

SECOND SECTION

CASE OF BABAT AND OTHERS v. TURKEY

(Application no. 44936/04)

JUDGMENT

STRASBOURG

12 January 2010

FINAL

12/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Babat and Others v. Turkey,
The European Court of Human Rights (Second Section), sitting as a
Chamber composed of:

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,

Kristina Pardalos, *judges*,
and Françoise Elens-Passos, *Deputy Section Registrar*,
Having deliberated in private on 8 December 2009,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44936/04) 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 three Turkish nationals, Mr Aziz Babat, Ms Azime Babat and Ms Marifet Akgün (Babat), (“the applicants”), on 3 September 2004.
2. The applicants were represented by Mr A. Baba, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.
3. On 21 November 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1954, 1954 and 1978 respectively and live in Tunceli and Istanbul respectively.
5. The first and the second applicants’ son and the third applicant’s brother, Önder Babat, was a fourth-year student at the Law Faculty of Istanbul University. Önder Babat had been the subject of disciplinary investigations at the University and at the time of the events had criminal proceedings pending against him for participating in an illegal demonstration. The applicants maintained that he was Kurdish, Alawite, and had strong left-wing political views.
6. According to the witness statements given to the public prosecutor on 22 March 2004 by Mr E.Ö., Mr B.Y. and Ms P.A., the events unfolded as follows: On 3 March 2004 Önder Babat and his three friends went to watch a documentary film at the French Cultural Centre at Istiklal Street in Taksim, Istanbul. Afterwards they visited the office of the *Devrimci Hareket Dergisi* (*Revolutionary Movement Magazine*), a magazine with left-wing political views located in Imam Adnan Street right next to Istiklal Street. Immediately after they left the office, at approximately 6.50 p.m., Önder Babat suddenly collapsed in the street bleeding heavily from the head. His friends, with the help of other people, took him to Taksim Ilkyardım Hospital where Önder Babat died. He was twenty-five years old.
7. According to a report drafted by two police officers and signed by Mr B.Y., one of Önder Babat’s friends, the police received information about the incident at 7.20 p.m. and arrived at Taksim Ilkyardım Hospital where, after taking oral statements from Önder Babat’s friends, the police,

with Mr B.Y., returned to the scene of the incident. They noted blood trails on the ground. The police were told by people in the vicinity that they had not witnessed anything unusual and that the injured person had been taken to the hospital by his friends.

8. At approximately 8.10 p.m. a second group of police officers from the Beyoğlu police headquarters arrived at the scene of the incident to make a preliminary investigation on behalf of the public prosecutor, who had been notified of the incident by telephone. A sketch was made of the scene of incident and seven sets of photographs were taken. The police noted a 10 x 10 cm stone on the floor approximately 1.80 metres from the blood trail. They considered that the stone might have caused his death by falling on his head from one of the surrounding buildings. They collected the stone and blood samples for the criminal laboratory. In the report drafted by the police the weapon is stated as unidentified. The police left the scene at 9.40 p.m. The officers in charge of the preliminary investigations issued an incident report. It was noted in this report that a hole of 5 cm x 5 cm was found on the upper left side of Önder Babat's head and an ecchymotic lesion of 2 cm was observed around his right eyebrow.

9. On the same date between 8.00 p.m. and 8.40 p.m. officers from the Beyoğlu police headquarters took statements from Önder Babat's three friends who had been with him at the time of the incident and from a waiter who worked at a nearby café. They all affirmed that they had no idea what had caused Önder Babat's injuries.

10. On 4 March 2004 at 11.30 a.m. Önder Babat's cousin gave a statement to officers from the Beyoğlu police headquarters, where he stated that Önder Babat did not have any enemies.

11. On the same day a post-mortem examination was carried out on Önder Babat's body. The doctor concluded that an autopsy had to be carried out to determine the cause of death.

12. On the same date an autopsy was carried out on Önder Babat's body on the orders of the Beyoğlu public prosecutor. In the autopsy report drafted on 1 April 2004 and signed by four doctors from the Forensic Medicine Institute, a bullet entry hole was observed on the left front parietal region and a 9 mm calibre cartridge was found in the right cerebellum. The doctors indicated that the cause of death was a fracture of the cranium and cerebral haemorrhage due to the gunshot wound, and that the gun had been fired at long range.

13. On 8 March 2004 the Istanbul provincial criminal police laboratory carried out a ballistic examination of the cartridge found in Önder Babat's head. The experts concluded that the bullet had been fired from a 9 mm Parabellum-type pistol.

