CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## THIRD SECTION

## FINAL DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 42775/98
by Volkan ÜKÜNÇ and Deniz GÜNEŞ
against Turkey

The European Court of Human Rights (Third Section), sitting on 10 April 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 26 June 1998,

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 partial decision of 5 December 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

# THE FACTS

The applicants, Volkan Ükünç and Deniz Güneş, are Turkish nationals. They were both born in 1980 and live in Edirne, Turkey. They are represented before the Court by Veysel Uçum, a lawyer practising in Istanbul.

## A. The circumstances of the case

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

On 8 February 1996 the applicants were taken into custody by the Edirne Anti-Terror Branch on suspicion of membership of an outlawed organisation, the DHKP-C (*Devrimci Halk Kurtuluş Partisi-Cephesi*; Revolutionary People's Liberation Party-Front). The applicants were kept in custody until 12 February 1996. They were interrogated by the police on 10 February 1996 in the absence of their lawyers.

The applicants allege that they were tortured in police custody. They contend that they signed a prepared statement on 10 February 1996 under duress in which they admitted to having carried out illegal activities on behalf of the DHKP-C. The statement referred to their having painted a slogan on a wall, distributed a publication entitled *Kurtuluş*, put up a poster in the entrance to a shop and watched while another member of the DHKP-C threw a petrol bomb at a lorry.

On 12 February 1996 the applicants were brought before the public prosecutor and then before a judge. On both occasions they repeated the content of their statements of 10 February 1996. They never mentioned that their statements had been obtained under torture. The applicants were released on the same day. They were not represented by lawyers during the making of their statements on 12 February 1996.

On 11 March 1996 the public prosecutor at the Istanbul State Security Court filed an indictment with the court and accused the applicants and three other co-accused of aiding and abetting an illegal terrorist organisation and requested the court to apply Article 169 of the Turkish Criminal Code and section 5 of Law No. 3713 (the Prevention of Terrorism Act 1991 as amended).

On 17 April 1996 the Edirne Assize Court requested the applicants' observations on the charges against them for submission to the Istanbul State Security Court. According to the minutes of the hearing which took place before the Edirne Assize Court the applicants did not want to be represented by lawyers. They challenged for the first time the authenticity of the statements which they gave to the police and then repeated on 12 February 1996 when brought before the public prosecutor and the judge. They contended that they were tortured by the police and forced to sign a

prepared statement. They further alleged that they were threatened by the police in order to make them repeat the same statement when they were brought before the public prosecutor and the judge on 12 February 1996.

On 21 May 1996 the applicants requested the Istanbul State Security Court not to require them to appear at any of the hearings since they had to attend school. This request was upheld by the court and the applicants were legally represented by four lawyers in their absence in subsequent hearings.

On 8 April 1997 the Istanbul State Security Court found the applicants guilty of aiding and abetting the DHKP-C, and sentenced them to two years and six months' imprisonment. The court pointed out that the applicants' defence statement to the Edirne Assize Court alleging that they had been forced to repeat the prepared confession statements when brought before the public prosecutor and the judge on 12 February 1996 was unconvincing. The court concluded that the applicants aided and abetted the DHKP-C by painting a slogan on a wall, distributing publications supporting DHKP-C and putting up a placard in the entrance to a shop.

The applicants appealed on the ground that they were convicted on the basis of the statements they had given under duress and that there was, therefore, no concrete evidence on which they could be convicted.

On 9 December 1997 the Court of Cassation dismissed the appeal lodged by the applicants and upheld the State Security Court's decision. The Cassation Court noted in its decision that the applicants' lawyers, despite having requested the Cassation Court to hold an appeal hearing, did not attend the hearing.

In accordance with established practice, the judgment of the Court of Cassation of 9 December 1997 was sent to the Istanbul State Security Court and deposited with that court's Registry on 5 January 1998.

The applicants claim that they became aware of the decision on 4 March 1998.

On 9 March 1998 the applicants applied for rectification of the Court of Cassation's decision on the ground that the preliminary investigation was unlawful having been conducted without their lawyer being present and given that they were minors at the date of the offences. The applicants' rectification request was rejected on 22 May 1998.

## B. Relevant domestic law and practice

Article 17 of the 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 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 of the Criminal Code provides:

> "Civil servants charged with the forcible execution of an order and 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 Code of Criminal Procedure (the 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.

A public prosecutor institutes criminal proceedings if he or she decides that the evidence justifies the indictment of a suspect (Article 163 CCP). Only if it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, may the public prosecutor close the investigation (Article 164 CCP).

Article 136 § 1 of the 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.

