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

SECOND SECTION

CASE OF SALMANOĞLU AND POLATTAŞ v. TURKEY

(Application no. 15828/03)

JUDGMENT

STRASBOURG

17 March 2009

FINAL

17/06/2009

This judgment may be subject to editorial revision.

In the case of Salmanoğlu and Polattaş v. Turkey,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 15828/03) 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 two Turkish nationals, Ms Nazime Ceren Salmanoğlu and Ms Fatma Deniz Polattaş ("the applicants"), on 11 March 2003.

2. The applicants, who had been granted legal aid, were represented by Ms O Aydın, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 16 April 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3). The President of the Chamber gave priority to the application in accordance with Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants, who were born in 1983 and 1980, live in Izmir and Switzerland respectively. They were sixteen and nineteen years old at the time of the events giving rise to the present application.

A. The applicants' detention in police custody medical reports issued in their respect and the investigation into their allegations of ill-treatment

5. On 6 March 1999 at 2 a.m. Nazime Ceren Salmanoğlu was taken into custody by police officers from the Anti-Terrorist Branch of the İskenderun police headquarters on suspicion of membership of the PKK (the Workers' Party of Kurdistan, an illegal organisation).

6. On the same day at 3 a.m. she was taken to the İskenderun State Hospital, along with two other persons. In a document of the police headquarters in which the names of the detainees were put, the doctor, E.B., noted that there were no signs of physical violence on the applicant's body.

7. On the same day, the head of the Anti-Terrorist Branch of the İskenderun police headquarters requested the İskenderun Maternity Hospital to establish Nazime Ceren Salmanoğlu's virginity status and determine whether she had had recent sexual relations (*bakire olup olmadığı ve yakın zamanda cinsel ilişkide bulunup bulunmadığını gösterir kati doktor raporunun verilmesi*). The medical expert, S.S., who conducted the examination, noted, on a document of the police, that Nazime Ceren Salmanoğlu was still a virgin and had not had recent sexual relations.

8. On 8 March 1999 at 11.30 a.m. Fatma Deniz Polattaş was arrested by police officers from the Anti-Terrorist Branch of the İskenderun police headquarters, pursuant to an arrest warrant issued against her within the context of a police operation conducted against the PKK.

9. On the same day, the head of the Anti-Terrorist Branch of the İskenderun police headquarters requested the İskenderun Maternity Hospital to establish Fatma Deniz Polattaş's virginity status and determine whether she had had recent sexual relations. She was examined by S.S. who subsequently informed the police that the applicant was a virgin and had not had recent sexual relations.

10. The applicants allege that they were subjected to ill-treatment while in police custody. In particular, Nazime Ceren Salmanoğlu was blindfolded, forced to stand for a long time, and deprived of food, water and sleep. She was also insulted and threatened with death and the torture of other members of her family. She was sexually harassed and beaten. Fatma Deniz Polattaş was blindfolded, insulted and beaten. The police officers also inserted a truncheon into her anus, which caused bleeding. A female police officer asked her family to provide clean underwear, which the applicant changed into. The applicants were both stripped naked by this female police officer, A.Y.

11. On 9 March 1999 at 12.35 a.m. the applicants and two other detainees were examined by a medical expert, B.I.K., at the İskenderun State Hospital who noted, in a letter sent to the hospital by the İskenderun police headquarters containing the detainees' names, that Fatma Deniz

Polattaş had been sensitive upon palpation of the scalp and in the lumbar region. The doctor observed no sign of physical violence on the applicants' persons.

12. On 12 March 1999 at 10.15 a.m. the applicants were once again referred to the İskenderun Maternity Hospital for virginity testing. The applicants were not examined as they refused to undergo a gynaecological examination.

13. On the same day, the applicants and two other persons were also examined by a general practitioner, A.A., in a health clinic, who noted that there was no sign of physical violence on the detainees' bodies in the letter which had actually been sent to him by the police.

14. On the same day the applicants were brought before a judge, who remanded them in custody. They were then placed in Adana prison. Subsequently, criminal proceedings were brought against them before the Adana State Security Court.

15. On 26 March 1999 Fatma Deniz Polattaş submitted a request to the İskenderun public prosecutor's office, in which she contended that she had been subjected to mental and physical torture while in police custody and requested a gynaecological examination.

