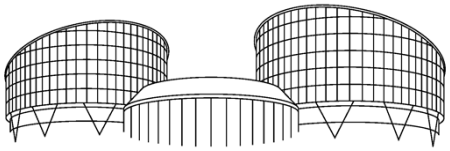

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AKKOYUNLU v. TURKEY

(Application no. 7505/06)

JUDGMENT

STRASBOURG

13 October 2015

FINAL

13/01/2016

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

In the case of Akkoyunlu v. Turkey,

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

Paul Lemmens, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Ksenija Turković,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 15 September 2015,

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

PROCEDURE

1. The case originated in an application (no. 7505/06) 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 a Turkish national, Mr Hayrullah Akkoyunlu ("the applicant"), on 6 February 2006.

2. The applicant was represented by Mr Sami Esen and Mr Serhat Hamdi Aydın, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that while performing his military service he had lost the sight in his left eye as a result of the military authorities' failure to provide him with prompt and appropriate medical assistance.

4. On 18 June 2012 the application was communicated to the Government. On 16 December 2014 the Chamber decided, under Rule 54 § 2 (c) of the Rules of Court, to invite the parties to submit further written observations on the admissibility of the applicant's complaint under Article 3 of the Convention.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Istanbul.

6. On 24 May 2001 the applicant started his compulsory military service in Şırnak. On 25 July 2001 he contacted the infirmary of his regiment, complaining of severe pain in his left eye. According to the applicant, the military doctor was absent and he was given eye drops by a soldier who had no medical qualifications. According to the Government, the records of the infirmary (which were not made available to the Court) showed that the applicant had been examined by a military doctor and given eye drops by that doctor and not by a soldier.

7. The following day the pain became persistent, so the applicant contacted the infirmary once again. He was told that he should go to his dormitory and rest. According to the applicant, despite the pain he was in, he was not relieved of his sentry duties during that period. On 2 August 2001 he was referred to the Cizre State Hospital, where he was diagnosed with a corneal ulcer.

8. On 6 August 2001 the applicant was transferred to the Diyarbakır Military Hospital, where his treatment started. However, he completely lost the sight in his left eye. According to the applicant, the doctors informed him that he had lost his eyesight because of the delay in starting the treatment, as in corneal ulcer cases it was essential to start treatment immediately.

9. On 13 August 2001 the applicant was transferred to Ankara GATA Military Hospital for further treatment. He stayed there until 25 September 2001, during which time he underwent several operations. He returned to the hospital for a number of additional operations from 9 November 2001 to 7 February 2002, 10 to 21 March 2002, 2 to 10 May 2002, and lastly, 15 to 18 July 2002.

10. A medical report issued on 17 July 2002 concluded that the applicant was no longer medically fit for military service and that he was eligible for an ocular prosthesis. On the basis of that report, the applicant was formally discharged from the army.

11. On 15 October 2002 the applicant instituted proceedings before the Supreme Military Administrative Court, seeking compensation from the Ministry of the Interior for the damage he had suffered to his eye during his compulsory military service as a result of the delay in his treatment. He claimed 30,000,000,000 Turkish liras (TRL[1]; approximately 19,000 euros (EUR)) in respect of pecuniary damage and TRL 30,000,000,000 in respect of non-pecuniary damage. He argued that for a period of one week after the start of his eye problem, he had been unable to see a doctor because there had been no doctor present at his regiment infirmary during that time. He gave the administrative court the names of a number of his fellow conscripts who had witnessed the fact that he had not been provided with medical

1. On 1 January 2005 the Turkish lira ("TRY") entered into circulation, replacing the former Turkish lira ("TRL"). TRY 1 = TRL 1,000,000.

treatment by a doctor in the first week but had instead been told to rest and use eye drops, and asked the court to question them.

12. In the written defence submissions that it sent to the administrative court, the Gendarmerie High Command argued that on 25 and 26 July 2001 the applicant had been examined at the infirmary of his regiment by military doctor İ.H.Ş., who had prescribed medication for him.

13. In his observations submitted to the administrative court on 6 January 2003 in response to those of the Gendarmerie High Command, the applicant maintained his allegation that on his first visit to the infirmary he had been examined by a soldier because the military doctor, İ.H.Ş., had been temporarily dispatched to another regiment. He repeated his request that witnesses be summoned to testify before the administrative court and asked the administrative court also to summon and question Dr İ.H.Ş.

