AS TO THE ADMISSIBILITY OF

Application No. 26973/95
by Celalettin YÖYLER
against Turkey

The European Commission of Human Rights sitting in private on 13 January 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION

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 11 March 1995 by Celalettin Yöyler against Turkey and registered on 4 April 1995 under file No. 26973/95;

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 8 January 1996 and the observations in reply submitted by the applicant on 8 May 1996 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1941 and lives in Adapazari, Turkey. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of the University of Essex, England.

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

A. The particular circumstances of the case

The applicant claims that the following events occurred.

Between 1966 and 1984 the applicant was the imam (religious leader) of his village of Dirimpinar (Malazgirt district). As a result of his involvement with a number of political organisations, including the Social Democratic Populist Party (SHP) and the People's Labour Party (HEP), of which he became the local leader, he was imprisoned on a number of occasions.

In 1994 three young women from the village, all of whom were related to the applicant's extended family, decided to join the PKK. On 15 September 1994 the gendarme unit commander of Malazgirt came to the village and threatened that if the women were not brought to him within three days he would burn the village to the ground.

The applicant's family and the families of the young women, frightened by this threat, loaded up their possessions and fled. However the gendarmes, accompanied by special teams, forced them to return to the village and unload their possessions. They gathered the families into a house by force, where they assaulted certain of them, including the applicant's wife. They withdrew from the village telling the villagers to take good photographs of their houses as that was all they would have to remember them by.

On 18 September 1994 at 8 p.m. special gendarme teams and village protectors came to the village. Villagers were ordered to go into their homes and switch off their lamps. The security forces then took diesel oil from the barrels and tractors of the village and set fire to the houses of the applicant and his family. The applicant was out of the village, in izmir, when the fire occurred.

The applicant gives a complete inventory of the extent of his and his family's losses as a result of the fire and estimates the cost of rebuilding at 1,5 billion Turkish Lira.

On 23 September 1994 the applicant filed a criminal complaint with the Karsiyaka prosecutor (Izmir) for the attention of the Malazgirt public prosecutor, calling for an on-site investigation and the institution of proceedings against the perpetrators. This document was registered under no. 35798 by the Karsiyaka public prosecutor's office.

On 24 September 1994 the applicant made a press statement through a human rights body, the Human Rights Association, which was carried the same day in the pro-Kurdish newspaper Özgür Ülke.

On 8 November 1994 the public prosecutor sent a letter (no. 31583) to the Gendarme Command at Malazgirt requesting a report on the matters raised in the applicant's allegations. He repeated his request in letters of 8 December 1994 (no. 30965) and 2 February 1995 (no. 31583).

By letter of 2 March 1995, the Gendarme Central Command at Malazgirt replied to the prosecutor's letter of 8 December 1994 by submitting the minutes of the testimonies they had taken.

The prosecutor took further testimonies in May 1995, and the gendarme commander M.A. in June and November 1995.

Since November 1995, there has been no development in the investigation.

The respondent Government state as follows.

The applicant left the village of Dirimpinar of his own free will, together with his spouse and children. He settled first in Adapazari and then Istanbul or Izmir.

The Government submit various minutes of the testimonies taken by the authorities in relation to the burning of the applicant's house.

i. Testimonies before the prosecutor on 29 May 1995

Muhsettin Yöyler, mayor (muhtar) of Dirimpinar, declared before the prosecutor that on the night of the incident he saw some persons setting fire to the house of the applicant, but as they had their faces covered, he could not recognise them. He did, however, recognise one of them, Ahmet (A.K.), a village protector from the village of Nurettin.

Abdulcebbar Sezen's statement revealed that the applicant was not in the village during the incident, but that his family was.

ii. Testimonies before the gendarme commander on 19 June 1995

Muhsettin Yöyler declared to the gendarme commander M.A. that although he saw the applicant's house burning, he did not see who set fire to it, as it was dark. Süleyman Yilmaz et Omer Sezen made identical statements.

iii. Testimonies before the gendarme commander on 22 November 1995

Aydin Sezen declared before the same gendarme commander M.A. that the applicant had always acted in a subversive manner towards the state, that his house was indeed burned, that he did not see who had set fire to it, but that the security forces definitely did not do it. He also added that all the villagers were pleased that the applicant had left the village.

