SECOND SECTION

CASE OF DERMAN v. TURKEY

(Application no. 21789/02)

JUDGMENT

STRASBOURG

31 May 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Derman v. Turkey,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 10 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21789/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Emrullah Derman ("the applicant"), on 26 February 2002.

2. The applicant was represented by Mr S. Karahan, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The case was declared inadmissible by a committee of three judges on 29 June 2006 for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention. Subsequently, on 23 June 2009, the application was reopened and restored to the list of cases pursuant to Rule 43 § 5 of the Rules of the Court. On 19 November 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1963 and lives in Istanbul.

5. The applicant was a shopkeeper. On 14 January 1999, following a complaint made by an individual, Y.G., the applicant was arrested by three police officers in civilian clothes and taken to a police station on suspicion of robbery. On the same day, the applicant was examined by a doctor at the Haseki Hospital, who noted no signs of injury to his body.

6. At the police station, the applicant was forced to sign self-incriminating statements. When he refused to do so, he was beaten up. More specifically, he was blindfolded, stripped naked, insulted, hosed with water, beaten, and subjected to *falaka* (beating on the soles of the feet).

7. According to a police report dated 16 January 1999, the applicant banged his head on the walls of his cell and punched himself in the stomach.

8. On 17 January 1999 the applicant was released from police custody. Before he was released, he was taken to the Bakırköy Branch of the Forensic Medicine Institute for a medical examination. According to the medical report prepared by the Forensic Medicine Institute, there were several injuries on the applicant's body and it was noted that he was unfit to work for seven days. The medical report revealed that the applicant had a 20x15 cm reddish purple bruise on the right shoulder blade, another 20 cm reddish purple bruise on the left shoulder blade, a 13x14 cm purple bruise on the left side of his waist, a 5x2 cm purple bruise on the right side of his waist, a 16x6 cm purple bruise around the navel, and several other small bruises.

9. At night on the same date, the applicant went to the emergency department of the American Hospital. The doctor who examined him noted in his report that the applicant had complained that he had been subjected to ill-treatment whilst in police custody. According to the report, the applicant had a 30x5 cm bruise on the right shoulder blade, two bruises measuring 40x5 cm and 30x5 cm on the left shoulder blade and a 25x7 cm bruise around the navel.

10. On 18 January 1999 the applicant was further examined at the Marmara University Hospital. It was noted that the applicant was unable to work for two weeks, as he was suffering from psychological trauma caused by having been ill-treated in police custody.

11. On an unspecified date, the applicant filed a criminal complaint with the Bakırköy public prosecutor and alleged that he had been ill-treated whilst in police custody. He requested the identification and prosecution of the police officers responsible.

12. By an indictment dated 22 June 1999, the Bakırköy public prosecutor initiated criminal proceedings in the Bakırköy Assize Court against three police officers, accusing them of ill-treatment of the applicant under Article 243 of the Criminal Code. The applicant joined the proceedings as a civil party.

13. During the trial, the court heard evidence from the accused officers and the applicant.

14. On 28 December 2001 the Bakırköy Assize Court, on the basis of the evidence in the case file, found the three police officers guilty of ill-treating the applicant. The court found it established that the police officers had intentionally ill-treated the applicant to extract a confession. It therefore sentenced each of the accused to a year's imprisonment under Article 243 of the former Criminal Code and banned them from public service for three months. Having regard to the attitude of the police officers during the trial, the court then reduced their sentence to ten months' imprisonment. Furthermore, the court decided to suspend their sentences pursuant to Section 6 of Law No. 647 on the basis that they did not show any likelihood of reoffending.

15. On an unspecified date, one of the convicted police officers filed an appeal against the decision of the Bakırköy Assize Court. However, on 1 December 2003 the Court of Cassation rejected his appeal, as he had failed to submit his request in time.

16. Subsequently, on 17 November 2004 the applicant initiated proceedings before the Istanbul Administrative Court, claiming compensation. On 13 October 2005 the Istanbul Administrative Court rejected the applicant's case, holding that he had failed to bring his case within the one-year time-limit following the decision of the Bakırköy Assize Court dated 28 December 2001. The applicant's appeal against this decision was rejected by the Supreme Administrative Court on 30 January 2008.

17. According to the information in the case file, the applicant is still being treated for psychological problems because of the ill-treatment he suffered in 1999.

II. RELEVANT DOMESTIC LAW

18. A description of the relevant domestic law and practice in force at the material time can be found in *Okkalı v. Turkey*, no. 52067/99, §§ 47-49, ECHR 2006-XII (extracts); *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 96-98, ECHR 2004-IV (extracts); and *Zeynep Özcan v. Turkey*, no. 45906/99, §§ 26-30, 20 February 2007; *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 45, 8 April 2008).

