

Opuz v. Turkey, (Application no. 33401/02)

1) Reference Details

Jurisdiction: European Court of Human Rights

Date of decision: 9 June 2009

Case Status: Chamber judgment of the European Court of Human Rights

Link to full case:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

2) Facts

The applicant, Mrs. Nahide Opuz, and her mother had been threatened and assaulted by H.O., her then husband, on several occasions from 1995 onwards. The incidents between April 1995 and March 1998 included death threats, running the applicant down with his car and beating her. These incidents were brought to the attention of the authorities and criminal proceedings were brought against H.O. for actual, aggravated and grievous bodily harm and attempted murder. However, on all of these occasions, the applicant and her mother withdrew the complaints. Thus, the cases were discontinued by the domestic courts in accordance with the Criminal Code.

In October 2001, the applicant was repeatedly stabbed by H.O. and was taken to hospital. H.O. was charged with knife assault and fined. The applicant's mother requested that H.O. be detained on remand, claiming that she and her daughter had previously withdrawn their complaints due to his persistent pressure and death threats.

In April 1998, October and November 2001 and February 2002 the applicant and her mother requested protection from the authorities, claiming that they were in immediate threat of death. They filed complaints with the prosecution authorities about H.O.'s threats and harassment. H.O. was questioned by the authorities and then released.

On 11 March 2002 H.O. shot the applicant's mother on her way to Izmir where she had decided to move with her daughter, killing her instantly. In March 2008 H.O. was convicted for murder and the illegal possession of a firearm. He was sentenced to life imprisonment. However, taking into account H.O.'s plea of provocation by the applicant's mother and his good conduct during the trial, the court mitigated the original sentence, changing it to 15 years and 10 months' imprisonment and a fine of 180 Turkish liras. In view of the time spent by the convict in pre-trial detention and the fact that the judgment would be examined on appeal, the court ordered the release of H.O.

In April 2008 the applicant filed another criminal complaint with the prosecution authorities requesting that they take measures to protect her life. In the complaint she noted that H.O. visited the applicant's new boyfriend and had threatened him and told him that he would kill the applicant. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The

authorities have since taken measures whereby H.O. would be arrested if spotted near the applicant's place of residence.

The applicants claimed that the state had violated Article 2 (the right to life), Article 3 (right not to be subject to torture or cruel, inhumane or degrading treatment) and Article 14 (the right of non-discrimination) under the European Convention on Human Rights.

3) Law

International law

Article 2 European Convention on Human Rights (the right to life);

Article 3 European Convention on Human Rights (the right not to be subject to torture or cruel, inhumane or degrading treatment);

Article 14 European Convention on Human Rights (the right to non-discrimination)

National law

Article 188, Article 199(1), Article 449, Article 456(1),(2) and (4), Article 457, Article 460 of the Criminal Code

Sections 1 and 2 of the Family Protection Act (Law no. 4320, 14 January 1998)

4) Legal Arguments

Article 2

The Applicant

In respect of Article 2, the applicant claimed that the authorities, including the Public Prosecutor, had done nothing to protect her and her mother's life, following H.O.'s death threats and assaults and that the authorities had not taken the protection measures set out under the Family Protection Act for the protection of vulnerable persons against domestic violence even after it came into force in 1998. Conversely, the authorities had even tried to persuade the applicant and her mother to drop their complaints. The applicant also pointed out that the sentence meted out to H.O. for murder had been very light. In deciding on the sentence, the Court had apparently taken into consideration H.O.'s claim that he had killed the applicant's mother for the sake of honour which mitigated the killing under traditional societal culture.

Civil Society

Referring to international practice, *Interights* submitted as an *amicus curiae* that where the national authorities failed to act with the due diligence required to prevent the *jus cogens* principles protected by Articles 2 and 3 of the Convention, including failure to prevent violence carried out by private actors, or to investigate, prosecute and punish such violence, such failure itself may amount to a violation of rights by the State, thereby incurring responsibility. They contended that under the

jurisprudence of the Convention on the Elimination of Discrimination against Women, a State not only had to ensure an appropriate legislative framework, but also to *ensure effective implementation and enforcement practice*.

The State

The State argued that in each case of complaint, authorities had followed up diligently. However, it was not possible under the Criminal Code for the authorities to proceed in most cases because the applicant and her mother had withdrawn their complaints which the State claimed they had done without duress. Further, the State claimed that H.O. had not been convicted on some occasions due to lack of evidence. In these circumstances, the State claimed that they could not separate the applicant and H.O. without violating article 8 (right to family life) of the Convention.

