

SECOND SECTION

CASE OF AŞAN AND OTHERS v. TURKEY

(Application no. 56003/00)

JUDGMENT

STRASBOURG

31 July 2007

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 Aşan and Others v. Turkey,

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

Mrs F. Tulkens, *President*,
Mr A.B. Baka,
Mr I. Cabral Barreto,
Mr R. Türmen,
Mr M. Ugrekhelidze,
Mr V. Zagrebelsky,
Mrs A. Mularoni, *judges*,
and Mrs F. Elens-Passos, *Deputy Section Registrar*,
Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in an application (no. 56003/00) 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 twelve Turkish nationals, Mr Halit Aşan, Mr Abdullah Aşan, Mr Mehmet Sıddık Aslan, Mr Zeki Aslan, Mr Adil Aşan, Mr Übeyt Yacan, Mr Şahbaz Aslan, Mr Süleyman Aslan, Mr Bazi Aşkan, Mr Ahmet Aşan, Mr Zeki Aşan and Mr Zübeyir Aşan (“the applicants”), on 21 December 1999.
2. The applicants were represented by Mr M.S. Tanrıkulu, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.
3. The applicants complained, in particular, that they had been subjected to ill-treatment while in gendarme custody in violation of Article 3 of the Convention. They also alleged a violation of Articles 5, 13 and 14 of the Convention.
4. On 24 November 2002 the Court decided to give notice of the application to the Government. In a decision of 4 May 2006 it decided to examine the merits of the application at the same time as its admissibility in accordance with Article 29 § 3 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1955, 1945, 1970, 1963, 1973, 1950, 1950, 1930, 1955, 1955, 1965 and 1958 respectively and all live in Şırnak.

A. The arrest and detention of the applicants

6. On 13 September 1999 the applicants Halit Aşan, Abdullah Aşan, M.Sıddık Aslan, Zeki Aslan, Adil Aşan, Übeyt Yacan, Şahbaz Aslan, Sülayman Aslan, Bazi Aşkan and Ahmet Aşan were arrested by gendarmes and taken into custody at the Beytüşşebab Provincial Gendarmerie Headquarters. The arrest protocol prepared by the gendarmes stated that the arrestees had been suspected of aiding and abetting an illegal terrorist organisation, namely the PKK (the Kurdistan Workers' Party).

7. On 17 September 1999 the Beytüşşebab Public Prosecutor requested the Magistrates' Court to extend the period of the applicants' detention in custody. The Magistrates' Court extended the period of their detention for ten days.

8. Between 15 and 19 September 1999, these applicants were questioned by three gendarmes in relation to their involvement in terrorist activities.

9. In the morning of 18 September 1999, the applicants Zeki Aşan and Zübeyir Aşan were arrested on suspicion of aiding and abetting the PKK and possessing drugs. They were also placed in custody at the Provincial Gendarmerie Headquarters.

10. On 21 September 1999 Zeki Aşan and Zübeyir Aşan were also questioned by the gendarmes in relation to their involvement in the PKK.

B. The medical reports furnished by the Beytüşşebab Health Centre

11. On 13 September 1999 and 22 September 1999, the applicants underwent medical examinations at the Beytüşşebab Health Centre at the request of the Beytüşşebab District Gendarmerie Command. The medical reports issued for the applicants by the Health Centre referred to the following findings prior to and subsequent to their detention in custody:

1. Halit Aşan

12. The medical reports of 13 September 1999 and 22 September 1999 on Halit Aşan stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified, other than an old surgical scar.

2. Abdullah Aşan

13. The medical report of 13 September 1999 on Abdullah Aşan stated that there was an old surgical scar and that the patient was possibly suffering from chronic bronchitis. It further stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified.

14. The medical report of 22 September 1999 indicated that Abdullah Aşan had difficulty in moving his arms and shoulders and that he had tenderness on his back, calf and thigh. It further stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified, other than an old surgical scar.

3. Mehmet Sıddık Aslan

15. The medical report of 13 September 1999 on Mehmet Sıddık Aslan stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified, other than an old surgical scar.

16. The medical report of 22 December 1999 stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been observed on the applicant. It was also noted that the applicant had a problem with his vision, pain in his lumbar region and felt exhausted.

4. Zeki Aslan

17. The medical report of 13 September 1999 on Zeki Aslan stated that no physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified, other than an old injury scar on one arm which was tender when touched.

18. According to the medical report dated 22 September 1999, one ear and the left shoulder were tender and the applicant had difficulty in moving his left thumb. The report also stated that there was an ecchymosis measuring 4 cm on the applicant's left hand and that he had reported pain in his back. Finally, an old injury scar was observed on one arm.

5. Adil Aşan

19. The medical report of 13 September 1999 on Adil Aşan recorded an old burn scar measuring 7 cm on the right arm, an old surgery scar around the right eye and an old injury scar on the right knee. It further stated that no other physical injuries such as scars, bruises, ecchymoses, haematoma or anything else had been identified

20. The medical report dated 22 September 1999 stated, in addition to the above findings, that the applicant had tenderness and difficulty in moving both his arms and that the lumbar area was tender. However, no physical injuries such as scars, bruises, ecchymoses, and haematoma had been identified.

6. Übeyt Yacan

21. The medical report of 13 September 1999 on Übeyt Yacan stated that no physical injuries had been identified, apart from red and painful testicles and an old scar.

22. According to the medical report dated 22 September 1999, the applicant had difficulty with the movement of his arms and shoulders, which were tender. He had

extreme tenderness in the lumbar region and had red and painful testicles. He had an ecchymosis on his left thumb, which was also tender. Furthermore, he had difficulty in urinating.

7. Şahbaz Aslan

23. The medical report dated 13 September 1999 on Şahbaz Aslan stated that no physical injuries such as scars, bruises, ecchymoses or haematoma had been identified.

24. According to the medical report dated 22 September 1999, Şahbaz Aslan had difficulty in standing up and looked extremely haggard. He had difficulty in moving his arms and shoulders. His back and calf were tender. His left eye was also bloodshot.

8. Süleyman Aslan

25. The medical report dated 13 September 1999 on Süleyman Aslan stated that no physical injuries such as scars, bruises, ecchymoses or haematoma had been identified, other than an old scar.

26. According to the medical report dated 22 September 1999, Süleyman Aslan had redness and tenderness on the nape of his neck. His left shoulder was also tender.

9. Bazi Aşkan

27. The medical report of 13 September 1999 on Bazi Aşkan stated that his lumbar area was tender when touched, and that there were injury scars on both knees.

28. The medical report of 22 September 1999 stated that his left arm and shoulder were tender. His lumbar area was also tender. However, no physical injuries such as scars, bruises or ecchymoses had been identified.

10. Ahmet Aşan

29. The medical report of 13 September 1999 on Ahmet Aşan indicated that he had a graze on his neck and that his lumbar area was tender. There was no sign of a physical violence on the body.

30. The medical report dated 22 September 1999 stated that he had difficulty with the movement of his arms and shoulders, which were also tender. He had pain in the lumbar region and chest. There was no sign of a scar, bruise or ecchymosis on his body.

11. Zeki Aşan

31. The medical report dated 18 September 1999 on Zeki Aşan stated that there was no sign of any physical violence on the body.

32. According to the medical report of 22 September 1999, the applicant's left arm, shoulder and left lumbar area were tender. He had redness on his right leg and back. He had an ecchymosis of 3x2 cm on his right arm.

12. Zübeyir Aşan

33. The medical report dated 18 September 1999 on Zübeyir Aşan indicated that there was a healed fracture and an old surgery scar measuring 5-6 cm on his right knee. There was also a surgery scar on the external side of the right ankle resulting from a fracture.

34. The medical report dated 22 September 1999 stated, in addition to the above, that the applicant's right shoulder and left lumbar area were tender. However, there was no sign of any scar, bruise or ecchymosis on his body.

C. The criminal proceedings against the applicants

35. On 22 September 1999 the applicants were brought before the public prosecutor. They claimed that they had been subjected to torture in custody. They further denied the veracity of the statements taken by the gendarmes. Some of the applicants' statements were taken with the help of an interpreter since they had trouble in understanding and speaking Turkish.

36. The applicants, together with other suspects, were brought before the Beytüşşebap Magistrates' Court. They denied the statements which they had made to the gendarmes, alleging that they had been obtained under torture. At the end of the hearing which finished late in the evening of 22 September 1999, the Magistrates' Court ordered the applicants' detention on remand.

37. On 23 September 1999 the applicants filed objections with the Beytüşşebap Assize Court against the detention order issued by the Magistrates' Court. They claimed that they were innocent of the alleged crimes and that they should be released pending trial. The Assize Court dismissed their request.

38. On 4 October 1999 the Beytüşşebap Chief Public Prosecutor, considering the nature of the alleged offences, issued a decision of non-jurisdiction in respect of the applicants and sent the case file to the Chief Public Prosecutor's office at the Diyarbakır State Security Court.

39. On 20 October 1999 the Chief Public Prosecutor filed a bill of indictment with the Diyarbakır State Security Court against the applicants. He requested that:

- Halit Aşan and Mehmet Sıddık Aslan be convicted and sentenced under Article 125 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713);
- Süleyman Aslan be convicted and sentenced under Article 168 § 2 of the Criminal Code and section 5 of the Prevention of Terrorism Act;

- Abdullah Aşan, Zeki Aslan, Adil Aşan, Übeyt Yacan, Şahbaz Aslan, Ahmet Aşan, Zeki Aşan and Zübeyir Aşan be convicted and sentenced under Article 125 of the Criminal Code; and that

- Bazi Aşkan be convicted and sentenced under Article 168 § 2 of the Criminal Code and section 5 of the Prevention of Terrorism Act.

40. On 9 December 1999 the Diyarbakır State Security Court heard the applicants. In the course of the hearing, the applicants filed petitions containing their defence submissions and complaints. They complained that they had been subjected to various types of ill-treatment during their detention. They alleged, in particular, that they had been deprived of food and water, kept blindfolded, beaten, hung, stripped naked, given electric shocks and had been hosed with pressurised water. They had been made to listen to high volume music and screams, truncheons had been inserted in their anus, and they had been forced to lie down on a wet floor. The applicants also alleged that they had been forced under torture to sign statements prepared by the gendarmes. The applicants' representative requested the release of the applicants pending trial. He also asked the court to initiate criminal proceedings against those who had inflicted torture on his clients.

41. The court took note of the applicants' allegations contained in their petitions and stated that they had been included in the case file. It then ordered the release pending trial of the applicants, with the exception of Halit Aşan, Süleyman Aslan and Mehmet Sıddık Aslan.

42. Meanwhile, following a constitutional amendment in 2004, the State Security Courts were abolished and the applicants' case was transferred to the Diyarbakır Assize Court.

43. On 10 April 2007 the Diyarbakır Assize Court acquitted the applicants of the charges.

D. Recent medical reports submitted by the applicants

1. Medical information furnished by the Human Rights Foundation of Turkey

44. In February and March 2000 the applicants Zeki Aşan, Bazi Aşkan, Ahmet Aşan, Zübeyir Aşan and Adil Aşan applied to the Diyarbakır branch of the Human Rights Foundation of Turkey for a medical examination and treatment.

45. On 1 June 2006 Dr M. Emin Yüksel furnished medical notes (*tıbbi epikriz*) on the state of health of these applicants. Having heard and examined the applicants, Dr Yüksel diagnosed them as mainly suffering from post-traumatic stress disorders.

2. Reports given by the Forensic Medicine Experts' Association

46. On 18 May 2006 the representative of the applicants Abdullah Aşan, Adil Aşan, Ahmet Aşan, Bazi Aşkan, Halit Aşan, Şahbaz Aslan, M. Sıddık Aslan, Süleyman Aslan,

Übeyit Yacan, Zeki Aşan, Zeki Aslan and Zübeyir Aşan applied to the Forensic Medicine Experts' Association and asked for an assessment of the medical reports provided by the Beytüşşebap Health Centre in the light of the applicants' allegations of ill-treatment.

47. On 7 June 2006 the applicants furnished the Court with the assessment reports prepared by three forensic medicine experts who concluded that the reports dated 22 September 1999, prepared by the Beytüşşebap Health Centre, were insufficient since there was no indication that the patients had been subjected to sufficient medical examinations or psychological tests. The experts further observed, in respect of each applicant, the following:

a) Abdullah Aşan

48. Abdullah Aşan complained that a truncheon had been inserted in his anus and, in the course of his medical examination, tenderness had been identified on his calf and thigh. However, this point was not clarified by physical and psychological examinations. The finding that he had difficulty in moving his arms and shoulders could have resulted from the “hanging by his arms”, mentioned in the petition. Having regard to the medical findings and the allegations, and in the absence of an adequate examination, it was considered that Abdullah Aşan could have been subjected to physical violence.

b) Adil Aşan

49. The finding that Adil Aşan had tenderness and difficulty in moving both his arms could have resulted from “hanging by the arms”, mentioned in the petition. In the absence of a sufficient examination, it was considered that the allegations matched the findings in the medical report.

