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

FOURTH SECTION

CASE OF Y.F. v. TURKEY

(Application no. 24209/94)

JUDGMENT

STRASBOURG

22 July 2003

FINAL

22/10/2003

In the case of Y.F. v. Turkey,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 1 July 2003,

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

PROCEDURE

1. The case originated in an application (no. 24209/94) against the Republic of Turkey lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Y.F. ("the applicant"), on 13 May 1994.

2. The applicant, who had been granted legal aid, was represented by Mr S. Tanrıkulu, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") did not appoint an Agent for the purposes of the proceedings before the Court. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

3. Relying on Article 8 of the Convention, the applicant complained that the forced gynaecological examination of his wife constituted a breach of her right to respect for her private life.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 29 February 2000 the Chamber declared the application partly admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber, after having consulted the parties, decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1951 and lives in Bingöl.

10. On 15 October 1993 the applicant and two days later his wife, Mrs N.F., were taken into police custody in Bingöl on suspicion of aiding and abetting an illegal terrorist organisation, namely the PKK (Workers' Party of Kurdistan).

11. Mrs F. was held in police custody for four days, during which period she was allegedly kept blindfolded. The police officers allegedly hit her with truncheons, insulted her verbally and threatened her with rape.

12. On 20 October 1993, following her detention in police custody, Mrs F. was examined by a doctor, who reported that there were no signs of ill-treatment on her body. On the same day she was taken to a gynaecologist for a further examination. The police requested that the report should indicate whether she had had vaginal or anal intercourse while in custody. Despite her refusal, Mrs F. was forced by the police officers to undergo a gynaecological examination. The police officers remained on the premises while Mrs F. was examined behind a curtain. The doctor reported that she had not had any sexual intercourse in the days preceding the examination.

13. On the same day Mrs F. was taken to the Bingöl public prosecutor's office, where she complained about her forced gynaecological examination. The public prosecutor did not record her complaints and ordered her release.

14. On 28 October 1993 the public prosecutor at the Diyarbakır National Security Court charged the applicant and his wife with aiding and abetting members of the PKK.

15. On 23 March 1994 the Diyarbakır National Security Court acquitted the applicant and his wife for lack of evidence.

16. On 9 February 1995, the applicant and his wife complained to the Bingöl public prosecutor about their ill-treatment while in police custody. They further complained that Mrs F. had been forced to undergo a gynaecological examination without her consent.

17. The police officers denied the allegations in statements made before the Bingöl public prosecutor. They submitted that it had been necessary for a gynaecological examination to be performed in order to determine whether Mrs F. had been sexually assaulted while in police custody. They further submitted that the examination had been performed with her consent.

18. On 5 October 1995 the Bingöl public prosecutor decided not to prosecute the police officers for lack of evidence. The applicant and his wife appealed.

19. On 29 November 1995 the Muş Assize Court quashed the public prosecutor's decision on the ground that there had been insufficient examination of the evidence in the investigation file.

20. On 19 December 1995 the Bingöl public prosecutor charged three police officers with, *inter alia*, violating Mrs F.'s private life by forcing her to undergo a gynaecological examination.

21. On 16 May 1996 the Bingöl Assize Court acquitted the defendant police officers on the ground that the complainants had not provided sufficient convincing evidence in support of their allegations. The court held that the police officers had had no intention of subjecting the applicant's wife to degrading and humiliating treatment when they made her undergo a gynaecological examination, but were trying to protect themselves against a possible accusation of rape. The applicant and his wife appealed.

22. On 7 May 1997 the Court of Cassation upheld the Bingöl Assize Court's judgment.

II. RELEVANT DOMESTIC LAW

23. The right to physical integrity is protected by the Constitution. Article 17 § 2 provides:

> "Save in the case of medical necessity and in circumstances defined by law, violation of physical integrity shall be prohibited; human beings shall not be subjected to scientific or medical experiments."

24. Article 66 of the Code of Criminal Procedure provides an exception to this rule. It lays down:

> "...
>
> During the preliminary investigation, medical examinations may be performed at the request of the public prosecutor."

25. Article 1 of the Regulation of 13 August 1999, which amended Article 8 of the Regulation of 1 October 1998 concerning the arrest, detention and questioning of suspects, provides that persons under arrest shall be body-searched before being taken into custody. Body searches of

female detainees must be performed by a female officer or a woman designated for that purpose.

