



A gendarme who fired lethal shots on the fringes of a demonstration could not claim impunity on grounds of self-defence

In today's Chamber judgment in the case of [Aydan v. Turkey](#) (application no. 16281/10), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

three violations of Article 2 (right to life) of the European Convention on Human Rights, and
a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) on account of the length of the proceedings.

The case concerned the accidental death of a passer-by who was shot by a gendarme on the fringes of a violent demonstration.

The Court held that it was not established that the force used to disperse the demonstrators, which had caused A. Aydan's death, had been necessary; that the State had failed in its obligation to secure the right to life; and lastly, that the courts should have carried out more detailed inquiries or reassessed the evidence in order to take account of the contradictions between witnesses' statements.

Principal facts

The applicants, Mrs Kerime Aydan and Mrs Kaşem Aydan, are Turkish nationals who were born in 1968 and 1948 respectively and live in Siirt (Turkey). They are the widow and mother of Abdullah Aydan, who was fatally wounded in Erüh town centre on 6 September 2005 by shots fired from a military jeep while he was waiting for a bus close to a demonstration in support of Mr Öcalan, head of the PKK. A. Aydan sustained a bullet wound to the head and died the same day in Dicle Hospital (Diyarbakır).

During the investigation, the suspect G.Y. stated that he had been driving a jeep accompanied by two other gendarmes. Their way had been blocked and they had been surrounded by 150 or 200 armed individuals who had thrown stones at them and attacked them with bars and knives. After issuing two warnings which went unheeded, he had fired through the broken windscreen of the vehicle to disperse the assailants. According to G.Y., since the weapon had been on the automatic setting, there had been a burst of gunfire; however, he had not aimed at the crowd. The other two gendarmes confirmed G.Y.'s statement but were unsure as to whether armed demonstrators had been present at the scene. Two police officers who had made a video recording of the demonstration said that they had not seen any armed demonstrators at the scene.

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

On 22 November 2005 the public prosecutor issued an indictment against G.Y. on a charge of homicide resulting from the use of lethal force which exceeded the limits of self-defence. He sought G.Y.'s conviction, arguing that he could have defended himself by less drastic means in order to disperse the crowd.

On 6 July 2006 the Assize Court discharged G.Y., taking the view that the witnesses who had spoken of a violent attack on the soldiers had been telling the truth. The court found it established that the accused had not intended to cause loss of life, but had acted with the aim of defending himself and protecting the other soldiers inside the jeep. This had led him to exceed the limits of self-defence whilst in the grip of an excusable state of emotion, fear or panic within the meaning of Article 27 § 2 of the Criminal Code.

The public prosecutor sought to have the Assize Court's decision overturned. In his view, the accused's conduct had breached the rules governing the use of firearms in cases of necessity. It was clear from the case file that the accused had not fired a warning shot into the air but had fired on the crowd. He had exceeded the limits of self-defence by firing shots in order to defend himself and the two soldiers who were with him, thereby killing A. Aydan, who had not been caught up in the crowd.

The Court of Cassation upheld the decision on 6 July 2006.

Following an objection raised by the principal public prosecutor at the Court of Cassation, the case was examined by the full Court of Cassation, which in its turn upheld the decisions taken. It considered that "the [notion of] exceeding the limits of self-defence whilst in the grip of an excusable state of emotion, fear or panic could apply in the present case". In reaching that conclusion the court took into consideration the violence of the attack on G.Y. and his two colleagues, which had taken place in Siirt – a city in south-eastern Turkey that had for years been marked by terrorist violence – as well as the death threats that had accompanied the attack and the fact that it had escalated despite the warnings issued.

In parallel with the criminal proceedings the applicants brought an action seeking compensation from the Ministry of the Interior for the pecuniary and non-pecuniary damage resulting from the death of A. Aydan. Those proceedings are still pending.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicants complained that A. Aydan had been killed by the security forces. Under Article 6 (right to a fair hearing within a reasonable time), they alleged that the length of the proceedings for compensation in respect of the pecuniary and non-pecuniary damage caused by the death of their husband and son was incompatible with their right to a hearing within a reasonable time.

