CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 31247/96
by Talat TEPE
against Turkey

The European Court of Human Rights, sitting on 22 January 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 8 January 1996 and registered on 30 April 1996,

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 14 April 1998,

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 of Kurdish origin, born in 1961 and living in Istanbul. He is represented before the Court by Mr Tim Otty and Mr Philip Leach, lawyers practising in London.

A. The circumstances of the case

As the facts are disputed between the parties, the facts as submitted by each party are set out separately.

1. The applicant's version of the facts

The applicant is a lawyer at the Istanbul Bar and practices in the State Security Courts in Turkey. His clients have included those accused of terrorist offences. The applicant was also the president of the TOHAV (*Toplumsal Hukuk Araştırmaları Vakfi* – the Common Legal Research Foundation) at the time of the incident.

On 9 July 1995 at 5.40 a.m., the applicant was arrested at the Istanbul Atatürk Airport on his way to visit Germany. He was held by police working in the security booth at the airport on the grounds that he was prohibited from leaving the country. He was then handed over to officers at the police centre in the airport. At about 10 a.m. he was taken to the Gayrettepe Office of Enforcement of Judgments (*İnfaz Bürosu*) in Istanbul.

The applicant was not informed of the reasons for his arrest during the days he was held by the Enforcement Office. He was forced to sleep on the concrete floor for two nights and was denied adequate food.

On 11 July 1995 at 2 p.m., the applicant was taken to the Istanbul Political Branch Directorate (*Siyasi Şübe Müdürlüğü*).

During the seven days the applicant was held by the Istanbul Directorate he was allowed to have two meetings with his lawyers in the presence of police officers. He was kept in a cell measuring 10 to 12 square metres. Some days he shared the cell with other persons. He was subjected to insults by police officers.

On 18 July 1995 at about 6 a.m., the applicant was taken to the airport and at 2 p.m. he was handed over to the officers from the Political Branch of the Bitlis Security Directorate.

In the Bitlis Directorate the applicant was immediately blindfolded. He was taken to an interrogation room where he was accused of aiding and abetting the PKK. He was assaulted and punched by 4 to 6 people when he rejected the accusation. He was told to strip and was placed sitting on the concrete floor. In this position he was given electric shocks to his feet. The applicant threw off the electric cable and in the ensuing struggle he managed to pull off his blindfold and catch a glimpse of the interrogators. He fainted as a result of the severe beatings. He was revived by being hosed

with cold water. He was again electrocuted for 25-30 minutes. The applicant was taken to another room when he agreed to sign and accept the charges against him.

In a statement he signed on 19 July 1995, the applicant confessed that he had aided and abetted the PKK in that he had provided its members with heavy winter clothing and raincoats, attended meetings with terrorists, legally represented organisation members, worked for pro-Kurdish parties, read Kurdish newspapers and publications and acted as a courier for the organisation.

After having signed his statement the applicant was taken to a cell but some time later he was taken out again for further interrogation. On this occasion, he was again stripped naked and hosed with cold water for approximately 20 minutes. The applicant was interrogated throughout the night and was forced to sit naked in a cold draughty room.

On 19 July 1995 at 10 a.m., the applicant was driven to different places around Bitlis where it was suggested that he had met with terrorists. After he was brought back to the Branch he was again interrogated from about 1 p.m. until 3 a.m. the next morning.

On 20 July 1995 at 6 a.m., the applicant was taken to the Bitlis State Hospital, where he was seen by a doctor. The doctor neither examined nor spoke to him.

On 20 July 1995 the applicant was brought before the Diyarbakır State Security Court Public Prosecutor. He stated before the prosecutor that his statement had been taken under duress and that the contents were not true. He further stated that the medical examination had been conducted in the presence of the police officers and that the doctor had failed to carry out a meaningful examination.

On the same date the applicant was brought before a judge at the Diyarbakır State Security Court. He denied the allegations against him and stated that he had been electrocuted and insulted while in custody. The judge ordered the applicant's release.

