CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61479/00
by Besse DAMLA and Others
against Germany

The European Court of Human Rights (Fourth Section), sitting on 26 October 2000 as a Chamber composed of

Mr A. Pastor Ridruejo, *President*,
Mr G. Ress,
Mr L. Caflisch,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mr J. Hedigan,
Mrs S. Botoucharova, *judges*,
and Mr V. Berger, *Section Registrar*,

Having regard to the above application introduced on 22 September 2000 and registered on 4 October 2000,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has not been complied with,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Besse Damla, born in 1953, is the mother of the second to seventh applicants, Dilek Damla, born in 1977, Nadire Damla, born in 1981, Veysi Damla, born in 1983, Nurullah Damla, born in 1987, Emrullah Damla, born in 1988, and Veysel Damla, born in 1991. They are Turkish nationals of Kurdish origin and live currently in Norden (Germany). In the proceedings before the Court they are represented by Mr Reinhard Marx, a lawyer practising in Frankfurt am Main.

The facts of the case, as submitted by the applicants, may be summarised as follows.

In 1996 the applicants entered the Federal Republic of Germany together with the first applicant's husband, respectively the other applicants' father. On 7 October 1996 they applied for asylum. On 8 October 1996 when heard before the Federal Office for Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) they declared that there were Yezidis. The first applicant stated that she had been kidnapped in 1977 by Moslems, but that after two or three days she escaped. According to Yezidi customs a kidnapped girl could not return to her family. She therefore went to Batman where she met her future husband who, although being officially a Muslim, belonged to the Yezidi community. In 1992 her husband's brother, the head of the village of Feqira, was murdered. Thereafter they were harassed by members of the State security service and their Muslim neighbours. In 1995 the first applicant's husband was arrested for three days by members of the security forces and asked him for the reasons of his conversion to the Yezidi religion. A further stay in Turkey had been impossible for them.

On 15 October 1996 the Federal Office for Refugees dismissed the applicants' request as being manifestly ill-founded and invited them to leave the German territory within one week. The Federal Office did not consider that the evidence they adduced in support of fear of persecution to be reliable and doubted the credibility of their asylum claim. According to the Federal Office, the first applicant had ceased being a Yezidi at the moment of her marriage with a Moslem. She was not recognised as a Yezidi neither by the members of her family nor by the people surrounding her. The applicants could therefore not be considered as Yezidis. Finally the applicants had not alleged to be victims of political persecution as Kurds.

On 28 October 1996 the applicants filed an action against the refusal of asylum and their envisaged expulsion and applied for an interim injunction (*einstweilige Anordnung*) requesting to stay their expulsion pending the administrative court proceedings. They repeated their previous submissions and referred to pending asylum proceedings of close members of their family some of which had been successful. They further stressed that on several occasions they had been interrogated and threatened by the Turkish police. Also their neighbours had treated them as Yezidis and the children had been insulted in school. Since Moslem fundamentalists had a strong influence in Batman, their situation there became unbearable.

On 11 November 1996 the Hannover Administrative Court (*Verwaltungsgericht*) dismissed their request for an interim injunction. Confirming the findings of the Federal Office, the Administrative Court added that being a Yezidi was a matter of birth, not of faith. A marriage with a person belonging to a different religion was considered as a sin and sanctioned by the exclusion from the Yezidi community. The applicants were not Yezidis. There was no indication that their life was determined by this religion that their neighbours considered them

as Yezidis. Unlike Yezidis practising their religion, the applicants were not subjected to persecution in Turkey.

On 16 February 1998 the applicants renewed their request to be granted political asylum (*Asylfolgeantrag*). They alleged that their submissions in the previous asylum proceedings had not been correctly understood due to linguistic problems. The first applicant's husband submitted that he too was born by Yezidi parents. When he was two years old, his mother had been kidnapped by Moslems. He then lived together with his mother and his Moslem stepfather. However, he and his mother had always maintained close contacts with the Yezidis in their surroundings and he had been brought up according to the Yezidi traditions.

On 25 February 1998 the parish of the Norden Evangelic-Lutheran church granted the applicants church asylum. The first applicant's husband was expelled to Turkey on 17 March 1998.

On 26 February 1998 the Hannover Administrative Court dismissed the applicants' renewed asylum request. The court observed that the applicants had failed to show that they had been prevented, through no fault of their own, from filing their new submissions in the previous proceedings.

On 1 October 1999 the Hannover Administrative Court dismissed the action filed by the applicants on 28 October 1996 against the refusal of asylum and their envisaged expulsion. The Court considered the applicants' submissions as unsubstantiated and contradictory. The first applicant's submission, according to which she had been kidnapped by Moslems when she was young, was irrelevant for the purposes of being granted asylum, since this event occurred too long a time ago. Moreover, even if it were true that her uncle had been murdered, there was no evidence that the applicants were persecuted for their religious beliefs. It was true that Yezidis manifesting their religion were persecuted in Turkey. However, if in a case such as the present where the religion had not been practised or where after the marriage with a person belonging to a different religion the membership in the Yezidi community had come to an end, there was no likelihood of persecution**.** Accordingly, there was no need to take further evidence in this respect. **Furthermore, persons of Kurdish origin had the possibility to live in the Western parts of Turkey, in particular in larger cities, where they did not risk direct or indirect persecution or an existence under the poverty level.**

On 16 December 1999 the Court of Appeal of Lower Saxony (*Niedersächsisches Oberverwaltungsgericht*) refused the applicants' application for leave to appeal. The court considered that the Administrative Court had correctly assessed the evidence and had rejected the applicants' requests to take further evidence in a convincing manner. The Administrative Court had not arbitrarily concluded that the applicant's submissions were unsubstantiated. The Court furthermore found that the Kurds from the Eastern regions had generally a possibility to live in the West of Turkey. As to the question whether Yezidis who practised their religion in an Moslem environment, had to fear persecution by Moslems, the Court pointed out that this question had been answered affirmatively in the past but was irrelevant in the present case because the applicants were not Yezidis.

