AS TO THE ADMISSIBILITY OF

Application No. 22495/93
by Esref YASA
against Turkey

The European Commission of Human Rights sitting in private on 3 April 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 12 July 1993 by Esref YASA against Turkey and registered on 20 August 1993 under file No. 22495/93;

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 22 April 1994 and the observations in reply submitted by the applicant on 15 June 1994;

- the further observations submitted by the Government on 24 October 1994 and the observations in reply submitted by the applicant on 20 December 1994.

Having deliberated;

Decides as follows:

THE FACTS

The applicant, Esref Yasa, born on 1962, is a Turkish national of Kurdish origin. He lives in Diyarbakir. He is the nephew of Hasim Yasa, a Turkish national of Kurdish origin, born on 1956, who was shot dead on 14 June 1993.

The applicant is applying on his own behalf and on behalf of his uncle, Hasim Yasa. He is represented before the Commission by Professor

Kevin Boyle and Ms Françoise Hampson, both university teachers at the University of Essex.

A. Particular circumstances of the case

The facts as submitted by the applicant may be summarised as follows.

Until recently the applicant carried out the business of a newsagent or newspaper vendor from a shop or a kiosk in the town of Diyarbakir. From October 1992 his life has been threatened by the police because he sold certain newspapers, especially Özgür Gündem and Özgür Halk.

In November 1992 about a week before his shop was set on fire and burned down, he was visited again by two police officers from the Diyarbakir Security Headquarters. One of them was Commissioner Kemal Fidan. The applicant did not know the other officer's name. These policemen told him that they would burn down his shop.

In the early hours of 15 November 1992 his shop was set on fire and destroyed. He calculates the damages as being 70 000 000 Turkish Liras.

After this incident the other newsagents decided to make a protest strike and on a date unspecified in November 1992 refused to sell anything including all newspapers. The police forced the sellers to accept newspapers and sell them but the applicant refused. As a result he was taken to the police station where he was ill-treated.

On 15 January 1993 at 7.00 the applicant was shot at in the Mardin Kapi area in Turistik caddesi. He provides the following account: when he was going by bicycle from home to his workplace with his son, he noticed two people about 20-25 years old, one of them tall and the other of average height. As a passenger minibus came past him from behind very quickly he was driven towards the pavement where these men were and he stopped. At that moment he saw one of the two men firing, it was a 9 mm firearm. Immediately he pulled out his unlicensed 7.65 mm pistol from his waist, and fired six shots. None of them hit the mark. But eight bullets from the pistol fired at him hit his body, three of these grazing his back and one his right leg. One entered his right arm, one his left wrist, one between his left fore and middle fingers and one through his right buttock into his belly.

The applicant took a car and went to Diyarbakir hospital. He gave the driver his unlicensed gun and asked him to take it and leave it with one of his relatives.

According to the applicant his operation to remove bullets in the Diyarbakir hospital intensive care unit was delayed for two hours by the actions of the police. His relatives were later subjected to insults and death threats at the hospital.

The applicant spent 11 days in the hospital. His left arm and several fingers of his left arm are still unusable. Detailed medical reports will be available later.

The applicant made a statement to the police at the hospital in which he claimed that his assailants were police. He has not been asked to make a statement about this crime by any prosecutor.

In March 1993 the kiosk was raided by the police looking for the firearm which the applicant had used to repel his attackers.

The applicant was convicted of an offence of possessing an unlicensed firearm on 24 May 1993. He was sentenced to one year imprisonment converted by decision of the court to a fine of 1 633 333

Turkish Liras. The applicant has made an appeal against the conviction and sentence. According to the latest information available to the Commission, this appeal is still pending.

On 14 June 1993 at 7.30, the applicant's uncle, Hasim Yasa, was shot and killed. He had been managing the applicant's newspaper business since March 1993, while the applicant kept away due to fear. He died as a result of three bullets fired in the head by unknown assailants. His seven year old son was the only witness. On the same day, the applicant was arrested, assaulted and threatened with death by the police. He was told by the police that they had carried out the shooting and that he was the intended target.