On 23 July 1995 the applicant was seen by Dr Emel Gökmen. In her medical examination she observed that the applicant was suffering from pain in his shoulders, back and neck. He was weak, tired and had violent headaches. He had a frequent need to urinate whilst sleeping and he was reliving the interrogation in his dreams. In her medical report dated 15 August 1995, Dr Gökmen concluded that according to the neurological consultation the applicant was suffering from pain in his neck movements and hypoestesia and hypoalgesia in the left C5 dermatome. In the cervical BT examination there was no medullar root impression. The applicant's medical problems were related to the trauma applied to the cervical region and it was recommended that he rest for seven days.

In a letter of 29 August 1995, the Bitlis Public Prosecutor informed the Istanbul Public Prosecutor that the applicant had alleged that he had been subjected to torture between 18 July 1995 and 20 July 1995. The prosecutor requested that a forensic doctor examine the applicant's body for traces of life-threatening blows and submit the results of the examination in a medical report.

On 24 November 1995 the public prosecutor at the Diyarbakır State Security Court filed an indictment with the same court against the applicant accusing him of aiding and abetting the armed organisation. The prosecutor requested that the applicant be convicted and sentenced under Articles 31 and 169 of the Turkish Criminal Code and Article 5 of Law 3713.

On 18 April 1996 the Provincial Administrative Council in Bitlis (*Memurin Muhakeme Komisyonu*) decided that no prosecution should be brought against the five police officers of the Bitlis Police Headquarters. The council noted in its decision that in a letter from the Istanbul Public Prosecutor, dated 18 August 1995 in the case no. 1995/562, it was stated that the applicant alleged that he had been subjected to torture while in custody at the Bitlis Political Branch Directorate between 18 July 1995 and 27 July 1995. The applicant was interrogated on 19 July 1995 and he was seen by a doctor in the Bitlis State Hospital on 20 July 1995. A medical report drafted on the same date found no traces of blows on the applicant's body. Subsequently, on 20 July 1995, the applicant was released by the Diyarbakır State Security Court judge. Therefore, contrary to what was claimed by the applicant, he had already been released by 20 July 1995 and could not have been subjected to torture between the dates stated in his allegation. The council concluded that there was no evidence to substantiate the claim that the police officers had committed the alleged crime.

On 6 June 1996 the Diyarbakır State Security Court acquitted the applicant.

2. The Government's version of the facts

In June 1992 Ö.B. and O.A. were arrested during an operation conducted against the members of the PKK. In their statements taken on 24 June 1992, Ö.B. and O.A. said that the applicant had been informed of the terrorist attack on the Hersan Police Station and that he had supplied his car for transportation purposes.

On 6 August 1992 the public prosecutor at the Diyarbakır State Security Court ordered the applicant's arrest.

On 9 July 1995 the applicant was arrested at Istanbul Airport.

On 11 July 1995 the applicant was taken to the Anti-Terror Branch of the Istanbul Security Directorate.

On 11 July 1995 the Istanbul Police Headquarters requested the public prosecutor attached to the Istanbul State Security Court to authorise an extension of the applicant's detention period. On the same day the public

prosecutor at the Istanbul State Security Court authorised the Istanbul Police Headquarters to extend the detention period for ten days starting from 9 July 1995.

On 17 July 1995 the applicant was seen by Dr Zeki Günlüoğlu at the Haseki Hospital in Istanbul. Dr Günlüoğlu noted in his report that there were no pathological findings on the applicant's body and that the final medical report would be drafted by the Forensic Medicine Institute.

On 18 July 1995 the applicant was handed over to an officer at the Bitlis Security Directorate. On the same day the Bitlis public prosecutor authorised the Bitlis Police Headquarters to extend the detention period for three days.