14. On 9 March 2004 the police superintendent (*Başkomiser*) at the Beyoğlu police headquarters informed the Beyoğlu public prosecutor that

the cartridge could not be matched with bullets fired from other weapons which had been used in previous criminal incidents involving unknown perpetrators, and that since the bullet was not deformed it was highly unlikely that it had ricocheted off any other target.

15. On 22 March 2004 the public prosecutor heard evidence from Mr E.Ö., Mr B.Y. and Ms P.A. Two of them stated that they had heard a sound which they considered to be probably the sound of Önder Babat's collapse on the street but that they had not heard any gunshots.

16. On 6 May 2004 the Beyoğlu public prosecutor put a question to the Forensic Medicine Institute as to whether the findings of the autopsy report could shed light on the angle and the distance of the shot.

17. On 24 September 2004 the Forensic Medicine Institute drafted a report concerning the public prosecutor's question, in which they declared that the shot had been fired from a long distance, namely further than 3540 cm. They did not, however, state an opinion as to the angle from which the shot had been fired, as such a finding was medically impossible due to the mobile nature of the target in question.

18. In the meantime, on 12 July 2004 the applicants lodged an application with the Beyoğlu public prosecutor. They claimed that they had received an anonymous call from a police officer who had alleged that during the ballistic examination carried out at the criminal police laboratory the cartridge found in Önder Babat's head had been discovered to have been defaced and scraped in an attempt to render the weapon used in the incident unidentifiable. These findings had not however been included in the ballistic report. The applicants requested an in-depth investigation regarding this allegation.

19. On 15 December 2004 the Beyoğlu public prosecutor ordered the Forensic Medicine Institute to examine the cartridge in accordance with the applicants' request.

20. On 5 January 2005 the Forensic Medicine Institute issued a report where they held that the microscopic examination of the cartridge had not revealed any traces of defacement or scrapings as alleged by the applicants.

21. In the meantime, on 3 August 2004 the applicants lodged a criminal complaint with the Beyoğlu public prosecutor against the officials carrying out the preliminary investigation into Önder Babat's death, and requested that the persons responsible be charged with breach of duty. The applicants claimed in particular that the authorities had attempted to cover up the real cause of Önder Babat's death by insisting that the death had been caused by a stone that fell on his head, that they had not drawn up a proper sketch plan of the scene of the incident, and that they had not sought witness statements from, or questioned persons in the vicinity of, the crime scene. They claimed that certain officials had even gone so far as to tell them that there was nothing suspicious in Önder Babat's death which would necessitate

informing the public prosecutor or which would require the performance of an autopsy. The applicants moreover alleged that the investigation had been limited to a comparative study with evidence in other “unknown perpetrator killings”, but no match had been attempted with any weaponry which had been recorded as being in the possession of the law enforcement officers or other licensed users.

22. On 8 November 2004 the Beyoğlu public prosecutor, referring to the steps undertaken in the preliminary investigation and to the fact that the investigation was ongoing, issued a decision not to prosecute (*takipsizlik kararı*) due to a lack of evidence indicating a breach of duty.

23. On 24 December 2004 the applicants objected to the public prosecutor’s decision.

24. On 2 February 2005 the Istanbul Assize Court rejected the applicants’ objection.

25. On 17 March 2005 the Beyoğlu public prosecutor instructed the Beyoğlu police headquarters to pursue its investigation and to arrest the suspects or, if it was unable to do so, to issue a progress report every three months.

26. According to the information in the case file, the investigation into Önder Babat’s death is still pending. The case file reveals much correspondence between the prosecutor and the police regarding the investigation.

THE LAW

I. ADMISSIBILITY

27. The Government asked the Court to dismiss the application as being inadmissible for failure to comply with the six-month rule (Article 35 § 1 of the Convention) because the applicants had failed to lodge their application within six months of the date on which the Istanbul Assize Court had rendered its decision.

28. The applicants did not specifically comment on this point.

29. Having regard to the subject matter of the case before the Istanbul Assize Court and the applicants’ complaints submitted before it, the Court considers that the decision of the Istanbul Assize Court of 2 February 2005 cannot be held to be a decision on the merits of the applicants’ complaints so as to be considered a final decision in the process of exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention. In any event, the Court would point out that the applicants had lodged their application with the Court on 3 September 2004, prior to the above decision referred to by the Government. It therefore rejects the Government’s objection under this head.

30. Moreover, the applicants’ complaint under this head is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court notes that it is not inadmissible on any other grounds. It must

therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

31. The applicants complained that Önder Babat had been killed by State agents or with their connivance and that no effective investigation had been conducted into his death, in breach of Articles 2 and 13 of the Convention.