16. On an unspecified date the İskenderun public prosecutor started an investigation into the allegations of Fatma Deniz Polattaş.

17. On 6 April 1999 Fatma Deniz Polattaş was examined by a doctor, B.K., at the İskenderun State Hospital. Following a digital rectal examination, the doctor noted that there was no sign of intercourse in the anal region.

18. On 14 May 1999 the İskenderun public prosecutor issued a decision based on lack of jurisdiction (*görevsizlik kararı*) and passed the investigation to the İskenderun District Administrative Council for further proceedings under the Law on the prosecution of civil servants (*Memurin Muhakematı Kanunu*).

19. On 15 December 1999 the İskenderun District Administrative Council decided not to grant authorisation to prosecute two police officers from the Anti-Terrorist Branch of the İskenderun police headquarters. The district council based its decision on the medical reports of 8 and 12 March and 6 April 1999.

20. In the meantime, on 1 June 1999 Nazime Ceren Salmanoğlu made a statement to the Adana State Security Court in which she alleged that she had been subjected to various forms of ill-treatment while in police custody, including sexual abuse and psychological pressure.

21. On 19 July 1999 the Turkish Medical Association issued an opinion on the applicants' previous medical examinations, without examining the applicants. Fatma Deniz Polattaş submitted to the Turkish Medical Association that she had been subjected to various types of ill-treatment while in police custody, including sexual abuse, rape (the insertion of a

truncheon into her anus) and beatings, as a result of which one of her teeth was broken. The applicant further stated that she had pain, bleeding and difficulty in defecating. The medical report referred to the medical report of 9 March 1999, according to which the applicant had been sensitive upon palpation of the scalp and in the lumbar region. It further referred to the report dated 12 March 1999 which stated that there was no sign of physical violence on the applicant's body. The doctors of the Association considered that the applicant's complaints about her anal region were consistent with the allegation of rape. They also considered that her other complaints, such as pain in the lumbar region and in the legs, as well as difficulty in respiration, matched her allegations of ill-treatment.

22. Nazime Ceren Salmanoğlu submitted that she had been subjected to various types of ill-treatment while in police custody, including threats, sexual abuse and beatings to numerous parts of her body, in particular to her head, legs, genitals and anal region. She complained of pain in her teeth, heart, head, neck, back, shoulders, arms and hands, and difficulty in respiration. She also stated that she had sleep and memory problems. The medical report referred to the reports of 9 and 12 March 1999, according to which the applicant did not bear any sign of physical violence. The doctors considered that Nazime Ceren Salmanoğlu's complaints matched the applicant's allegations of ill-treatment.

23. The doctors from the Turkish Medical Association further considered that the applicants should undergo several medical examinations. They noted in respect of both applicants that the medical examinations which they had undergone following their release from police custody were not capable of establishing whether the applicants had actually been subjected to ill-treatment as alleged. The experts considered that these examinations were not "medically valid" as they did not comply with the standards established by the Ministry of Health and the Turkish Medical Association. In that connection, they noted that a record of the subjects' statements and their complaints of physical and psychological symptoms had not been noted. They further considered that there had not been a detailed record of the findings of a thorough clinical examination. The doctors from the Turkish Medical Association also observed that the reports did not give details regarding the psychological complaints of the subjects and the doctors' findings in this respect. They particularly criticised the virginity tests, stating that the doctors who had conducted these tests should have obtained the subjects' consent and listened to their statements. They considered that, in the circumstances of the applicants' case, the virginity tests appeared to have been carried out in order to humiliate the applicants.

24. On 9 November 1999 the applicants' lawyers made a statement to the İskenderun public prosecutor's office, alleging that the applicants had been subjected to ill-treatment while in police custody. They requested an investigation into the actions of the medical experts who had examined the

applicants during and after their detention in police custody, and those of the police officers from the Anti-Terrorist Branch of the İskenderun Security Directorate. They also requested that the applicants be examined by medical experts from the Departments of Psychiatry at Çapa and Çukurova Universities.

25. On 24 November 1999 the applicants were examined by a doctor from the Adana Forensic Medicine Institute. The report concerning Fatma Deniz Polattaş referred to the latter's complaints of pain in the anal region while sitting and on defecation. The doctor observed that one of her teeth was broken and concluded that she was unfit for work for ten days. As regards Nazime Ceren Salmanoğlu, the doctor observed a bruise of 1.5 cm. on her back and considered that she was unfit for work for three days.