On 17 March 2000 the applicants requested to reopen the asylum proceedings. When interviewed on 6 April 2000 before the Federal Office for Refugees, they submitted that the first applicant's husband was a Yezidi. He had been excluded from his family when his mother married a Moslem. However, he and the first applicant lived according to the Yezidi

faith. After the murder of the first applicant's uncle in 1992 their neighbours realised that they were Yezidis. They were then harassed by the resident population and had to move house about ten times. Following the introduction of compulsory religious instruction in school, it became clear that the children were not Moslems and they were insulted and beaten. The applicants maintained that in case of their expulsion to Turkey their would face a real risk of being murdered.

On 12 May 2000 1998 the Federal Office for Refugees refused to conduct new asylum proceedings. It took the view that the applicants' submissions did not constitute new facts. Furthermore, the Federal Office did not consider the evidence they adduced in support of their fear of persecution to be reliable and doubted the credibility of their asylum claim.

The applicants filed an action with the Oldenburg Administrative Court and applied for an interim injunction (*einstweilige Anordnung*) requesting to stay their expulsion pending the administrative court proceedings.

On 29 May 2000 the Oldenburg Administrative Court dismissed this request on the ground that the applicants submissions were contradictory and not credible. Their claims had to be considered as completely fabricated. There was no evidence showing that they were of Yezidi origin and that they were persecuted when they had left their country nor was there a sufficient likelihood that they would be persecuted if they were to return to their country. However, there were no grounds justifying to quash the final judgments given by the Hannover Administrative Court. According to the Oldenburg Administrative Court, the applicants merely alleged an erroneous appreciation of the law and facts by the previous court instances. Their earlier and new submissions concerning their membership in the Yezidi community being unsubstantiated, there was no need to take further evidence in this respect.

The applicants filed a constitutional complaint against the refusal of the requested *interim injunction*.

On 10 July 2000 a panel of three judges of the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to accept the applicants' constitutional complaint for adjudication.

COMPLAINTS

The applicants complain under Articles 3 of the Convention that, if returned to Turkey, they would risk ill-treatment by reason of their religious belief. They allege in particular that everywhere in Turkey they would be victims of violence and harassment by Moslems and members of the security forces. As Yezidis they could not expect any protection by the Turkish State. They also alleged a violation of Article 8 in this respect.

PROCEEDINGS BEFORE THE COURT

The application was introduced on 22 September 2000 and registered on 4 October 2000. The applicants requested the Court to stay their deportation from Germany.

On 17 October 2000 the Acting President of the Fourth Section of the Court decided not to indicate to the Government of Germany, pursuant to Rule 39 of the Rules of Court, the measure suggested by the applicants.

THE LAW

1. The applicants claim that their envisaged expulsion to Turkey amount to a breach of Article 3 of the Convention.

Article 3 provides as follows:

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

The Court recalls that expulsion by a Contracting State may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, §§ 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70, and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74). However, a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3 of the Convention (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 37, § 111). The Court further notes that the practice of the Convention organs has been to require compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of a certain severity has occurred (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

The Court further recalls that its examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one in view of the absolute character of Article 3 (see the above-mentioned Chahal judgment, p. 1859, § 96). It notes in this regard that the German authorities had due regard to the arguments submitted by the applicants in the administrative court proceedings as well as to the past and current situation in the receiving country. It also observes that the Federal Office for Refugees found that the applicant's recollection of the events which led them to leave Turkey was unreliable and that it had serious reservations about the credibility of the applicants' account in general. Furthermore, the Federal Office for Refugees carefully evaluated the evidence which the applicants submitted in support of their renewed asylum request**.. Furthermore, the Court observes that altogether three different asylum proceedings have been carried out by the German courts in the applicants' case. They carefully evaluated the evidence which the applicants submitted in support of their asylum requests. The Court recalls that, as a general rule, the assessment of the facts and the taking of evidence and its evaluation is a matter which necessarily comes within the appreciation of the national courts and cannot be reviewed by the Court unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them. However, nothing in the file suggests that the assessment of evidence was arbitrary.**

Having regard to the above considerations and having examined the arguments and materials submitted by the applicants, the Court considers that the applicants have not shown that there are substantial grounds for believing that they would face a real risk of being subjected to treatment proscribed by Article 3 if removed to Turkey. **There is in particular no evidence that they would be subjected to persecution or harassment by individuals or the Turkish security forces in the Western parts of Turkey.** It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

2. The applicants also allege that their expulsion amounted to a violation of Article 8 of the Convention.

Article 8 provides, so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ..., public safety or the economic well-being of the country, for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

The Court recalls that the expulsion of a person from a country where close members of his family reside may amount to an infringement of the right to respect for his private and family life guaranteed in Article 8 § 1 of the Convention (see the Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, § 36). On the other hand, Article 8 does not guarantee a right to choose the most suitable place to develop family life (see the Ahmut v. the Netherlands judgment of 28 November 1996, *Reports* 1996-VI, p.2033, §§ 67 and 71).

The Court notes that in the present case the facts relied on in support of the contention of a breach of Article 8 are the same as those relied on in the Article 3 claim above. The Court considers that the considerations set out above in connection with Article 3 apply equally to the complaints under Article 8 of the Convention.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court, [unanimously,] [by a majority,]

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Antonio Pastor Ridruejo
President