In a further statement, Muhsettin Yöyler told M.A. that the applicant had always been a PKK supporter, that the applicant and his family were not in the village on the night of the incident, that he did not see who set fire to the house, but that he was sure that it was not the security forces. He also stated that the applicant himself might perhaps have done it.

Abdulcebbar Sezen told the police officer that the applicant was a member of the PKK, that he used to be a source of trouble in the village and that the villagers were pleased that he had left the village. He also stated that the applicant's house was definitely not burned by the security forces or the gendarmes and that the security forces had always helped the villagers.

Muhlis Umulgan declared that the applicant was collaborating with the PKK, that on the night of the incident he saw the applicant's house burning but was afraid to go out as he knew that the PKK was in the region at the time. He added that the security forces did not burn the applicant's house.

As to Süleyman Yilmaz, he declared that the applicant was not in the village when the incident occurred, that three days before the fire his spouse and children had left the village as well, taking the furniture, that some days before the incident security forces had been in the village, but that during the incident they were not in the village. He finally stated that he did not know who burned the applicant's house but was sure that it was not the gendarmes.

The investigation could not continue in the applicant's absence.

According to a letter of 2 April 1995 from the Gendarme Central Command Malazgirt, the applicant had left Dirimpinar for an unknown place, probably Adapazari.

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.

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),

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

- to issue threats (Article 191),

- to make an unlawful search of someone's home (Articles 193 and 194),

- 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.).

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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in the areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant complains that his house and possessions along with those of other residents related to him in the village of Dirimpinar

were burned and destroyed by security forces. He invokes Articles 3, 8, 13, 14 and 18 of the Convention and Article 1 of the First Protocol.

As to Article 3, the applicant submits that the security forces threatened him and his immediate family with reprisals because three young women had left the village to join the PKK. He alleges that the destruction of his home and possessions constitutes inhuman treatment or punishment.

As to Article 6, he submits that his right to access to court to vindicate his civil rights has been denied through the failure of the public prosecutor to act.

As to Article 8, he submits that the destruction of his family home and the homes of his extended family constitutes an interference with his home and with his family life, for which there is no justification under Article 8 para 2.

As to Article 13, he submits that there is an administrative practice of violation of this Article in South East Turkey. He refers to the arguments on the violation of that Article in the related Application No. 21893/93, Akdivar and others v. Turkey, dec. 19.11.94, and relies on the said arguments mutatis mutandis.

As to Article 14, in conjunction with Articles 3, 6, 8 and 13 of the Convention and Article 1 of the First Protocol, he complains that he was a victim of discrimination in the enjoyment of his rights under these Articles on grounds of race or ethnic origin.

As to Article 18, he submits that the destruction of his own and the villagers' homes and possessions is completely foreign to the Convention system and cannot be said to have a purpose prescribed by the Convention in the restriction of the rights and freedoms guaranteed.

As to Article 1 of Protocol No. 1, he complains that he has been deprived of the peaceful enjoyment of his possessions in a manner that was wholly unwarranted.

As to the exhaustion of domestic remedies, he considers that he has sought to exhaust local remedies to no avail. The applicant alternatively submits that there is an administrative practice of not respecting the rule in Article 13 of the Convention which requires the provision of effective domestic remedies. In such circumstances, the applicant considers that there are no practical local remedies since the injury he complains of was the result of a deliberate State policy of destruction of villages and expulsion of their inhabitants in South East Turkey.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 March 1995 and registered on 4 April 1995.

On 4 September 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 8 January 1996 after an extension of the time-limit fixed for that purpose. The applicant replied on 8 May 1996, also after an extension of the time-limit.

THE LAW

The applicant alleges that on 18 September 1994 his village was raided by gendarmes. He claims that during the raid his home and possessions were destroyed, together with those of other villagers

related to him. The applicant invokes Article 3 (Art. 3) of the Convention (the prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (the right to respect for family life and the home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition on discrimination), 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).

Exhaustion of domestic remedies

The Government submit that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention before lodging the application with the Convention. They contend that although the applicant filed a formal complaint with the public prosecutor, he failed to pursue it. The Government point out that the applicant disappeared immediately after filing his complaint with the prosecutor and that the authorities were unable to trace him. The Government consider that the applicant was not willing to pursue his complaint before the prosecutor.