26. According to Circular no. 2000/93 issued by the Ministry of Justice on 20 September 2000, which repealed Circulars nos. 6058, 6065, 6068, 6070 and 6090, medical personnel shall respect fundamental human rights and freedoms and rules on privacy when conducting medical examinations and tests. The doctor must see and examine the patient personally and must not rely on another person's statement in his or her report.

Medical examinations must be performed under appropriate conditions and out of the hearing and sight of members of the security forces. Persons required to undergo a medical examination must be seen on premises to which only medical personnel are admitted and undress in readiness for the examination after being given the necessary information.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant alleged that the forced gynaecological examination of his wife constituted a breach of Article 8 of the Convention, the relevant part of which provides:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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."

28. The Government disputed that allegation.

A. Whether there was an interference with the rights of the applicant's wife under Article 8

1. The parties' submissions

(a) The applicant

29. The applicant submitted that his wife had been subjected to a gynaecological examination against her will, which constituted an unjustified interference with her right to respect for private life within the meaning of Article 8 of the Convention.

(b) The Government

30. The Government submitted that the gynaecological examination had been performed with the consent of both the applicant and his wife. They maintained that the necessary explanation had been given to the applicant's wife prior to the examination and that she could have refused to undergo it. Since the applicant's wife had not objected to the examination and it could not have been carried without her consent, it had to be regarded as having been performed with her consent.

2. The Court's assessment

31. The Court notes at the outset that the Government did not at any stage in the proceedings dispute the fact that the applicant could bring a complaint on behalf of his wife. In this connection, it reiterates that it is open to the applicant, as a close relative of the victim, to make a complaint concerning allegations by her of violations of the Convention, in particular having regard to her vulnerable position in the special circumstances of this case (see *İlhan v. Turkey* [GC], no. 22277/93, § 55, ECHR 2000-VII). Thus, the question before the Court is whether there has been an "interference" with the rights of the applicant's wife under Article 8 of the Convention on account of the gynaecological examination allegedly performed against her will.

32. It is not in dispute between the parties that the applicant's wife underwent a gynaecological examination by a doctor following her detention in police custody. However, the Court has been presented with conflicting accounts as to whether or not it was performed with her consent.

33. The Court observes that Article 8 is clearly applicable to these complaints, which concern a matter of "private life", a concept which covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p.11, § 22). It reiterates in this connection that a person's body concerns the most intimate aspect of private life. Thus, a compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right (see *X v. Austria*, no. 8278/78, Commission decision of 13 December 1979, Decisions and Reports (DR) 18, p. 155, and *Acmanne and Others v. Belgium*, no. 10435/83, Commission decision of 10 December 1984, DR 40, p. 254).

34. The Court notes that the applicant's wife complained to the authorities that she had been forced to undergo a gynaecological examination against her will (see paragraph 16 above). For their part, the Government contended that it would not have been possible to perform such an examination without the consent of Mrs F., who could have objected to it when she was taken to the doctor's consulting room. However, the Court considers that, in the circumstances, the applicant's wife could not have

been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities who exercised complete control over her throughout her detention (see, *mutatis mutandis, Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 41-42, §§ 113-15).

35. There has accordingly been an "interference by a public authority" with the right of the applicant's wife to respect for her private life.

36. Such an interference will violate Article 8 of the Convention unless it is "in accordance with the law", pursues one of the legitimate aims set out in the second paragraph of that Article, and can be considered "necessary in a democratic society" in pursuit of that aim (see *Dankevich v. Ukraine*, no. 40679/98, § 151, 29 April 2003, and *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, p. 32, § 84).

B. Whether Article 8 was violated

1. The parties' submissions

(a) The applicant

37. The applicant submitted that Turkish law did not prescribe the gynaecological examination of female detainees, which was a practice that had been introduced by the security forces. In his opinion, the stated purpose of such examinations – namely to avoid false accusations of sexual harassment by police officers – could not be considered to be a justification for such practice. In a democratic society, false accusations of that sort could be avoided by shortening the detention period permissible under domestic law and by allowing detainees to have access to a lawyer while in custody. Alternatively, in cases of necessity, such an examination should be performed only on the order of a judge or a public prosecutor.

