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. 46412/99
by Mahmut YAŞAR
against Turkey

The European Court of Human Rights (Second Section), sitting on 31 March 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr S. NAISMITH, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 13 February 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, Mr Mahmut Yaşar, is a Turkish national, who was born in 1974 and lives in Diyarbakır. He is represented before the Court by Mr T. Elçi, a lawyer practising in Diyarbakır.

A. The circumstances of the case

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

On 1 June 1994 the applicant was taken into custody by policemen from the Anti-Terrorism Branch of the Diyarbakır Security Directorate on suspicion of his membership of an illegal organisation, namely the Workers' Party of Kurdistan ("the PKK").

On 2 June 1994 the applicant was examined by a doctor at the Bismil Health Clinic who reported that there was no sign of ill-treatment on the applicant's body.

In his police statement dated 6 June 1994, which was allegedly taken under duress, the applicant stated he had made propaganda and collected money in support of the PKK, of which he was a member. He further admitted that he owned an unlicensed gun.

On 7 June 1994 the applicant was once again taken to the Diyarbakır State Hospital for a medical examination. The report indicated that he did not bear any signs of ill-treatment.

On the same day, the applicant was further interrogated by the public prosecutor at the Diyarbakır State Security Court. Before the public prosecutor, the applicant denounced his police statement, alleging that it had been made under duress. While admitting that he owned an unlicensed gun, he denied being a member or engaging in the activities of the PKK. The applicant was subsequently brought before the investigating judge at the Diyarbakır State Security Court, where he repeated his statement taken by the prosecutor. Taking into account the seriousness of the allegations, the judge ordered that the applicant be placed in detention on remand.

By an indictment dated 13 June 1994, the public prosecutor at the Diyarbakır State Security Court initiated criminal proceedings against the applicant. He accused the applicant of membership of the PKK, and accordingly called for the applicant to be convicted pursuant to Article 168 § 2 of the Criminal Code.

The trial commenced before the Diyarbakır State Security Court. In the subsequent nine hearings the court, taking into account the nature of the alleged offence and the state of the evidence, refused to release the applicant on bail.

On 4 September 1996, during the tenth hearing, the court ordered the applicant's release pending trial.

The same day, while waiting to be released from the Gaziantep Prison, the applicant was taken into police custody by members of the Gaziantep Security Directorate. On 7 September 1996 the applicant was handed over to police officers from the Diyarbakır Security Directorate and he was taken to the building of the Rapid Action Force for interrogation.

The applicant alleges that he was ill-treated there. He submits that he was stripped naked, beaten, hosed with cold water, hung by his arms and subjected to electric shocks. The police officers questioned him about his involvement with the PKK. They read out an internal PKK report, which was allegedly written by the applicant. The officers told the applicant that this document had been found among the belongings of a PKK member, who had been killed during a clash with the security forces. The officers also questioned the applicant about four armed attacks which had taken place in Bismil in 1994. On 18 September 1996, together with the applicant, the officers made on-site inspections of the crime scenes. The applicant states that he was forced to sign the incident reports which had been prepared by the police officers. The police also took samples of the applicant's handwriting.

On 19 September 1996 the applicant was taken to the Diyarbakır State Hospital for a medical control. The doctor reported that there were no signs of ill-treatment on the applicant's body. He was subsequently brought before the investigating judge at the Diyarbakır State Security Court where he denied having participated in any armed attacks. The applicant also denounced his police statement, alleging that it had been extracted from him under duress. The applicant further denied writing the PKK report. Considering the seriousness of the allegations against him, the investigating judge ordered the applicant's detention on remand.

On 26 September 1996 the prosecutor at the Diyarbakır State Security Court filed an indictment, accusing the applicant and four other persons of aiding and abetting the PKK and of having carried out a number of armed activities on behalf of the PKK. In support of these accusations, the prosecutor referred to the PKK report that was allegedly drawn up by the applicant and the incident reports dated 18 September 1996. The prosecutor asked the court to prosecute and convict the applicant pursuant to Article 125 of the Criminal Code.

On 3 October 1996 the Diyarbakır State Security Court commenced the second set of criminal proceedings against the applicant.

On 4 November 1996, during the second hearing, the applicant denied the accusations against him and stated that he had not written the PKK report. He asked the court to obtain a forensic report. The court, taking into account the nature of the alleged offence and the state of the evidence, decided that the applicant should be kept in detention on remand.

Subsequently on 23 December 1996, 24 February 1997, 28 April 1997, 17 June 1997 and 28 August 1997 respectively the court refused to release the applicant, relying on the seriousness of the offence and the evidence in the case-file.

