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

FIRST SECTION

CASE OF OSMANOĞLU v. TURKEY

(Application no. 48804/99)

JUDGMENT

STRASBOURG

24 January 2008

FINAL

24/04/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Osmanoğlu v. Turkey,

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

Christos Rozakis, *President,*
Loukis Loucaides,
Riza Türmen,
Nina Vajić,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 11 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 48804/99) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national of Kurdish origin, Mr Muhyettin Osmanoğlu ("the applicant") on 25 September 1996.

2. The applicant was represented before the Court by Mr Mark Muller, Mr Tim Otty, Mr Kerim Yıldız and Ms Lucy Claridge of the Kurdish Human Rights Project in London, and by Mr Reyhan Yalçındağ, Mr Aygül Demirtaş and Mr Selahattin Demirtaş, lawyers practising in Diyarbakır. The Turkish Government ("the Government") did not designate an agent for the purposes of the proceedings before the Convention institutions.

3. The applicant alleged, in particular, that his son had been taken into the custody of the police and had subsequently disappeared in circumstances engaging the responsibility of the respondent State under Articles 2, 3, 5, 8, 13 and 14 of the Convention.

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. By a decision of 15 June 2006, the Court declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant Muhyettin Osmanoğlu was born in 1942 and lives in Diyarbakır. He is the father of Atilla Osmanoğlu, who was born in 1968. Atilla was allegedly detained by the police on 25 March 1996 and subsequently disappeared.

A. Introduction

8. The facts of the case are disputed by the parties and will be set out separately.

9. The facts as presented by the applicant are set out in Section B below. The Government's submissions concerning the facts are summarised in Section C below. The documentary evidence submitted by the parties is summarised in Section D.

B. The applicant's submissions on the facts

10. The applicant is a retired civil servant. At the time of the events giving rise to the present application he and his family lived in Diyarbakır, where his son Atilla ran the wholesale grocery shop owned by the applicant. Prior to living in Diyarbakır the applicant and his family had lived in the nearby town of Hazro, where he worked as a civil servant. In February 1992 the applicant and his family moved to Diyarbakır after an officer threatened his son. In 1994 the applicant was detained for 28 days and was subjected to ill-treatment during his detention. He was subsequently acquitted of the charges against him.

11. At approximately 11 a.m. on 25 March 1996 the applicant arrived at the shop and saw two men escorting Atilla out of the shop. One of the men was blonde, tall and beardless with an “American-style haircut”. The second man was thickset, of average height and with dark skin. The men were armed and carried walkie-talkies.

12. The two men told the applicant that they were police officers and that they were taking his son to police headquarters so that he could submit a bid for a contract to provide canteen services at police headquarters. The men also took with them a box of sugar and a kilo of tea. When the two men told the applicant that they would return Atilla in about half an hour and Atilla confirmed this, the applicant decided not to intervene. The applicant saw Atilla being led to a car that contained two other occupants. Neighbouring shop owners also witnessed the two men taking Atilla with them.

13. The same two men had previously visited the shop, stating that they had come from the canteen, and had asked Atilla to go with them. When Atilla had refused to go, the two men had sat in the shop for about an hour and had made three telephone calls, which Atilla said he did not understand as the men had spoken in code. Atilla had been worried about the incident when he had related it to the applicant that evening.

14. When Atilla did not return on the evening of 25 March 1996, the applicant thought that he had been detained in custody. The following day he applied to the governor's office and also to the chief prosecutor's office at the State Security Court. He applied again to the same prosecutor on 29 March and on 1, 9 and 19 April. On 16 May 1996 the applicant applied once again to the governor's office.

15. The applicant received a reply to his petition of 1 April 1996 from the prosecutor at the State Security Court, who stated that his son's name did not feature in the custody records.

16. In June 1996 the applicant was summoned before the Diyarbakır State Security Court in connection with his petitions. The statement and the complaint he made were filed under preliminary file number 1996/4041. In relation to his petition to the governor's office, the applicant was told to contact the murder desk at Diyarbakır police headquarters. The applicant applied by letter to that authority but did not receive a response other than a request to identify a number of unidentified bodies found in the area.

17. Finally, in his observations submitted to the Court in reply to the Government's observations on the admissibility and merits of the case, the applicant referred to an article published in the newspaper *Özgür Gündem* on 4 July 2005 giving details of a purported confession made by one Mr Abdulkadir Aygan, allegedly a former agent of the JİTEM (*Jandarma İstihbarat Terörle Mücadele* – anti-terror intelligence branch of the gendarmerie), describing the abduction and subsequent killing of his son Atilla (see paragraph 28 below).

C. The Government's submissions on the facts

18. The Government confirmed that the applicant had lodged a complaint with the prosecutor on 1 April 1996. In that complaint the applicant alleged that his son had been taken into custody by police officers and requested information concerning his son's whereabouts.

19. Upon receipt of the applicant's complaint, the prosecutor examined the custody records of police headquarters and concluded that Atilla Osmanoğlu had not been taken into custody. The prosecutor did not initiate an investigation, on the grounds that there were neither custody records showing that Atilla Osmanoğlu had been detained nor any other evidence of his having been kidnapped or been the victim of an unlawful act.

20. On 20 May 1996 a statement was taken from the applicant at the murder desk of Diyarbakır police headquarters. Following the taking of this statement, Atilla Osmanoğlu was registered as a missing person and an investigation was carried out throughout the country in order to find him.

21. After the Court had declared the application admissible, it requested the Government to provide a copy of the full investigation file concerning Atilla Osmanoğlu's disappearance, together with information as to whether any investigation had been opened into Abdulkadir Aygan's alleged confession relating to the abduction and killing of the applicant's son. In reply, the Government informed the Court that no investigation had been initiated either into the disappearance of Atilla Osmanoğlu or into the alleged confession of Mr Aygan, as the allegations had been abstract and unsubstantiated.

D. Documentary evidence submitted by the parties

22. The following information appears from the documents submitted by the parties.

23. On 26 March 1996 the applicant submitted a petition to the governor's office in Diyarbakır in which he stated that his son had been taken away the previous day by two plain-clothes police officers claiming to have come from the canteen of Diyarbakır police headquarters. The applicant also stated that he had not been provided with any information about his son's whereabouts, despite the fact that he had applied to all the relevant authorities.