The applicant was driven to different places around Bitlis in order to locate where he had met with terrorists. Later, in a statement he signed on 19 July 1995, the applicant confessed that he had aided and abetted members of the PKK on 20 October 1991 in that he had provided organisation members with clothing and drove them to Bitlis from the village of Pertaş.

On 20 July 1995 the applicant was seen by a doctor in Bitlis who noted in his report that there were no signs of beating or injuries consistent with the use of force on his body.

B. Relevant domestic law and practice

1. Criminal law and procedures

Article 17 of the Turkish Constitution in part 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 Turkish 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."

Article 135/a of the Turkish Code of Criminal Procedure (Türk Ceza Muhakemeleri Usulü Kanunu) provides:

> "The statement of the accused should be based on his free will. The accused shall not be subjected to physical or mental interference such as torture, forced medication, fatigue, deceit, the use of physical force and harshness or other use of devices which will result in the obstruction of his free will.
>
> No unlawful benefit shall be promised.
>
> Statements extracted from the accused by using the unlawful ways described above cannot be considered as evidence even if the accused does not challenge their lawfulness."

Article 136 § 1 of the Turkish Code of Criminal Procedure (amended by Law 3842 of 18 November 1992) provides:

> "The accused or a person arrested shall have access to legal assistance of one or more lawyers at any stage and level of the investigation."

Article 31 of Law 3842 provides that the above provision shall not be applicable for charges that fall under the jurisdiction of the State Security Courts.

2. The law relating to detention in police custody

Article 19 of the Constitution provides:

> "Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with the formalities and conditions prescribed by law: ...
>
> The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days ... These time-limits may be extended during a state of emergency.
>
> A person deprived of his liberty for whatever reason shall have the right to take proceedings before a judicial authority which shall give a speedy ruling on his case and order his immediate release if it finds that the deprivation of liberty was unlawful.
>
> Compensation must be paid by the State for damage sustained by persons who have been victims of treatment contrary to the above provisions, as the law shall provide."

Pursuant to Article 128 of the Code of Criminal Procedure, a person arrested and detained shall be brought before a justice of the peace within twenty-four hours. This period may be extended to four days when the individual is detained in connection with a collective offence.

At the material time, section 30 of Law no. 3842 of 18 November 1992, amending the legislation on criminal procedure, provided that, with regard to offences within the jurisdiction of the state security courts, any arrested person had to be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days.

COMPLAINTS

The applicant complains under Article 3 of the Convention that he was the victim of inhuman and degrading treatment or torture while in police custody.

He also complains under Article 5 § 1(c) of the Convention that his detention was not in accordance with a procedure prescribed by law. He submits that criminal investigations against lawyers must be carried out by a public prosecutor according to Articles 58 and 59 of the Turkish Advocacy Law. He maintains that he was interrogated by the political branch of the police. The applicant further complains that there was no reasonable suspicion of him having committed an offence for the purpose of bringing him before a competent legal authority.

The applicant next complains under Article 5 § 3 of the Convention that he was held in police custody for twelve days from 9 July 1995 to 20 July 1995.

The applicant claims under Article 6 of the Convention that there exists no independent and impartial tribunal before which he could initiate proceedings in relation to his allegation of torture. He submits that the outcome of the criminal proceedings instituted by the public prosecutor effectively determined his rights to compensation, since it was a precondition to obtaining compensation.

The applicant complains under Article 13 of the Convention that he had no effective remedies as regards the violations of his Convention rights.

Lastly, the applicant complains under Article 14 of the Convention in conjunction with the above mentioned Articles, that he was subjected to discrimination on grounds of his Kurdish origin.

THE LAW

A. Alleged violation of Article 3 of the Convention

The applicant complains that he was the victim of inhuman and degrading treatment or torture while in police custody. He relies on Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

1. The Government's preliminary objections

The Government submit that the applicant has failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. The Government point out that it would have been open to the applicant to sue the Administration for damages on the basis of Article 125 of the Constitution, read in conjunction with section 13 of Law no. 2577 concerning administrative proceedings. They draw attention to the fact that the Administration's liability is engaged under these provisions without the need for a plaintiff to prove fault.