c) Ahmet Aşan

50. The finding that Ahmet Aşan had tenderness and difficulty in moving his arms and shoulders could have resulted from the “hanging by the arms” mentioned in the petition. In the absence of a sufficient examination, it was considered that the allegations matched the findings in the medical report.

d) Bazi Aşkan

51. The finding that Bazi Aşkan had tenderness on his left shoulder and that he had difficulty in moving his left arm could have resulted from the “hanging by the arms”, mentioned in the petition. In the absence of a sufficient examination, it is considered that the allegations matched the findings in the medical report.

e) Halit Aşan

52. Halit Aşan was kept in police custody for nine days. He alleged that he had been beaten up and subjected to physical violence and torture for five days. By the time of the

medical examination, certain lesions could have healed and the visual examination might not have been sufficient to identify the alleged trauma.

f) Şahbaz Aslan

53. The finding that Şahbaz Aslan had a difficulty in moving his arms and that there was tenderness on his back could have resulted from “hanging by the arms”. By the time of the medical examination, certain lesions could have healed and the visual examination might not have been sufficient to identify the alleged trauma. In the absence of a sufficient examination, it was considered that the allegations matched the findings in the medical report.

g) Mehmet Sıddık Aslan

54. Mehmet Sıddık Aslan alleged that he had been kept in detention in custody for nine days and that he had been beaten up and subjected to physical violence and torture for five days. By the time of the medical examination, certain lesions could have healed and the visual examination might not have been sufficient to identify the alleged trauma. However, it was considered that the physical findings mentioned in the medical report corresponded to the allegations made by Mehmet Sıddık Aslan.

h) Süleyman Aslan

55. The finding that Süleyman Aslan had tenderness on his left shoulder could have resulted from the “hanging by the arms”, mentioned in the petition. In the absence of sufficient examination, it was considered that until the medical examination, certain lesions could have healed and that the findings in the medical report corresponded to the allegations of ill-treatment.

i) Übeyit Yacan

56. The finding that Übeyit Yacan had tenderness on his shoulders and that he had difficulty in moving his left arm could have resulted from the “hanging by the arms”, mentioned in the petition. In the absence of sufficient examination, it was considered that by the time of the medical examination, certain lesions could have healed and that the findings in the medical report corresponded to the allegations of ill-treatment.

j) Zeki Aşan

57. The finding that Zeki Aşan had tenderness in his left arm and shoulder could have resulted from the “hanging by the arms”, mentioned in the petition. In the absence of a sufficient examination, it was considered that the findings in the medical report corresponded to the allegations of ill-treatment.

k) Zeki Aslan

58. The finding that Zeki Aslan had tenderness in his left shoulder could have resulted from the “hanging by the arms”, mentioned in the petition. In the absence of a sufficient examination, it was considered that the findings in the medical report corresponded to the allegations of ill-treatment.

l) Zübeyir Aşan

59. Although the medical report did not mention wounds, lesions, haematoma or ecchymoses on the body of Zübeyir Aşan, it was considered that the medical findings could have resulted from the alleged physical violence inflicted during custody.

II. RELEVANT DOMESTIC LAW AND PRACTICE

60. A full description of the domestic law at the relevant time may be found in *Batı and Others v. Turkey* (nos. 33097/06 and 57834/00, §§ 95-99, ECHR 2004-IV).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

61. The applicants complained that they had been subjected to various forms of ill-treatment while in custody, in violation of Article 3 of the Convention, which reads as follows:

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

A. Admissibility

62. The Government asked the Court to dismiss the application as being inadmissible 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 they had allegedly suffered by instituting an action in the civil or administrative courts.

63. The applicants disputed the Government's argument.

64. The Court reiterates that it has already examined and rejected the Government's argument in previous cases (see, in particular, *Karayığit v. Turkey* (dec.), no. 63181/00, 5 October 2004). It finds no particular circumstances, in the present application, which would require it to depart from that conclusion. Consequently, the Court rejects the Government's preliminary objection.

65. The Court considers that the applicants' complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes, therefore, that the application is not manifestly ill-founded within

the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

1. The parties' submissions

66. The applicants maintained that the suffering they experienced, taken as a whole, amounted to torture. In this connection, they alleged that they had been deprived of food and water, that they had been blindfolded, beaten, hung, stripped naked, given electric shocks and that they had been hosed with pressurised water. They had also been made to listen to high volume music and screams, truncheons had been inserted in their anus, and they had been forced to lie down on a wet floor.

