

SECOND SECTION

CASE OF ALİ GÜNEŞ v. TURKEY

(Application no. 9829/07)

JUDGMENT

STRASBOURG

10 April 2012

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 Ali Güneş v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Isabelle Berro-Lefèvre,

András Sajó,

Işıl Karakaş,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 20 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 9829/07) 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 Ali Güneş (“the applicant”), on 13 January 2007.

2. The applicant was represented by Mr Kamil Tekin Sürek, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that he had been subjected to ill-treatment in breach of Article 3 of the Convention.

4. On 8 July 2010 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

THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1968 and lives in Istanbul. He is a high school teacher, an executive member of the Education and Science Workers’ Union and a member of the Confederation of Public Workers’ Unions.

6. The 2004 NATO summit took place in Istanbul from 28 to 29 June. The Governor of Istanbul designated thirteen locations in Istanbul where people would be allowed to hold demonstrations.

7. As the remaining facts of the case are in dispute between the parties, they will be set out separately. The facts as presented by the applicant are set out in Section B below (paragraphs 8-10) and the Government’s submissions concerning the facts are summarised in Section C below (paragraphs 11-13). The documentary evidence and further factual elements submitted by the applicant and the Government is summarised in Section D (paragraphs 14-27).

B. The applicant’s submissions on the facts

8. On 28 June 2004 the applicant and a number of other teachers arrived at the square outside the Mecidiyeköy Underground Station in Istanbul, which is one of the thirteen locations referred to

above, to issue a press release.

9. The applicant and all his colleagues were unarmed and behaved in a peaceful manner. Nevertheless, police officers who had been circling the crowds grabbed the applicant and his friends by the arms, sprayed them with tear gas and beat them up.

10. The police officers then took the applicant to a police station, where he was kept for a period of eleven hours. He was subsequently brought before a prosecutor, who ordered his release.

C. The Government's submissions on the facts

11. After the applicant and other demonstrating teachers finished reading their press release, police officers asked them to disperse. When the demonstrators refused to do so, the police officers warned them that they would be taken into custody. The group continued to refuse to disperse and, instead, went on to stage a sit-in protest. They told the police officers that they would continue with their protest until their friends, who had been arrested elsewhere, had been released.

12. When the police continued to try to persuade them, the demonstrators attacked the police with stones and sticks. They also damaged cars in the vicinity and injured a number of police officers. As a result, the police officers used tear gas in order to disperse them. The applicant was taken to the police station, where he was kept for a period of eleven hours before his release was ordered by a prosecutor.

13. On the same day the applicant was examined by two doctors. The first examination was carried out at 11.30 a.m. at the Haseki State Hospital. The doctor noted that the applicant's eyes were red, and considered it necessary for the applicant to be examined by a specialist doctor. The specialist doctor who examined the applicant at Sağmalcılar Hospital at 6.45 p.m. on the same day noted that there was no sign on the applicant's body that he had been subjected to ill-treatment.

D. Documentary evidence and further factual elements submitted by the parties

14. According to a report prepared on 28 June 2004 by nine of the police officers who had taken part in the incident, the spokesperson for the demonstrators in Mecidiyeköy told the police officers that a number of fellow union members had been arrested at another location in Istanbul earlier in the day. The spokesperson added that the demonstrators in Mecidiyeköy would not be dispersing unless and until their friends had been released, and would instead march to Taksim Square. When the police informed the spokesperson that this would not be allowed and warned the demonstrators to disperse, the demonstrators attacked the police officers with the sticks from their banners, and proceeded to stage a sit-in protest. The Rapid Response Force (*Çevik Kuvvet*) then dispersed the demonstrators and arrested eleven persons, including the applicant, who refused to disperse.

15. The incident was widely reported in the national press. In a photograph published in the daily newspaper *Sabah* the applicant is pictured between two police officers who are holding him by the arms, and one of whom is spraying the applicant's nose and mouth with gas at very close range.

16. At 11.30 a.m. on the same day the applicant was examined by a doctor at Haseki Hospital, who noted redness in both eyes and referred him to a specialist doctor. The ophthalmologist who examined the applicant later that day at the same hospital observed hyperaemia in both eyes, and recorded his findings in a report.

17. At 6.45 p.m. on the same day the applicant was apparently examined by another doctor. However, no entries were made by that doctor in the sections of the report reserved for detailing the incident, the applicant's allegations and the doctor's findings. These parts of the report were simply crossed out by the doctor. Thus, the report only mentions the name of the applicant, his date of birth, the time of the medical examination and the name of the police officer who accompanied him.

18. It appears that the applicant was examined by yet another doctor on the same day. The doctor noted in his report (report no. 3015) that there were ecchymosed areas measuring 8 centimetres and 5 x 8 centimetres below the applicant's shoulders. The doctor also noted that the applicant's eyes were reddened.

19. According to medical reports submitted by the Government, the ten demonstrators who had been arrested together with the applicant (see paragraph 14 above) also had various injuries on their

bodies.