On 3 November 1997, during the seventh hearing, the trial court decided to join the two ongoing criminal proceedings against the applicant. The court further ordered that the applicant's detention on remand be continued.

On 8 December 1997, during the eighth hearing, the court decided to send the PKK report and the samples of the applicant's handwriting to the Forensic Institute for examination. Taking into account the seriousness of the offence and the evidence in the case-file, the Court ordered that the applicant's detention on remand be continued.

On 10 February 1998 the applicant submitted a letter to the trial court. Referring to Articles 5 and 6 of the Convention, he requested to be released. The court refused this request.

The applicant's two further requests for release were also rejected for similar reasons by the trial court during the tenth and eleventh hearings, which took place on 16 April 1998 and 16 June 1998 respectively.

On 8 July 1998 the Forensic Institute concluded its report, finding that the document submitted by the Diyarbakır State Security Court for examination had been written by the applicant. It appears that this forensic report was not brought to the attention of the trial court until the thirteenth hearing, which was held on 20 October 1998.

The following six hearings, which took place between 25 December 1998 and 14 September 1999, were all postponed as one of the prosecution witnesses failed to appear before the trial court to give evidence. At the end of each hearing, the court ordered that the applicant's detention on remand be continued, taking into account the nature of the offence and the state of the evidence.

On 18 June 1999 the constitution was amended and the military judge sitting on the bench of the Diyarbakır State Security Court was replaced by a civilian judge.

On 15 February 2000 the State Security Court, composed of three civilian judges, delivered its judgment. While noting that the applicant had alleged that his police statement had been taken under duress, the court did not determine this issue in its judgment. The court considered that there was insufficient evidence to conclude that the applicant had carried out the armed attacks as alleged in the indictment. However, it held that there was sufficient evidence to conclude that he was a member of the PKK. Accordingly, the court sentenced the applicant to twelve years and six months' imprisonment, pursuant to Article 168 § 2 of the Criminal Code.

On 22 January 2001 the Court of Cassation quashed the judgment on the ground that the first-instance court had not carried out a thorough examination of the case before reaching its decision.

On 13 April 2001 the Diyarbakır State Security Court, composed of three civilian judges, commenced the re-trial of the applicant.

During the subsequent nine hearings that took place on 5 July 2001, 18 September 2001, 27 November 2001, 5 February 2002, 2 April 2002, 4 June 2002, 25 July 2002, 12 September 2002 and 22 October 2002 respectively, the court, relying on the state of the evidence and the nature of the offence, refused to release the applicant.

On 10 December 2002 the court delivered its judgment. It noted the applicant's complaint that he had been forced to make confessions during his police custody. However, having regard to the content of the case-file, the court found it established that the applicant was a member of the PKK. It accordingly sentenced him to twelve years and six months' imprisonment, pursuant to Article 168 § 2 of the Criminal Code. Taking into account the period he had already spent in detention on remand, the court decided to release the applicant.

On 3 March 2003 the applicant appealed against the judgment. In challenging the decision of the first-instance court, the applicant's representative referred to the ill-treatment to which the applicant had been subjected in custody. In particular, he maintained that the applicant had been stripped naked, beaten, hosed with cold water, subjected to electric shocks and hung by his arms.

On 17 December 2003 the Court of Cassation, upholding the Diyarbakır State Security Court's reasoning and assessment of evidence, rejected the applicant's appeal.

B. Relevant domestic law

A full description of the domestic law may be found in *Yağcı and Sargın v. Turkey* (judgment of 8 June 1995, Series A no. 319-A, §§ 29-31) in respect of the complaint raised under Article 5, *Aksoy v. Turkey* (judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, §§ 24-30) in respect of the complaints raised under Articles 3 and 13, and *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002) in respect of the complaint raised under Article 6.

COMPLAINTS

The applicant complains under Article 3 of the Convention that he was subjected to ill-treatment in police custody. In this connection, he alleges that he was beaten, hosed with cold water, hung by his arms and subjected to electric shocks.

The applicant also complains that the length of his detention on remand exceeded the reasonable time requirement of Article 5 § 3 of the Convention.

Invoking Article 6 § 1 of the Convention, the applicant maintains that he has not received a fair trial by an independent and impartial tribunal due to the presence of a military judge on the bench of the Diyarbakır State Security Court. He further alleges that the criminal proceedings against him were not completed within a reasonable time.

Under Article 13 of the Convention, the applicant submits that he had no effective remedy in domestic law in respect of his ill-treatment complaint.

Finally, the applicant alleges a violation of Article 14 of the Convention and states that he suffered discrimination on account of his ethnic origin.