24. On 1 April 1996 the applicant submitted a petition to the prosecutor at the State Security Court in Diyarbakır in which he stated that his son had been detained by members of the security forces on 25 March 1996 and that he had not heard anything from him since that date. He asked the prosecutor to inform him about his son's fate and where he was being detained. According to a hand-written note added to this petition by the prosecutor on 4 April 1996, the name of the applicant's son did not feature in the custody records.

25. On 16 May 1996 the applicant submitted a second petition to the governor's office in Diyarbakır, reiterating the content of his previous petition of 26 March 1996. The applicant also added that his son had no connections with any illegal organisation.

26. A statement was taken from the applicant on 20 May 1996 at the murder desk of Diyarbakır police headquarters. The applicant reiterated the content of his previous statements and gave a description of the two men who had taken his son away. He stated that he would be able to identify the two men if he saw them again. He also added that the same two men had visited his shop two days before they had taken his son, and that after leaving his shop they had gone to a neighbouring shop. The applicant

pointed out that the owner of the neighbouring shop could be questioned in order to establish the identity of the police officers.

27. The name Atilla Osmanoğlu does not feature in the custody records of Diyarbakır police headquarters which were submitted to the Court by the Government after the application was declared admissible.

28. On 4 July 2006 the confession purportedly made by Abdulkadir Aygan was published in the newspaper *Özgür Gündem*. Mr Aygan was quoted as having stated that Attila Osmanoğlu had been kidnapped by the JİTEM and that his head had been smashed with a hammer by a certain Cindi Acet –also known as *Koçero* – so that it would not be possible to identify the body. The body, which had later been thrown into a disused oil tanker near the town of Silopi, had been found on 30 March 1996 and an autopsy report had been drawn up by the Silopi prosecutor. The file opened by the prosecutor had been given the preliminary investigation number 1996/313. According to the autopsy report, the body was that of a male measuring 175 centimetres, weighing 70 kilograms, approximately 25-30 years of age and with dark hair. There were a number of severe cuts to the face, and parts of the skull were broken. The body had been buried in the part of Silopi cemetery reserved for unclaimed bodies. The applicant had subsequently been shown the pictures of this body but had been unable to identify the deceased as his son.

II. RELEVANT DOMESTIC LAW

29. A description of the relevant law may be found in *İpek v. Turkey* (no. 25760/94, §§ 92-106, ECHR 2004-II (extracts)).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

30. In a letter submitted on 29 May 2007, i.e. almost one year after the application was declared admissible, the Government informed the Court that the Diyarbakır public prosecutor had rendered a decision of non-prosecution on 23 June 2006 and that the applicant had not lodged a formal objection against that decision. The Government subsequently submitted to the Court a document showing that the decision in question had been communicated to the applicant on 2 October 2006. The Government invited the Court to declare the application inadmissible for the applicant's failure to exhaust domestic remedies.

31. The applicant argued that, contrary to what was claimed by the Government, he had not been notified about the decision of

non-prosecution. In the applicant's opinion, even if he had objected to that decision, the outcome would have been the same as the suspect remained at large. In any event, the case had already been declared admissible and the Government had not provided any evidence to show otherwise.

32. It must be stressed at the outset that the Government did not inform the Court about the decision of non-prosecution until 29 May 2007 despite the fact that they had the opportunity to include it in their post-admissibility additional observations which were submitted to the Court on 20 September 2006.

33. Furthermore, the Court notes that the prosecutor's decision of 23 June 2006 was based on the statute of limitations having been reached. The offence was referred to in the decision as "restriction of personal liberty" and the statute of limitations for that offence was 10 years under the applicable domestic legislation. It was not a decision taken at the end of an investigation but was a decision merely confirming that the statute of limitations had been reached. Indeed, as acknowledged by the Government, no investigation had been initiated either into the disappearance of Atilla Osmanoğlu or into the alleged confession of Mr Aygan (see paragraph 21 above).

34. In the light of the foregoing, the Court considers that the applicant, who has made numerous unsuccessful applications to the domestic authorities to have an investigation instigated into the disappearance of his son, was not required to lodge an objection against the prosecutor's decision to discontinue an investigation which has, in the Government's own admission, never taken place. It therefore rejects the Government's preliminary objection.

II. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. The applicant

35. The applicant submitted that there was sufficient evidentiary basis on which to conclude beyond reasonable doubt that his son had been abducted by State agents. He had himself been an eyewitness to the abduction and had given the authorities a description of the two men involved. Furthermore, the newspaper report based on Mr Aygan's confession constituted corroborating evidence in support of his allegations concerning the involvement of the State in the disappearance of his son. The applicant conceded that the information provided by Mr Aygan amounted only to hearsay evidence; however, he invited the Court to exercise its

powers under Article 38 § 1 (a) of the Convention and Rule A1 (3) of the Annex to the Rules of Court and carry out a fact-finding inquiry into the events surrounding the disappearance of his son and in particular to examine and verify the information provided by Mr Aygan, who was a former agent of the State.

36. As the body of his son had never been positively identified, the applicant conceded that he was unable to provide concrete evidence of his son's death. However, relying on the Court's case-law concerning similar allegations (in particular, *Akdeniz and Others v. Turkey*, no. 23954/94, § 88, 31 May 2001), the applicant submitted that there was a reasonable presumption of death attributable to the respondent Government which arose from the following factors:

(a) the length of time which had elapsed since he last saw his son in the custody of State security forces;

(b) the history of harassment suffered both by his son and himself (see paragraph 10 above);

(c) the lack of any documentary evidence relating to his son's detention;

(d) the absence of any satisfactory and plausible explanation from, or investigation by, the State; and

(e) the hearsay evidence contained in the newspaper article detailing the allegations made by Mr Aygan.

37. The applicant also submitted that the respondent Government had failed to comply with a specific request for disclosure of information made by the Court. According to that request, made at the time the case was communicated to them, the Government had been invited to submit to the Court a copy of the entire investigation file and a copy of the custody records, but had failed to do so. The applicant invited the Court to conclude that the Government had breached their obligations under Article 38 § 1 (a) of the Convention to assist the Court in the establishment of the facts of the case.

