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Date: 27/01/2016

DH-DD(2016)107

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Meeting: 1250 meeting (8-10 March 2016) (DH)

Item reference: Action report (26/01/2016)

Communication from Turkey concerning the case of Avcı and others against Turkey (Application No. 70417/01)

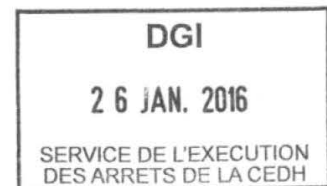
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Réunion : 1250 réunion (8-10 mars 2016) (DH)

Référence du point : Bilan d'action

Communication de la Turquie concernant l'affaire Avcı et autres contre Turquie (Requête n° 70417/01)
(anglais uniquement)



UPDATED ACTION REPORT

Avcı and Others v. TURKEY (70417/01)

Judgment of 27 June 2006, final on 27 September 2006

I. CASE DESCRIPTION

1. This case concerns a violation of the prohibition of torture and ill treatment on account of measures taken to prevent the applicants from absconding while hospitalized during their criminal conviction.

2. The applicants, Mesut Avcı and others had been taken to the hospital due to their hunger strike while being held in the prison in 2000. During their stay in the unit, the applicants were restrained by having one ankle tied to the bedpost by means of a metre-long chain. They alleged that there had not been any effective remedy whereby they could challenge this treatment.

3. The Court mainly found that disproportioned measures taken to prevent the applicants from absconding during their hospitalization following a hunger strike and under the Turkish legislation and the regulations governing the gendarmerie there had been lack of an effective remedy in this respect (Article 3 and 13).

II. INDIVIDUAL MEASURES

Just Satisfaction

4. The European Court awarded just satisfaction in respect of the non-pecuniary damage sustained by the applicants.

5. The damage awarded by the Court to the applicants and inheritors of the deceased applicants was paid.

III. GENERAL MEASURES

6. The Turkish authorities have envisaged or taken a number of measures aimed at preventing similar violations. These measures are legislative amendments and ensuring effective investigation in cases involving actions of police and gendarmerie, training and awareness-raising measures as well as an array of other measures aimed at preventing similar violations.

1- Legislative Amendments about Administration of Prisons and Execution of Penalties:

7. Article 2 of the Law on the Execution of Penalties and Security Measures no. 5275 (entered into force on 1 June 2005) prohibits all kind of cruel, inhuman, degrading or humiliating treatment.

8. Article 155 of the Regulation on the Administration of Prisons and Execution of Penalties and Security Measures (entered into force on 6 April 2006), in pursuant to Article

121 of the Law no. 5275, forbids chaining or putting someone in chains and regulates in which conditions handcuffs and materials restricting the physical movements may be used.

9. Article 4 of the Section 5 of the Directive on the External Security of the Prisons and Referral and Transfer Services ("Directive"), dated 26 December 2006, designates means which may be used during transfer or referral of convicts and detainees. In this regard, all necessary measures which do not cause any damage to health shall be taken such as handcuffing, holding the arm of the one referred, making a circle with enough number of personnel around her/him.

10. Article 3 of Section 6 of the Directive mandates that where the doctor asks for the handcuffs to be unlocked since they hinder examination or treatment to be effected, the handcuffs shall be removed during the examination and treatment.

11. Article 4 of Section 6 of the Directive ordains that where necessary, the convicts or detainees could be handcuffed in a way not the causing harm to their health in order to prevent them absconding. As is inferred, the measure of putting someone in chains, which has been the subject matter of the judgments, has been definitely prohibited by the amendments made in legislation.

12. The practise of the ill convicts' being chained to the bedpost as a measure, by the amendments made after the incident, is definitely prohibited. Furthermore, the opportunity for directly investigation of the civil servants, who have committed offences of torture and ill-treatment, has been introduced.

2- Measures taken as to effective remedy

2.a. Pre-authorization for prosecution

13. Allegations of torture and ill-treatment are to be taken seriously and diligently by the judicial authorities at all stages of the investigation and trial process. Public prosecutors immediately and *ex officio* initiate investigations concerning allegations of torture and ill-treatment and conduct them in person in accordance with the current Code of Criminal Procedure and the circulars issued by the Minister of Justice. If he/she does not initiate an investigation regarding a complaint or a tip, that action shall be likely to amount to the offence of negligence of duty which is prescribed in Article 257 of the Law no.5237. Moreover, that action shall generate the disciplinary offence set out in Article 63/d of the Law no. 2802 on Judges and Prosecutors.