Article 3

The Applicant

With regard to Article 3, the applicant claimed that the injuries and anguish she had suffered as a result of the violence inflicted upon her by H.O. had amounted to torture within the meaning of Article 3 of the Convention. She felt that the violence seemed as if it had been inflicted under state supervision as despite the ongoing violence and her repeated requests for help, the authorities had failed to protect her from her husband.

The State

The State claimed that the applicant's withdrawal of complaints and her failure to cooperate with the authorities had prevented the authorities from continuing with the criminal proceedings against H.O. The State also claimed that the applicant could have petitioned the Directorate of Social Services and the Child Protection Agency to seek shelter in one of the guest houses set up to protect women.

Article 14 in conjunction with Article 2 and 3

The Applicant

The applicant also claimed that she and her mother had been discriminated against by reason of their gender contrary to Article 14 and in conjunction with Articles 2 and 3. The applicant claimed *de jure* discrimination within the domestic Civil Code (that was in force at the relevant time), pointing to provisions which distinguished between men and women and provided for the subservience of women within the household. Further, the applicant also claimed *de jure* discrimination within the Criminal Code where women were regarded as the property of men and in which women's right to liberty was severely impinged upon within the law relating to sexual crimes. It was due to this, the applicant claimed, that killings for reasons of "honour" incurred lighter sentences, such as that meted out to H.O.

Despite the reforms made of the Civil and Criminal Code in 2002 and 2004, domestic violence inflicted by men was still tolerated and impunity was granted to the aggressors by judicial and administrative bodies. The applicant claimed that she and her mother had been victims of violations of Articles 2, 3, 6 and 13 for the reason that they were women. It was very unlikely for a man to be a victim of similar violations.

Civil Society

Interights submitted that the failure of the State to protect against domestic violence was tantamount to failing in its obligation to provide equal protection of the law based on sex. They further noted that there was increasing recognition internationally – both within the United Nations and Inter-American systems – that violence against women was a form of unlawful discrimination.

The State

The State asserted that there was no gender discrimination in the instant case, since the violence in question was mutual. Furthermore, it claimed that there was no institutionalised discrimination resulting from the criminal or family laws or from judicial and administrative practice and that the domestic law did not contain any formal and explicit distinction between men and women. It had not been proven that the domestic authorities had not protected the right to life of the applicant because she was a woman.

5) Decision

With respect to the Article 2 violation, the Court reiterated that the State's duty under Article 2 extended to ensuring that the right to life was not violated by individuals. In holding that the State had violated Article 2, the Court took into consideration several points. Firstly, the Court found 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 the individual from the criminal acts of a third party and therefore incurred responsibility to act positively in response to the applicant and her mother's claimed risks to life. In finding this, the Court considered that the authorities were aware of the violent record of H.O.'s behaviour towards the applicant and her mother. The authorities failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. They did not order the protective measures against domestic violence provided for under the Family Protection Act and did not issue an injunction to prevent H.O from being in contact with the applicant and her mother.

The Court also found that despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to continue with criminal investigations against H.O. on account of the seriousness of his behaviour and his constant threat to the applicant's physical integrity. The State had therefore failed to establish and apply effectively a system by which all forms of domestic violence could be punished and sufficient safeguards for the victims could be provided.

With regard to Article 3, the Court held that there had been a violation on the part of the State. The Court agreed that the treatment of the applicant had been sufficiently serious to engage Article 3 and that the punishments meted out by the State to H.O. had been extraordinarily mild, so as to have no preventative or deterrent effect and even showed a certain tolerance towards his violence.

Domestic law had failed to provide specific protection for victims of domestic violence prior to 1998 and when the Family Protection Act came in force in 1998, the authorities had failed to apply the measures provided in the Act to protect the applicant and her mother. The Court noted with concern that the violence against the applicant had still not come to an end and that the authorities continued to show inaction. Despite the applicant's petition of 15 April 2008 requesting the prosecuting authorities to take measures for her protection, nothing was done until after the Court requested the Government to provide information about the measures that have been taken by their authorities.

The Court concluded that there has been a violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.

With regard to Article 14, the Court concluded that it had been established in international practice (namely, the interpretation of the Convention for the Elimination of Discrimination Against Women and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, as well as the comments and decisions of international legal bodies, such as the Inter-American Commission) that the State's failure, even if unintentional, to protect women against domestic violence breached women's right to equal protection of the law.

According to reports and evidence from NGOs, domestic violence was mainly suffered by women and despite the Family Protection Act, when victims reported domestic violence to police stations, police officers did not investigate their complaints and instead tried to convince the victims to return home and drop their complaint. In addition, delays were frequent when issuing and serving injunctions under the Family Protection Act, due to the negative attitude of the police officers and the fact that the courts treated the injunctions as a form of divorce action.

The Court, therefore, considered that domestic violence affected mainly women and that the general and discriminatory judicial passivity of the State created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.