38. Finally, the applicant submitted that, given the significant potential of the missing documentation to corroborate or refute the allegations made by him, the Court was entitled to draw inferences as to the well-foundedness of the allegations. In this connection the applicant, referring to the judgments in the cases of *Akkum and Others v. Turkey* (no. 21894/93, § 211, ECHR 2005-II (extracts)) and *Çelikbilek v. Turkey* (no. 27693/95, § 70, 31 May 2005), argued that it was for the Government to explain conclusively why the documents in question could not serve to corroborate his allegations.

2. The Government

39. The Government argued that there was no evidence in the case file to enable the Court to conclude beyond reasonable doubt that the applicant's

son had been abducted and killed by a State agent or by a person acting on behalf of the State authorities.

B. Article 38 § 1 (a) and the consequent inferences drawn by the Court

40. Before proceeding to assess the evidence, the Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI).

41. Furthermore, in cases where the non-disclosure by the Government of crucial documents in their exclusive possession prevents the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicant, or to provide a satisfactory and convincing explanation of how the events in question occurred (see *Akkum and Others*, cited above, § 211, and *Çelikbilek*, cited above, § 70).

42. Turning to the present case, the Court notes that, when it communicated the case to the Government, it requested them to provide copies of the investigation file and custody records. The Government, without submitting copies of the custody records or any documents other than a statement taken from the applicant by the police (see paragraph 26 above), stated in their observations on the admissibility and merits of the case that the relevant custody records had been examined by the prosecutor and that the prosecutor had thus been able to conclude that the applicant's son had not been detained in custody. On that basis, it had been considered unnecessary to initiate an investigation.

43. After it had declared the application admissible, the Court again requested the Government to submit copies of the entire domestic investigation file. The Government submitted copies of what they claimed were the custody records of Diyarbakır police headquarters (see paragraph

27 above). The name of the applicant's son does not feature in the relevant parts of the custody records.

44. The Court points out that the above-mentioned obligation under Article 38 of the Convention to assist the Court in its investigation of the application is only applicable after the case has been declared admissible. Noting that the Government did submit copies of the custody records after the application had been declared admissible, the Court cannot but conclude that the Government did comply with their obligations under Article 38 § 1 (a) of the Convention.

C. The Court's assessment of the facts

45. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 161). Nevertheless, it must be stressed at the outset that this particular evidential criterion has an autonomous meaning in the Court's proceedings (see *Mathew v. the Netherlands*, no. 24919/03, § 156, ECHR 2005); it has never been the Court's purpose to borrow the approach of the national legal systems that use the standard of proof "beyond reasonable doubt" (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). Thus, according to the Court's established case-law, in the absence of direct evidence, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (ibid. and the cases cited therein). The level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (ibid.).

46. Turning to the facts of the present case, the applicant submitted that his eyewitness account of the events, coupled with the allegations made by Mr Aygan (see paragraphs 17 and 28 above), provided sufficient proof in support of his allegation that his son had been abducted by agents of the respondent Contracting Party.

47. As regards the applicant's eyewitness account of the events, the Court observes that the applicant, both when he approached the national authorities and in the proceedings before the Court in Strasbourg, has been consistent in recounting the version of the events leading up to his son being taken away from his shop. He gave descriptions of the two men (see paragraph 26 above) and informed the national authorities that the neighbouring shop owner had witnessed the two men taking his son away (see paragraph 26 above). Despite this, no investigation was conducted into his allegations by the domestic authorities other than a statement being taken from him and the custody records being checked.

48. In this connection, the fact that the name of the applicant's son does not feature in the custody records is not, on its own, a decisive factor; the unreliability and inaccuracy of custody records for that particular part of Turkey during the relevant period have been highlighted by the Court in a number of similar cases (see, *inter alia*, *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 125; *Timurtaş*, cited above, § 105; *Çakıcı v. Turkey* [GC], no. 23657/94, § 105, ECHR 1999-IV; *Çiçek v. Turkey*, no. 25704/94, § 165, 27 February 2001; and *Orhan v. Turkey*, no. 25656/94, § 371, 18 June 2002).

49. In the light of the above, the Court sees no reason to doubt that the applicant's son was indeed taken away as alleged, that is, by two men who identified themselves as police officers.

50. As regards the allegations made by Mr Aygan (see paragraphs 17 and 28 above), the Court observes that similar allegations made by Mr Aygan concerning the killing of the applicant's husband in the case of *Nesibe Haran v. Turkey* were examined by the Court in the context of that case and it was concluded that no decisive importance could be attached to them "since they were untested and at the most circumstantial evidence" (see *Nesibe Haran v. Turkey*, no. 28299/95, § 67, 6 October 2005).

51. In this connection and as regards the applicant's invitation to the Court to carry out a fact-finding mission with a view to verifying the accuracy of the information provided by Mr Aygan, the Court is of the view that such an investigation is a matter for the domestic authorities. Furthermore, the Court notes that, according to the information provided by the applicant, the neighbouring shop owner who was visited by the two men who took Atilla away (see paragraph 26 above) has since moved from the area and the applicant does not know his address. The applicant also informed the Court that neither he nor his lawyers had been able to locate Mr Aygan. In the circumstances of the present case the Court is not persuaded that a fact-finding inquiry in Turkey by the Court would clarify the circumstances of the case.

52. The Court observes that the Government were specifically requested by the Court to clarify whether any investigation had been opened into the allegations made by Mr Aygan relating to the abduction and killing of the applicant's son. The Government informed the Court that no investigation had been initiated into Mr Aygan's allegations as the allegations were "abstract and unsubstantiated". Noting that Mr Aygan named the alleged killer of the applicant's son and gave details of the alleged killing and the location where the body was buried, the Court disagrees with the Government that the allegations were vague. Nevertheless, owing to the national authorities' failure to investigate Mr Aygan's allegations, these allegations continue to remain untested and, as such, amount to no more than circumstantial evidence. The authorities' failure to investigate Mr Aygan's allegations will be examined from the standpoint of the

Government's positive obligation under Article 2 of the Convention to carry out an effective investigation (see paragraph 91 below).