In addition, the applicant failed to seek compensation in accordance with civil law remedies. The Government contend that domestic case-law confirms that damages may be awarded against officials of the State who resort to torture against individuals. Furthermore, even if an official is acquitted of criminal charges for lack of evidence, the civil courts are not bound by that decision and may proceed to hear a claim for damages brought against him in accordance with the law of tort. The Government refer to Article 53 of the Civil Code and the relevant case-law in this respect.

The Government also point to inaccuracies in the medical report relied on by the applicant. The Government submit that the medical reports dated 17 and 20 July 1995 revealed that there was no trace of torture on the applicant's body. According to the Government, the applicant submitted the results of a medical examination conducted much later on 15 August 1995. For that reason the application should be rejected for an abuse of the right to petition.

In reply, the applicant submits that any purported remedy would have been illusory, inadequate and ineffective. The public prosecutor failed to pursue a full investigation into his allegations. In doing so the public prosecutor acted contrary to his obligations under Article 243 of the Turkish Criminal Code.

The applicant points out that the investigation into his allegations was conducted by the Bitlis Administrative Council. In the applicant's opinion, the decision of the Council itself that there could be no prosecution of the officers concerned, demonstrates a failure to take the applicant's complaints seriously. The applicant, therefore, concludes that the remedy suggested by the Government was ineffective.

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 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 Turkish law provides civil and administrative remedies against illegal and criminal acts attributable to the State or its agents.

As regards a civil action for redress for damage sustained through the illegal acts or patently unlawful conduct on the part of State agents, the Court recalls that a plaintiff to such an action must, in addition to establishing a causal link between the tort and the damage he has sustained, identify the person believed to have committed the tort (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 73).

In the instant case, criminal proceedings were taken against five named officers of the Bitlis Police. However, the Provincial Administrative Council in Bitlis Province (*Memurin Muhakeme Komisyonu*) decided that no prosecution should be brought against these officers. In these circumstances the Court considers that the introduction of a tort action against the police officers would have had no reasonable prospects of success, regardless of the lesser standard of proof involved.

The Court considers that the above considerations apply equally to the Government's assertion regarding the applicant's failure to bring an action in administrative law under Article 125 of the Convention. It further recalls that this remedy cannot be regarded as sufficient for a Contracting State's obligations under Article 3 of the Convention in cases like the present, in that it is aimed at awarding damages rather than identifying and punishing those responsible (see the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports* 1998-VI, p. 3290, § 102).

The Court, therefore, concludes that the applicant was not required to bring the civil and administrative proceedings suggested by the Government and that he has exhausted domestic remedies in view of the outcome of the criminal proceedings against the police officers. It dismisses the Government's objections to the admissibility of the applicant's Article 3 complaint.

As to the Government's final contention that the application is an abuse of the right of application, the Court finds that the Government have not substantiated their claim that the applicant deliberately misled the Court as to the accuracy of the medical examination of 15 August 1995. This objection is therefore also rejected.

2. Merits

The Government submit that the applicant's claim that he was ill-treated while in police custody was fabricated for purely political purposes in order to dishonour the security forces struggling against terrorism.

In reply, the applicant submits that the medical examinations carried out on 17 and 20 July 1995 cannot be relied on as the report dated 17 July 1995 pre-dates the allegations of torture and the report dated 20 July 1995 is of no evidential value. The applicant asserts that he had no proper medical examination and that the medical report was prepared in his absence and in the presence of a police officer. The applicant also claims that doctors are subjected to harassment and intimidation in Turkey and thus refrain from carrying out medical examinations of persons who have been tortured.