In respect of damage alleged to have been caused by the State, the Government submit that the applicant could have introduced an action for compensation before the administrative courts, which give judgments on the basis of "absolute" or strict liability of the administration or on the basis of fault or negligence on the part of the administrative agents. They refer to various judgments of the highest administrative court (Council of State, Conseil d'Etat) and other administrative courts, which have held that the administration was objectively liable for damage caused by terrorist acts in the state of emergency areas.

The Government point out that the applicant could also have lodged a claim for compensation in an ordinary civil court, on the basis of the Code of Obligations. They submit in this respect that a civil action for damages is independent from a criminal action and refer to domestic judgments where the claimants obtained damages regardless of criminal liability.

The applicant maintains that, by filing an application before the prosecutor, he exhausted domestic remedies. He refers to the length of the time which the investigation is taking and submits that there is no effective investigation being conducted into the destruction of his belongings. He also submits that there is no possibility of an adequate investigation due to the fact that A.M., the gendarme charged by the prosecutor with carrying out the investigation, is not willing to have an effective investigation. He points out in this respect that the only identified suspect, a village protector, has never been arrested and that he is under the orders of A.M.

As regards the exhaustion of administrative and civil remedies, the applicant refers to the case of Akdivar and others v. Turkey (N° 21893/93), where the Commission had found that the applicants were not required to exhaust these remedies.

The Commission recalls that Article 26 (Art. 26) of the Convention requires only the exhaustion of such remedies as relate to the breaches of the Convention alleged and can at the same time 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 v. the Netherlands judgement 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, pp. 250, 262).

The Commission notes that the incident occurred on 18 September 1994 and that the applicant filed a complaint with the public prosecutor on 23 September 1994. It appears that the competent public prosecutor started the investigation in November 1994, when he wrote a letter to the Gendarme Command at Malazgirt requesting them to take action. He repeated the request in December 1994 and February 1995. Both the public prosecutor and the gendarmes continued the investigation throughout May and June 1995 by taking statements. It also appears that on 19 June 1995 the Malazgirt Gendarme Command sent the prosecutor minutes of various testimonies. On 25 October 1995 a warrant of arrest for the identified suspect Ahmet Kinay was issued by the public prosecutor, and in November 1995 a gendarme commander took further statements.

The Commission has not been informed of any findings made as a result of this investigation. Nor has it been informed about the reasons of not taking action against the suspect A.K.

The Commission considers that in the circumstances of this case the applicant is not required to pursue any legal remedy separate from the investigation commenced by the public prosecutor as a result of the applicant's criminal complaint (see Eur. Court HR, Akdivar and others v. Turkey judgment of 16 September 1996, Reports 1996-I, paras. 71-75). The Commission concludes that the applicant may be considered to have complied with the domestic remedies rule laid down in Article 26 (Art. 26) of the Convention. Consequently, 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 that there is no evidence that the applicant or his spouse has been subjected to treatment contrary to Article 3 (Art. 3) of the Convention or that the applicant was discriminated against, non-discrimination on the basis of race, religion, language or conviction being guaranteed by the Turkish Constitution. They also submit that the complaint of lack of access to court is manifestly ill-founded as the applicant abandoned his complaint before the prosecutor, that the applicant and his family had already left the village when the incident occurred and that there is no evidence to show that the applicant's house was burnt by security forces. On the contrary, according to the statements taken by the gendarmes, neither the security forces nor the gendarmes were in the village that night.

The Government conclude that the State is not responsible for the burning of the applicant's house, which was the result of a private dispute.

Finally, the Government contend that the applicant's rights were not restricted in any way.

Accordingly, the Government consider that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The applicant maintains that his account of events is accurate. He maintains his complaints outlined above, which he claims are substantiated.

He submits in this respect that A.K., a village protector in Nurettin village under the command of the gendarme M.A., had been identified as being one of the persons who set fire to his house.

The applicant also points out the contradictions in the

statements of Muhsettin Yöyler, Abdulcebbar Sezen and Süleyman Yilmaz before the prosecutor and the gendarme.

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 THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission