AS TO THE ADMISSIBILITY OF

Application No. 26129/95
by Mustafa Tanli
against Turkey

The European Commission of Human Rights sitting in private on 5 March 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
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
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. ŠVÁBY
G. RESS
A. PERENIi
C. BÎRSAN
P. LORENZEN
K. HERNDL

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 22 December 1994 by Mr. Mustafa Tanli against Turkey and registered on 5 January 1995 under file No. 26129/95;

Having regard to :

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

- the Commission's decision of 10 April 1995 to communicate the application;

- the observations submitted by the respondent Government on 2 August 1995 and the observations in reply submitted by the applicant on 23 October 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1933 and lives in Airi. 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:

The applicant states that the following occurred:

On 26 and 27 June 1994, the Central Commander, the Station Commander and a group of soldiers from the Doiubeyazit Central Command arrived at the village of Ortulu to make a search. The soldiers gathered all the villagers outside the mosque.

The applicant's son, Mahmut Tanli, conducted some of the soldiers round the village as they searched the applicant's house. The Station Commander and the Central Commander questioned the applicant about his son Mahmut Tanli and the applicant told them that he was walking round the village with the soldiers. The group of soldiers from Doiubeyazit Central Command left the village on 26 or 27 June 1994. They took Mahmut away with them. At the time he was taken away, Mahmut Tanli was in good health and condition.

On 27 or 28 June 1994, the police informed the applicant and his family that Mahmut Tanli had died of a heart attack while in police custody and that they wished to hand over his body to the family.

The body of Mahmut Tanli was delivered by the police to the applicant and his family at Uluyol neighbourhood police station on 27 or 28 June 1994. There were clear marks of force on the body and a large incision (which had been stitched) running down the left breast towards the upper abdomen.

The police claimed that Mahmut Tanli had died of a heart attack while in custody and that the incision was the result of an operation carried out when he had a heart attack. Mahmut Tanli had no known or suspected heart disease or heart defect before he was taken into custody. The police asked the applicant to sign a document, which he did sign without knowing what it was, because he was afraid for his own safety. Mahmut Tanli was not known to have committed any criminal offence or suspected of having done so.

The applicant was afraid to request or arrange a forensic examination of Mahmut Tanli's body, which he believed might lead to reprisals against him or other members of his family.

The respondent Government state the following:

On 27 June 1994, pursuant to information received from a former PKK member and other documentary evidence, Mahmut Tanli was taken into custody in Uluyol Police Station on suspicion of aiding and abetting the PKK.

During his questioning, Mahmut Tanli first refused the allegations. When the police officers gave details about his alleged connections with the PKK, he got excited, began stammering and trembling. His voice changed. He went pale. The police stopped the interrogation and called a doctor. Dr. Y. A. arrived at the police station within a few minutes. At that time, Mahmut Tanli's pulse was slow and irregular. Dr. Y. A. asked the policemen to call an ambulance and fetch some medicine. Mahmut Tanli's life functions gradually weakened and within three minutes he died.

Dr. Y. A. did not observe any wounds or bruises on the body.

The Public Prosecutor arrived at the police station soon. Mahmut Tanli's body was taken to the Agri State Hospital for an autopsy.

According to the autopsy report, there was no trace of lesions, traumas or use of force on the head. There was no fresh ecchymosis on the body. After the external examination, the breast, the abdominal part and the head were opened and the internal organs were examined. The autopsy report concluded that the death resulted from a cardiac arrest.

The Public Prosecutor proposed the applicant to send the body to the Forensic Medical Institute in istanbul for a further examination. The applicant, who had first agreed and filed a request in this respect, withdrew his request after talking to the other members of the family.

The Public Prosecutor immediately started an investigation into the death of Mahmut Tanli. He questioned the three police officers involved in the interrogation of Mahmut Tanli. He wrote to the Military Recruitment office in Doiubeyazit and asked

for the records on Mahmut Tanli's physical condition during his military service. He summoned and took the statements of a number of witnesses.

On 12 August 1994 the Public Prosecutor issued an indictment and started criminal proceedings against three police officers involved in the questioning of Mahmut Tanli.

In the course of four hearings between 22 September 1994 and 2 January 1995, the Airi Assize Court (Aiir Ceza Mahkemesi) took evidence from the accused and the witnesses. The Court then decided to send the file to the Forensic Medicine Institute in istanbul to receive its opinion on the death of Mahmut Tanli.

On 5 May 1995 the Court decided that the body of Mahmut Tanli be exhumed and sent to Forensic Medicine Institute in istanbul for a forensic examination. The Government have been requested to submit, before 31 January 1996, information on the contents of any opinion which may have been delivered by the Forensic Medical Institute and of any further decision which may have been taken by the Airi Assize Court. The Commission has not received any documents or information from the Government in this respect.

COMPLAINTS

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

As to Article 2 he complains of the death of Mahmut Tanli while in police custody. He also refers to the lack of any effective state system for ensuring protection of the right to life and to the inadequate protection of the right to life in domestic law.

As to Article 3 he refers to acts of torture inflicted on Mahmut Tanli by agents of the State. He also complains of his inability to discover the circumstances in which his son was killed.

As to Article 5 the applicant refers to the unlawful arrest and detention of his son.

