COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF BALÇIK AND OTHERS v. TURKEY

(Application no. 25/02)

JUDGMENT

STRASBOURG

29 November 2007

FINAL

29/02/2008

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 Balçık and Others v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mr R. TÜRMEN,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 8 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 25/02) 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 seven Turkish nationals, Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Semiha Kırkoç, Ms Meral Kalanç, Ms Sema Gül and Ms Gülsen Dinler ("the applicants"), on 20 September 2001.

2. The applicants were granted legal aid. The first applicant was represented by Mr Zeynel Polat, a lawyer practising in Istanbul and the remaining six applicants were represented by Mrs G. Altay, a lawyer also practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 12 April 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1967, 1979, 1971, 1963, 1979, 1973 and 1972 respectively and live in Istanbul.

5. Upon receipt of intelligence reports that on 5 August 2000 a group of demonstrators would gather in the İstiklal Street in Istanbul to read a press

declaration and block the tram line to protest against F-type prisons, police officers and members of the "Rapid Intervention Force" (*çevik kuvvet*) were deployed in the area. At noon, the applicants, together with thirty-nine others, gathered in İstiklal Street to make a press declaration to protest against F-type prisons. The police asked the group to disperse and to end the gathering and informed them that the demonstration was unlawful since no advance notice had been submitted to the authorities. The demonstrators refused to obey and attempted to march along İstiklal Street, chanting slogans and reading out a press declaration. Subsequently, at about 12.30 p.m. the police dispersed the group, allegedly by using truncheons and tear-gas. The applicants were arrested along with thirty-nine other persons. The applicants Sema Gül and Semiha Kırkoç were subsequently taken to the Taksim Hospital.

6. The doctor who examined Sema Gül noted the following:

> "There are bruises on both arms and a swelling on the left foot."

As regards Semiha Kırkoç, the doctor noted the following:

> "There is a 4 cm long laceration on the left parietal region..."

7. There were no medical reports in respect of the remaining applicants.

8. The incident report dated 5 August 2000 stated that the security forces had to use force to disperse the group as they refused to obey the warnings. It was further indicated that one police officer was wounded during the incident.

9. The applicants were subsequently taken to Beyoğlu central police directorate and Karaköy police station, where they were kept for one day.

10. The next day, they were released upon the order of the Beyoğlu public prosecutor.

11. On an unspecified date, the applicants filed a petition with the Beyoğlu public prosecutor against the police officers who had carried out the arrest. In their petition, they complained, *inter alia*, of the unlawfulness of their arrest and the excessive use of force by the police officers during and after the arrest.

12. On 5 January 2001 the Beyoğlu public prosecutor issued a decision of non-prosecution in respect of the police officers who had been on duty at the relevant time. In his decision, the public prosecutor considered that the force used by the security forces was in line with Article 16 of the Law No. 2559 on the Duties and Powers of the Police and had not been excessive. In the public prosecutor's opinion, the injuries sustained by the complainants had been caused by the use of force which was proportionate.

13. The applicants filed an objection against the public prosecutor's decision.

14. On 25 June 2001 the Istanbul Assize Court dismissed the applicants' objection.

15. Meanwhile, on 14 August 2000, the Beyoğlu public prosecutor filed a bill of indictment with the Beyoğlu Criminal Court. The public prosecutor accused the applicants under Article 28 § 1 of Law no. 2911 of taking part in an illegal demonstration without prior authorisation and not dispersing despite the police officers' warning.

16. On 19 September 2005 the Beyoğlu Criminal Court acquitted the applicants. The court held that making a press statement was a constitutional right and that prior authorisation was not needed to use this right. The court further observed that it was not certain that the warning given to the accused to disperse could be heard by all the demonstrators. It concluded that the accused had used their constitutional rights and, consequently, had not committed any offence.

II. RELEVANT DOMESTIC LAW

A. Constitutional guarantees

17. Article 34 of the Constitution provides:

> "Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.
>
> ...
>
> The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

B. The Demonstrations Act

18. At the material time section 10 of the Assemblies and Marches Act (Law no. 2911) was worded as follows:

> "In order for a meeting to take place, the governor's office or authorities of the district in which the demonstration is planned must be informed, during opening hours and at least seventy-two hours prior to the meeting, by a notice containing the signature of all the members of the organising board..."