14. During the proceedings the administrative court appointed three university professors from the ophthalmology department of Gazi University's Faculty of Medicine as experts with a view to clarifying whether there had been any medical malpractice in the applicant's case. Their expert report drawn up on 6 April 2005 concluded:

> "Our medical opinion, based on our examination of the plaintiff's allegations, is as follows:
>
> 1. It is understood that, although the problem in the patient's eye is described in the medical reports as a 'corneal ulcer', the cause of the corneal ulcer (Herpes virus? Fungal infection? Bacterial infection?) is not known. Furthermore, it is considered that it was not possible to establish with certainty the infection factor at the hospitals where the patient was observed and treated. For this reason, it is not possible to decide whether the eye problem was related to his military service or whether it was idiosyncratic.
>
> 2. Similarly, because the problem could not be fully diagnosed, it was not possible to determine the outcome [of the applicant's symptoms] within one to two weeks.
>
> 3. [We are of the opinion that] there were no delays, shortcomings, mistakes or negligence in the steps taken in transferring the patient to the hospital, diagnosing the problem, treating the problem or treating the patient."

15. The applicant submitted a written statement to the administrative court on 29 April 2005, arguing that the medical report contained contradictory conclusions. He pointed out that, although the experts had indicated in the report that the problem had not been fully diagnosed, they had then gone on to conclude that there had been no shortcomings in the diagnosis of the problem. He further argued that the conclusion reached by the experts, namely that "because the problem could not be fully diagnosed, it was not possible to determine the outcome [of the applicant's symptoms] within one to two weeks", fully supported his allegations. His contention was also that, precisely because the problem had not been diagnosed properly, the treatment had not started in a timely manner. The applicant asked the administrative court to take steps to eliminate the inconsistencies

by requesting and obtaining additional reports from a different set of experts.

16. In his written opinion submitted to the Supreme Military Administrative Court, the public prosecutor stated that the applicant should be awarded compensation either for the authorities' negligence if such negligence was established, or on the basis of the no-fault strict liability of the military administration.

17. On 18 May 2005 the Supreme Military Administrative Court, on the basis of the expert report of 6 April 2005 (see paragraph 14 above), dismissed the applicant's claim by a majority of four to one and held that no fault could be attributed to the military authorities in the treatment of the applicant.

18. In its decision the Supreme Military Administrative Court did not deal with the applicant's allegation that between 25 July and 2 August 2001 he had been unable to see a doctor in the regiment infirmary because there had not been a doctor there during that time, other than stating that the applicant had "contacted the infirmary of the regiment on 25 and 26 July 2001 and started receiving medical treatment there". Nor did the administrative court respond to the applicant's requests to have his witnesses heard.

19. A dissenting judge stated in his separate opinion that issues such as the cause of the problem, whether or not it had been as a result of the applicant's military activities, and what bearing the one-to-two week delay had had on the outcome had not been established in the expert report of 6 April 2005. The dissenting judge thus considered that the administrative court should not have decided the case without having obtained a new report and clarified those points.

20. The applicant requested a rectification of the administrative court's decision. He claimed, in particular, that his arguments had not been examined adequately by the court and repeated his arguments regarding the contradictions in the expert report of 6 April 2005.

21. On 21 September 2005 the Supreme Military Administrative Court refused the applicant's rectification request by a majority of four to one.

22. According to a medical report of 9 October 2009 issued by the Haseki Hospital, the applicant was deemed to be suffering from a permanent disability as a result of the loss of sight in his left eye. It was indicated that his ability to work had been reduced by 41% as a result of the disability, and that the applicant was entitled to receive a disability pension.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

23. The applicant complained under Articles 2 and 3 of the Convention that because his regiment had not immediately referred him to a hospital, his access to appropriate medical treatment had been delayed, which had led to the loss of sight in his left eye. He argued that, as he had been under the control of the military authorities during his compulsory military service, the State should be held responsible for the damage he had sustained. Relying on Article 13 of the Convention, the applicant also complained that he had not had an effective domestic remedy which could have provided him with redress for his complaints.