The application was lodged with the European Court of Human Rights on 18 March 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Danutė **Jočienė** (Lithuania),
Peer **Lorenzen** (Denmark),
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Helen **Keller** (Switzerland),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 2

The Court considered it established that A. Aydan, who had had no connection with the demonstrators, had been shot and killed by a gendarme while waiting at a bus stop near the demonstration. The Court observed that the demonstrators had thrown stones at a security forces vehicle; however, the intensity of the attack was disputed between the parties. While the domestic courts had found that a group of around 200 people had surrounded the vehicle and thrown stones at the jeep, the public prosecutor at the Court of Cassation had expressed doubts as to the violence of the attack and had even maintained that the jeep had not been surrounded. According to other witnesses, the group had been small (between four and ten people). It was clear from G.Y.'s statements that he had exaggerated considerably the risks which he and the other occupants of the vehicle had faced. On the basis of the evidence in the case file it was by no means established that the demonstrators had been armed with knives or firearms.

In the Court's view, it was not sufficiently established that the attack had been extremely violent. This led it to conclude that G.Y. had not acted in the honest belief that his own life and physical integrity, and those of his colleagues, had been in danger. Nor was the Court satisfied that G.Y. had fired a warning shot into the air. It was thus not established, in the Court's view, that the use of lethal force which had caused the death of A. Aydan had been absolutely necessary within the meaning of Article 2. Accordingly, the Court found a first violation of that Article.

Basing their decision on Article 27 § 2 of the Turkish Criminal Code, the domestic courts had granted G.Y. a discharge. According to the Court of Cassation, the notion of "exceeding the limits of self-defence whilst in the grip of an excusable state of emotion, fear or panic" was applicable in the present case. The Court acknowledged that the concept of exceeding the limits of self-defence was not unknown in European criminal law. Nevertheless, members of the security forces operating in a context of extreme tension – in the present case, in a region where disturbances were to be expected – had to possess the appropriate moral, physical and psychological qualities. Furthermore, the granting of a discharge to a gendarme who had made unjustified use of his firearm was liable to be interpreted as giving carte blanche to the security forces. The Court thus considered that the application of Article 27 § 2 of the Criminal Code in this case was incompatible with the terms of Article 2 of the Convention, according to which the use of lethal force had to be "absolutely necessary" and strictly proportionate to the aims enumerated in that Article. It therefore found a second violation of Article 2.

Lastly, the Court observed that the gendarme who had killed A. Aydan on 6 September 2005 had not been questioned until seven days later. A delay of this length in interviewing the prime suspect in the investigation demonstrated that the authorities had not acted with the requisite diligence. Such a delay not only created an appearance of collusion between the judicial authorities and the police but could also lead the public to believe that the security forces operated in a vacuum and were not answerable to the judicial authorities.

The Court found it regrettable that the Assize Court and the Court of Cassation had differed as to the facts. It considered that the domestic courts should have conducted more detailed inquiries or reassessed the evidence in order to explain the contradictions between the gendarmes' statements and those of the witnesses. Accordingly, the Turkish authorities had not conducted an effective investigation into the death of A. Aydan and there had therefore been a third violation of Article 2.

Article 6 § 1

The Court noted that the two sets of proceedings instituted by the applicants seeking compensation for the pecuniary and non-pecuniary damage linked to the death of their son and husband had lasted for over seven years and two months and had still not been concluded. In the light of its case-law on the subject, the Court considered that the length of the proceedings was excessive, in breach of Article 6 § 1.

Just satisfaction (Article 41)

The Court held that Turkey was to pay 15,000 euros (EUR) to the applicants in respect of pecuniary damage, EUR 50,000 to A. Aydan's widow and EUR 15,000 to his mother in respect of non-pecuniary damage, and EUR 5,000 to the applicants in respect of costs and expenses.

Separate opinion

Judge Jočienė and Sajó expressed a joint separate opinion which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.