19. Section 22 of the same Act prohibited demonstrations and processions on public streets, in parks, places of worship and buildings in which public services were based. Demonstrations organised in public squares had to comply with security instructions and not disrupt individuals' movement or public transport. Finally, section 24 provided that demonstrations and processions which did not comply with the provisions of this law would be dispersed by force on the order of the governor's office and after the demonstrators had been warned.

C. Law No. 2559 on the Duties and Powers of the Police

Article 16

"The police may use firearms in the event of:

(a) Self defence, ...

(h) if a person or a group resists the police and prevents them from carrying out their duties or if there is an attack against the police."

Additional Article 6 (dated 16 June 1985)

"In cases of resistance by persons whose arrest is necessary or by groups whose dispersal is necessary or of their threatening to attack or carrying out an attack, the police may use violence to subdue these actions.

Use of violence refers to the use of bodily force, physical force and all types of weapons specified in the law and it gradually increases according to the nature and level of resistance and attack in such a way as to restore calm.

In cases of intervention by group forces, the extent of the use of force and the equipment and instruments to be used are determined by the commander of the intervening force."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

20. The applicants complained under Article 3 of the Convention that the force used during their arrest was excessive and disproportionate and constituted ill-treatment. Article 3 reads as follows:

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

1. The Government's preliminary objections

21. The Government asked the Court to dismiss this complaint for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. They argued that the applicants could have sought reparation for the harm allegedly suffered by instituting an action in the administrative courts. They further maintained that this part of the application was not lodged within the six-month time-limit.

22. As regards the Government's preliminary objection concerning the non-exhaustion of domestic remedies, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Karayiğit v. Turkey* (dec.), no. 63181/00, 5 October 2004). It finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned application. Consequently, it rejects this part of the Government's preliminary objection.

23. As regards the Government's second objection concerning the six-month rule, the Court reiterates that under Article 35 § 1 of the Convention, it may deal with an application within a period of six months from the date on which the final decision was taken. In the instant case, the final decision concerning the applicants' allegations of ill-treatment was delivered on 25 June 2001 by the Istanbul Assize Court. As the application was lodged with the Court on 20 September 2001, this part of the application was introduced with the Court within the six-month time-limit. In view of the foregoing, the Court also rejects this part of the Government's objections.

2. As regards the applicants Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Meral Kalanç and Ms Gülsen Dinler

24. The Court recalls that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, it has generally applied the standard of proof "beyond reasonable doubt" (see *Talat Tepe v. Turkey*, no. 31247/96, § 48, 21 December 2004). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

25. In the instant case, the applicants Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Meral Kalanç and Ms Gülsen Dinler complained that they had been injured as a result of the excessive use of force by the police to disperse the demonstration. Nonetheless, several elements cast doubt on the veracity of the applicants' claims. The Court observes that, although the applicants were released the day after the incident, they have not submitted any medical reports in support of their complaint nor adduced any material which could add probative weight to their allegations. There is nothing in the case file to show that the applicants had been injured as alleged during the incident.

26. In view of the above, the Court concludes that the applicants, Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Meral Kalanç and Ms Gülsen Dinler, have not substantiated their claims and this part of the application should therefore be declared inadmissible as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

3. As regards the applicants Ms Semiha Kırkoç and Ms Sema Gül

27. The Court notes that the Article 3 complaint lodged by Ms Semiha Kırkoç and Ms Sema Gül is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

28. As the Court has underlined on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies, making no provision for exceptions and no derogation from it is permissible under Article 15 § 2 (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93).

29. As stated above, in assessing evidence, the standard of proof "beyond reasonable doubt" is generally applied (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). Further, where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32).

30. The Court notes that in the present case it is undisputed between the parties that the injuries observed on the two applicants, namely on Ms Semiha Kırkoç and Ms Sema Gül, had been caused as a result of the use of force by the police during the incident on 5 August 2000. This is also indicated by the incident report which stated the police had to use force to disperse the group of demonstrators.

31. Having regard to the above, the Court considers that the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive.

32. The Court observes that, although no prior notification was given to the authorities about the meeting, the police had received intelligence reports that there would be a gathering in the İstiklal Street on 5 August 2000. The security forces were thus able to take preventive measures. The area concerned was secured by numerous police officers and members of the rapid intervention force. As a result, in the particular circumstances of the present case, it cannot be said that the security forces were called upon to react without prior preparation (see *Rehbock v. Slovenia*, no. 29462/95, § 72, ECHR 2000-XII). The Court notes that the group did not obey the police warnings to disperse. However, as explained in detail below (see paragraphs 51-54 below), there is nothing in the case file to suggest that the demonstrators presented a danger to public order. At this point, the Court also refers to the judgment of the Beyoğlu Criminal Court dated 19 September 2005 by which the applicants were acquitted of the charges

against them. The domestic court held that, by making a press declaration, the accused had exercised their constitutional rights and had not committed any offence.