26. On 14 December 1999 the İskenderun public prosecutor issued a decision not to prosecute anyone in relation to the applicants' allegations, holding that there was insufficient evidence to bring criminal proceedings.

27. On an unspecified date, the applicants submitted an objection to the decision of 14 December 1999.

28. On 26 January 2000 the President of the Hatay Assize Court quashed the decision of the İskenderun public prosecutor. It decided that criminal proceedings should be brought under Article 243 of the Criminal Code against the police officers who had questioned the applicants while they were in custody. In its decision, the President noted that the applicants' allegations had not been adequately examined by the public prosecutor. In particular, Nazime Ceren Salmanoğlu's allegations that her dental braces had been broken as a result of the beatings in police custody and had therefore been removed were not examined. Likewise, the public prosecutor had not determined the date on which Fatma Deniz Polattaş' tooth had been broken. The medical examinations indicated in the report of the Turkish Medical Association had not been carried out. Moreover, the public prosecutor had not looked into the question whether the applicants had actually submitted complaints against the prison doctor. Nor had he taken statements from the police officers who had taken the applicants' statements or the doctors who had examined them.

B. Criminal proceedings against the police officers

29. On 18 February 2000 the İskenderun public prosecutor filed a bill of indictment with the İskenderun Assize Court, charging four police officers from the Anti-Terrorist Branch of the İskenderun police headquarters - M.Ç., H.Ö., A.Y. and G.İ., under Article 243 of the former Criminal Code, with torturing the applicants.

30. On 14 April 2000 the İskenderun Assize Court held the first hearing on the merits of the case. The court heard the accused police officers, the

applicants, Nazime Ceren Salmanoğlu's father and the doctors who had examined the applicants after their release from police custody.

31. The applicants alleged that they had been subjected to various forms of ill-treatment (see paragraph 10 above). They further submitted that they had not stated on 12 March 1999 before the public prosecutor and the judge that they had been subjected to ill-treatment as they were scared. Nazime Ceren Salmanoğlu submitted that during the medical examination conducted at the end of her detention in police custody there were police officers in the examination room. She also submitted that one of the accused officers, G.İ., had been in the public prosecutor's office when the prosecutor had taken their statements. Fatma Deniz Polattaş contended that an object had been inserted into her anus and there had been bleeding. Therefore, A.Y. asked her parents to bring clean underwear. She further submitted that she had told the doctor who had examined her during her custody period that she had been ill-treated. However, the police officers had arrived to the room where she was medically examined and the doctor, who was a woman, had not noted her complaints in the report. She also stated that one of her teeth had been broken as she had been punched in the face in police custody.

32. The police officers denied the allegations of ill-treatment and the allegations that they had been in the office of the prosecutor or the medical examination room. As regards the virginity testing, G.İ. submitted that they had requested this examination in order to prevent any false allegations of sexual abuse in police custody.

33. The doctors, B.K., B.I.K., E.B. and T.S. maintained that they had not observed any signs of physical or psychological violence when they had examined the applicants. They denied the applicant's allegations that the medical examinations had taken place in the presence of police officers. As regards the sensitivity on Fatma Deniz Polattaş's scalp and lumbar region upon palpation noted in the report of 9 March 1999, B.I.K., who had examined her, maintained that the applicant had been disturbed as she had not wished to have physical contact. The doctor stated that the sensitivity noted in the report was not an indication of an injury.

34. One of the accused officers, M.Ç., and the doctor who had examined Nazime Ceren Salmanoğlu on 6 March 1999 stated that this applicant had consented to the virginity test.

35. Nazime Ceren Salmanoğlu's father contended before the court that he and his wife had seen their daughter on different occasions when she had been in police custody. He observed that Nazime Ceren Salmanoğlu had an injury to her lips. He further maintained that his wife had told him that she had seen a bruise on their daughter's cheek.

36. At the end of the hearing, the court ordered, *inter alia*, that the applicants be examined at the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University. The court requested information from the Faculty of Medicine as to whether the applicants were suffering from any

psychological problem and, if so, whether the cause of their psychological suffering could be established. The assize court further ordered a medical examination of Nazime Ceren Salmanoğlu, in particular a bone scintigraphy, in order to determine whether she had been subjected to violence and if so when.