53. In the light of the foregoing the Court considers that both before the national authorities and in the proceedings before the Court the applicant has done all that could be reasonably expected from him to support his allegations. Nevertheless, although the Court is prepared to accept that the applicant's son was taken away by two men who identified themselves as police officers, it is unable to establish, on the basis of the evidence in the file, whether or not the two men were indeed police officers. This inability follows directly from the respondent Government's failure to carry out an investigation into the applicant's allegations. The Court finds it more appropriate to deal with the consequences of this failure when examining the applicant's complaint concerning the Government's alleged failure to protect his son's right to life (see paragraphs 70-84 below).

54. Finally, the applicant argued that the Court should reverse the burden of proof on account of the Government's failure to cooperate with the Court in the establishment of the facts and should require the Government to prove that the documents withheld by them do not corroborate his allegations (see paragraph 38 above). The Court points out that in the cases referred to by the applicant in support of this argument (*Akkum and Others* and *Çelikbilek* – see paragraph 38 above), the Court was unable to establish the facts on account of the Government's failure to submit to it a number of crucial documents. In the present case, however, the inability to verify the accuracy of the applicant's allegations stems from the lack of a domestic investigation which, as held above, falls to be examined, in the circumstances of the present case, from the standpoint of the obligation to protect the right to life of the applicant's son.

D. Whether Atilla Osmanoğlu can be presumed dead

55. In the above-mentioned case of *Timurtaş* the Court held as follows:

> "82. ...Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might ... raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody...
>
> 83. In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an

> interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention..."

56. In the instant case the Court has not found it established that the applicant's son was detained by members of the security forces, but has found that he was abducted on 25 March 1996 by two men in the circumstances alleged by the applicant.

57. Nevertheless, the Court is of the opinion that a finding of State involvement in the disappearance of a person is not a condition *sine qua non* for the purposes of establishing whether that person can be presumed dead; in certain circumstances the disappearance of a person may in itself be considered as life-threatening. In this connection the Court observes that on a number of occasions it has reached the conclusion that the disappearance of a person in south-east Turkey at the relevant time could be regarded as life-threatening (for the purposes of presumption of death see, *inter alia*, *Akdeniz v. Turkey*, no. 25165/94, § 99, 31 May 2005; for the purposes of the obligation to carry out effective investigations into allegations of disappearances with a view to establishing the circumstances surrounding the disappearance and identifying those responsible see, *inter alia*, *Toğcu v. Turkey*, no. 27601/95, § 112, 31 May 2005, and the cases cited therein).

58. Although in many of these cases the victims' alleged PKK involvement was a factor taken into account by the Court when considering their disappearances as life-threatening in the light of the situation in south-east Turkey at the time, the lack of any suggestion that the applicant's son might have been involved in PKK-related activities does not make his disappearance any less life-threatening. To this end, the Court observes that the manner of his abduction shows many similarities with the disappearances of persons prior to their being killed in south-east Turkey at around the relevant time which have been examined by the Court (see, in particular, *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII (extracts); *Nuray Şen v. Turkey* (No. 2), no. 25354/94, 30 March 2004; and *Çelikbilek*, cited above).

59. For the above reasons and taking into account the fact that no information has come to light concerning the whereabouts of Atilla Osmanoğlu for more than 11 years -a fact not disputed by the Government-, the Court accepts that he must be presumed dead.

60. The Court will now proceed to examine the applicant's complaints under the various Articles of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

61. Article 2 of the Convention provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Alleged abduction and killing of Atilla Osmanoğlu by State agents

62. The applicant alleged that his son had been abducted by the security forces and was now to be presumed dead, in violation of Article 2 of the Convention.

63. The Government denied that State agents had been involved in the abduction of the applicant's son.

64. The Court has already found that it was unable to establish who might have been responsible for the disappearance of Atilla Osmanoğlu (see paragraph 53 above). It follows, therefore, that there has been no violation of Article 2 of the Convention on that account.

B. Alleged failure to safeguard the right to life of Atilla Osmanoğlu

1. The applicant

65. The applicant submitted that, in view of the grave danger to life which an enforced disappearance involved and the urgent need to locate the person, the authorities' failure to initiate a prompt and effective investigation into the disappearance of his son had directly endangered his son's life and constituted a violation of the State's positive obligation to protect life pursuant to Article 2 of the Convention.

66. He pointed out that no action had been taken to investigate his son's whereabouts or well-being in the crucial early days following the abduction. Despite the fact that he had petitioned the governor's office on 26 March 1996, that is, the day after his son's disappearance, no response had been received from the authorities until 1 April 1996. In any event, the action taken on 1 April 1996, namely the checking of the custody records by the prosecutor (see paragraph 24 above), had been woefully inadequate and had failed to discharge the State's obligations under the Convention.

67. Furthermore, the authorities had failed to follow up specific evidential leads provided by him, in particular the description of the two perpetrators provided in his statement to the authorities on 20 May 1996

(see paragraph 26 above). He had expressly said in that statement that he would be able to identify the two men if he saw them again. Nevertheless, the only action taken in response to the allegations he made on 20 May 1996 had been to register his son's name as a missing person, and even that had not been done until almost two months after the abduction and following at least seven petitions.

2. The Government

68. The Government submitted that the prosecutor had examined the custody records and concluded that Atilla Osmanoğlu had not been taken into custody by the police. The prosecutor had not initiated an investigation on the grounds that there was neither a custody record showing that the applicant's son had been detained nor any other evidence indicating that he had been kidnapped or been the victim of an unlawful act.

69. On 20 May 1996, after a statement had been taken from the applicant at the murder desk of police headquarters, Atilla Osmanoğlu had been registered as a missing person and an investigation had been carried out throughout the country in order to find him.

3. The Court's assessment

70. The Court would point out at the outset that the abduction and subsequent disappearance of a person is an unlawful act under Turkish law (see *İpek*, cited above, § 95). Having regard to its finding above that the applicant's son was abducted as alleged by the applicant (see paragraph 49 above), it must be concluded that the applicant's son did fall victim to an unlawful act.

71. The Court has not found it established that State agents were responsible for the disappearance of the applicant's son (see paragraph 53 above). However, this does not necessarily exclude the responsibility of the Government under Article 2 of the Convention. According to the established case-law of the Court, the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, § 36).

72. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another

individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, § 116).

73. In this connection the Court reiterates that, in the light of the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 78, ECHR 2000-X).

74. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Osman*, cited above, § 116).