20. The applicant and the other demonstrators were brought before the prosecutor and questioned. In his statement the applicant maintained that he had not committed any offences but had simply exercised his democratic rights. He also informed the prosecutor that the police had used pepper spray against him. According to the statement, a lawyer was present during the applicant's questioning.

21. On 7 September 2004 the applicant lodged an official complaint with the Şişli prosecutor against the police officers. He argued that when he and his colleagues had been preparing for their press release at 10.00 a.m. on the day of the incident, a number of police officers had attacked them with their truncheons and sprayed them with tear gas. He complained that he had been beaten up with truncheons and punched and kicked by the police officers even after he had been arrested. He pointed out that the police officers responsible could be identified from the photographs published in the newspapers. The applicant argued that the police officers' actions had been in violation of both the domestic legislation and his rights under the Convention, including his rights to liberty and security, freedom of expression and protection from ill-treatment.

22. The applicant subsequently found out in 2007 that before he had even lodged his official complaint on 7 September 2004 a prosecutor had already decided on 30 June 2004 not to prosecute the police officers. In the prosecutor's decision sixteen persons, including the applicant, were referred to as "the complainants". The sixteen persons also included the ten demonstrators arrested together with the applicant (see paragraph 14 above). The nine police officers (see paragraph 14 above) were named as the defendants. The offence in question was given as "ill-treatment".

23. The prosecutor stated in his decision that the police officers had allowed the demonstrators to read out their press release but that when the demonstrators had wanted to march to Taksim square, they had had to disperse them. In the opinion of the prosecutor the officers had been carrying out their duties under the Act on the Powers and Duties of the Police, and had not committed any offences. Despite the fact that it was expressly stated in the decision that it was to be communicated to the complainants, and that the complainants could lodge objections against it, the prosecutor's decision was not communicated to the applicant.

24. On 4 July 2007 the applicant wrote to the Şişli prosecutor and asked for information about the investigation.

25. In his reply of 21 November 2007 the Şişli prosecutor forwarded to the applicant's legal representative a copy of the decision adopted by his office on 30 June 2004.

26. On 4 December 2007 the applicant lodged an objection against the decision and drew attention to the prosecutor's failure to have regard to the medical reports described above (see paragraphs 16 and 18 above) and the photographs of him in the press.

27. On 8 February 2008 the Beyoğlu Assize Court rejected the objection, stating that the prosecutor's decision of 30 June 2004 had been in compliance with the applicable legislation and procedure.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

28. The applicant complained under Article 3 of the Convention that, even after he had been arrested by the police, he had been beaten up and sprayed with harmful gases. Relying on Article 13 of the Convention, he also complained that the national authorities had failed to adequately examine his allegations against the police officers.

29. The Government contested that argument.

30. The Court deems it appropriate to examine both complaints solely from the standpoint of Article 3 of the Convention, which provides as follows:

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

A. Admissibility

31. The Government considered that the applicant had failed to make use of a number of civil and administrative remedies in respect of his complaints of ill-treatment.

32. The Court reiterates that it has already examined and rejected similar preliminary objections made in similar cases (see, in particular, *Gazioğlu and Others v. Turkey*, no. 29835/05, §§ 29-30, 17 May 2011, and the cases cited therein). It finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's objection regarding the admissibility of the complaint.

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

34. The Government considered the applicant's allegations to be baseless. According to the Government, when the applicant and his fellow demonstrators had refused to obey the police officers' orders to disperse, they had been warned not to violate the law. However, when the group had insisted on continuing with their protests which impeded the circulation of the traffic, the police officers had formed a cordon around them and arrested them. No struggle had taken place between the police and the demonstrators. When the applicant had resisted the police officers' attempts to arrest him, the police officers had had to use force which could not be considered excessive. Since the use of force by the police officers had been proportionate to the aim of maintaining public order, there had been no violation of Article 3 of the Convention.

35. The Government further submitted that an investigation had been instigated by the Istanbul prosecutor immediately after complaints had been made to his office. The prosecutor had questioned the police officers and, in reaching his decision, had had regard to the parties' statements and the medical reports. The fact that the outcome of the investigation had not been what the applicant had expected did not mean that the investigation had been ineffective.

36. The Court observes at the outset that the applicant's complaints of ill-treatment are twofold. Firstly, he complained about having been sprayed with tear gas by the police officers even after being arrested. In respect of this complaint the applicant submitted to the Court the photograph published in a national newspaper (see paragraph 15 above), and referred to the above-mentioned medical reports showing that his eyes had been affected by the gas (see paragraph 16 above). Secondly, he complained about having been beaten up by the police officers. In order to substantiate this second allegation he relied on the medical report detailing his injuries (see paragraph 18 above).

37. The Court has already had occasion to examine the issue of the use of "tear gas", or "pepper spray", for the purposes of law enforcement, and recognised that the use of "pepper spray" can produce effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis and allergies. In strong doses it may cause necrosis of the tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging (haemorrhaging of the suprarenal gland) (*Oya Ataman v. Turkey*, no. 74552/01, §§ 17-18, ECHR 2006-XIII).