67. The Government claimed that the applicants had failed to produce any evidence capable of proving their allegations. Referring to the medical reports of the Beytüşşebap Health Centre, the Government argued that the applicants' allegations were unsubstantiated.

2. The Court's assessment

(a) General principles

68. The Court reiterates that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 62, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111, and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

69. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

(b) Application of the above principles in the present case

i) As regards the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan

70. The Court notes that the above-mentioned applicants underwent medical examinations at the Beytüşşebap Health Centre before and after their detention in the custody of the Beytüşşebap Provincial Gendarmerie Command. Having compared the medical reports given on 13 September 1999 and 22 September 1999, the Court observes that the findings contained in the reports given on the latter date differ from the previous ones and refer to signs of violence such as ecchymoses, tenderness and complaints of pain (see paragraphs 17-18, 21-22, 23-24, 25-26 and 31-32 above).

71. Accordingly, the Court considers that the findings contained in the medical reports dated 22 September 1999 are, at the very least, consistent with the applicants' allegations of having been beaten. In this connection, it notes that the Government have failed to provide any explanation as to the manner in which the injuries noted in the medical reports were sustained by the applicants. Furthermore, in contrast to the medical reports issued for the other applicants, the reports given in respect of the above-mentioned applicants do not contain any statements to the effect that there was no finding of physical violence on their bodies.

72. In view of the above and the absence of a plausible explanation from the Government as to the cause of the injuries sustained by the applicants, the Court finds that these injuries were the result of treatment for which the Government bore responsibility.

73. There has accordingly been a violation of Article 3 of the Convention in respect of the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan.

ii) As regards the applicants Halit Aşan, Abdullah Aşan, Mehmet Sıddık Aslan, Adil Aşan, Bazi Aşkan, Ahmet Aşan and Zübeyir Aşan

74. The Court notes that the medical reports issued in respect of these applicants before and after their detention in custody all state that no signs of scars, bruises or ecchymoses were observed on their bodies. Although the applicants furnished alternative reports which indicated that some of them suffered from post-traumatic stress disorder, and expressed the view that the findings contained in the medical reports matched their allegations of ill-treatment (see paragraphs 44-59 above), the Court would remark that these reports were issued in 2006, which is almost seven years after the alleged events, and that they do not indicate with sufficient certainty that the applicants were subjected to ill-treatment, as alleged, at the material time.

75. While in the alternative reports there are statements to the effect that the difficulties faced by some of the applicants in moving their arms or shoulders could have resulted from "hanging by the arms" (see paragraphs 48-51, 53 and 55-58 above), the Court

considers that any ill-treatment inflicted in the way alleged by the applicants would have left marks on their bodies which would then have been observed by the doctor who examined them at the end of their detention in custody on 22 September 1999. In this respect, it sees no reason why the doctor who examined the applicants following their release from custody would not have noted the alleged signs of physical violence, particularly bearing in mind that he had already recorded such signs in respect of other applicants. Accordingly, it finds that there is no material in the case file which could call into question the findings in these reports or add probative weight to the applicants' allegations (see *Sevgin and Ince v. Turkey*, no. 46262/99, § 57, 20 September 2005).

76. Having regard to the foregoing, the Court considers that the evidence before it does not enable it to find beyond reasonable doubt that these applicants were subjected to ill-treatment.

77. It follows that there has been no violation of Article 3 of the Convention in respect of the applicants Halit Aşan, Abdullah Aşan, Mehmet Sıddık Aslan, Adil Aşan, Bazi Aşkan, Ahmet Aşan and Zübeyir Aşan.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

78. The applicants alleged that they had been denied an effective domestic remedy in respect of their complaint of ill-treatment, in violation of Article 13 of the Convention which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

79. The Court notes that this complaint 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.

B. Merits

1. Submissions of the parties

80. The applicants contended that they had raised their complaints of ill-treatment before the public prosecutor and the Beytüşşebap Magistrates' Court, as well as the Diyarbakır State Security Court. They therefore submitted that they had taken all reasonable steps to ensure that their complaints could be properly and thoroughly investigated by the State authorities. However, the response of the authorities was totally inadequate.

81. The Government maintained that there had been no breach of Article 13 of the Convention since the applicants' allegations were unsubstantiated.

2. The Court's assessment

82. The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim that she or he has been subjected to ill-treatment by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure (see *Çelik and İmret v. Turkey*, no. 44093/98, § 54, 26 October 2004).

83. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-40, §§ 102-04, *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV, and *Çelik and İmret*, cited above, § 55). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

84. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 of the Convention for the ill-treatment suffered by the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan whilst in the custody of the gendarmerie. These applicants' complaints are therefore “arguable” for the purposes of Article 13 in connection with Article 3 of the Convention (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 64, ECHR 2003-V, and *Çelik and İmret*, cited above, § 56).

85. As regards the remaining applicants, however, the Court has not found it proven beyond reasonable doubt that they had been ill-treated by the gendarmes. As it has held in previous cases, this does not preclude the complaint in relation to Article 3 from being an “arguable” one for the purposes of Article 13 (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 112).

86. In this latter connection, the Court would observe that the difficulty in determining whether there was any substance to these applicants' allegations as to the nature of the treatment they endured rests with the failure of the authorities to investigate their complaints (see, *Veznedaroğlu v. Turkey*, no. 32357/96, § 31, 11 April 2000).

87. The Court notes that the applicants raised their allegations of ill-treatment before the Beytüşşebap public prosecutor, the Beytüşşebap Magistrates' Court and the Diyarbakır State Security Court (see paragraphs 35, 36 and 40 above). They also reiterated their complaints in the course of their trial and asked the authorities to initiate criminal proceedings against the perpetrators (see paragraph 40 above). Although the Diyarbakır State Security Court took note of the applicants' allegations, no steps were taken either to obtain further details from the applicants or to question the gendarmes involved. In other words, the authorities turned a blind eye to the applicants' allegations of torture.

88. The Court thus considers that, in the circumstances, the applicants had laid the basis of an arguable claim that they had been tortured. The inertia displayed by the authorities in response to their allegations was therefore inconsistent with the notion of an “effective remedy” which entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible.

89. In view of the foregoing, the Court concludes that all the applicants were denied an effective remedy on account of the failure of the authorities of the respondent State to investigate their complaints of torture.

90. Consequently, there has been a violation of Article 13 of the Convention.

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

91. The applicants complained under Article 5 § 1 (c) of the Convention that they had been unlawfully deprived of their liberty as there had been no reasonable suspicion for their arrest. Article 5 § 1 (c) 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: ...

(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...”

92. The Government contended that the applicants had been arrested on suspicion of aiding and abetting an illegal terrorist organisation. There was therefore reasonable suspicion of them having committed an offence.

93. The Court reiterates that having a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence (*Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, p. 16, § 32). However, facts which raise a suspicion need not be of the same level of clarity as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage in the process of criminal investigation (*Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27 § 55).

94. The Court observes that the applicants were arrested in the course of an operation carried out against the PKK. According to the arrest protocols, the applicants were arrested on suspicion of aiding and abetting the PKK (see paragraphs 6 and 9 above). Following their arrest, the applicants were detained on remand and subsequently tried by the Diyarbakır State Security Court and Assize Court on charges of membership of an illegal terrorist organisation.

95. The Court considers that the aforementioned elements are sufficient to support the conclusion that there was a “reasonable suspicion” for the applicants' arrest. The fact that they were subsequently acquitted of the charges does not of itself call into question the existence of such a suspicion in conformity with Article 5 § 1 (c).

96. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

97. The applicants further complained that they were not informed of the reasons for their arrest. They relied on Article 5 § 2 of the Convention, which reads as follows:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

98. The Government maintained that the applicants had been informed of the reasons for their arrest and that they had all been questioned in relation to their involvement in the PKK whilst in custody.

99. The Court observes that the applicants were all arrested in the course of an operation against members of the PKK. The arrest protocols clearly mention the reasons for their arrest, namely their alleged involvement in the PKK and the drugs found in the possession of some of the applicants (see paragraphs 6 and 9 above).

100. Accordingly, the Court considers that, in the circumstances of the present case, the applicants must be deemed to have been aware of the legal basis for their arrest and subsequent detention.

101. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

102. The applicants complained that they had been held in police custody between seven to nine days without being brought before a judge or other officer authorised by law to exercise judicial power. They alleged a violation of Article 5 § 3 of the Convention, which provides as follows:

“ Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

103. The Court notes that this complaint 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.

B. Merits

104. The Government argued that the length of the applicants' detention in custody was in conformity with the legislation in force at the material time. They further maintained that the relevant domestic law had been amended in accordance with the Court's jurisprudence.