75. As to whether there was a real and immediate risk to the life of Atilla Osmanoğlu, the Court has already established that the disappearance of a person in circumstances such as those in which the applicant's son disappeared can be regarded as life-threatening (see paragraphs 57-58 above). Furthermore, the Court has previously held that the disappearance of a person in life-threatening circumstances requires the State, pursuant to the positive obligation inherent in Article 2 of the Convention, to take operational measures to protect the right to life of the disappeared person (see *Koku v. Turkey*, no. 27305/95, § 132, 31 May 2005). It must also be pointed out in this connection that, both the disappeared person in the *Koku* case and the applicant's son in the present case had been threatened previously (see paragraph 10 above and see *Koku,* cited above, § 18). Furthermore, both in the *Koku* case and in the present case the authorities were informed of the abduction the following day.

76. The Court finds therefore that, following his disappearance, the life of the applicant's son was at more real and immediate risk than that of other persons at that time. It follows that the action which was to be expected from the domestic authorities was not to prevent the disappearance of the applicant's son – which had already taken place – but to take preventive operational measures to protect his life, which was at risk from the criminal acts of other individuals (ibid., § 132).

77. In this connection the Court observes that the authorities were made aware as early as 26 March 1996 of the abduction of the applicant's son (see paragraph 23 above). Accordingly, from that date, the authorities were under an obligation to take immediate steps to protect his right to life. It must be stressed at this juncture that, as is the case in respect of the obligation to carry out effective investigations when individuals are killed as

a result of the use of force, the obligation to take steps to protect the right to life is not an obligation of result but of means (see, *mutatis mutandis*, *McKerr v. the United Kingdom*, no. 28883/95, § 113, ECHR 2001-III). It is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge (see *Osman*, cited above, § 116).

78. Nevertheless, as acknowledged by the Government, "no investigation [was] initiated into the disappearance of Atilla Osmanoğlu". In this connection, the Court finds that the mere checking of the custody records is not on its own sufficient to protect the right to life of the applicant's son (see paragraph 19 above). As regards the Government's claim that Atilla Osmanoğlu was registered as a missing person and an investigation carried out "throughout the country in order to find him" (see paragraph 20 above), the Court observes that the Government did not provide any specifics about this purported investigation or any documents pertaining to it (see paragraphs 42-43 above). No weight can be attached, therefore, to the purported search for the applicant's son "throughout the country".

79. The Court is of the opinion that a number of basic steps could have been taken by the investigating authorities which would have offered a reasonable prospect of success in finding the applicant's son. To that end, the starting point for the prosecutor should have been to obtain more information from the applicant and to question the neighbouring shop owners who, the applicant claimed, had witnessed his son being taken away by the two men.

80. In the light of the descriptions given by the applicant, the prosecutor could have made attempts to verify whether the two men who took the applicant's son away were indeed police officers. Furthermore, the Court takes judicial notice of the fact that, during the relevant period, there were a large number of police and gendarmerie checkpoints on the roads in the area which could have been alerted to be on the lookout for the applicant's son in case he was transported through one of the checkpoints.

81. In addition, the following steps, which were highlighted by the applicant in his observations and with which the Court agrees, could have been taken by the investigating authorities with a view to finding Atilla Osmanoğlu:

(a) an inspection of the relevant gendarmerie or police headquarters or any other premises to which the applicant's son might have been brought after he had been abducted;

(b) the making of enquiries and the taking of statements from those in custody in the relevant gendarmerie or police headquarters at the time of the disappearance, in an attempt to establish whether or not the applicant's son had been taken into custody;

(c) the making of enquiries and the taking of statements from those officers who were on duty on the relevant dates; and

(d) attempts to secure potential eyewitnesses to the incident.

82. As pointed out above, according to Turkish law it is a criminal offence to deprive an individual unlawfully of his or her liberty. Public prosecutors have a duty to investigate offences reported to them (see *İpek*, cited above, § 96). Despite this, the prosecutor in the instant case remained completely and incomprehensibly inactive at a time when many people were being killed in that region of Turkey (see *Koku*, cited above, § 143). By failing to take any steps, neither the prosecutor, nor indeed the Turkish authorities in general, did everything within their power to protect the right to life of the applicant's son after his abduction (see, *mutatis mutandis*, ibid.).

83. In the light of the foregoing the Court concludes that, although there were criminal-law provisions in place, the failure to take immediate measures undermined the effectiveness of the protection afforded by those provisions in this case and thus removed the protection which Atilla Osmanoğlu should have received by law.

84. The Court concludes that the authorities failed to take the reasonable measures available to them to prevent a real and immediate risk to the life of Atilla Osmanoğlu from materialising. There has, accordingly, been a violation of Article 2 of the Convention in its substantive aspect.

C. Alleged inadequacy of the investigation

85. The applicant submitted that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, established a positive obligation on States to investigate complaints of disappearance effectively and to apply effective sanctions against the perpetrators of enforced disappearances.

86. The Government submitted that no investigation had been carried out into the applicant's allegations because they had been abstract and unsubstantiated.

87. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161; and *Kaya v. Turkey,* judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). In that connection, the

Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman v. Turkey* [GC], no. 21986/93, § 105, ECHR 2000-VII).

88. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony (see *Tanrıkulu*, cited above, § 109). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

89. There is also a requirement of promptness and reasonable expedition implicit in this context (see *Yaşa v. Turkey,* judgment of 2 September 1998, *Reports* 1998-IV, §§ 102-104; *Çakıcı*, cited above, §§ 80, 87 and 106; and *Tanrıkulu,* cited above, § 109).

90. The above-mentioned obligations apply equally to cases where a person has disappeared in circumstances which may be regarded as life-threatening. In this respect, the Court has already held that the disappearance of the applicant's son could be considered as life-threatening (see paragraphs 57-58 above).

91. Nevertheless, as conceded by the Government themselves, no investigation was carried out into the disappearance of the applicant's son. In this connection, the Court also regrets that the allegations made by Mr Aygan did not spur the Government into action. The Court disagrees with the Government that Mr Aygan's allegations were abstract and unsubstantiated, and is of the view that the specific allegations at issue merited consideration by the domestic authorities. In this connection the Court cannot but remark that a decision not to carry out an investigation into those allegations on the ground that they were "unsubstantiated" reveals an illogical decision-making process, as allegations cannot be found to be unsubstantiated unless they are investigated first.