14. Previously, if the complaint or the information about an alleged offence of torture concerned a public servant, i.e. a member of the police or the gendarmerie, the public prosecutor was, until January 2003, according to the Law no. 4483 (1999), not permitted to proceed with the investigation without prior permission of the governor or regional governor. This was one of the principle impediments to the prosecution of public officials.

15. In this context, the offence of ill-treatment in Turkish law needs to be explained. Such offences have been foreseen in the current criminal law as aggravated sort of battery. The so-called ill-treatment offence, the former Criminal Code contained exactly this notion,

has been designated as aggravated battery which is drawn up in Article 86/1-3.d of the current Criminal Code. As is known, all kind of continuous battery will constitute torture.

16. In January 2003 the Law on the Trial of Civil Servants and other Public Officials, and Article 154 of the Code of Criminal Procedures were amended, lifting the requirement to obtain permission from superior of the accused public officials in order to initiate investigations on him/her in cases of torture and ill-treatment. In other words, the public prosecutor may and must initiate investigation against public officers for the offences of torture and ill-treatment directly without requesting any permission. For instance, as it was accepted that the accused police officers, who had taken the victim to the police station for a criminal investigation without giving information to the public prosecutor and ill-treated him by means of holding at the police station without taking any action, had committed the imputed offence in the course of their duties, the Court of Cassation Grand Chamber for Criminal Matters held that pursuant to the provisions of the Law no. 4483, there was no need to take a permission for investigation in respect of those accused persons. Also, the 4th and 8th Chambers of the Court of Cassation quashed the first instance courts' decisions of stay of trial, given the absence of cause of action on the ground that obtaining pre-authorisation from administrative authorities was necessary (See Annex 1).

17. It should be indicated here that if a prosecutor requests authorization from administrative authorities, it may be resulted in the initiation of disciplinary proceedings in respect of him/her for the disciplinary offence stipulated in Article 63/d of the Law no. 2802; moreover, it will be noted down in the appraisal of inspectors.

18. Taking into account that disciplinary proceedings and appraisals directly affect the transfer of prosecutors to more desired cities and their commissioning to a higher position, the fault made by a prosecutor will result for him an inconvenient evaluation as a whole.

19. The Turkish Government considers that all necessary general measures have been taken for that sort of violation and therefore no other general measures are required.

2.b Effective, prompt and independent investigations into complaints

20. As a result of the amendments made in domestic law since the year 2000 for the effective investigation of torture and ill-treatment allegations, the offence of torture has been re-defined and significant steps have been taken in the fight against torture and ill-treatment by increasing the penalty for the said offences and extending prescription period for ill-treatment and abolishing it for torture. Judicial and administrative investigations are launched for officials who have allegedly violated rights acting individually against the general principles and policies of the Turkish Police, and those who are found guilty are punished.

21. Amendments were introduced into the Code of Criminal Procedure (no. 5271 - entered into force on 1 June 2005) aimed at ensuring the speedy investigation and, if appropriate, prosecution of alleged offences of torture or ill-treatment.

22. The Code of Criminal Procedure has introduced effective investigation measures in order to ensure the completion of trials in the possible shortest period as prescribed by the additional Article 7 of the previous Code. The current Code prescribes the completion of a

trial in one hearing in principle. Necessary mechanisms were included in the said Law to this end. As regards ensuring the collection of all case-related evidence during the process of investigation, Article 174 provides that courts may remand any indictment which does not have sufficient evidence. Thus, public prosecutors are prevented from preparing an indictment not compatible with the conditions set out in Article 170 and from filing a law-suit without collecting existing evidence that is supposed to affect the establishment of the offence.

23. Public prosecutor shall initiate an *ex officio* investigation as soon as he/she becomes aware that a crime has been committed (Article 160 of the Code of Criminal Procedure).

24. Moreover, the Minister of Justice issued a circular pursuant to which investigations concerning allegations of torture and ill-treatment shall be conducted by the public prosecutor and not by law enforcement officers in a prompt, effective and just manner with respect to human rights and in accordance with not only domestic law but also international treaties and the ECtHR judgments (See Annex 2).

25. According to this circular the cases of torture and ill-treatment are considered to be urgent cases by the prosecution offices.

26. On the other hand, the Ministry of Interior issued a number of instructions and circulars concerning the rules of carrying out investigations, taking of statements at the police headquarters, management and inspection of custody facilities (2014) and the Ministry also designated necessary rules in order for prevention of torture and ill-treatment (See Annex 3).

27. The Constitutional Court has also played a significant role since it started to receive individual application as of September 2012. There are many judgments regarding ill-treatment and torture, *inter alia*, two of them illustrate the progress in the Conventional standards to show the point of the view of the judicial authorities in Turkey.