105. The applicants reiterated their allegations.

106. The Court has already accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 61, *Murray*, cited above, § 58, and *Demir and Others v. Turkey*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2653, § 41). This does not mean, however, that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see, among others, *Murray*, cited above, § 58).

107. The Court notes that the applicants Zeki Aşan and Zübeyir Aşan claimed to have been arrested in the morning of 18 September 1999 and brought before a judge in the evening of 22 September 1999 (see paragraphs 9 and 36 above). These applicants alleged therefore that their detention in custody had lasted more than four days and six hours. It further observes that the Government have not provided any information on this point. Accordingly, in view of the Government's failure to clarify the total time spent by Zeki Aşan and Zübeyir Aşan in custody, the Court accepts that their detention in custody did indeed exceed four days and six hours. As regards the other applicants, the Court notes that they were arrested on 13 September 1999 and brought before a judge on 22 September 1999. Their detention in custody thus lasted nine days.

108. Against this background, the Court reiterates that in the *Brogan and Others* case it held that detention in police custody which had lasted four days and six hours without judicial control fell outside the strict constraints as to time laid down by Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism (see *Brogan and Others*, cited above, p. 33, § 62). Even supposing that the activities of which the applicants stood accused were linked to a terrorist threat, the Court cannot accept that it was necessary to detain the applicants for more than four days and six hours.

109. There has, accordingly, been a violation of Article 5 § 3 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

110. The applicants further complained under Article 5 § 4 of the Convention that they had no remedy in domestic law to challenge the lawfulness of their detention in custody. They alleged a violation of Article 5 § 4 of the Convention, which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Admissibility

111. The Court notes that this complaint 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.

B. Merits

112. The Government contended that Article 128 § 4 of the Code of Criminal Procedure, as in force at the material time, provided an effective remedy to challenge the lawfulness of detention in police custody. Since the applicants had been able to avail themselves of this remedy, there had been no violation of Article 5 § 4 of the Convention.

113. The applicants maintained their allegations.

114. The Court reiterates that in several cases raising similar questions to those in the present case, it rejected the Government's aforementioned submission and found a violation of Article 5 § 4 of the Convention (see, among others, *Öcalan v. Turkey* [GC], no. 46221/99, § 76, ECHR 2005, and *Sakık and Others v. Turkey*, judgment of 26 November 1997, *Reports* 1997-VII, § 54). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in such cases.

115. In conclusion, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

116. The applicants complained under Article 5 § 5 of the Convention that they had no right to compensation for the alleged violations of Article 5 of the Convention. Article 5 § 5 of the Convention provides as follows:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

117. The Government submitted that, in cases of illegal detention, a request for compensation could be submitted within three months following the final decision of the

trial court under the terms of Law no. 466 on compensation payable to persons unlawfully arrested or detained. Given that the applicants had failed to avail themselves of this remedy, this complaint should be declared inadmissible for non-exhaustion of domestic remedies.

118. The applicants maintained that they had no right under Law no. 466 to claim compensation since the length of their detention was lawful under domestic law.

119. The Court notes that an action for compensation under Law no. 466 could only be brought for damage suffered as a result of an unlawful deprivation of liberty. It observes that the applicants' detention in custody was in conformity with the domestic law. Consequently, they did not have a right to compensation under the provisions of Law no. 466 (see *Sakik and Others*, cited above, § 60). It therefore dismisses the Government's objection as to non-exhaustion of domestic remedies.

B. Merits

120. The Court concludes that, in the absence of an enforceable right to compensation in the circumstances of the present case, there has been a violation of Article 5 § 5 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 3, 5 AND 13 OF THE CONVENTION

121. The applicants complained that they had been detained and tortured on account of their Kurdish origin in violation of 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.”

122. The Government maintained that the applicants' complaint under Article 14 of the Convention was without any foundation.

123. The Court has examined the applicants' allegation. However, it finds that no violation of this provision can be established on the basis of the evidence before it. This aspect of the case is therefore to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. 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

125. The applicants each claimed 120,000 euros (EUR) in respect of non-pecuniary damage.

126. The Government submitted that the amounts claimed were excessive and unjustified.

127. The Court has found a violation of Article 3 of the Convention, as a result of the ill-treatment suffered by the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan, and a violation of Article 13 of the Convention on account of the failure of the authorities to carry out an effective investigation into any of the applicants' allegations of torture. Having regard to the circumstances of the present case, and deciding on an equitable basis, it awards by way of non-pecuniary damages EUR 10,000 to each of the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan, and EUR 5,000 to each of the remaining applicants.

