the national authorities were aware of his allegation of torture with regard to the fact that he was questioned by the public prosecutor in the hospital on 2 September 1994 and that the prosecutor has noted his medical situation. Furthermore, the applicant maintains that the medical report prepared in the Dicle State Hospital on 30 August 1994 clearly stated that he was suffering from fever and nausea. The applicant finally submits that his representative stated in the hearings before the Diyarbakir State Security Court that he was subjected to torture while he was in custody.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first 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. However, Article 35 § 1 does not require 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 an investigation into the applicant's allegation was, in fact, conducted by the national authorities after the case communicated to the respondent Government. However, it is not here solely concerned with the question whether this proceeding was effective and adequate; it must also examine whether in all the circumstances, the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress.

In this respect the Court considers that, even if it were accepted that the applicant made no complaint to the public prosecutor of torture in police custody, the public prosecutor must have realised that the applicant could have been subjected to torture since he had taken the applicant's statement in the hospital and had noted his medical situation. However, the prosecutor chose to make no inquires, despite the fact that in Turkish law he was under a duty to investigate (see relevant domestic law).

Insofar as the Government argues that the application has been filed out of time in that it was introduced more than six months after the alleged act complained of, the Court reiterates that where no domestic remedy is available the six months' time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of in the application (cf. Eur. Comm. HR, No. 23413/94, Dec. 28.11.95, D.R. 83, p. 31).

However, special considerations could apply in exceptional cases where applicants first avail themselves of a domestic remedy and only at a later stage become aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six months period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (cf. Eur. Comm. HR, No 23654/94, Dec. 15.5.95, D.R. 81, p. 76).

In the present case, it appears that the applicant complained of the allegation of torture during the proceedings before the Diyarbakir State Security Court in the two hearings took place on 1 May 1995 and 6 July 1995. However, the court decided that it would consider the applicant's allegation when it delivers its final decision.

It further appears that the applicant has lodged his application under the Convention on 18 July 1995 after having started to doubt that no effective investigation would be initiated into his allegation of torture by the national authorities. In these circumstances, the Court accepts that the six months' time limit within the meaning of Article 35 § 1 of the Convention started to run as from 6 July 1995 at the earliest and consequently, that the application has been brought within this time-limit.

In the light of the foregoing, the Court concludes that the Government's preliminary objection in this respect must be dismissed.

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

application 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,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Erik Fribergh
Registrar

Elisabeth Palm
President