38. In the same judgment the Court also observed that, according to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 ("the CWC"), tear gas is not considered a chemical weapon and its use is authorised for the purpose of law enforcement, including domestic riot control (Article II § 9 (d)). The CWC entered into force with regard to Turkey on 11 June 1997.

39. The Court notes that concerns have been expressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") over the use of such gases in law enforcement. The CPT considers that:

"... [P]epper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly

defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control.” (CPT/Inf (2009) 25)

40. In its reports pertaining to its visits carried out in a number of Member States of the Council of Europe the CPT has made the following recommendations:

“... [A] clear directive governing the use of pepper spray to be drawn up, which should include, as a minimum:

clear instructions as to when pepper spray may be used, which should state explicitly that pepper spray should not be used in a confined area;

the right of prisoners exposed to pepper spray to be granted immediate access to a doctor and to be offered measures of relief;

information regarding the qualifications, training and skills of staff members authorised to use pepper spray;

an adequate reporting and inspection mechanism with respect to the use of pepper spray...” (See, *inter alia*, CPT/Inf (2009) 8)

41. The Court shares the CPT’s concerns and concurs with the above-mentioned recommendations. It stresses, in particular, that there can be no justification for the use of such gases against an individual who has already been taken under the control of the law enforcement authorities, as was the case in the present application.

42. When notice of the application was given to the respondent Government, the Government were asked by the Court to clarify what justification there was for the police officers to spray the applicant with gas after he had been arrested. However, the Government did not respond to that specific question and did not, therefore, seek to justify the spraying of the applicant with pepper gas.

43. Having regard to the effects the gases cause and the potential health risks they entail (see paragraph 37 above), the Court considers that the unwarranted spraying of the applicant’s face in the circumstances described above must have subjected him to intense physical and mental suffering and was such as to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). It thus concludes that by spraying the applicant in such circumstances the police officers subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

44. Having regard to the foregoing conclusion, the Court does not deem it necessary to examine separately whether the applicant has also been beaten up by the police officers.

45. As to the applicant’s complaint concerning the adequacy of the investigation, as pointed out above the investigation was closed by the prosecutor within forty-eight hours. Other than the prosecutor’s decision to close the investigation (see paragraph 22 above), no documents have been submitted to the Court to show that any steps were taken by the authorities to investigate the allegations of ill-treatment. The Court thus finds that the national authorities have failed in their duty to carry out an effective investigation into the applicant’s allegations of ill-treatment.

46. In the light of the foregoing the Court finds that there has been a violation of Article 3 of the Convention on account of the spraying of the applicant’s face with tear gas, as well as on account of the failure to carry out an investigation into the applicant’s allegations.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

47. Lastly, relying on Article 5 of the Convention, the applicant complained that he had been arrested by the police and deprived of his liberty in breach of the domestic legislation and without any lawful ground.

48. The Court considers it appropriate to examine this complaint from the standpoint of Article 5 § 1 of the Convention, which provides as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

49. The Government contested the applicant’s argument.

50. The Government considered that the applicant had failed to comply with the six-month time limit because he had not introduced his application within six months of his release from police custody on 28 June 2004.

51. The Court does not deem it necessary to deal with the Government’s objection concerning the issue of the six-month rule; it considers that this complaint is in any event manifestly ill-founded.

52. The Court observes at the outset that the applicant did not elaborate on this complaint and did not single out any alleged irregularities in the procedure concerning his arrest and detention.

53. In any event, the Court observes that the applicable procedure appears to have been followed by the national authorities. The applicant’s arrest was recorded in the police officers’ report (see paragraph 14 above) and his transfer from the police station to the prosecutor’s office was also recorded in an official document signed by the applicant. He was subsequently questioned by the prosecutor – in the presence of a legal representative – in relation to his participation in the demonstration, and his release was ordered on the same day.

54. In the light of the foregoing, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

56. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government considered this claim to be exaggerated and invited the Court to reject it.

58. Having regard to the events leading to the violations found under Article 3 of the Convention, the Court awards the applicant the sum claimed by him in full, that is EUR 10,000, in respect of non-pecuniary damage.

B. Costs and expenses

59. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court. In support of his claim the applicant submitted to the Court a time sheet showing the time spent by his legal representative on the case.

60. In the opinion of the Government the claim was unsupported and exaggerated.

61. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

62. The Court considers it appropriate that the 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. *Declares* the complaints under Article 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the spraying of the applicant's face with tear gas, as well as on account of the failure to carry out an investigation into the applicant's allegations;
3. *Holds*
 - (a) that the respondent State is to pay 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, plus any tax that may be chargeable to the applicant, to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage; and
 - (ii) EUR 1,500 (one thousand five hundred euros), 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Françoise Tulkens Registrar President

ALİ GÜNEŞ v. TURKEY JUDGMENT

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