As to Article 13 he complains of the absence of an independent national authority before which his complaints under the Convention can be brought with any prospect of success.

As to Article 14 in conjunction with all the above articles of the Convention the applicant alleges that he and his son have been discriminated against on the ground of their Kurdish origin.

As to Article 18 he complains that the restrictions on his rights and freedoms under the Convention are applied for purposes not permitted under the Convention.

The applicant maintains that there is no requirement that he pursue alleged domestic remedies.

According to him, any alleged remedy is illusory, inadequate and ineffective because:

a) the torture and killing of Mahmut Tanli were carried out by agents of the Turkish State; in his view there is strong evidence that such acts have been repeated, and that they have received official tolerance;

b) there is an administrative practice of not respecting the rule which requires the provision of effective domestic remedies;

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) the applicant and other relatives and friends of Mahmut Tanli are afraid to pursue complaints to the Turkish State authorities about the torture and killing of Mahmut Tanli, which they fear would lead to reprisals against them by agents of the Turkish State.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 December 1994 and registered on 5 January 1995.

On 10 April 1995 the Commission decided to communicate the application to the Government and ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 2 August 1995 after one extension in the time-limit. The applicant's observations in reply were submitted on 23 October 1995.

THE LAW

The applicant complains that his son was killed while he was in police custody. He invokes Article 2 (the right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 5 (the right to liberty and security of person), Article 13 (the right to effective national remedies for Convention breaches), Article 14 (prohibition on discrimination) and Article 18 (prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention.

Exhaustion of domestic remedies

The Government submit that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is in his opinion illusory, inadequate and ineffective, since, inter alia, the torture and killing of Mahmut Tanli were planned and executed by agents of the State. He refers to an administrative practice of torture and unlawful killings giving rise to a presumption that the local remedies are not effective.

The applicant also alleges that, 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;

The Government point out that the criminal proceedings instituted against the police officers before the Airi Assize Court (Aiir Ceza Mahkemesi) are still pending and that the applicant filed his application with the Commission without awaiting the outcome of these proceedings. The Government further submit that the case before the Airi Assize Court proceeds effectively without any delays or irregularities. They refer to certain provisions of the Turkish Criminal Code under which, they submit, the accused officers, if found guilty by the Court, could be sentenced to from eight to fifteen years' imprisonment.

The applicant submits that the information given by the respondent Government as regards the pending criminal proceedings are not supported by documentary evidence. He further submits that the Government's observations do not reveal the content or terms of the indictment drawn up against three police officers. The applicant points out that the last step in the proceedings was a decision dated 5 May 1995 ordering that the remains of Mahmut Tanli be exhumed and sent for a forensic examination and that no progress appears to have been made since that time.

The Government refute the applicant's allegation that the applicant is afraid of pursuing the remedies before the national authorities because of fears of reprisals. They submit in this regard that should the fears of reprisals have been well-founded, the applicant would have been afraid to bring an application before the Commission through the local Human Rights Association and the Kurdistan Human Rights Project.

The applicant maintains that such a fear was not unfounded. He argues the existence of intimidation and harassment of persons questioning the actions of the authorities.

The Commission recalls that Article 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 further adequate remedies to deal effectively with his complaints.

The Commission notes that while the Government refers to the pending criminal proceedings before the Airi Assize Court concerning the death of the applicant's son in June 1994, almost one year and eight months have elapsed since the death and the Commission has not been informed of any judgment given by the Court. It further notes that it has not been informed on any progress in the proceedings since 5 May 1995, i.e. the date on which the Court had decided that the remains of the applicant's son be exhumed and sent for an examination by the Forensic Medicine Institute in Istanbul. The Government have not reacted to a request to provide the Commission with information on any opinion which may have been delivered by that Intsitute and on any further decisison which may have been taken by the Assize Court. In view of the delays involved and the serious nature of the crime alleged, the Commission is not satisfied that these proceedings, in the prevailing circumstances, can be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

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 criminal proceedings before the Airi Assize Court (see eg. No. 19092/91, Yaiiz v. Turkey, Dec. 11.10.93, D.R.75 p. 207). The Commission concludes that the applicant should be considered now to have complied with the domestic remedies rule laid down in Article 26 of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

Abuse of the right of petition

The Government submit that the description of the applicant's nationality in his application to the Commission as "Turkish (Kurdish)", has political connotations and separatist overtones which constitutes an abuse of the right of petition. They argue that the nationality of a person does not relate to the ethnic origin but to a legal bond between a state and a person.

The applicant refutes this allegation. He submits that the description as "Turkish (Kurdish)" is not an abuse but a statement of fact.

The Commission considers that reference to the applicant's ethnic origin while describing his nationality, does not constitute an abuse of the right of petition and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government submit that there was no evidence that the applicant's son was ill-treated and killed by agents of the State. In this respect, they refer to the autopsy findings according to which, the death of the applicant's son resulted from a cardiac arrest. They submit that no traces of lesions or trauma or fresh ecchymosis were found on the head and the body of the applicant's son. They do not contest that there were stitched incisions on the body of the applicant's son. However, they were the result of the autopsy conducted in the Agri State Hospital.

The applicant maintains his account of events.

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 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission by a majority

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

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (S. TRECHSEL)