Article 169 of the Criminal Code provides:

> "Any person, who knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to not less than three and not more than five years' imprisonment..."

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

Pursuant to Article 5 of Law no. 3713, the penalty laid down in the Criminal Code as punishment for the offence defined in Article 4 of the Act are increased by one half.

## COMPLAINTS

The applicants complain that they were tortured in police custody. They invoke Article 3 of the Convention.

The applicants submit that they were deprived of their right to a lawyer in police custody as well as before the public prosecutor and the judge. They also complain that they were tried and convicted by the Istanbul State Security Court which was neither independent nor impartial. They invoke Articles 6 §§1 and 3 (c) of the Convention.

## THE LAW

1. The applicants complain under Article 3 of the Convention that they were subjected to torture during their detention in police custody. Article 3 of the Convention provides as follows:

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

The Government argue that the complaint under Article 3 of the Convention is inadmissible as the applicants failed to comply with the six-month rule in Article 35 § 1 of the Convention. They submit that in the absence of domestic remedies the six-month period runs from the date of the act complained of. The applicants' police custody ended on 12 February 1996 whereas the application was introduced more than two years later.

The applicants contest the Government's submissions. In the applicants' opinion, the trial court had a power to uphold their complaints of torture and to acquit them and it was therefore a relevant domestic remedy. They submit that they have exhausted this particular remedy by informing the trial court of their allegations. The six-month period should therefore start running on 4 March 1998 when the Court of Cassation decision was communicated to them.

The Court recalls that pursuant to Article 35 § 1 of the Convention, the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. In the absence of domestic remedies, the six-month period runs from the date of the act complained of (see *Hazar and others v. Turkey*, (dec.) no. 62566/00, ECHR 2002-...).

However, the Court further recalls that special considerations could apply in exceptional cases where an applicant avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective.

The Court observes at the outset that the applicants' lawyer did not set out any details of the alleged torture in the application form. It was merely stated that "the clients were subjected to torture during the preliminary investigation". Furthermore, other than presenting as evidence of this allegation of torture their challenge before the trial court of the admissibility of their statements taken whilst in police custody, this issue has not been alluded to by the applicants in their observations submitted to the Court.

The Court observes that it would have been possible for the applicants, upon their release from police custody, to be examined by a doctor in order to obtain medical reports in support of their allegations that they had been tortured. Furthermore, the applicants could have lodged formal complaints with the relevant authorities concerning these allegations. They did not do so.

Even assuming that the applicants' circumstances could have caused them to feel vulnerable, powerless and apprehensive of the representatives of the State during their time in custody (See *İlhan v. Turkey* [GC], no. 22227/93, § 61 ECHR 2001-I) the Court considers it significant that neither the applicants nor their four lawyers ever referred to their complaints of torture until 17 April 1996, i.e. two months after their release from police custody. The Court further notes in this context that the applicants have not argued that they were prevented from doing so as a result of intimidation or otherwise.

The Court observes in this connection that the applicants' submission concerning the alleged torture made to the trial court on 17 April 1996 was aimed at challenging the reliability and admissibility in evidence of the statements taken from them in police custody. No details of the alleged torture were given by the applicants during that hearing.

Nevertheless, the Court, noting that 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, under Article 153 of the Code of Criminal Procedure, to investigate the facts by conducting the necessary inquiries to identify the perpetrators, is prepared to accept that the applicants did avail themselves of a domestic remedy by submitting to the trial court their allegations of torture and that this interrupted the running of the six-month period.

The Court notes that during the applicants' trial no mention was made by the trial court of the allegations of torture brought to its attention. The applicants did not pursue the allegations further in the course of the trial. In its judgment of 8 April 1997 the Istanbul State Security Court concluded that the applicants' allegations were unconvincing.

The Court further notes that the applicants, other than alleging that they had given their statements under duress, did not reiterate their complaints of torture in their appeal petition submitted to the Court of Cassation.

The Court finds that a mere allegation of duress in itself, without any description as to what form that duress had taken, is not sufficient to be interpreted as an allegation of torture. Furthermore, despite the fact that they asked the Court of Cassation to hold a hearing, the applicants' lawyers failed to attend the hearing, thus waiving the opportunity to bring their clients' allegations to the attention of the Court of Cassation. Consequently, the procedure before the Court of Cassation did not concern the allegations of torture.