37. During a hearing held on 16 June 2000 the first-instance court heard the doctor who had examined the applicants on 12 March 1999, A.A. He maintained that the police officers had waited outside the examination room, one metre from the door, where they could hear the conversation with the patients and even see inside the room if they wanted. He contended that he had asked the applicants to show him their abdomen, backs and half of their legs. He submitted that he had not conducted an examination concerning their psychological state. The examination he conducted could only have revealed traces of physical violence on their bodies. A.A. finally stated that both applicants were present in the room during their examination and that they had witnessed each other's examinations.

38. On the same day S.S., the doctor who conducted the virginity testing on the applicants on 6 and 8 March 1999, was also heard by the court. He submitted that the applicants had given consent to the examination. They did not have any allegation of rape or sexual abuse. The sole purpose of the examination was to establish their virginity status. S.S. also submitted that police officers had not been present in the room where this examination had taken place.

39. On the same day, Nazime Ceren Salmanoğlu's mother stated before the first-instance court that she had seen her daughter one day after her arrest and that there had been a bruise on her daughter's lips then. She further contended that three to four days after the arrest she had seen the applicant again and observed another injury on her lips. She finally stated that her daughter had not told her that she had been subjected to ill-treatment in custody. The first-instance court also heard Fatma Deniz Polattaş's uncle, who was a retired police officer, and who submitted that he had taken clean underwear to the police headquarters as A.Y. had asked him to do so. He also noted that the applicant had appeared to be exhausted when he had seen her in Adana prison.

40. On 12 September 2000 F.A., a woman who was detained in Adana prison, made statements before the court. She said that the applicants had appeared to be exhausted when they were brought to the prison. She further contended that there had been a swelling on the lips of Nazime Ceren Salmanoğlu and that Fatma Deniz Polattaş had had difficulty in sitting. She submitted that Fatma Deniz had told her that a truncheon had been inserted into her anus while in police custody. During the same hearing, the applicants and Nazime Ceren Salmanoğlu's father joined the proceedings as civil parties (*müdahil*).

41. On 27 October 2000 the İskenderun Assize Court heard the nurse who had assisted B.K. during the rectal examination of Fatma Deniz Polattaş carried out on 6 April 1999. The nurse, J.E., stated that there had been a female prison guard in the examination room when the examination had taken place. She submitted that the guard had not wished to leave the room and had therefore turned her back and stayed. She maintained that the presence of the prison guard had not had any impact on the examination.

42. On the same day, four inmates detained in the same prison as the applicants made statements before the court and contended that they had not noticed any sign of physical violence on the applicants' persons when they had arrived at the prison.

43. On 12 April 2001 the medical reports regarding the applicants' examinations at the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University were submitted to the İskenderun Assize Court.

44. On 19 July 2001 the Hatay public prosecutor requested the assize court to order the Forensic Medicine Institute to draw up a further report, as the medical reports drafted during the preliminary investigation and the reports by the Medical Association and Istanbul University were contradictory. On the same day, the İskenderun Assize Court decided to send the case file to the Forensic Medicine Institute and requested the latter to submit a report containing information as to whether the applicants had been subjected to ill-treatment while in police custody and whether the findings of the doctors from Istanbul University could be considered to be the result of the alleged ill-treatment.

45. On 10 May 2002 Nazime Ceren Salmanoğlu refused to consent to an examination by the experts from the Forensic Medicine Institute. On 11 July 2002 the applicants' lawyer informed the İskenderun Assize Court that she had not consented to the examination as the medical experts wished to conduct a digital rectal examination, although this applicant had not alleged that she had been raped while in police custody. On the same day the first-instance court once again requested the Forensic Medicine Institute to submit a report.

46. Between 9 October 2002 and 13 March 2003 the assize court postponed the hearings as the Forensic Medicine Institute did not submit the requested report.

47. On 22 April 2003 the Forensic Medicine Institute submitted two reports drawn up by its 6th and 4th Sections of Expertise (*İhtisas Kurulu*)[1] on 9 December 2002 and 5 March 2003 respectively, concerning Nazime Ceren Salmanoğlu, to the first-instance court.

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[1]. The 4th Section of Expertise gives medical opinions in cases where psychiatric opinion is needed. The 6th Section of Expertise is competent to give medical opinions on cases involving, *inter alia*, sexual violence.