92. In the light of the total failure to carry out an investigation – which has already given rise to a violation of Article 2 of the Convention in its substantive aspect – the Court concludes that there has also been a violation of Article 2 of the Convention under its procedural limb.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

93. The applicant alleged that his own treatment at the hands of the State following his son's disappearance amounted to inhuman and degrading treatment in violation of Article 3 of the Convention, which provides :

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

94. In the applicant's opinion the following special features supported his submission that he had been a victim of treatment contrary to Article 3 of the Convention:

(a) the parent-child bond;

(b) the fact that he had witnessed the abduction of his son and, as a result, suffered great mental anguish on account of his failure to intervene before his son left;

(c) his repeated and determined attempts to obtain information about his son's disappearance, commencing the day after the abduction, and the fact that he had had to bear the brunt of this task; and

(d) the fact that he had been met with an ineffective and inadequate response from the authorities of the respondent Government at every stage.

95. The Government were of the opinion that there had been no violation of Article 3 of the Convention since no State agent had been implicated in the disappearance of the applicant's son.

96. The Court reiterates that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries (see *İpek*, cited above, §§ 181-183, and the authorities cited therein). The Court further emphasises that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Çakıcı*, cited above, § 98).

97. In the present case, the Court notes that the applicant is the father of the disappeared Atilla Osmanoğlu. The applicant witnessed his son being taken away by two men claiming to be police officers more than eleven years ago and has not heard from him since. Despite the applicant's having approached the domestic authorities to report the abduction and disappearance of his son and also to share with them the information he had about the abduction, the authorities took no action other than telling him that his son's name did not feature in the custody records (see paragraph 24 above).

98. In view of the above, the Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of

his son and his inability to find out what has happened to him. The manner in which his complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

99. The Court concludes therefore that there has been a violation of Article 3 of the Convention in respect of the applicant.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

100. Relying on Article 5 of the Convention, the applicant alleged that his son had been the victim of a violation of that provision on account of his arbitrary and unacknowledged detention by State authorities and/or the failure and/or refusal of the State to conduct a prompt and effective investigation into his complaints.

101. The Government argued that it had not been established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities had been involved in the alleged abduction and detention of the applicant's son.

102. As regards the applicant's allegation that his son had been detained by the State authorities, the Court reiterates that it has been unable to make a finding as to who might have been responsible for the disappearance of the applicant's son (see paragraph 53 above). There is thus no factual basis to substantiate the applicant's allegation.

103. With regard to the applicant's complaint under the same Article concerning the lack of an investigation, the Court, having regard to the above findings of violations stemming from the lack of an investigation, does not deem it necessary to examine separately whether the same failure also gives rise to a violation of Article 5 of the Convention.

104. Consequently, the Court finds no violation of Article 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

105. The applicant submitted that the prolonged distress and anguish caused by his son's disappearance over the past eleven years amounted to a violation of his right to respect for family life within the meaning of Article 8 of the Convention. According to the applicant, this breach was the direct result of the respondent State's failure to protect his son's right to life, liberty and security pursuant to Articles 2 and 5 of the Convention.

106. The Government, beyond denying the factual basis of the applicant's allegations, did not specifically address any Article 8 issues.

107. Having regard to its findings under Articles 2 and 3 above, the Court does not find it necessary, in the circumstances of the present case, to determine whether there has been a breach of Article 8 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. Relying on Article 13 of the Convention, the applicant submitted that he had been denied an effective remedy in respect of his Convention complaints. He argued that the serious shortcomings of the respondent Government's conduct were sufficient for the Court to conclude that he had been denied an effective remedy in respect of the disappearance of his son and had thereby been denied access to any other available remedy at his disposal, including a claim for compensation.

109. The Government did not make any submissions as regards the applicant's complaints under this Article.

110. Article 13 of the Convention 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."

111. Having regard to the violation of Article 2 of the Convention under its procedural head (see paragraph 92 above) the Court does not find it necessary to examine the same facts also in the context of Article 13.

VIII. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 5 OF THE CONVENTION

112. The applicant argued that his son's disappearance and presumed death and the failure of the authorities to conduct an effective investigation and to provide an effective remedy were due to the fact that he and his son were of Kurdish origin. According to the applicant, there was a discriminatory practice by the police and other State security forces in the south-east region of Turkey which singled out members of the Kurdish population for enforced or involuntary disappearances and for assassination in police custody.

113. The applicant further argued that, quite apart from the discriminatory practice of forced disappearances, members of the Kurdish population in south-east Turkey were discriminated against in respect of the investigation of such disappearances. In support of this argument the applicant referred to a number of judgments in which the Court had found violations of Article 2 and/or Article 13 of the Convention on account of the authorities' failure to carry out effective investigations in cases exclusively involving members of the Kurdish population in Turkey.

114. The Government did not make any submissions in relation to these complaints.

115. As regards the applicant's allegation that his son's disappearance and presumed death were due to his Kurdish origin, the Court stresses that it has not found it established that agents of the State were involved in the

abduction. There is thus no factual basis to substantiate the applicant's allegation in this respect.

116. Concerning the applicant's second allegation under this Article, namely that the underlying reason for the failure to investigate the abduction of his son was his ethnic origin, the Court would point out that the above violations of the Convention are based on the complete lack of an investigation at the domestic level. As a result of the absence of an investigation there are no documents or any other evidence from which the Court may glean information to examine whether the applicant's allegation of discriminatory treatment by the investigation authorities has any merits.

117. There has therefore been no violation of Article 14 of the Convention taken in conjunction with Articles 2 and 5 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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. Pecuniary damage

119. The applicant submitted that his son Atilla, who was born in 1968, had been 28 years old at the time of his abduction. Atilla also had a partner – to whom he had been married according to Islamic traditions – and they had lived in the same house as the applicant and the applicant's wife. The applicant's five other children and two grandchildren also lived in the same house. As the applicant was too old to carry out regular work, Atilla used to manage the shop on a daily basis. The shop had provided the main income for the entire family. The applicant had had to close the shop as a result of Atilla's disappearance and the family had lost their income as a result.