28. The Court found a violation of right to life and prohibition of torture in the judgments of *Deniz Yazici* (no. 2013/6359, 10 December 2014) and *Cezmi Demir* and others (no. 2013/293, 17 July 2014) in respect of lack of effective and diligent inquest carried out concerning allegations of ill-treatment and/or torture as well as leniency of the punishment for perpetrators of such offences. In these judgments, the Court awarded just satisfaction to the applicant(s) in respect of non-pecuniary damage. Where the Constitutional Court allows for reopening of proceedings, it is mandatory for the first instance court to re-open the case file in question. In these judgments the Court pointed out the case-law of the European Court of Human Rights (See links below:
<http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/4699ad0b-aa70-4935-b504-c8344982bd8f?highlightText=i%C5%9Fkence&wordsOnly=False>

<http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/53a65317-8c60-4f89-9840-5f34f3acd814?highlightText=i%C5%9Fkence&wordsOnly=False>).

29. The Turkish Government considers that all necessary general measures have been taken for that sort of violation and therefore no other general measures are required.

2.c Recently Established Institutions As Remedy

30. Turkey has undertaken a series of initiatives to establish mechanisms at the domestic level to uphold human rights. These measures may potentially lead to stronger protection of the rights set out in the Convention. To this end, the Turkish Government has set up a number of human rights institutions.

2.c.1 Individual Application to the Constitutional Court

31. Turkish authorities would like to draw attention to the Constitutional amendment made in September 2010 by which the individuals are granted the right of individual application to the Constitutional Court of Turkey after exhaustion of other remedies, where an individual may claim that any of her or his rights under the European Convention on Human Rights has been violated by the public authorities.

32. As mentioned above it is observed that constructive judgments taking the case-law of the ECtHR as basis have been issued particularly in respect of the issues of torture and ill-treatment.

2.c.2 The Ombudsman Institution

33. The Ombudsman Institution was established in Turkey, following the adoption of the Law on the Ombudsman Institution on 14 June 2012. According to the law, the Ombudsman Institution is accountable to the Parliament and no one shall issue instructions to it. It shall examine complaints and make recommendations on the functioning of the administration with regard to the rule of law and human rights.

34. The purpose of the Institution is to establish an independent and efficient complaint mechanism regarding the delivery of public services and to investigate, research and make recommendations about the conformity of all kinds of actions, acts, attitudes and behaviours of the administration including allegations of torture and ill-treatment with law and fairness under the respect for human rights. Natural and legal persons including foreign nationals may lodge complaints to the Ombudsman Institution.

35. The establishment of the Ombudsman's office is a potentially important addition to the range of institutions available to the public to file human rights complaints against public officials. However, no decision has been rendered till now regarding torture or ill-treatment.

2.c.3 National Human Rights Institution

36. The National Human Rights Institution (NHRI) was assigned the role of the national preventive mechanism (NPM) under the Optional Protocol to the United Nations Convention on Prevention of Torture (OPCAT).

37. The National Human Rights Institution of Turkey was established by the Law no. 6332 of 21 June 2012. In order to carry out its duties and exercise its authority, it is a public legal entity vested with administrative and financial autonomy by the relevant legislation regulating it.

38. The duties of the Institution include: the protection and promotion of human rights and activities for the prevention of violations; the fight against torture and ill-treatment; investigating complaints and applications, following their course and intervening in order to solve human rights problems; delivering training activities in human rights-related fields; carrying out reviews and researches with the aim of monitoring and evaluating developments in the area of human rights.

39. As an example, the institution prepared a report on December 2014 concerning the allegations of the death of a refugee due to being battered at the Van Police Headquarters. This report referred to the case-law of the European Court of Human Rights and international law. In the report which contains the information and findings with respect to “Lütfullah Tacik’s Death” and “the Van Removal Center”, the death incident and the conditions at the Removal Center have been assessed in terms of human rights and recommendations have been proposed in that regard.

40. As a result, recommendations in the report have been proposed for the purposes of ensuring the effective investigation of the alleged violation and thus preventing possible violations of rights in cases of similar incidents and also ensuring full implementation of conditions, principles and necessary services specified in the national and international legislation. The suggestions listed in accordance with the findings put forth have been communicated to the relevant Ministries and public institutions.

41. The National Human Rights Institution has a broad authority to conduct inquiries about the allegations of torture and ill-treatment; accordingly, it prepares reports on such inquiries and, having regard to the international standards, makes recommendations to the relevant institutions.

