AS TO THE ADMISSIBILITY OF

Application No. 23763/94
by Selma TANRIKULU
against Turkey

The European Commission of Human Rights sitting in private on 28 November 1995, 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. SVÁBY
G. RESS
A. PERENIC
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 25 February 1994 by Selma TANRIKULU against Turkey and registered on 28 March 1994 under file No. 23763/94;

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 1 March 1995 and the observations in reply submitted by the applicant on 20 April 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in

1964 and resides at Silvan. She is represented before the Commission by Professor Kevin Boyle and Ms. Francoise Hampson, both university teachers at the University of Essex. The applicant states that she brings the application in her own name and on behalf of her deceased husband, Dr. Zeki Tanrikulu, and her children (she has two daughters and at the time of her husband's death was expecting a third child).

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

The applicant states that the following occurred.

Zeki Tanrikulu was born in Silvan in 1958. He was a medical doctor and Head Consultant at Silvan District State Hospital at the time of his death.

On 2 September 1993, at 11.55 hours, about two minutes after the applicant had seen her husband from the balcony of the hospital residences in which they lived, she heard the sounds of heavy automatic weapons. She went out, ran a few metres and saw her husband shot down near a wall in a slightly raised place called "Kaymakam" ramp, about 20 metres from the Security Directorate. There is a distance of about 50 metres between the Hospital and the Security Directorate.

When she arrived on the spot, her husband was still alive. Having seen that there was no one around except for police, the applicant started to run down the ramp in order to see the assailants. She saw two people running a few metres away. Their haircuts looked smart. One was wearing a light blue T-shirt and jeans and the other was wearing a yellow T-shirt and brown cloth trousers. She shouted after them but the men did not turn round. They entered the street leading to the Security Directorate and disappeared. Since the applicant saw them from behind, she did not see their faces and could not see whether they were carrying weapons. The applicant ran out of breath and fell on the ground. When she got up, she went back to get the licensed gun of her husband from his bag and again ran in the direction the presumed assailants had gone. Aware of the police present, she told them "the murderers are escaping, catch them" but the police did not react at all. While hospital personnel took her husband into the hospital, the applicant shouted at the police and described the presumed assailants to them.

Zeki Tanrikulu died 15 minutes after being taken into hospital.

After the incident, the applicant saw a man who turned out to be the Security Director in the hospital. She said to him that her husband had asked for a few days' leave. Indicating that her husband had not been granted the leave although there were six other doctors working at the hospital, she said: "Was it because you knew that he was going to be killed that you didn't give it to him?" After she had been informed that this man was the Security Director she said to him that her husband had been killed in front of the Security Directorate. The Security Director showed no reaction.

Two days later, two doctors (Mustafa, an intern, and Ilhan, an internal diseases expert) asked the Silvan District Governor for leave indicating that they would otherwise resign. The District Governor is then alleged to have said: "Zeki was killed because he was Kurdish and from round here. You are Turks, nothing will happen to you." The applicant states that she requested Ilhan to make a written statement, which he refused, saying that it would put his own life in danger. The applicant states that a six-month intern has obtained leave on several occasions, although he was not entitled to such leave.

The police examined the facts on the spot. One hour after the attack, a report signed by three police officers was drawn up which tells of sixteen empty cartridges and one deformed bullet being found at the place of the incident. The report further states that residents

in the area gave a description of the two perpetrators: both were thin and tall and clad in jeans, one was wearing a yellow T-shirt and the other a white striped shirt. The report goes on to say that during a wide investigation of the area no individuals fitting either of the descriptions were found.

The body of the applicant's husband was examined by forensic medical doctors in the presence of the District Public Prosecutor and an autopsy report was issued on 2 September 1993. According to this report, the applicant's husband had been hit by many bullets.

On 5 November 1993, the Head of the District Public Prosecution's office of Silvan, after considering the nature of the charges, the way the incident had occurred and the evidence, decided that he had no competence to investigate the matter and sent the file to the Head of the Public Prosecution's office at the Diyarbakir State Security Court.

No statement was taken from the applicant by any of the authorities.

According to the applicant, her husband had no enemies. He had been taken into custody once, on 6 June 1993, by plainclothes police connected to the Security Directorate who said that they wanted a statement. He was held for five and a half hours and released. He was never brought before a public prosecutor.

The respondent Government state the following.

The death of the applicant's husband is currently under investigation by the Public Prosecutor of the Diyarbakir State Security Court. Although witnesses have been heard and an on-site inspection, an autopsy and a forensic examination have taken place, the perpetrators have not so far been apprehended. The Government have submitted copies of witness statements, the report of the on site inspection mentioned above and a sketch, a ballistic expert's report and the autopsy report. All documents bear dates between 2 and 9 September 1993, except for one of the documents containing a witness statement which is dated 2 September 1994.

The refusal of a few days' leave requested by the applicant's husband is unconnected with his death; given that the applicant's husband was Deputy Head Consultant at the hospital, his leave would have interrupted the medical service.

Also, the alleged taking into custody of the applicant's husband on 6 June 1993 is not connected with the incident. In fact, the applicant's husband was summoned to the police station on 6 April (not June) 1993 in order to give a statement upon the allegation that he was hiding a named terrorist in his home. As soon as it had been established that this allegation was false, the applicant's husband was released.

The Government further submit that the applicant has stated that she did not sign the written authorisation for her representation in the proceedings before the Commission.

On this latter point, the applicant's representatives reply that the applicant has confirmed that she did sign the letter of authorisation submitted with the application.