33. In these circumstances, the Court finds that the Government have failed to furnish convincing or credible arguments which would provide a basis to explain or to justify the degree of force used against the applicants, whose injuries are corroborated by medical reports. As a result, it is concluded that the injuries of Ms Semiha Kırkoç and Ms Sema Gül were the result of treatment for which the State bore responsibility.

34. It follows that there has been a violation of Article 3 in respect of Ms Semiha Kırkoç and Ms Sema Gül.

II. ALLEGED VIOLATION OF ARTICLES 9, 10 AND 11 OF THE CONVENTION

35. The applicants alleged that the police intervention in the meeting constituted a violation of their freedom of thought, freedom of expression and freedom of assembly. In this respect, they invoked Articles 9, 10 and 11 of the Convention.

36. The Court considers that the applicants' complaints should be examined from the standpoint of Article 11 alone, which reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Admissibility

37. The Government suggested that, since the applicants were acquitted of the charges against them in 2005, they could no longer be considered as victims within the meaning of Article 34 of the Convention.

38. The Court considers that the Government's argument alleging that the applicants could not claim that they had been victims of a breach of their right under Article 11 of the Convention raises a question which is closely linked to the merits of the complaint. It therefore joins the preliminary objection of the Government to the merits (*Bączkowski and Others v. Poland*, no. 1543/06, §§ 45-48, 3 May 2007).

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

B. Merits

1. Existence of any interference with the applicants' rights

40. The Court recalls in the first place that according to the Convention organs' constant approach, the word "victim" of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 27; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 41).

41. In the present case, there is no dispute between the parties as to the initial existence of an interference with the applicants' right of assembly. The Court acknowledges that the domestic court acquitted the applicants of the charges against them. However it cannot overlook the fact that this decision was delivered on 19 September 2005, almost 5 years after the incident. It also notes that by participating in this meeting, the applicants aimed to draw attention to F-type prison conditions, which was a topical issue at the time. In the Court's view, the interference in the meeting, the force used by the police to disperse the participants and the subsequent prosecution could have had a chilling effect and discouraged the applicants from taking part in similar meetings (see *Bączkowski and Others*, cited above, § 67-68).

42. In view of the above, the Court considers that the applicants were negatively affected by the police intervention and subsequent criminal proceedings brought against them, irrespective of the final result.

2. Justification for the interference

43. The Government stated that the meeting in question had been organised unlawfully in that no advance notification had been sent to the relevant authorities. They pointed out that the second paragraph of Article 11 imposed limits on the right of peaceful assembly in order to prevent disorder.

44. The Court reiterates that an interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims.

45. In this connection, it is noted that the interference in the present case had a legal basis, namely section 22 of Law No. 2911 (Assemblies and Marches Act), and was thus "prescribed by law" within the meaning of Article 11 § 2 of the Convention. As concerns legitimate aim, the Government submitted that the interference pursued the legitimate aim of preventing public disorder and the Court finds no reason to differ.

46. Turning to the question of whether the interference was "necessary in a democratic society, the Court refers in the first place to the fundamental principles underlying its judgments relating to Article 11 (see *Djavit An v. Turkey*, no. 20652/92, §§ 56-57, ECHR 2003-III; *Piermont v. France*, judgment of 27 April 1995, Series A no. 314, §§ 76-77; and *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, § 32). It is clear from this case-law that the authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens (see *Oya Ataman v. Turkey*, no. 74552/01, § 35, ECHR 2006-....).

47. The Court also notes that States must not only safeguard the right to assemble peacefully, but also refrain from applying unreasonable indirect restrictions upon that right. Finally, it considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Djavit An*, cited above, § 57; *Oya Ataman*, cited above, § 36).

48. As a preliminary point, the Court considers that these principles are also applicable with regard to demonstrations and processions organised in public areas. It notes, however, that it is not contrary to the spirit of Article 11 if, for reasons of public order and national security, *a priori*, a High Contracting Party requires that the holding of meetings be subject to authorisation and regulates the activities of associations (see *Djavit An*, cited above, §§ 66-67).