24. The Government contested the applicant's arguments.

25. The Court considers that the applicant's complaints should be examined from the standpoint of Article 3 of the Convention only, which reads as follows:

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

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicant alleged that he had not received immediate and appropriate medical care from his regiment infirmary. He claimed that when he had contacted the infirmary, the doctor had been absent and he had therefore been examined by a soldier who had given him eye drops without examining him. Although he had been transferred to a hospital a week later when the military doctor returned to the regiment, by then it was too late to save his eyesight. The applicant also submitted that the expert report obtained during the compensation proceedings contained contradictory findings. By basing its decision on such a report, the domestic court had failed to protect his rights adequately.

28. The Government contested the allegations and stated that there had been no medical negligence in the diagnosis or the treatment of the applicant's condition. Referring to the records of the regiment infirmary

(which were not made available to the Court; see paragraph 6 above), the Government argued that the applicant had received immediate medical care from a military doctor and had subsequently been transferred to a hospital when his problem persisted. According to the Government, it did not transpire from any of the medical reports that the one-week delay in referring the applicant to the Cizre State Hospital had undermined the effectiveness of his treatment. In any event, during that one-week period the applicant had been prescribed medication by the infirmary doctor.

29. In the opinion of the Government, the national authorities had complied with their positive obligations by promptly providing the applicant with the necessary medical assistance at appropriate medical facilities. The Supreme Military Administrative Court had appointed three medical experts, who had also concluded in their report that no fault could be attributed to the military authorities. The Government argued that it was not for the Court to question the experts' medical conclusions or to assess whether those conclusions were correct. Furthermore, the Supreme Military Administrative Court had taken all the evidence into account and had duly reasoned its decision; there had been no arbitrariness in the proceedings.

30. Lastly, the Government submitted that there was insufficient evidence to establish that the applicant had been subjected to ill-treatment.

31. The applicant responded to the Government's submissions by challenging the assertion that he had been examined by a doctor as soon as his eye problem had started. He argued that the "treatment" referred to by the Government during the first week of his illness had consisted of giving him eye drops. He also drew attention to the national court's failure to hear the witnesses proposed by him, whose testimony would have supported his submission that he had not been seen by any doctor between 25 July and 2 August 2001. The applicant maintained that the corneal ulcer could have been prevented if he had been provided with appropriate treatment immediately after the problem had started.

2. The Court's assessment

32. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, §§ 70-71, ECHR 1999-IX and the case cited therein).

33. The positive obligation inherent under Article 3 of the Convention was held to impose a duty on the Contracting States to ensure that a person should be able to perform his military service in conditions which are compatible with respect for human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity

exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, his health and well-being are adequately secured by, among other things, providing him with the medical assistance he requires (see *Chember v. Russia*, no. 7188/03, § 50, ECHR 2008; and *Baklanov v. Ukraine,* no. 44425/08, § 65, 24 October 2013). In the present case, having regard to his status as a conscript who was not able to leave his regiment to procure the medical treatment he needed from a medical establishment of his own choice, the Court considers that the applicant's loss of sight in his left eye in the circumstances described above was sufficiently severe as to reach the above-mentioned threshold under Article 3 of the Convention.

34. In addition to the above, the Court considers that conscripts are entirely in the hands of the State and events that occur in the army lie wholly, or in large part, within the exclusive knowledge of the authorities. Therefore, the State is under an obligation to account for any injuries or health problems allegedly resulting from acts or omissions of the military authorities (see, *mutatis mutandis*, *Beker v. Turkey*, no. 27866/03, §§ 41-43, 24 March 2009). The applicant in the present case started performing his military service on 24 May 2001 and was in the course of doing so when his eye problem began on 25 July 2001. There is no material before the Court to suggest that the applicant's eye problem existed before 25 July 2001, that is, the date on which he first sought medical assistance.

35. Thus, in order to establish whether the respondent Government have satisfactorily discharged their burden of showing that they complied with their positive obligation to provide him with prompt and appropriate medical treatment for his problem, the Court will have regard to the investigation carried out by the national authorities and the conclusions reached by them.