32. The Court considers that the applicants' complaint falls to be examined under Article 2 alone, the relevant part of which provides as follows:

“Everyone's right to life shall be protected by law.”

A. The parties' submissions

33. The Government maintained, firstly, that there was no State involvement in the killing of Önder Babat and, secondly, that the authorities could not have known the latter would be a victim of a bullet while walking down the street. Moreover, referring to the steps taken with regard to the investigation into Önder Babat's death, they considered that an effective investigation had been conducted in the present case and that the authorities were still actively pursuing their investigation to catch those responsible for the killing.

34. The applicants maintained that Önder Babat's death was politically motivated and was perpetrated within the context of psychological warfare by some units of the Turkish security forces, namely JITEM (the Gendarmerie AntiTerrorist Intelligence Branch). In this connection, they submitted that, even if the State had not directly committed the crime, they had done nothing to stop the activities and crimes of these semi-official organisations. The applicants pointed out that a number of killings perpetrated by unknown assailants had taken place in various parts of Turkey in the same week as Önder Babat's death. As regards the investigation, the applicants noted that, despite heavy media coverage and written inquiries submitted by 23 members of parliament to the Turkish Grand National Assembly, the prosecutor remained inactive and the investigation conducted into the incident was full of flaws and omissions.

B. The Court's assessment

35. The Court reiterates the basic principles laid down in its judgments concerning a State's obligations under Article 2 of the Convention under both its substantive and procedural limbs (see, in particular, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-147, Series A no. 324; *Buldan v. Turkey*, no. 28298/95, §§ 73-75, 20 April 2004; *Ülkü Ekinci v. Turkey*, no. 27602/95, §§ 135-136, 16 July 2002; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 85-92, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 67-71, ECHR 2003VIII; *Ramsahai and Others v. the Netherlands [GC]*, no. 52391/99, § 321, ECHR 2007..., and *Dölek v. Turkey*, no. 39541/98, §§ 70-75, 2 October 2007). It will examine the present case in the light of those principles and in the light of the

documentary evidence adduced by the parties, in particular the documents furnished by the parties in respect of the judicial investigations carried out into the impugned incident, and the parties' written observations on the merits.

36. As regards the killing of Önder Babat, the Court observes that the applicants made serious allegations about involvement of State agents in his death. In this connection, the applicants pointed out the existence of semiofficial organisations in Turkey which were known to commit extrajudicial killings to suit their own purposes. They considered that Önder Babat was a victim of such a killing. The Court, having regard to the undisputed information provided by the applicants that a number of unknown perpetrator killings had taken place in various parts of Turkey the very week Önder Babat was killed, does not find that the applicants' claims under this head are completely untenable.

37. However, for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of "beyond reasonable doubt", and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among other authorities, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 79, 27 June 2006). In the instant case, apart from a newspaper article where allusions are made to the possibility that a certain Hakan Saraylıoğlu might have killed Önder Babat, there is no cogent evidence before the Court concerning the supposed identity of the gunman who shot and killed Önder Babat. Moreover, aside from a police superintendent's affirmation that the bullet had not ricocheted off any other target (see paragraph 14 above), there is also no evidence to conclude with certainty that Önder Babat was the ultimate target or that his killing was politically motivated. In this connection, the Court observes that, while it transpires from the case file that Önder Babat was a politically active student and had criminal proceedings pending against him, there is also no indication that he was a prominent figure or, more decisively, that he had been threatened by anyone, or had reason to believe that his life was at risk prior to his death.

38. In view of the above, the Court considers that the material in the case file does not enable it to conclude beyond all reasonable doubt that Önder Babat was killed by any State agent or person acting on behalf of the State authorities. It follows that there has been no violation of Article 2 on that account.

39. As to the investigation into the circumstances surrounding Önder Babat's death, the Court reiterates that the nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of

investigation work (see *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000VI, and *Ülkü Ekinci*, cited above, § 144). It further repeats that a State's procedural obligation under Article 2 of the Convention is not an obligation of result, but of means (see among others *Gongadze v. Ukraine*, no. 34056/02, § 176, ECHR 2005XI). In this connection, it is undisputed that a number of steps were taken by the investigating authorities in order to ascertain the circumstances surrounding Önder Babat's death. Moreover, the Court admits that the manner in which Önder Babat was killed – a single gun shot by an unknown perpetrator – and the place of the killing – a very popular and busy street in Istanbul – must have adversely affected the investigation into his killing and have presented the authorities with a particular difficult task in ascertaining the circumstances in which the incident took place and of trying to establish the identity of those responsible.