THE LAW

The applicant complains of violations of Article 3 (prohibition on torture), Article 5 (right to liberty and security), Article 6 (right to a fair hearing), Article 13 (right to an effective remedy) and Article 14 (prohibition on discrimination).

A. The Government's preliminary objections

The Government assert that the applicant cannot be considered to have exhausted domestic remedies since he has never filed a formal complaint with the public prosecutor with a view to opening a criminal investigation into his allegations of ill-treatment. The Government stress in this connection that, when the applicant appeared before the public prosecutor and the investigating judge on 19 September 1996, he simply declared that his police statement had been taken under duress, without providing any concrete information about having been subjected to ill-treatment.

The applicant maintains that he repeatedly complained to the authorities about being tortured. He alleges that the public prosecutor deliberately omitted to include his ill-treatment complaint in the case-file. He also alleges that he submitted his complaint to the investigating judge on the same day. Furthermore the applicant alleges that he raised the matter again during his trial and finally, in a more detailed manner, in his appeal petition to the Court of Cassation.

Contrary to the Government's assertion, the Court observes that the applicant has repeatedly brought the substance of his ill-treatment complaint to the attention of the domestic authorities. In this context, the Court refers in particular to the decisions of the Diyarbakır State Security Court, dated 15 February 2000 and 10 December 2002 respectively. In both decisions, the domestic court took note of the applicant's allegation that his police statement had been taken under duress. Moreover, in his appeal petition dated 3 December 2003, the applicant clearly stated that he was tortured during police custody and that his conviction was based on his testimony extracted from him under torture. The Court recalls that, pursuant to Article 153 of the Criminal Procedure Code, 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.

Accordingly, in the Court's opinion, the applicant's attempts should have been sufficient to alert the authorities to investigate his complaint and he can therefore be considered to have done all that could be expected of him to exhaust the national channels of redress in this respect (*Örnek and Eren v. Turkey* (dec.), no. 41306/98, 9 January 2003).

Consequently, the Court dismisses the Government's preliminary objection.

B. Merits

1. The applicant complained that the treatment to which he was subjected during his police custody constituted a breach of Article 3 of the Convention.

The Government refuted the allegations. They submitted that the applicant failed to substantiate his allegations or introduce any evidence in support of his claims that he was subjected to treatment contrary to Article 3 of the Convention. The Government stated that the applicant was examined on two occasions, at the beginning and at the end of his police custody and the forensic reports showed that there were no traces of ill-treatment on his body.

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 the 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.

2. The applicant also complained that the length of his detention on remand exceeded the reasonable time requirement of Article 5 § 3 of the Convention.

The Government submitted that the applicant's detention was in line with domestic law. They further stated that the applicant's detention was reviewed at regular intervals. However, in view of the seriousness of the charges brought against him and the evidence in the case-file, the court considered to prolong his detention pending 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 the 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.

3. The applicant maintained under Article 6 of the Convention that he was not tried by an independent and impartial court.

The Government referred to the constitutional amendment of 1999 whereby military judges could no longer sit on such courts.

The Court recalls that it has examined similar cases in the past and has concluded that there was a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003). However, the present application may be distinguished for the following reasons:

Although the applicant's trial commenced before the Diyarbakır State Security Court whose composition included a military judge, while the proceedings were still pending, in 1999, the Constitution was amended and the military judge sitting on the bench of the Diyarbakır State Security Court was replaced by a civil judge. Consequently, when the applicant was convicted on 15 February 2000, the Diyarbakır State Security Court was composed of three civilian judges. Subsequently, the conviction was quashed by the Court of Cassation for a lack of effective investigation. As a result, the applicant was once again tried before the Diyarbakır State Security Court, which was composed from the outset of three civilian judges. During the retrial, the court made a full re-examination of the facts of the case and a re-assessment of the evidence, before once again convicting the applicant.

In the light of the foregoing, the Court finds that the applicant's complaint concerning the independence and impartiality of the Diyarbakır State Security Court should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings were not concluded within a reasonable time.

In their observations, the Government submitted that the length of the proceedings was not unreasonably wrong, having regard to the number of the accused persons in the case. They further highlighted the complexity of the case and the nature of the offence with which the applicant was charged.

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 the 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.

5. The applicant maintained under Article 13 of the Convention that he had no effective remedy in domestic law in respect of his ill-treatment complaint.

The Government did not make any comments on this issue.

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 the 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.

6. The applicant finally alleged a breach of Article 14 of the Convention and stated that he had suffered discrimination on account of his ethnic origin.

The Government did not make any specific submissions on this complaint.

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 the 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 inadmissible the applicant's complaint concerning the independence and impartiality of the Diyarbakır State Security Court;

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

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President