3. Training and Project Activities

3.a Training Activities for Gendarmerie

42. Within the scope of the “Site Induction Training” on human rights performed between 2009 and 2015, in 32 cities visited, 2365 personnel in total were provided with training and 609 jails were inspected (See Annex 4)

43. The course of Human Rights is provided in;

(1) The Main Course of Gendarmerie Commissioned Officers for one semester for three times a week, 48 hours in total.

(2) The Main Course of Gendarmerie Non-Commissioned Officers three times a week, 33 hours in total.

(3) The Gendarmerie Non-Commissioned Officer College, three times a week, 42 hours in total.

44. A document titled “Brochure on Precedent Judgments rendered by the ECtHR (2009-2011) was prepared concerning ten (10) judgments on the Gendarmerie rendered by the

European Court of Human Rights in respect of Turkey between 2009 and 2011, and it was published for use of the Gendarmerie Station Commands.

45. Furthermore, a document titled "Assessment of the ECtHR judgments with regard to the Gendarmerie" was prepared concerning the judgments on the Gendarmerie rendered by the European Court of Human Rights in respect of Turkey, and it was submitted for the use of units.

The Gendarmerie Human Rights Violations Examination and Evaluation Center (JIHIDEM):

46. With regard to the allegations concerning human rights violations that may be committed by the gendarmerie personnel during their performance of duties, on 26 April 2003 the Gendarmerie Human Rights Violations Examination and Evaluation Center(JIHIDEM) was established for the purpose of;

47. Accepting the complaints and applications on the basis of a system

48. Performing a research as regards these allegations

49. Ensuring a judicial or an administrative investigation to be performed where these allegations are true

50. Providing information to the applicant with regard to the developments and the results of the procedures performed.

51. Any kind of human rights violations are researched in detail and requisite procedures are performed through this center.

52. The Gendarmerie Human Rights Violations Examination and Evaluation Center carries out its activities pursuant to Article 74 of the Constitution, the Law on Petition no. 3071, the Law on the Right to Information no. 4982, the Code of Criminal Procedure no. 5271, the Directive on the Gendarmerie Human Rights Violations Examination and Evaluation Center JGY 27-8(A).

53. In the event that the allegations in the application are determined to fall within the scope of the human rights violations, through Brigade/Regional equal or Superior Unit Command, an administrative investigation board consisting of a superior commissioned officer having sufficient knowledge and experience or personnel having sufficient knowledge about the issue is assigned for necessary researches to be performed. It is taken into consideration that the personnel assigned as the investigator should not be the one complained of or his/her subordinate. The allegations are also investigated through Inspectors for Examining Allegations of Human Rights Violations to be assigned in the Gendarmerie General Command Headquarters, when necessary. As a result of the investigation performed, the application and administrative investigation file are submitted to the relevant Public Prosecutor's Offices for judicial examination and necessary administrative evaluation is made in respect of the relevant personnel. Subsequent to the examination, the applicant is informed of the results and the developments.

54. 396 applications in total were lodged before the Gendarmerie Human Rights Violations Examination and Evaluation Center with the allegation of human rights violations. Disciplinary sanctions were imposed on the relevant personnel in respect of nine applications upon the examination of the applications lodged with the allegation of human rights violations. 25 applications in total were lodged before the Gendarmerie Human Rights Violations Examination and Evaluation Center with the allegation of torture. No disciplinary sanction was imposed on any personnel as a result of the examinations in respect of these allegations.

55. The website of the JIHIDEM gives detailed information about activities on human rights in respect of gendarmerie available on:

http://www.jandarma.gov.tr/jihidem/jihidem_eng/home_page.htm

56. The Turkish Government considers that the measures taken are capable of preventing similar violations and therefore no other measures are required.

4- Publication and Dissemination of the Judgment:

57. The judgment in question was translated into Turkish and published at the official web-site of the Human Rights Department of the Ministry of Justice

58. It is available on <http://www.inhak.adalet.gov.tr/ara/karar/avciyd.pdf>

In addition, the translated text of the judgment has been circulated to the Constitutional Court, the Ministry of Interior and the Court of Cassation.

IV. CONCLUSION

59. In the light of the submissions made above, the Government considers that Turkish authorities have taken all necessary general and individual measures for the execution of the judgments and have provided full redress to the applicant. The Government therefore respectfully invites the Committee of Ministers to close its examination on this case.

ANNEXES

- 1) Judgments of the Court of Cassation, docket no. 2008/15833(4), 2010/2(Gr), 2008/1685 (8)**
- 2) Ministry of Justice Circular no.158-20 February 2015**
- 3) Ministry of Interior Circulars**
- 4) Information note provided by General Command of Gendarmerie**