(b) The Government

38. The Government argued that the gynaecological examination of female detainees was necessary to avoid false accusations of sexual violence being directed against the security forces. To that end, the medical reports prepared after such examinations constituted evidence that could be used to refute defamatory allegations of sexual molestation. In that connection, the Government drew attention to the recommendations set out in the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to Turkey between 27 February and 3 March 1999. In its report, the CPT emphasised that forensic medical examination of detainees by a doctor was a significant safeguard against sexual violence. Accordingly, the CPT had urged the national authorities to take the necessary measures, including the

preparation of forensic medical reports, with a view to protecting detainees against sexual violence. Thus, the domestic law and practice had been reformed, *inter alia*, by the entry into force on 1 October 1998 of regulations on arrest, detention and questioning, and by the adoption of new formal procedures to be followed for forensic medical examinations, including those carried out in respect of allegations of sexual violence.

39. With reference to the Court's case-law, the Government further maintained that, in determining whether an interference was "necessary in a democratic society", account had to be taken of the fact that a margin of appreciation was left to the Contracting States (see *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67, and *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 27, § 60).

40. The Government concluded that the alleged interference with the right of the applicant's wife to respect for her private life should be considered to be an act falling within the State's margin of appreciation.

2. The Court's assessment

41. The Court must first consider whether the interference was "in accordance with the law". This expression requires primarily that the impugned measure should have some basis in domestic law (see *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27, and Series A no. 176-B, p. 52, § 26, respectively).

42. In this regard, the Court notes that the Government have not argued that the interference complained of was "in accordance with the law" at the relevant time. They referred in their observations to regulations and circulars which were issued after the date of the disputed examination (see paragraphs 25 and 26 above). Furthermore, under Turkish law, any interference with a person's physical integrity is prohibited except in the event of medical necessity and in circumstances defined by law (see paragraph 23 above). Moreover, in the course of the preliminary investigation, a detainee may only be examined at the request of a public prosecutor (see paragraph 24 above).

43. However, in this case the Government failed to demonstrate the existence of a medical necessity or the circumstances defined by law. Nor did they suggest that a request for a medical examination had been made by the public prosecutor. Finally, while the Court accepts the Government's submission that the medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment, it considers that any interference with a person's physical integrity must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts. In

the light of the foregoing, the Court finds that the interference in issue was not "in accordance with law".

44. This finding suffices for the Court to hold that there has been a violation of Article 8 of the Convention. It is not therefore necessary to examine whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" in pursuit thereof (see *M.M. v. the Netherlands*, no. 39339/98, § 46, 8 April 2003).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 25,000 United States dollars (USD) by way of compensation for non-pecuniary damage.

47. The Government argued that the claim was excessive and would lead to unjust enrichment.

48. The Court considers that the applicant's wife can be taken to have suffered frustration and anxiety resulting from her gynaecological examination against her will. Deciding on equitable basis, the Court awards the sum of 4,000 euros (EUR), which is to be paid to the applicant to be held for his wife.

B. Costs and expenses

49. The applicant claimed a total of 5,700 USD for costs and expenses incurred in making the application. This included costs incurred by his representative Mr S. Tanrıkulu (USD 5,500 for fifty-five hours' legal work) and expenses such as translations, telephone calls, postage, photocopying and stationery (281,000, 000 Turkish liras).

50. The Government submitted that the claims for costs and expenses were unsubstantiated.

51. Deciding on an equitable basis and having regard to the detail of the claims submitted by the applicant, the Court awards him the sum of EUR 3,000, to be held for his wife, together with any value-added tax that may be chargeable, less 4,100 French francs (EUR 625) received by way of legal aid from the Council of Europe, such sum to be converted into Turkish

liras at the date of settlement and to be paid into the applicant's bank account in Turkey.

C. Default interest

52. 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. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, to be held for his wife, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts: EUR 4,000 (four thousand euros) in respect of non-pecuniary damage and EUR 3,000 (three thousand euros) in respect of costs and expenses, plus any tax that may be chargeable, less EUR 625 (six hundred and twenty-five euros), such sum to be converted into Turkish liras at the rate applicable at the date of payment and to be paid into the applicant's bank account in Turkey;
   (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;

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

Done in English, and notified in writing on 22 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President