In the light of the above, the Court considers that the failure of the judicial authorities to act must have become gradually apparent up until 8 April 1997, i.e. the date on which the Istanbul State Security Court rendered its final decision on the matter, and that therefore the applicants should have been aware of the ineffectiveness of remedies in domestic law by that date. Accordingly, the six-month period provided for in Article 35 of the Convention should be considered to have started running not later than 8 April 1997 (see *İçöz v. Turkey*, (dec.), no. 54919/00, 9.1.2003, unreported, and, *mutatis mutandis*, *Veznedaroğlu v. Turkey* (dec.), no. 32357/96, 7 September 1999, unreported). On that account, the application should have been introduced not later than October 1997. In the event it was introduced on 26 June 1998.

It follows that this part of the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The applicants submit that they were deprived of their right to a lawyer in police custody as well as before the public prosecutor and the judge. They also complain that they were tried and convicted by the Istanbul State Security Court which was neither independent nor impartial. They invoke Articles 6 §§ 1 and 3 (c) of the Convention which provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...".

*a) The Government's preliminary objection*

The Government argue that the application is inadmissible as the applicants failed to comply with the six-month rule in Article 35 § 1 of the Convention because they did not introduce their application within six months of the Court of Cassation's decision of 9 December 1997.

The applicants submit that the decision of the Court of Cassation was not communicated to them and that they only became aware of the decision on 4 March 1998. They maintain that the relevant date for the six month period to start running was 22 May 1998, i.e. the date on which their request for rectification of the judgment was dismissed.

The Court observes that, despite the wording of Article 33 of the Code of Criminal Procedure which stipulates that judgments and decisions of courts are to be served on the parties to the case, it is not the practice of the Criminal Divisions of the Court of Cassation to serve their decisions on defendants (see *Seher Karataş v. Turkey*, no. 33179/96, § 28, 9 July 2002, unreported).

The Court also observes that, in accordance with established practice, the judgment of the Court of Cassation of 9 December 1997 was sent to the Istanbul State Security Court and deposited with that court's Registry on 5 January 1998. It was, therefore, accessible from that date.

In these circumstances the six-month period started to run on 5 January 1998. Accordingly, the application was introduced in time.

For these reasons, the Court dismisses the Government's objection.

*b) Merits*

*i. Complaint concerning the right to legal representation during the initial stages of the investigation*

The Government maintain that the applicants did not require lawyers at the initial stages of the investigation. In this connection, the Government refer to the minutes of the hearing at the Edirne Assize Court according to which the applicants did not want to be represented by lawyers. In any event, the Government point out, the applicants were represented by four lawyers during their trial and they were, therefore, able to challenge the accusations against them. For the above reason, the Government request the Court to declare the applicants' complaint under Articles 6 §§ 1 and 3 (c) of the Convention inadmissible as being manifestly ill-founded.

The applicants maintain their complaints and point out that the Government have not disputed that they were not provided with legal assistance during the initial stages of the investigation. They further maintain that the fact that they were minors at the time of their detention obliged the authorities to provide the assistance of a lawyer. The fact that the applicants have subsequently appointed four lawyers to represent them proved that they wanted to be represented by lawyers as soon as they have had an opportunity. In the same vein, it also proved that they would have appointed lawyers during the initial stages of the investigation had they been allowed to do so.

The Court considers, in the light of the parties' submissions, that this part of the application 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. 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.

*ii. Complaint concerning the independence and impartiality of the State Security Court*

The Government maintain that the State Security Courts are neither extraordinary courts nor political or military courts, but specialised tribunals set up in various major cities to try persons accused of offences against the Republic of Turkey. They operate in accordance with the general provisions of the Code of Criminal Procedure and an appeal lies against their decisions to the Court of Cassation. In the Government' submission, there is nothing to suggest that the appointment of a military judge to the bench of a State Security Court impairs its independence and impartiality. A military judge enjoys the same guarantees as any senior judge. The fact that a military judge is subject to the disciplinary rules of the military service does not in any way imply that he is subordinated to his superior officers in the exercise of his judicial functions.

The Government report that by virtue of an amendment to Article 143 of the Constitution on 18 June 1999 the military judges in the State Security Courts have now been replaced by civil judges. Parallel amendments have been made to the Law on the Establishment of State Security Courts by virtue of Law no. 4390 of 22 June 1999.

The applicants maintain their complaint and submit that according to the judgments of the Court the presence of a military member at the hearings before the State Security Courts violated their right to a fair trial.

The Court considers, in the light of the parties' submissions, that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. It concludes, therefore, that this part of 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 unanimously

*Declares* admissible, without prejudging the merits, the applicants' complaints that they were denied the assistance of a lawyer during the initial stages of the investigation and that they were tried and convicted by a tribunal which lacked impartiality and independence;

*Declares* the remainder of the application inadmissible.

Vincent BERGER
Registrar

Georg RESS
President