48. On the same day the İskenderun Assize Court requested the Forensic Medicine Institute to conduct a medical examination on Fatma Deniz Polattaş and submit a report about her.

49. Between 22 April 2004 and 23 September 2004, the first-instance court postponed the hearings as it was waiting for the report by the Forensic Medicine Institute concerning Fatma Deniz Polattaş.

50. On 23 September 2004 the Forensic Medicine Institute submitted three reports drawn up by its 2nd, 6th and 4th Sections of Expertise[1] on 15 October 2003, 20 and 25 August 2004 respectively, concerning Fatma Deniz Polattaş, to the first-instance court.

51. On the same day, the assize court requested the Plenary Assembly of the Forensic Medicine Institute (*Adli Tıp Kurumu Genel Kurulu*) to submit a final medical opinion as to whether the applicants had been subjected to ill-treatment while in police custody.

52. On 3 March 2005 the Forensic Medicine Institute submitted two reports dated 13 January 2005 drawn up by its Plenary Assembly to the İskenderun Assize Court.

53. On the same day the first-instance court requested the parties to submit final observations on the merits of the case.

54. On 22 April 2005 the İskenderun Assize Court acquitted the accused police officers, finding that there was insufficient evidence to convict them. In its judgment, the first-instance court noted that there was no evidence demonstrating that the applicants had been subjected to physical or psychological violence while in police custody. The assize court considered that the distress which the applicants might have suffered could have stemmed from their detention and conviction at a very young age. The İskenderun Assize Court further noted that it had taken into consideration the opinion of the majority of the Plenary Assembly of the Forensic Medicine Institute that the applicants had not suffered from post-traumatic stress disorder. It considered that the Forensic Medicine Institute, although a State institution, was an independent body. It noted the minority dissenting opinions as an indication of the independence of the members of the Plenary Assembly. The first-instance court finally noted that there had been a disciplinary investigation into the doctors who had examined the applicants during and after their detention in police custody and no sanctions had been imposed on them as a result.

55. On 7 June 2005 the applicants appealed. In their petition, they maintained, *inter alia*, that the virginity tests had constituted a sexual assault.

56. On 15 November 2006 the Court of Cassation quashed the judgment of 22 April 2005. It decided to terminate the criminal proceedings against

[1]. The 2nd Section of Expertise is competent to give medical opinions in cases involving, *inter alia*, physical violence.

the police officers on the ground that the prosecution was time-barred (*zamanaşımı*).

C. Medical reports issued in respect of the applicants during the criminal proceedings brought against the police officers

1. Reports of the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University

57. Between 2 June and 28 September 2000, Nazime Ceren Salmanoğlu and Fatma Deniz Polattaş were examined eight and nine times respectively by three experts from the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University. After referring to the psychological findings in two reports dated 23 October 2000, the experts diagnosed the applicants as suffering from post-traumatic stress disorder. Fatma Deniz Polattaş was further diagnosed with major depressive disorder. The experts concluded that Nazime Ceren Salmanoğlu had suffered a traumatic experience and Fatma Deniz Polattaş had suffered an aggravated traumatic experience. The doctors reached these conclusions having regard to the applicants' submissions about traumatic experiences which had allegedly involved physical, psychological and sexual assault that they had endured one and half years prior to their examination. Subsequently, Nazime Ceren Salmanoğlu underwent psychotherapy at the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University. Fatma Deniz Polattaş underwent psychotherapy and drug therapy.

2. Bone scintigraphy tests

58. On 25 September 2000 the applicants were further subjected to bone scintigraphy tests. According to the relevant report, all values were normal in respect of both applicants.

3. Reports of the Sections of Expertise of the Forensic Medicine Institute in respect of Nazime Ceren Salmanoğlu

59. The report submitted to the assize court on 22 April 2003 (see paragraph 47 above), drawn up by the 6th Section of Expertise (*İhtisas Kurulu*) on 9 December 2002 stated that there was no evidence demonstrating that the applicant had been subjected to physical violence. The 6th Section took into consideration the reports issued in respect of the first applicant during and after her police custody when rendering this decision. It further noted that the bruise recorded in the report of 24 November 1999 (see paragraph 25 above) was three to five days old. The 6th Section considered that Nazime Ceren Salmanoğlu should be subjected

to an examination by the 4th Section of Expertise in relation to the diagnosis of post-traumatic stress disorder.