49. Having regard to the domestic legislation, the Court observes that at the material time no authorisation was required for the holding of public demonstrations; however, notification was required seventy-two hours prior to the event. In principle, regulations of this nature should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention. It goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility. In the Court's opinion, it is important that preventive security measures such as, for example, the presence of first-aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature. This being so, associations and others organising demonstrations, as actors in the democratic process, should respect the rules governing that

process by complying with the regulations in force (see *Oya Ataman*, cited above, §§ 38 and 39).

50. It appears from the evidence before the Court that, in the instant case, the group of demonstrators was informed by the police that their march was unlawful and would disrupt public order at a busy time of the day, and had been ordered to disperse. The applicants and other demonstrators did not comply with these orders and attempted to continue their march.

51. However, there is no evidence to suggest that the group presented a danger to public order, apart from possibly blocking the tram line. The Court notes that the group in question consisted of forty-six persons, who wished to draw attention to a topical issue, namely the F-type prison conditions. It is observed that the rally began at about noon and ended with the group's arrest within half an hour at 12.30 p.m. The Court is therefore particularly struck by the authorities' impatience in seeking to end the demonstration. At this point, the Court also recalls that although no notification had been given, the authorities had prior knowledge (see, *a contrario*, *Oya Ataman*, cited above) that such a demonstration would take place on that date and could have therefore taken preventive measures.

52. In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.

53. Accordingly, the Court considers that in the instant case the police's forceful intervention was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention.

54. In view of the above, the Court therefore dismisses the Government's preliminary objection regarding the applicant's alleged lack of victim status and concludes that there has been a violation of Article 11 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLES 7, 17 AND 18 OF THE CONVENTION

55. The applicants maintained under Article 7 of the Convention that they had been arrested and the criminal proceedings had been brought against them on account of an act which did not constitute a criminal offence under domestic law. The applicants also complained that the unlawful restrictions placed on their right to freedom of thought, freedom of expression and freedom of assembly, the criminal proceedings brought against them and their inability to raise their complaints before the domestic

judicial authorities into their allegations constituted a violation of Articles 17 and 18 of the Convention.

56. The Court notes that these complaints are linked to the one examined above and must likewise be declared admissible.

57. Referring to its finding of a violation under Article 11 of the Convention (see paragraphs 52-54 above), the Court considers that it has examined the main legal question raised in the present application.

58. Having regard to the facts of the case and the submissions of the parties, the Court concludes that there is no need to give a separate ruling on these complaints (see *Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 73, ECHR 2001-VIII).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

61. The Government contested this claim.

62. The Court considers that the applicants are sufficiently compensated by the finding of a violation of Article 11 of the Convention (see *Oya Ataman*, cited above, § 48). However, as regards the finding of a violation of Article 3 in respect of two applicants, namely Ms Sema Gül and Ms Semiha Kırkoç, the Court, ruling on an equitable basis, awards these two applicants EUR 3,000 each in respect of non-pecuniary damage.

B. Costs and expenses

63. The first applicant claimed EUR 3,500 and the remaining six applicants claimed EUR 5,500 for the costs and expenses incurred before the Court.

64. The Government contested these claims.

65. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court notes that the applicants solely

referred to the Istanbul Bar Association's scale of fees and failed to submit any supporting documents. The Court therefore does not award any sum under this head.

C. Default interest

66. 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 complaint concerning Article 3 of the Convention inadmissible in respect of five applicants, namely Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Meral Kalanç and Ms Gülsen Dinler and declares the remainder of the application admissible;

2. *Joins to the merits* the Government's preliminary objection concerning the applicants' victim status in respect of Article 11 of the Convention and *dismisses* it;

3. *Holds* that there has been a violation of Article 3 of the Convention in respect of two applicants, namely Ms Sema Gül and Ms Semiha Kırkoç;

4. *Holds* that there has been a violation of Article 11 of the Convention;

5. *Holds* that there is no need to examine separately the applicants' other complaints raised under Articles 7, 17 and 18 of the Convention;

6. *Holds* that the finding of a violation in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by five applicants, namely Mr Erkal Balçık, Mr Kubilay İyit, Ms Filiz Kalkan, Ms Meral Kalanç and Ms Gülsen Dinler;

7. *Holds*

   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) each to Ms Sema Gül and Ms Semiha Kırkoç in respect of non-pecuniary damage; to be converted into New Turkish liras at the rate applicable at the date of settlement and free of any taxes or charges that may be payable,

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

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 29 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President