36. The Court notes that the applicant instituted compensation proceedings before the Supreme Military Administrative Court. In theory, at least, at the end of those proceedings he could have obtained an assessment of and compensation for the damage he had suffered. That remedy was therefore appropriate in the present case. The Court will therefore examine the manner in which the proceedings were conducted.

37. The Court takes judicial notice of the fact that immediate medical intervention is crucial in corneal ulcer cases to prevent scarring of the cornea. The Court observes that neither the national authorities nor the Government have challenged the applicant's claim that he went to the regiment infirmary on 25 July 2001 as soon as his problem emerged. What is disputed is whether or not there was a doctor at the infirmary at the time and whether the applicant was provided with appropriate medical assistance during the ensuing period before he was referred to a hospital for the first time on 2 August 2001.

38. According to the Government, there was a doctor at the regiment infirmary on 25 July 2001 and that doctor examined the applicant and prescribed appropriate medication for him. In support of their submissions the Government relied on the records of the infirmary. However, those records were not made available to the Court (see paragraph 6 above). The only official documentation in the Court's possession pertaining to the steps taken during that period is the decision of the administrative court, which states that the applicant "applied to the infirmary of the regiment on 25 and 26 July 2001 and started receiving medical treatment" (see paragraph 18 above).

39. Despite the fact that the main question before the administrative court was whether or not prompt medical assistance had been provided to the applicant by a doctor on 25 July 2001, the Court observes that the administrative court appears to have made no attempt to take the simple step of obtaining testimony from the doctor and the witnesses proposed by the applicant with a view to verifying the accuracy of the applicant's allegation.

40. In any event, even assuming that a doctor was present at the regiment infirmary, as maintained by the Government, the Court notes that neither the administrative court nor the three medical experts appointed by it sought to question that doctor in order to ascertain the reasons behind his failure to diagnose the corneal ulcer when he purportedly examined the applicant on 25 July 2001. Nor did they attempt to find out the exact nature of the medical treatment allegedly provided to the applicant for a period of eight days before he was finally referred to a hospital on 2 August 2001.

41. The Court has also examined the report prepared by the three medical experts at the request of the administrative court (see paragraph 14 above) and noted the applicant's concerns about the adequacy of the report. It appears from the report that in order to prescribe effective and appropriate treatment, it was fundamental to determine the cause of the corneal ulcer. Although the experts observed that the cause had not been determined, they nevertheless went on to conclude that no fault could be attributed to the military authorities in the transfer, diagnosis and treatment of the applicant.

42. Despite the contradictory conclusions contained in the report and the fact that the applicant had brought those contradictions to its attention, the administrative court did not try to eliminate them by taking further steps, such as obtaining a new medical report. Moreover, in its decision the administrative court did not deal with the pertinent arguments put forward by the applicant. Furthermore, although in his request for rectification of the administrative court's decision the applicant repeated his criticism of the conclusion reached in the medical report and although similar concerns about the report's adequacy were voiced by a dissenting judge of the administrative court (see paragraph 19 above), the court examining the objection did not deem it necessary to deal with those arguments. The

foregoing shortcomings meant that several crucial questions remained unanswered in the medical report.

43. In the light of the shortcomings in the administrative proceedings which are highlighted above, the Court concludes that the Government have failed to discharge their burden of showing that they have complied with their positive obligation to provide the applicant with prompt and appropriate medical assistance for his eye problem.

44. There has accordingly been a violation of Article 3 of the Convention on account of the Government's failure to comply with their positive obligation.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

46. The applicant claimed a total of 91,000 euros (EUR) in respect of pecuniary and EUR 100,000 in respect of non-pecuniary damage.

47. In support of his claim for pecuniary damages the applicant submitted to the Court a report prepared by an expert confirming that as a result of the loss of sight in his left eye, the applicant was deemed to have lost 41% of his ability to work. On that basis, the expert calculated the applicant's loss of earnings as TRY 155,243 (approximately EUR 66,000).

48. The remaining sum of EUR 25,000 claimed by the applicant in respect of pecuniary damage was for an ocular prosthesis. The applicant did not, however, submit any evidence in support of this claim.

49. The Government argued that the applicant's claims were "excessive, ill-founded and did not correspond to the case-law of the Court". They were also of the opinion that there was no causal link between the alleged violation of the Convention and the applicant's claim for pecuniary damage.

50. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention. In view of its conclusion that the Government have failed to meet their positive obligation to provide the applicant with appropriate and prompt medical assistance, it finds that there is a direct causal link between the violation found under Article 3 of the Convention and the damage incurred by the applicant. In this connection, the Court observes that the Government have not sought to challenge the report prepared by the applicant's expert in respect of the applicant's loss of earnings. Nor have

they argued that the calculations made by that expert do not reflect the true extent of the pecuniary damage suffered by the applicant. Having regard to the documents in its possession, the Court considers it reasonable to award the applicant the sum of EUR 66,000 in respect of pecuniary damage on account of his loss of earnings.

51. As the applicant has failed to submit any supporting evidence for his claim for an ocular prosthesis, the Court rejects his remaining claim for EUR 25,000 in respect of pecuniary damage. It considers, however, that, in addition to the award made above, the Government must also, if the applicant so requests, meet the costs of an ocular prosthesis transplantation and of any subsequent necessary medical treatment associated with his eye problem (see, *mutatis mutandis*, *Oyal v. Turkey*, no. 4864/05, § 102, 23 March 2010).

52. As for the applicant's claim of EUR 100,000 in respect of non-pecuniary damage, deciding on an equitable basis the Court awards him EUR 15,000.

B. Costs and expenses

53. The applicant did not make a claim for any costs and expenses.

C. Default interest

54. The Court considers it appropriate that the default interest rate 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. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the Government's failure to comply with their positive obligations under that provision;

3. *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, EUR 66,000 (sixty-six thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(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;

4. *Holds*, by six votes to one, that, if the applicant so requests, the respondent State is to meet the costs of an ocular prosthesis transplantation and of any subsequent medical treatment associated with the applicant's eye problem;

5. *Holds*, unanimously,
(a) that the respondent State is to pay the applicant, within the same three months, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(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;

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

Done in English, and notified in writing on 13 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kjølbro is annexed to this judgment.

P.L.
S.H.N.

PARTLY DISSENTING OPINION OF JUDGE KJØLBRO

1. For the Court to grant compensation for pecuniary damage, there must be a "clear causal connection" between the pecuniary damage claimed by the applicant and the violation of the Convention found by the Court (see, inter alia, *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV, *Storck v. Germany*, no. 61603/00, § 176, ECHR 2005-V).

2. In the present case, the Court has found a violation of Article 3 of the Convention "on account of the Government's failure to comply with their positive obligations" (para. 44). More specifically, the Court found that "the Government have failed to discharge their burden of showing that they have complied with their positive obligation to provide the applicant with prompt and appropriate medical assistance for his eye problem" (para. 43). It is undisputed that the applicant went to the regiment's infirmary complaining about severe pain in his left eye on 25 July 2001, and the Government has not been able to prove that the applicant received any medical treatment that day as alleged by the Government but denied by the applicant.

3. In other words, the basis for finding a violation of Article 3 is the fact that the Government were not able to prove that the applicant received proper medical treatment on 25 July 2001, when he contacted the infirmary of his regiment.

4. In my view, there is insufficient evidence for saying that there is a "clear causal connection" between the violation found and the applicant's loss of sight in his left eye following the corneal ulcer.

5. There is insufficient evidence for saying that the corneal ulcer could or should have been diagnosed, had the applicant been examined by a doctor at the infirmary on 25 July 2001. Nor is there sufficient basis for saying that the delay from 25 July 2001 until 2 August 2001, when the applicant was transferred to the Cizre State Hospital, has caused the subsequent loss of sight in his left eye. Thus, on the basis of the information in the file, including the medical expert report of 6 April 2005, the Court cannot say that the corneal ulcer could or should have been diagnosed earlier, or that earlier medical treatment would have saved the sight in the left eye.

6. In other words, there is insufficient basis for saying that the applicant's loss of eyesight is a direct consequence of medical negligence or malpractice. Therefore, and irrespective of the tragic consequences for the applicant, there is, in my view, insufficient basis for saying that there is a "clear causal

connection" between the violation found and the damage claimed.

7. For those reasons, I voted against granting the applicant compensation for pecuniary damage (points 3(a)(i) and 3(b) of the operative provisions.