60. The second report submitted to the first-instance court, dated 5 March 2003, was drawn up by the 4th Section of Expertise. According to this report, the first applicant did not show any sign of post-traumatic stress disorder on the day of her examination on 8 November 2002. However, the Section considered that the applicant had suffered from this disorder due to the trauma which she had experienced when she was detained in police custody, and that she had recovered as a result of the psychiatric treatment which she had received at the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University.

4. Reports of the Sections of Expertise of the Forensic Medicine Institute in respect of Fatma Deniz Polattaş

61. In its report of 15 October 2003 the 2nd Section considered that there was no evidence demonstrating that Fatma Deniz Polattaş had been subjected to physical violence. The 2nd Section took into consideration the reports issued in respect of the applicant during and after her police custody when rendering this decision. It also opined that the date on which the applicant's tooth had been broken could not be determined.

62. The report of the 6th Section dated 20 August 2004 stated that the veracity of the second applicant's allegations of anal rape could not be assessed, since the rectal examination had been conducted long after the alleged sexual assault.

63. In its report of 25 August 2004, the 4th Section of Expertise considered that Fatma Deniz Polattaş had suffered, like Nazime Ceren Salmanoğlu, from post-traumatic stress disorder and also from major depressive disorder, but had recovered as a result of the treatment which she had undergone. The Section noted that Fatma Deniz Polattaş had experienced a traumatising event prior to her medical examinations between 2 June and 28 September 2000.

5. Reports of the Plenary Assembly of the Forensic Medicine Institute

64. According to the reports dated 13 January 2005 and submitted to the assize court on 3 March 2005 (see paragraph 52 above), the majority of the Plenary Assembly (fifteen members) considered that the applicants were not suffering from post-traumatic stress disorder. The Assembly considered that there were no physical findings in support of the diagnosis of the doctors from the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University. Noting that the only basis for this diagnosis had been the applicants' statements, the Assembly considered that the reports issued by the doctors from the Istanbul University had not been objective.

65. Attached to the opinion of the majority of the Plenary Assembly, the Forensic Medicine Institute also submitted dissenting opinions. One member of the Plenary Assembly considered that, on the basis of the file, it could not be determined whether or not the applicants were suffering from any psychological disorder. Fourteen of the members considered that the applicants were suffering from post-traumatic stress disorder. However, the date on which the traumatic experience had occurred could not be determined. Another member opined that no decision could be made, since there were contradictions in the file. Finally, eight members of the Plenary Assembly opined that the reports of 4th Section of Expertise stating that the applicants were suffering from post-traumatic stress disorder were accurate.

D. Criminal proceedings against the applicants

66. On 24 March 1999 the public prosecutor at the Adana State Security Court filed a bill of indictment against the applicants and five other people. The applicants were charged under Articles 168 § 2 and 264 § 6 of the Criminal Code and Article 5 of Law no. 3713 with membership of an illegal organisation and for throwing Molotov cocktails.

67. On 2 November 1999 the Adana State Security Court convicted the applicants of membership of an illegal organisation and sentenced Nazime Ceren Salmanoğlu and Fatma Deniz Polattaş to eight years and four months' and twelve years and six months' imprisonment, respectively. The applicants were also convicted of throwing Molotov cocktails, for which they were sentenced to three years, eight months and thirteen days, and five years, six months and twenty days' imprisonment, respectively. In its judgment, the State Security Court took into consideration the applicants' statements to the police. The court noted that, although the applicants had alleged that they had been subjected to ill-treatment while in police custody, the medical experts who had examined them following their release from custody had not observed any signs of ill-treatment on their bodies. The State Security Court considered that the applicants' allegations were therefore unsubstantiated.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIAL

68. The relevant law and practice in force at the material time are outlined in the judgment of *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 95-100, ECHR 2004-... (extracts)); Annexes to the Interim Report of the Turkish Government in response to the Report of the European Committee for the Prevention of Torture (the "CPT") on its visit to Turkey from 5 to 17 October 1997, CPT/Inf (99) 3; Report to the Turkish Government on the visit to Turkey carried out by the CPT from 5 to 17 October 1997, CPT/Inf (99) 2, § 39.

