CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## FOURTH SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 36189/97
by Mehmet YAKAR
against Turkey

The European Court of Human Rights (Fourth Section), sitting on 16 April 2002 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 8 April 1997 and registered on 23 May 1997,

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 decision of 7 September 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, born in 1949 and living in Doğubeyazıt, Ağrı, Turkey. He is represented before the Court by Mrs Eren Keskin, 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.

The applicant is the father of the deceased Orhan Yakar, who was 16 years old at the time of the events in question.

In June 1996 the applicant's son went to Istanbul where he worked as a painter for a couple of months. In September 1996 the applicant lost contact with his son. In November 1996 the applicant went to Istanbul in order to find out his son's whereabouts. Orhan's neighbours told him that his son had disappeared two months earlier.

On 13 November 1996 the applicant filed a petition with the office of the Istanbul Public Prosecutor. He requested that his son be found and that those responsible be punished if anything had happened to him. The applicant also filed a petition with the Istanbul Security Directorate as to the whereabouts of his son. Then, he returned to his village in Ağrı.

On 17 November 1996 the security forces carried out a search in order to arrest a member of the PKK who had been located near the township of Sancak in the province of Bingöl. The security forces arrested the applicant's son in the course of the search. In an incident report drafted by the gendarmes it was noted that the applicant's son had been carrying a rifle and some ammunition when he was arrested. In a further incident report it was noted that Orhan Yakar had been arrested at 2.45 p.m. and that he had been subsequently transferred to the Interrogation Department in the Provincial Gendarmerie Command (*İl Jandarma Komutanlığı Sorgu Kısım Amirliği*) by a helicopter.

Neither reports bore the signature of the applicant's son.

On 18 November 1996 the gendarmes, accompanied by the applicant's son, carried out a search in order to find the body of a terrorist. While the gendarmes were 40 or 45 metres away from the location where the body had been left, Orhan, who was walking in front of the gendarmes, stepped on a mine placed by the PKK and died. The gendarmes continued their search and found the body of the terrorist. They also arrested a member of the PKK and seized two rifles.

In the meantime, the applicant was told at the Doğubeyazıt Gendarmerie Command that his son had joined the PKK and that he had surrendered to the security forces in Bingöl where he had been held in custody.

The applicant went to Bingöl in order to investigate the whereabouts of his son. He was told at the Bingöl Gendarmerie Command that his son, who had just surrendered to the security forces, had died after stepping on a mine.

In a letter of 22 November 1996 the Bingöl Gendarmerie Command informed the public prosecutor in Bingöl that the applicant's son had been arrested on 17 November 1996, at 2.30 p.m., in the township of Sancak near the village of Karapınar and had been transferred to the Interrogation Department in the Provincial Gendarmerie Command. During his interrogation the applicant's son had stated that he knew where the body of İhsan Meriç, who had died during the clashes of 16 November 1996, was hidden. The gendarmes, accompanied by Orhan, had carried out a search in order to find out where the body was hidden. However, Orhan had died after stepping on a mine.

On 23 December 1996 the applicant filed a petition with the office of the Bingöl public prosecutor. He requested that the corpse of his son be handed over to him.

On 6 January 1997 the applicant requested from the Bingöl Gendarmerie Command access to all information and documents concerning the death of his son.

In a letter by the Bingöl Gendarmerie Command dated 9 January 1997 the applicant was informed that the documents concerning his son's death had been transferred to the office of the Bingöl public prosecutor and that the Command had no authority to give information to the applicant. The applicant was also informed that he could seek the relevant information from the office of the Bingöl public prosecutor or from the Ministry of Interior.

On 14 March 1997 the applicant filed a petition with the Ministry of Interior. The applicant stated that he had been unable to receive any documents or information from the authorities concerning the death of his son. He requested that all relevant information and documents be transmitted to him.

On 22 May 1997 the Istanbul Security Directorate transmitted the relevant information and documents provided by the Bingöl Gendarmerie Command to the applicant's lawyer in Istanbul.

On 27 May 1997 the Bingöl public prosecutor made a written request to the Bingöl Gendarmerie Command to summon the gendarmes who had witnessed the death of the applicant's son. The prosecutor stated that he would hear them within the preliminary investigation into the death of the applicant's son.

On 10 July 1997 Major Muharrem Fındık gave a statement before the Bingöl public prosecutor. He stated that the applicant's son had died in the course of an operation carried out in order to find the body of İhsan Meriç. Major Fındık had been walking 40 or 45 metres behind the applicant's son

when he heard an explosion. The gendarmes had been unable to collect the dismembered body owing to heavy weather conditions.

The gendarmes, Gürbüz Beyiktaş, Mehmet Tutak and Niyazi Patır, who also appeared before the public prosecutor, reiterated the Major's statement.

In a letter dated 11 July 1997 the Bingöl public prosecutor reported the death of the applicant's son to the Populations Office (*Nüfus Müdürlüğü*) in Bingöl.

On 22 August 1997 the public prosecutor at the Diyarbakır State Security Court decided that no prosecution should be brought against Orhan Yakar on account of his membership of the PKK as he had died on 18 November 1996.

On 23 September 1999 the applicant gave a statement to Sergeant Süleyman Üçkuyulu. He stated that he had been trying to find out the whereabouts of his son since 1996. The authorities had told him that his son had died after stepping on a mine. However, despite his requests, his corpse had not been handed over to him. He had lodged an application with the European Court of Human Rights and this application was pending before the Court. He requested that his son's corpse be handed over to him.

In the course of the investigation into the death of the applicant's son the Bingöl Provincial Administrative Council issued a decision, on 23 August 2000, stating that no prosecution should be brought against the members of the security forces. In its view, Orhan Yakar had died after stepping on a mine, which had been placed by the PKK. The security forces had been unable to collect Orhan's body owing to heavy weather conditions and the possible existence of other mines in the region. It was concluded that the security forces had performed their duty with diligence.

On 3 October 2000 the Doğubeyazıt Gendarmerie Command transmitted the Bingöl Provincial Administrative Council's decision of 23 August 2000 to the Sarısu Gendarmerie Command. The Doğubeyazıt Gendarmerie Command requested that the applicant be notified of this decision.

In a letter dated 16 October 2000 the applicant informed his lawyer that he had been forced to sign some papers at the Sarısu Gendarmerie Command without having read them. He had requested to see the papers but he had been given them after his lawyer had telephoned the Command. Then, he had been asked why he had appointed Ms Keskin as his lawyer. It had been suggested to him that he withdraw his application before the Court and he had been advised to claim compensation from the national authorities.

On 16 October 2000 the applicant filed an objection with the Bingöl District Administrative Court (*Bölge İdare Mahkemesi*) against the decision of the Bingöl Provincial Administrative Council.

The case is still pending before the Bingöl District Administrative Court.

## B. Relevant domestic law and practice

### *1. Criminal law and procedure*

The Turkish Criminal Code (*Türk Ceza Kanunu*), as regards unlawful killings, has provisions dealing with unintentional homicide (Articles 452 and 459), intentional homicide (Articles 448) and aggravated murder (Article 450).

Pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure (*Türk Ceza Muhakemeleri Usulü Kanunu*; hereinafter referred to as "CCP"), complaints in respect of these offences may be lodged with the public prosecutor. The complaint may be made in writing or orally. In the latter case, such a complaint must be recorded in writing (Article 151 CCP). The public prosecutor and the police have a duty to investigate crimes reported to them (Article 153 CCP).

If there is evidence to suggest that a deceased has not died of natural causes, the police officers or other public officials who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152 CCP). Pursuant to Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty shall be liable to imprisonment.

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). The 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.

In so far as a criminal complaint has been lodged, a complainant may file an appeal 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).

### *2. Administrative liability*

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

> "All acts and 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.

*3. Civil action for damages*

Pursuant to Article 41 of the Civil Code, anyone who suffers damage as result of an illegal act or tort act 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 and the issue of the defendant's guilt (Article 53).

## COMPLAINTS

The applicant complains under Article 2 of the Convention that his son was killed whilst in the custody of security forces. He also complains of the lack of any effective system for ensuring protection of the right to life in domestic law.

The applicant complains under Article 3 of the Convention that the failure of the authorities to provide any satisfactory explanation for his son's death constituted inhuman treatment in relation to himself. He submits that the absence of any adequate investigation into his complaint resulted in a separate breach of that provision.

The applicant complains under Article 5 of the Convention that his son was not brought before a judicial authority within a reasonable time and that his son was deprived of his right to challenge the lawfulness of his detention.

The applicant complains under Article 6 §§ 1, 2, 3 (a) and (c) of the Convention that his son was deprived of his right to stand trial before a court. He further complains that his son was not presumed innocent until his guilt was proved. He submits that as a father he was not informed of the nature and cause of the accusation against his son and that his son was deprived of his right to legal assistance. Lastly, the applicant complains under Article 6 § 1 of the Convention that he was deprived of his right of access to a court in respect of the death of his son.

The applicant complains under Article 13 of the Convention of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

The applicant complains under Article 14 in conjunction with Articles 2, 3, 5, 6 and 13 of the Convention that there exists an administrative practice of discrimination on grounds of race or ethnic origin in Turkey.

The applicant complains under Article 15 of the Convention that Turkey violates rights from which no derogation can be made under paragraph 2 of this provision.

Lastly, the applicant complains under Article 18 of the Convention that the interferences with the exercise of his and his son's Convention rights were not designed to secure the ends permitted under the Convention.

# THE LAW

The applicant mainly complains of the death of his son whilst in the custody of security forces. He relies on Articles 2, 3, 5, 6, 13, 14 (in conjunction with Articles 2, 3, 5, 6 and 13), 15 and 18 of the Convention.

## A. The Government's preliminary objections

The Government argue that a criminal investigation into the applicant's complaints has been opened in the course of which various effective investigative measures have been taken in a diligent manner. These criminal proceedings are still pending as, so far, no final judgment has been handed down. The Government infer from this that the applicant has failed to exhaust domestic remedies.

The applicant maintains that the domestic remedies proved to be ineffective in his case.

The Court emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means in particular that the Court must take realistic account, not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the

circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports of judgments and Decisions* 1998-VI, p. 2431, § 77).

In the instant case, the Court notes that the Bingöl public prosecutor initiated criminal proceedings against the gendarmes who allegedly acted negligently and caused the death of Orhan Yakar. However, the Bingöl Provincial Administrative Council found that no prosecution should be brought against the gendarmes since they had performed their duty with diligence.

The Court further notes that the applicant filed three petitions on 13 November 1996, 23 December 1996 and 14 March 1997 with the national authorities complaining about the death of his son. He also lodged an objection with the Bingöl District Administrative Court against the decision of the Bingöl Provincial Administrative Council.

In these circumstances, the Court considers that the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress.

However, the question arises whether or not the criminal investigation at issue can be regarded as effective for the purposes of the Convention. The Court considers that this question cannot be answered at this stage of the proceedings, it being closely linked to the substance of the applicant's complaints. It should therefore be joined to the examination of the merits.

Having regard to the above considerations the Court dismisses the Government's objection.

## B. Merits

### *1. Alleged violation of Articles 2, 3, 5 and 13 of the Convention*

The applicant complains that his son was killed whilst in the custody of the security forces. He also complains of the lack of any effective system for ensuring protection of the right to life in domestic law. The applicant alleges that the authorities failed to provide any satisfactory explanation for his son's death. He submits that the absence of any adequate investigation into his complaint resulted in a breach of his Convention rights. The applicant further alleges that his son was not brought before a judicial authority within a reasonable time and that his son was deprived of his right to challenge the lawfulness of his detention. Lastly, the applicant complains of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

The Government draw attention to the nature and scale of the terrorist threat in Turkey and to the particular difficulties encountered in taking action to ward off the threat. They highlight that the Court has already

acknowledged in the past the special features and difficulties of investigating terrorist offences. According to the Government, the applicant's complaints are manifestly ill-founded and therefore the Court should declare them inadmissible.

As regards the applicant's complaints under Articles 2, 3, 5 and 13 of the Convention, the Court considers in the light of the parties' submissions, that the complaints raise 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 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.

*2. Alleged violation of Article 6 of the Convention*

**(a) As regards the applicant's complaints in respect of his son**

The applicant complains under Article 6 §§ 1, 2, 3(a) and (c) of the Convention that his son was deprived of his right to stand trial before a court. He further complains that his son was not presumed innocent until his guilt was proved. He submits that as a father he was not informed of the nature and cause of the accusation against his son and that his son was deprived of his right to legal assistance.

The Government submit that the authorities had been unable to bring the applicant's son before a tribunal because he died one day after he was taken into custody.

The Court notes that no prosecution was brought against the applicant's son on account of his membership of the PKK. The Court is of the opinion that, in the absence of any proceedings initiated against the applicant's son, his complaints under this head do not raise any issues under the Convention (see, *mutatis mutandis*, *Mahmut Erdoğan v. Turkey* (dec.), no. 26337/95, unpublished).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

**(b) As regards the applicant's access to a court**

The applicant also complains under Article 6 § 1 of the Convention that he was deprived of his right of access to a court in respect of the death of his son.

The Government make no submissions on this complaint.

The Court considers that the essence of the applicant's complaint under this head is closely linked to the requirement imposed on the respondent State under Article 2 of the Convention to conduct an effective investigation into the circumstances surrounding Orhan Yakar's death. It should therefore

be declared admissible (see, *mutatis mutandis, Suat Özalp and others v. Turkey* (dec.), no. 32457/96, unpublished).

*3. Alleged violation of Articles 14, 15 and 18 of the Convention*

The applicant submits that there exists an administrative practice of discrimination on grounds of race or ethnic origin in Turkey. He relies on Article 14 in conjunction with Articles 2, 3, 5, 6 and 13 of the Convention. The applicant also complains under Article 15 of the Convention that Turkey violates rights from which no derogation can be made under paragraph 2 of this provision. Lastly, the applicant complains of a violation of Article 18 in that the facts of the case reveal clear abuses of power by the State.

The Government contest the applicant's arguments. They maintain that all individuals are equal before Turkish law without discrimination.

The Court notes that these complaints arise out of the same facts as those under Articles 2 and 13 of the Convention. The Court, therefore, does not consider it necessary to examine these complaints separately (see the Yaşa v. Turkey judgment cited above, § 120).

For these reasons, the Court unanimously

*Joins* to the merits the question concerning the effectiveness of the criminal investigation in question;

*Declares* admissible, without prejudging the merits, the applicant's complaints under Articles 2, 3, 5 and 13 of the Convention as well as his complaint under Article 6 § 1 of the Convention that he was deprived of his right of access to a court in relation to the death of his son;

*Declares* inadmissible the remainder of the application.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President