120. At the time of Atilla's death the shop had provided a monthly turnover of approximately 2,000 new Turkish liras (YTL). The applicant asked the Court to award him that amount in respect of each month that had elapsed since the disappearance of his son, making a total of YTL 276,000 (approximately 160,000 euros (EUR)).

121. The Government objected to the amount claimed by the applicant and argued that he had not produced any evidence to prove the material damage. The Government also objected to the claims for contingent earnings and asked the Court not to accede to them in the absence of any evidence or to resort to fictitious calculations. According to the Government, the applicant could, if necessary, be awarded an equitable amount of pecuniary damage without allowing the compensation procedure

to be exploited by the lodging of exaggerated claims not supported by any evidence or documents. Otherwise, any such amount would be fictitious and would lead to unjust enrichment.

122. The Court's case-law has established 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, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı,* cited above, § 127).

123. The Court observes that the applicant failed to submit to the Court an itemised claim detailing the loss of income stemming from the disappearance of his son. However, the undisputed fact remains that Atilla Osmanoğlu had been providing his family with a living. Having regard to the family situation of Atilla Osmanoğlu, his age and his professional activities which provided his partner and family with a living, the Court finds it established that there was a direct causal link between the authorities' failure to protect the right to life of Atilla Osmanoğlu and the loss to his family of the financial support provided by him.

124. In the light of the foregoing the Court, deciding on an equitable basis, awards EUR 60,000 in respect of pecuniary damage, to be paid into the applicant's bank account in Turkey and held by him for the partner and heirs of Atilla Osmanoğlu jointly (see, *mutatis mutandis*, *Koku*, cited above, § 195).

B. Non-pecuniary damage

125. The applicant submitted that he and his family had suffered severe trauma and distress as a result of the disappearance of Atilla Osmanoğlu, the authorities' failure to carry out an adequate investigation into his disappearance and the fact that he and his family still had no indication of the whereabouts of Atilla and whether he was still alive. He left the determination of the award for non-pecuniary damage to the discretion of the Court and asked the Court to take into account all the facts of the case.

126. The Government were of the opinion that, in view of the lack of evidence to substantiate the applicant's allegations, only a symbolic amount in respect of non-pecuniary damage would be equitable.

127. The Court notes the violations of Articles 2 and 3 of the Convention which it has found. Consequently, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards EUR 20,000 in respect of non-pecuniary damage, to be paid into the bank account in Turkey of the applicant and be held by him for the partner and heirs of Atilla Osmanoğlu jointly. It also awards the applicant the sum of

EUR 10,000 for non-pecuniary damage sustained by him in his personal capacity on account of the violation of Article 3 of the Convention.

C. Costs and expenses

128. The applicant claimed a total of 19,471.24 pounds sterling (GBP) and EUR 11,262 for the fees and costs incurred in bringing the application. His claim comprised:

(a) GBP 19,031.24 for the fees of his lawyers working for the Kurdish Human Rights Project (KHRP) in the United Kingdom;

(b) EUR 5,325 for the fees of his lawyers based in Turkey;

(c) GBP 440 for administrative costs such as telephone, facsimile, postage, photocopying and stationery incurred by the United Kingdom-based lawyers; and

(d) EUR 5,937 for translation and administrative costs such as telephone, facsimile, postage, photocopying and stationery incurred by the lawyers based in Turkey.

129. In support of his claims for the fees of his lawyers the applicant submitted a detailed schedule of costs.

130. The Government objected to what they saw as the highly excessive amount requested by the applicant's representatives. They submitted that only expenses which had been actually incurred could be reimbursed; all costs and expenses must be documented by the applicants or their representatives. Moreover, rough figures or rough lists should not be considered as relevant and as proof of the alleged expenditure. Expenses should not exceed a reasonable amount and should be actually necessary. All requests for expenses must be based on invoices and every item should be supported by documents.

131. Making its own assessment based on the information available and having regard to the awards made in similar cases (see, *inter alia*, *Koku*, cited above, § 203), the Court awards the applicant EUR 15,000 in respect of costs and expenses – exclusive of any value-added tax that may be chargeable –, the net award to be paid in pounds sterling into his representatives' bank account in the United Kingdom.

D. Default interest

132. 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

1. *Holds* unanimously that there has been no violation of Article 2 of the Convention in respect of the abduction of the applicant's son, allegedly by agents of the State, and his subsequent presumed death;

2. *Holds* by four votes to three that the respondent State failed to protect the life of the applicant's son, in violation of Article 2 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the disappearance of the applicant's son and his subsequent presumed death;

4. *Holds* by four votes to three that there has been a violation of Article 3 of the Convention in respect of the applicant;

5. *Holds* unanimously that there has been no violation of Article 5 of the Convention;

6. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 8 of the Convention;

7. *Holds* unanimously that it is not necessary to examine separately the complaint under Article 13 of the Convention;

8. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Articles 2 and 5 of the Convention;

9. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 60,000 (sixty thousand euros) in respect of pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and to be paid into the bank account of the applicant and held by him for the partner and heirs of his son Atilla Osmanoğlu;
      (ii) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and to be paid into the bank account of the applicant and held by him for the partner and heirs of his son Atilla Osmanoğlu;

(iii) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and to be paid into the bank account of the applicant;

(iv) EUR 15,000 (fifteen thousand euros) in respect of costs and expenses; this sum is to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into the bank account of the applicant's representatives in the United Kingdom;

(v) 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following joint partly dissenting opinion of Judges Türmen, Vajić and Steiner is annexed to this judgment.

C.L.R.
S.N.

JOINT PARTLY DISSENTING OPINION OF JUDGES TÜRMEN, VAJIĆ AND STEINER

We agreed with the majority that there had been a violation of Article 2 in its procedural aspect. However, we are unable to share the majority's finding of a violation of Article 2 in its substantive aspect for the following reasons.

In cases of disappearance in custody where there has been a lack of information for a considerably long period of time, the person is presumed to have died in custody and, in the absence of a plausible explanation, the respondent Government's responsibility for the death is engaged.

In order to reach such a conclusion the Court seeks to establish: (1) that the person was deprived of liberty in life-threatening circumstances; (2) that this deprivation was effected by Government agents; (3) that there has been a lack of information or a refusal to acknowledge the deprivation of liberty (see, for example, *Timurtaş* v. Turkey, no. 23531/94, § 85, ECHR 2000-VI; *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; *Taniş and Others v. Turkey*, no. 65899/01, ECHR 2005-VIII; and *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001).