The applicant maintains that he was acquitted of the charges made against him, which meant that reliance on the statement signed by him during his custody was not a sufficient basis for his conviction. According to the applicant, this demonstrated that even the State Security Court was prepared to see some merit in his complaints.

As regards the substance of the applicant's complaint concerning Article 3 of the Convention, the Court considers, in the light of the parties' submissions, that this complaint raises complex issues of law and fact, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaint 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.

B. Alleged violation of Article 5 §§ 1 (c) and 3 of the Convention

The applicant complains that his detention was not in accordance with a procedure prescribed by law. He submits that criminal investigations against lawyers must be carried out by a public prosecutor according to Articles 58 and 59 of the Turkish Advocacy Law. He maintains that he was interrogated by the political branch of the police. The applicant further complains that there was no reasonable suspicion of him having committed an offence for the purpose of bringing him before a competent legal authority. Lastly, the applicant complains that he was held in police custody for twelve days from 9 July 1995 to 20 July 1995. The applicant relies on Article 5 §§ 1(c) and 3 of the Convention, which provides insofar as relevant as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised

by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. ..."

1. The Government's preliminary objection

The Government submit that Law no. 466 envisages the payment of compensation to persons who have been unlawfully arrested or detained. The applicant could have lodged compensation proceedings at his nearest assize court within three months of the final decision taken against him concerning his allegations under Article 5 of the Convention. However, he failed to do so.

In reply the applicant submits that the remedy suggested by the Government is ineffective in his case. As his length of detention would appear to be in conformity with domestic law, any claim for compensation lodged under Law no. 466 would have been futile. The applicant further submits that the Government failed to identify any examples of successful prosecutions of officials for detention contrary to the Advocacy Law.

The Court points out that a claim for compensation as indicated by the Government would not make it possible to end detention in custody of an unjustified nature within the meaning of Article 5 § 1 of the Convention (see applications nos. 23145/93 and 25091/94, Commission decisions of 2 December 1996).

As to the applicant's Article 5 § 3 complaint, the Court observes that the applicant complains of the length of his detention in police custody, not that he had no remedies whereby he could obtain compensation. The remedy mentioned by the Government with reference to Law no. 466 concerns Article 5 § 5 only, which has not been invoked by the applicant (see the Demir and Others v. Turkey judgment of 23 September 1998, *Reports* 1998, pp. 2652-53, § 37).

Accordingly, the Court dismisses the Government's objections.

2. Merits

The Government refer to the nature and the scale of the terrorist threat in Turkey and the particular difficulties encountered in dealing it. The threat was incomparably more serious and more imminent than that posed by other examples of terrorism in Europe. They draw attention to the extremely serious nature of the terrorist offences in question and highlight that the Court has already acknowledged in the past the special features and difficulties of investigating terrorist offences. The Government conclude that there was reasonable suspicion for arresting the applicant.

In reply, the applicant maintains that it is still unclear from the Government's submissions whether there was any reasonable suspicion for his detention.

As regards the substance of the applicant's complaints concerning Article 5 §§ 1 (c) and 3 of the Convention, the Court considers, in the light of the parties' submissions, that these complaints raise complex issues of law and fact, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established.

C. Alleged violation of Articles 6, 13 and 14 of the Convention

The applicant complains that there exists no independent and impartial tribunal before which he could initiate proceedings in relation to his allegation of torture. He submits that the outcome of the criminal proceedings instituted by the public prosecutor effectively determined his rights to compensation, since it was a precondition to obtaining compensation. The applicant further complains that he had no effective remedies as regards the violations of his Convention rights. The applicant finally complains that he was subjected to discrimination on the ground of his Kurdish origin. The applicant relies on Articles 6, 13 and 14 of the Convention, which provide insofar as relevant as follows:

Article 6

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

Article 13

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... national or social origin, [or] association with a national minority, ..."

The Court considers, in the light of the parties' submissions, that the applicant's complaints under Articles 6, 13 and 14 of the Convention raise complex issues of law and fact, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President