COMPLAINTS

The applicant alleges in her own name, on behalf of her children and her deceased husband that they have been victims of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, she complains that her husband was killed in circumstances suggesting that undercover agents of the State were involved, or that the killing of her husband constituted a violation of the State's obligation to protect her husband's right to life. She asserts that the police had adequate personnel and armoured cars and that, if appropriate action had been taken, the police could have caught the alleged assailants. She further complains of the lack of any effective system to ensure protection of the right to life in domestic law.

As to Article 3, she refers to discrimination on the grounds of race and ethnic origin.

As to Article 6, the applicant complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing, as a result of which the applicant cannot bring civil proceedings arising out of the killing.

As to Article 13, the applicant complains of the lack of any independent national authority before which these complaints can be brought with any prospect of success.

As to Article 14, the applicant complains of discrimination on grounds of race and/or ethnic origin in the enjoyment of the rights guaranteed under Articles 2, 6 and 13.

The applicant considers that she is not required to pursue domestic remedies. She considers that any alleged remedy is illusory, inadequate and ineffective because:

(a) there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies,

(b) the unlawful killing of individuals at the hands of undercover agents of the Turkish security forces is common 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.

The applicant asks for a guarantee of safety for herself, members of her family and those who have assisted her in pursuing this case.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 February 1994 and registered on 28 March 1994.

On 11 October 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 23 December 1994.

By letter of 24 January 1995 the Commission's Secretary pointed out to the Government that the period for the submission of the Government's observations had expired and that no extension of that time-limit had been requested. It was added that the application was being considered for inclusion in the list of cases for examination by the Commission at its session in February/March 1995.

Observations were submitted by the Turkish Government on 1 March 1995. The applicant replied on 20 April 1995.

THE LAW

The applicant complains of the killing of her husband. She invokes Articles 2 (Art. 2) (the right to life), 3 (Art. 3) (prohibition on inhuman and degrading treatment), 6 (Art. 6) (the right of access to court), 13 (Art. 13) (the right to effective national remedies for Convention breaches) and 14 (Art. 14) (prohibition on discrimination) of the Convention.

Article 25 (Art. 25) of the Convention

The Government contend that the applicant has stated that she did not sign the document authorising her representation in the proceedings before the Commission.

The applicant's representatives submit that the applicant has confirmed that she did sign this document.

The Commission notes that the application was introduced by the applicant's representatives on the basis of a power of attorney dated 27 September 1993. The representatives maintain that the power of attorney has been validly signed by the applicant. The Government have contested this but have not provided any evidence showing that the document has been forged. In these circumstances, the Commission accepts, on the basis of the available material, that the application has been validly introduced on the applicant's behalf.

Exhaustion of domestic remedies

The Government submit that the applicant has failed to comply with the requirement under Article 26 (Art. 26) of the Convention to exhaust domestic remedies before lodging an application with the Commission.

The Government contend in the first place that an investigation by the Public Prosecutor of the Diyarbakir State Security Court into the incident is currently still pending. They further submit that the applicant has not pursued this criminal investigation, has not claimed compensation for the loss of her husband and has not made any complaint to the competent public prosecutor covering the allegations included in the present application.

The applicant maintains that there is no requirement that she pursue domestic remedies. Any notionally available remedy is rendered illusory and ineffective by an administrative practice of non-respect for the requirement under the Convention of the provision of effective domestic remedies.

The applicant adds that, in order to be able to use a remedy, the individual needs to be able to seek and obtain legal advice and the lawyers need to be able to pursue appropriate remedies without fear of the consequences. She alleges, however, that several lawyers who have dealt with cases of this kind have been subjected to detention and ill-treatment. Some of them are facing criminal charges, which include drawing up documents belittling or making propaganda against the Turkish State.

The applicant does not deny that the procedures identified by the Government are formally part of the Turkish legal structure, but she contends that the Government have not shown how such procedures could conceivably be effective for the specific circumstances of the present application. The purported remedies are ineffective in her case for the following reasons:

- the investigation into her husband's death has still not been concluded, even though the documentary evidence of the investigation as submitted by the Government dates from between 2 and 9 September 1993. The applicant suggests that the date of

2 September 1994 on one of the witness statements might well be a misprint, the correct date being 2 September 1993, given its close relationship with the other witness statement;

- the investigation appears to be based on the assumption that the perpetrators were not members of the security forces;

- the fact that no statement was taken from the applicant herself;

- the untenability of the claim that a wide search of the area took place by police as claimed in the report of 2 September 1993, whereas the police seen and called upon by the applicant actually had the opportunity to pursue and apprehend the assailants at the time of the incident but failed to undertake action of any kind; and

- the absence of any significant case-law demonstrating the successful use of these remedies on a regular basis in other similar cases.

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 under the state of emergency to deal effectively with her complaints.

While the Government refer to the pending investigation by the Public Prosecutor of the Diyarbakir State Security Court, the Commission notes that the applicant's husband died on 2 September 1993 and the investigation has not yet been concluded more than two years later. The Commission is not satisfied in view of the delays and the serious nature of the alleged crime that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention, in particular having regard to the circumstances of this case where the applicant herself has not been interviewed by the authorities except insofar as, immediately after the incident, the applicant described the perpetrators to the police present at that time. The Commission notes, moreover, that the applicant's description of the perpetrator's clothing does not entirely correspond with the description in the police report. No explanation has been given as to any obstacles in the way of bringing the investigation to a conclusion.

The Commission considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the pending investigation by the Public Prosecutor of the Diyarbakir State Security Court (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75). The Commission concludes that the applicant may 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 Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As to the substance of the applicant's complaints

The Government submit that the death of the applicant's husband was unconnected to either his required presence at the police station on 6 April 1993 or the refusal of his request for a few days' leave.

The applicant maintains that, despite the implied assertion by the Government that her husband was not killed by agents of the State, the facts of the case point to the contrary.

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 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, 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)