It is interesting to note that in *Timurtaş*, which is the leading case, the Court carefully distinguished it on two grounds from *Kurt v. Turkey* (judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III), where the Court had not found a violation of Article 2: (a) in *Kurt* "there were insufficient persuasive indications that the applicant's son had met his death in custody", whereas in *Timurtaş* "it [was] established ... that Abdulvahap Timurtaş [had been] taken to a place of detention"; and (b) "there were few elements in the *Kurt* case file identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the [*Timurtaş*] case [left] no doubt that Abdulvahap Timurtaş [had been] wanted by the authorities for his alleged PKK activities" (see *Timurtaş*, cited above, § 85).

In the present case, it is unanimously accepted that the involvement of the security forces in the disappearance of the applicant's son, Atilla Osmanoğlu, has not been established (see paragraphs 53 and 56 of the judgment).

Furthermore, it is also stated that Atilla Osmanoğlu had no connections with the PKK (see paragraph 58).

In view of these elements and in accordance with the Court's case-law, we cannot conclude in the present circumstances that the responsibility of the respondent State is engaged.

We are unable to agree with the majority's view that "a finding of State involvement in the disappearance of a person is not a condition *sine qua non* for the purposes of establishing whether that person can be presumed dead;

in certain circumstances the disappearance of a person may in itself be considered as life-threatening" (see paragraph 57).

It is true that under certain circumstances the disappearance of a person may be life-threatening. However, the question in the present case is whether the respondent State can be held responsible for such a life-threatening situation if it is established that the disappearance did not occur when the victim was under the control of the authorities and when the State is not involved in the disappearance. The answer given by the Court's case-law to this question is clearly in the negative. The *Akdeniz* judgment referred to by the majority confirms this view. In that judgment the Court held as follows: "the eleven men must be presumed dead following their detention [emphasis added] by the security forces. Consequently, the responsibility of the respondent State for their death is engaged" (see *Akdeniz*, cited above, paragraph 89).

In this connection, we consider that the alleged similarities between the abduction of the applicant's son and the abduction of persons referred to by the majority in paragraph 58 of the judgment are not sufficient to reach the conclusion that the disappearance of Atilla Osmanoğlu was life-threatening. Such parallels would only carry weight if the Court were to accept the existence of an administrative practice of abductions and killings. However, both the Court and the former Commission have always refused to reach such a conclusion.

It is not clear from the present judgment what action a respondent State is expected to take in cases where it is not found responsible for the disappearance of the person. The majority seem to indicate that "the respondent State is under the obligation to carry out effective investigations into allegations of disappearances" (paragraph 57).

We fully share this view. However, this is a question to be examined under the procedural aspect of Article 2 and not under its substantive aspect. Yet, in the present judgment, the lack of an effective investigation constitutes the basis of a finding of a substantive violation of Article 2 (see paragraph 92). Furthermore, the same lack of effective investigation is also the reason for finding a violation of Article 2 in its procedural aspect. Finding two violations for the same reason with the same facts is rather unusual in the Court's case-law.

The positive obligation of the State to protect the lives of persons under its jurisdiction and the obligation of the State to carry out an effective investigation in cases of disappearance are two different notions and should be treated as such.

The positive obligation of the State to take measures to protect an individual from criminal acts of other individuals is preventive in nature. It relates to a phase before such an incident occurs.

The Court has always interpreted this duty of the State rather narrowly. There will have been a breach of Article 2 only if the authorities knew, or

ought to have known, of the existence of a real and immediate risk to the life of an individual. Such an obligation "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing" (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, § 116). That positive obligation, however, does not impose a requirement that a State must necessarily succeed in locating and prosecuting perpetrators of fatal attacks (see *Tekdağ v. Turkey*, no. 27699/95, § 79, 15 January 2004).

In the present case, the authorities were not informed before the abduction of a risk to the life of the applicant's son, neither did he ask for protection; it is also not contested that the authorities were not involved in the disappearance of Mr Osmanoğlu and that he was not under the control of the security forces. Mr Osmanoğlu's whereabouts were not known by the authorities. It was not even clear whether he was dead or not. Thus the only action that the authorities could reasonably have been expected to take was to conduct an investigation into the circumstances of his disappearance and establish whether or not he was dead, and if he were not, to find out where he was.

In fact, the "preventive operational measures" required by the majority to prevent a real and immediate risk to the life of the applicant's son after his disappearance (see paragraph 81 of the judgment), such as making enquiries, taking statements, securing eyewitnesses, etc., all relate purely to the investigation which is examined under the procedural limb of Article 2.

Lastly, the present case should be distinguished from that of *Koku v. Turkey* (no. 27305/95, 31 May 2005), which is referred to by the majority and in which the Court found a violation in so far as the respondent State had failed to protect the life of the applicant's brother in violation of Article 2 of the Convention, on the following grounds: Hüseyin Koku was a well-known politician. He was a member of HADEP and was allegedly involved in PKK activities. Before his abduction he was receiving threats from the police, the Governor and the Mayor. By contrast, in the present case Mr Osmanoğlu was not a political figure; he was not involved in any PKK-related activity. He was not under threat and he accompanied the two men who came to the shop of his own accord.

The second difference is that Mr Koku's body was found six months after his disappearance, whereas in the present case Mr Osmanoğlu's body was never found.

Thirdly, in *Koku* the respondent State failed to submit to the Court a number of documents from the investigation file. That failure led the Court to find that the Government had fallen short of their obligations under Article 38 § 1 (a) of the Convention and, as a result, the Court drew inferences from the Government's failure. In the present case, however, the

Government did cooperate with the Court in the establishment of the facts (see paragraph 44).

It is with the above considerations in mind that we reach the conclusion that there has been no violation of Article 2 in its substantive aspect.

Finally, in the light of our foregoing considerations and the differences outlined above between the *Koku* judgment and the present judgment, we believe that the finding of a substantive violation of Article 2 on account of the respondent State's failure to take "preventive operational measures" represents a fundamental change in the Court's jurisprudence. We are of the opinion that such a change, with its potential implications for future cases, should have been a matter for the Grand Chamber to decide.