19. In particular, Section 6 of Law no. 647 on the execution of sentences reads as follows:

Section 6(1)

"The court may decide to suspend the execution of a fine and/or a prison sentence of up to one year ... if it is convinced, taking into account the offender's criminal record and potential to commit crime, that there is little risk of any further offence being committed, and provided that the offender has never been sentenced to anything other than a fine. The reasons for suspending the sentence must be stated in the decision."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

20. The applicant complained under Article 3 of the Convention that he had been subjected to torture whilst in police custody. He further alleged that the ensuing criminal proceedings against the accused police officers had been ineffective. Article 3 of the Convention reads as follows:

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

A. Admissibility

21. The Government argued that the application should be rejected for non-exhaustion of domestic remedies. In this connection, they stated that the applicant should have brought compensation proceedings before the administrative or civil courts to seek compensation for the harm he had allegedly suffered.

22. The Court observes in the first place that the only remedies Article 35 of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged (see*Okkalı*, cited above, § 57). It further recalls that the obligations of the State under Article 3 cannot be satisfied merely by awarding damages. For complaints about treatment suffered in police custody, criminal proceedings are the proper means of obtaining redress (*see Okkalı*, cited above, § 58).

23. In the present case, a criminal action was indeed brought and led to the conviction of three police officers for ill-treatment within the meaning of Article 243 of the former Criminal Code (see paragraph 14 above). The Court should now determine whether in the particular circumstances of the case the applicant should have exhausted the remedies referred to by the Government. The Court notes that this objection is closely linked to the Government's positive obligation to provide a sufficiently deterrent protection against breaches of the absolute prohibition enshrined in Article 3. Accordingly it decides to join it to the merits.

24. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

25. The Court recalls that where allegations are made under Article 3 of the Convention, it must apply a particularly thorough scrutiny. Where domestic proceedings have taken place, however, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Gäfgen v. Germany* [GC], no. 22978/05, § 93 , ECHR 2010-....).

26. In assessing the treatment to which the applicant was subjected to during his police custody, the Court notes that in its decision of 28 December 2001 the domestic court confirmed the applicant's allegations and established that the accused police officers had intentionally ill-treated him to extract a confession (see paragraph 14 above). Furthermore, in their observations, the Government did not challenge the applicant's allegations. Consequently, the Court finds it established that the applicant was ill-treated as alleged during his police custody.

27. Having said that, the Court should focus on the positive obligation of the State to provide a sufficiently deterrent protection against breaches of the rights enshrined under Article 3 of the Convention. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI). The Court also recalls that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). According to the established case-law, this means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts (see *Okkalı*, cited above, § 65). The Court also recalls that when an agent of the State is accused of crimes that violate Article 3, any ensuing criminal proceedings and sentencing must not be time-barred and the granting of amnesty or pardon should not be permissible (see, *mutatis mutandis*, *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

28. Turning to the facts of the present case, the Court notes that, as the sentences of police officers, who were found guilty of ill-treating the applicant to extract a confession (see paragraph 14 above), were suspended, the way in which domestic law was applied in the present case undeniably falls into the category of the "measures" which are unacceptable according to the Court's case-law, as its effect was to render convictions ineffective (see *Zeynep Özcan*, cited above, § 40-46, and *Okkalı*, cited above, §§ 73-78). The Court considers that the impugned court decision suggests that

the judges exercised their discretion more in order to minimise the consequences of an extremely serious unlawful act than to show that such acts could in no way be tolerated.

29. Consequently, the Court finds that, far from being rigorous, the criminal justice system as applied in this case was not sufficiently dissuasive to effectively prevent illegal acts of the type complained of by the applicant.

30. The Court further notes that had the applicant exhausted the administrative and/or civil remedies referred to by the Government, he might have been awarded compensation. It recalls, however, that it has decided to focus on the positive obligation of the State to provide a sufficiently deterrent protection against breaches of the rights enshrined in Article 3 of the Convention. Consequently, the Government's preliminary objection must be rejected.

31. In the light of the above, and having particularly regard to the fact that the ill-treatment inflicted on the applicant had been classified as torture by the domestic court, the Court concludes that there has been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. The applicant sought an award of just satisfaction for non-pecuniary damage suffered and left its amount to the discretion of the Court. As regards legal fees, the applicant submitted a fee agreement, according to which he had undertaken to pay his representative 10,000 euros (EUR) plus 20% of any amount of just satisfaction awarded by the Court.

33. The Government did not make any comment.

34. The Court finds that the applicant must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violation found and ruling on an equitable basis, it awards the applicant EUR 42,000 in respect of non-pecuniary damage.

35. As regards costs and expenses, the Court may make an award in so far as they were actually and necessarily incurred and are reasonable as to quantum (see *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, and ruling on an equitable basis, the Court awards the applicant EUR 1,000 in this respect.

36. The Court considers it appropriate that default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 3 of the Convention;

4. *Holds*

(a) that the respondent State is to pay to the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) EUR 42,000 (forty two thousand euros), plus any tax that may be chargeable to him, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand euros) plus any tax that may be chargeable to him, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Françoise Tulkens
Deputy Registrar President

DERMAN v. TURKEY JUDGMENT