On 10 October 1993, in an armed attack carried out near their home the applicant's brother Yalcin (13) was killed and his brother Yahya (16) was injured. The two brothers had been helping to run a kiosk which sold only the Özgür Gündem.

A statement from the Secretary of the Human Rights branch at Diyarbakir made in or about June 1994 refers to an eight and a half months closure of the Özgür Gündem and it is alleged that the new newspaper, Özgür Ülke, intended to replace it, has been effectively prevented from being delivered to Diyarbakir, those copies which arrive being subject to seizure.

The respondent Government states as follows. Following the incident on 15 January 1993, when the applicant was shot and injured, fragments of bullet cases found at the scene were subject to forensic examination. The nine cases from the firearm fired by the applicant's aggressors were found to have been fired from the weapon used in the killing of Mehmet Sait Erten.

Investigations by the public prosecutor at Diyarbakir into the shooting of the applicant and the killing of his uncle, which were commenced at a date unspecified in 1993, are apparently still pending.

The Government refute any allegation that there has been official intimidation of persons connected with the sale of newspapers, such newspapers being freely available throughout Turkey.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(translation)

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

The Government assert that this provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on a 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.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to commit arson (Articles 369, 370, 371, 372) or aggravated arson if human life is endangered (Article 382),

- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or

- to damage another's property intentionally (Article 526 et seq.).

The Turkish Criminal Code makes it a criminal offence to subject someone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452,459), intentional homicide (Article 448) and murder (Article 450).

For all these offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13, 14 and 18 of the Convention and Article 1 of the First Protocol.

As to Article 2 he claims that he was the victim of a life-threatening attack by agents of the State, or that the State failed in its obligation to protect his right to life. He complains of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law. On behalf of Hasim Yasa who according to the applicant was murdered by the police, he complains of a violation of the right to life.

As to Article 3 he maintains that the risk of life-threatening attacks is very much greater in South-East Turkey than elsewhere in Turkey. In addition, he complains of the physical ill-treatment he experienced at the hands of the police on three separate occasions: during the news vendors' strike in November 1992, on 15 January 1993 when he was prevented from receiving emergency treatment for several hours and on 14 June 1993 after his uncle's funeral.

As to Article 6 he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the life-threatening attack, as a result of which he cannot bring civil proceedings arising out of the attack against him.

As to Article 10 he maintains that he was attacked because he was selling specific newspapers. He claims a violation of this Article on account of threats and an attack designed to deter the lawful exercise of freedom of expression. He refers to an administrative practice on this matter.

As to Article 13 he complains of the lack of any authority before which his complaints can be brought with any prospect of success.

As to Article 14 he complains of discrimination in the enjoyment

of his rights under Articles 2, 6, 10 and 13 of the Convention. He refers to an administrative practice of discrimination on account of race or ethnic origin.

As to Article 18 he claims that his arrests on several occasions by the police and their interference with his right to sell lawful newspapers were restrictions on his right which pursued no legitimate purpose under the Convention and constituted the exercise of arbitrary abuse of power.

As to Article 1 of Protocol No. 1 he refers to the destruction of his premises at Dörtyol in the Ofis area of Diyarbakir. He alleges that the police were responsible for their destruction.

The applicant also makes a special plea to the Commission to take such action as is appropriate on an emergency basis in order to safeguard his life.

As regards the exhaustion of domestic remedies, he refers to the submissions made in two other cases (Applications No. 21895/93 and No. 22276/93, Dec. 19.10.94). He refers to the fact that the police authorities in Diyarbakir have directly threatened him and told him, after the killing of his uncle, that he had been the intended target. He considers that domestic remedies are non-existent in such circumstances.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 July 1993 and registered on 20 August 1993.

On 11 October 1993 the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 22 April 1994 after two extensions in the time-limit. The applicant submitted observations in reply on 15 June 1994.

On 30 August 1994 the Commission decided to request the Government to submit further information.

The Government submitted further information on 24 October 1994 after one extension in the time-limit and the applicant replied on 20 December 1994.

THE LAW

The applicant alleges that he was subject to a life-threatening attack by agents of the State and that he had been subject to physical ill-treatment by the police on three occasions. The applicant invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3)(prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 10 (Art. 10) (freedom of expression), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition on discrimination) and Article 18 (Art. 18) (the prohibition on using authorised Convention restrictions for ulterior purposes) as well as Article 1 of Protocol No. 1 (P1-1) to the Convention (the right to property).

Six month time-limit

The Commission has examined whether the applicant has complied with the requirement imposed by Article 26 (Art. 26) of the Convention that complaints must be introduced within six months of the final decision taken in respect of them. The case-law of the Commission

establishes that where no domestic remedy is available, the six month period runs from the act complained of (see eg. No. 10530/83, Dec. 16.5.85, D.R. 42 p. 171).

In the present case, the Commission recalls that the applicant complains of the destruction of his newspaper kiosk on 15 November 1992 and that he was ill-treated by the police when arrested and detained by them in November 1992. The applicant's complaints in this respect were however submitted to the Commission on 12 July 1993, that is more than six months after these events. He has further alleged that there are no effective remedies available to him in respect of these matters.

An examination of the case not disclosing the existence of any special circumstances which might have interrupted or suspended the running of the six month period, the Commission finds that these complaints have been introduced out of time and must be rejected under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

Exhaustion of domestic remedies

In respect of the remainder of the application, the Government argue that the complaints are inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention.

In respect of any damage or injury alleged to have been caused by the State or its agents, the Government submit that the applicant had the possibility of introducing an administrative action before the administrative courts for compensation relying, inter alia, on Article 125 of the Turkish Constitution.

In respect of the injuries suffered by the applicant and the death of his uncle, the Government also point out that investigations are still pending before the public prosecutor and that the applicant has taken no steps, in civil or criminal procedure, in respect of the alleged ill-treatment and threats made by the police.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the incidents complained of were carried out by or under the responsibility of agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences if they pursue remedies; the lack of genuine investigations by public prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings, intimidation, endangering life or destruction of property.

The applicant submits that in any event any ongoing investigation is a pro forma exercise with no evidence of progress being made.

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 he had at his disposal adequate remedies to deal effectively with his complaints.

While the Government refers to the pending inquiry by the public prosecutor into the death of the applicant's uncle and the shooting of the applicant, the Commission notes that more than twenty months have elapsed since the former incident and over two years from the latter. While it is not clear when exactly in 1993, the public prosecutor commenced the inquiries, the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the alleged crimes, the Commission is not satisfied that pending investigations can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

While in respect of the allegations of ill-treatment on two occasions by the police and threats to his life, it does not appear that the applicant has made any separate complaint to the competent authorities or instituted any claim for compensation or damages, the Commission finds that these complaints are connected to the princicpal complaints concerning the attacks on the applicant and his uncle in respect of which investigation was instituted. In view of the vulnerability of the applicant's position, attacks having been made on himself and three members of his family (uncle and two brothers), the Commission finds that it cannot be said at this stage that his fear of reprisal if he pursued his complaints further would be wholly without foundation.

The Commission further considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 (Art. 26) of the Convention. Consequently, the remainder of the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the merits

The Government submit the applicant's complaints of ill-treatment are vague and general and that there is no substantiation of the allegations of State involvement in the shooting of the applicant and his uncle. Further, they contend that there is no policy of intimidating those involved in the sale of newspapers which are freely available throughout Turkey.

The applicant maintains his submissions.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES INADMISSIBLE the applicant's complaints relating to the destruction of his kiosk on 15 November 1992 and his ill-treatment by the police in November 1992;

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

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)