128. The Court has further found a violation of Article 5 §§ 3, 4 and 5 of the Convention in respect of the applicants' detention in the custody of the gendarmerie. It therefore accepts that the applicants suffered some non-pecuniary damage - such as distress resulting from their detention ranging from four days and six hours to nine days, without the opportunity to challenge its lawfulness - which cannot be sufficiently compensated by the finding of a violation. Having regard to its case-law, and making its assessment on an equitable basis, the Court awards EUR 500 to the applicants Zeki Aşan and Zübeyir Aşan and EUR 2,700 to each of the other applicants (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 99, 2 November 2004, and *Dalkılıç v. Turkey*, no. 25756/94, § 36, 5 December 2002).

129. In sum, the Court awards each of the applicants the following amounts under the head of non-pecuniary damage:

- EUR 7,700 for Halit Aşan;
- EUR 7,700 for Abdullah Aşan;
- EUR 7,700 for Mehmet Sıddık Aslan;
- EUR 12,700 for Zeki Aslan;
- EUR 7,700 for Adil Aşan;

- EUR 12,700 for Übeyt Yacan;
- EUR 12,700 for Şahbaz Aslan;
- EUR 12,700 for Süleyman Aslan;
- EUR 7,700 for Bazi Aşkan;
- EUR 7,700 for Ahmet Aşan;
- EUR 10,500 for Zeki Aşan; and
- EUR 5,500 for Zübeyir Aşan.

B. Costs and expenses

130. The applicants also claimed EUR 7,900 for the costs and expenses incurred before the domestic courts and the Strasbourg Court. This amount consisted of 79 hours' legal work carried out by their representative in the course of the proceedings before the domestic courts (30 hours) and for the preparation of their application to the Court (49 hours). They also asked the Court to make an award in respect of their expenses for photocopying, postage, telephone and fax.

131. The Government contended that the applicants had failed to submit documents, such as invoices and receipts, to prove their claims. They also maintained that no award should be made in respect of the costs incurred in the course of the proceedings before the domestic courts.

132. According to the Court's case-law, an applicant is entitled to reimbursement of 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, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award a total sum of EUR 5,000 for the proceedings before the Court to the applicants jointly.

C. Default interest

133. 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 applicants' complaints under Articles 3, 5 §§ 3, 4, 5 and 13 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 in respect of the applicants Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan;
3. *Holds* that that there has been no violation of Article 3 of the Convention in respect of the applicants Halit Aşan, Abdullah Aşan, Mehmet Sıddık Aslan, Adil Aşan, Bazi Aşkan, Ahmet Aşan and Zübeyir Aşan;
4. *Holds* that there has been a violation of Article 13 of the Convention in respect of all applicants;
5. *Holds* that there has been a violation of Article 5 §§ 3, 4 and 5 of the Convention in respect of all applicants;
6. *Holds*

(a) that the respondent State is to pay the applicants, who are listed below, the following sums, which are to be converted into Turkish liras at the rate applicable at the date of settlement, and to be paid within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention:

- (i) EUR 7,700 (seven thousand seven hundred euros) for Halit Aşan;
 - EUR 7,700 (seven thousand seven hundred euros) for Abdullah Aşan;
 - EUR 7,700 (seven thousand seven hundred euros) for Mehmet Sıddık Aslan;
 - EUR 12,700 (twelve thousand seven hundred euros) for Zeki Aslan;
 - EUR 7,700 (seven thousand seven hundred euros) for Adil Aşan;
 - EUR 12,700 (twelve thousand seven hundred euros) for Übeyt Yacan;
 - EUR 12,700 (twelve thousand seven hundred euros) for Şahbaz Aslan;
 - EUR 12,700 (twelve thousand seven hundred euros) for Süleyman Aslan;
 - EUR 7,700 (seven thousand seven hundred euros) for Bazi Aşkan;
 - EUR 7,700 (seven thousand seven hundred euros) for Ahmet Aşan;
 - EUR 10,500 (ten thousand five hundred euros) for Zeki Aşan; and
 - EUR 5,500 (five thousand five hundred euros) for Zübeyir Aşan;
- (ii) EUR 5,000 (five thousand euros) jointly to all the applicants for costs and expenses;

- (iii) plus any taxes that may be chargeable;
- (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;

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

Done in English, and notified in writing on 31 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. Elens-Passos F. Tulkens
Deputy Registrar President

AŞAN AND OTHERS v. TURKEY JUDGMENT

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