40. Nonetheless, after having examined the scarce documentation contained in the case file, the Court is not persuaded that, in the instant case, the authorities have taken all reasonable steps to secure the evidence concerning the incident. On the contrary, it finds that the investigative authorities could be construed as having displayed a somewhat passive attitude in this respect. For example, the Court observes that the search for evidence at the scene of incident took place only once and at a time when the police had had no idea as to the cause of Önder Babat's collapse on the street. The next day, however, it became clear that he had been killed by a gunshot. Despite this new development, the prosecutor never asked the police to revisit the scene of the incident in order to reconstruct the events with a view to establishing where the shooter could have been positioned and, although the Court does not rule out that the scene was most likely contaminated in the meantime, at least to attempt to find additional forensic evidence, if any. More decisively, however, the prosecutor was content to hear evidence only from Önder Babat's friends and a waiter who was present at the scene of the incident. No attempts were made to secure the testimonies of locals who worked or resided on that street. Nor were any calls made to the public to come forward if they had witnessed the incident that day. Finally, the Court observes that no significant steps have been taken in the investigation since January 2005.

41. In the light of the foregoing, the Court concludes that the State authorities did not take all the measures which could be reasonably expected of them to carry out an effective investigation into the facts surrounding the killing of Önder Babat and that therefore the State was in breach of its procedural obligations to protect the right to life.

42. It follows that there has been a violation of Article 2 under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

43. The applicants alleged that both Önder Babat's death and the ineffectiveness of the ensuing investigation had been motivated by the fact that he was Kurdish and had strong left-wing political views. They relied on Article 14 of the Convention, which provides as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

44. Having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 2 under its procedural limb above, the Court considers that it has examined the main legal question raised in the present application. It concludes, therefore, that there is no need to give a separate ruling on the applicant's remaining complaint under Article 14 of the Convention (see, for example, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007, and *Abdullah Yılmaz v. Turkey*, no. 21899/02, § 77, 17 June 2008).

IV. 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 first and the second applicants, who are the parents of the deceased and live in an impoverished village in Tunceli, claimed 9,000 euros (EUR) and EUR 11,500 respectively for pecuniary damages. The third applicant, who is the sister of the deceased and who supported her brother's education by providing shelter and assuming related costs, claimed EUR 8,500 in respect of pecuniary damages. The above sums corresponded to the financial support the applicants considered that they would have been expected to receive from Önder Babat until the latter's retirement from a legal profession at the age of sixty-five had he not been unlawfully killed.

47. The first and the second applicants each claimed EUR 20,000 in respect of non-pecuniary damage. The third applicant claimed EUR 15,000 for non-pecuniary damage.

48. The Government contested the amounts. In particular, they found the applicants' pecuniary damage claims unsubstantiated.

49. As regards pecuniary damages, the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Taniş and Others v. Turkey*, no. 65899/01, § 231, ECHR 2005VIII). However, the Court finds no causal link between the matters held

to constitute violation of the Convention – the absence of an effective investigation – and the pecuniary damage alleged by the applicants (see, for example, *Toğcu v. Turkey*, no. 27601/95, § 155, 31 May 2005).

Consequently, it dismisses the applicants' claim under this head.

50. As to non-pecuniary damage sustained by the applicants, the Court notes that it has found a violation of Article 2 of the Convention under its procedural limb. Having regard to the circumstances of the case and ruling on an equitable basis, the Court awards, jointly, EUR 15,000 to Mr Aziz Babat and Ms Azime Babat, and EUR 5,000 to Ms Marifet Akgün (Babat).

B. Costs and expenses

51. The applicants also claimed 2,500 Turkish liras (approximately EUR 1,183) in respect of legal fees due to their lawyer for the proceedings before the Court. In this connection, they referred to the Turkish Bar Association's scale of fees.

52. The Government contested the amount.

53. 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, the Court observes that the applicants did no more than refer to the Turkish Bar Association's scale of fees and failed to submit any supporting documents in support of their claim. The Court therefore makes no award under this head.

C. Default interest

54. 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 application admissible;

2. *Holds* that there has been no violation of Article 2 of the Convention on account of the killing of Önder Babat;

3. *Holds* that there has been a violation of Article 2 of the Convention on account of the ineffectiveness of the criminal investigation into Önder Babat's death;

4. *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at

the rate applicable at the date of settlement:

- (i) EUR 15,000 (fifteen thousand euros), jointly, to Mr Aziz Babat and Ms Azime Babat, and EUR 5,000 (five thousand euros) to Ms Marifet Akgün (Babat) in respect of non-pecuniary damage;
- (ii) any tax that may be chargeable on the above amounts;
- (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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction. Done in English, and notified in writing on 12 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Françoise Tulkens
Deputy Registrar President