The CPT expressed its views on the provisions of Turkish law concerning medical examination of persons in police custody in the following reports: CPT/Inf (2000) 17 § 19; CPT/Inf (2001) 25 §§ 64-66; CPT/Inf (2002) 8 § 42; CPT/Inf (2003) 8 § 41; CPT/Inf (2006) 30, § 25.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

69. The applicants complained under Articles 3 and 6 of the Convention that they had been subjected to ill-treatment, in particular sexual abuse and rape, while in police custody. They further submitted that the criminal proceedings against the police officers, which had not been concluded within a reasonable time and had therefore become time-barred, had not been effective.

The Court considers that these complaints should be examined from the standpoint of Article 3 of the Convention alone.

A. Admissibility

70. The Government argued that the applicants should have awaited the outcome of the criminal proceedings before lodging their application, since these proceedings had been effective. They further maintained that, if the applicants had considered that these proceedings were ineffective, they should have introduced their application before 12 September 1999, that is to say within six months following the end of their detention in police custody. In the latter context, the Government concluded that the applicants had failed to comply with the six-month rule.

71. The applicants replied that they had become aware of the ineffectiveness of the proceedings against the police officers as those proceedings evolved. They submitted that the fact that the proceedings had been subsequently time-barred demonstrated that the domestic remedies had been inadequate.

72. The Court reiterates that the last stage of domestic remedies may be reached before the Court is called upon to pronounce on admissibility (see, for example *Yusuf Fidan v. Turkey* (dec.), no. 2420994, 29 February 2000). The Court observes that the proceedings concerning the applicants' allegations were concluded on 15 November 2006 (see paragraph 56 above), which is before the Court delivered its decision on admissibility. It therefore rejects the Government's argument that the applicants should have awaited the outcome of the criminal proceedings before introducing their

application. The Court further reiterates that the six-month time-limit imposed by Article 35 § 1 of the Convention requires applicants to lodge their applications within six months of the final decision (see *Enzile Özdemir*, cited above, § 37). The Court therefore considers that the application lodged on 11 March 2003 was introduced in conformity with the six-month time-limit provided for in Article 35 § 1 of the Convention

73. In view of the above, the Court dismisses the Government's preliminary objections. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 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

74. The applicants submitted that they had been beaten, blindfolded, insulted and sexually harassed during their detention in police custody. Fatma Deniz Polattaş further alleged that she had been subjected to anal rape. The applicants contended that the treatment which they had suffered at the hands of the police officers had caused them to suffer from post-traumatic stress disorder, as substantiated by the reports of the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University and the 4th Section of Expertise of the Forensic Medicine Institute. They submitted that the medical reports drawn up during their detention had not been capable of establishing whether they had actually been subjected to ill-treatment, as stated by the Turkish Medical Association. The applicants finally stated that the criminal proceedings brought against the police officers had been ineffective. They complained, in particular, about the delays in bringing the proceedings against the police officers between 26 March 1999 and 18 February 2000, and in the submission of the medical reports to the first-instance court.

75. The Government contended that the applicants' allegations of ill-treatment were unsubstantiated. In this connection, they submitted that the medical reports drafted during and immediately after the applicants' detention in police custody had stated that there had not been any sign of ill-treatment on the applicants' bodies. The Government further maintained that the doctors from the Turkish Medical Association had drawn up the report of 19 July 1999 without examining the applicants, and that the report of the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University had been evaluated by the trial court. Regarding the gynaecological examinations, the Government submitted that the applicants had undergone these examinations as they had made allegations of rape and that they had given their consent for these examinations. The Government

finally contended that the domestic authorities had conducted an effective investigation into the applicants' allegations despite the fact that neither of the relevant medical reports issued in their respect stated that they had been subjected to ill-treatment in police custody.

2. The Court's assessment

a. As regards the alleged ill-treatment during the applicants' detention in police custody

76. The Court reiterates that, in assessing evidence in this field, it applies the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many others, *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV; *Süleyman Erkan v. Turkey*, no. 26803/02, § 31, 31 January 2008).

77. In the instant case, the Court observes that both parties submitted several medical reports as evidence in support of their submissions to the Court. The reports relied on by the applicants demonstrate that the applicants were suffering at least from psychological disorders as a result of traumatic experiences which had occurred during their detention in police custody, whereas the reports issued on the applicants' release from detention indicate no sign of ill-treatment on their persons.

78. The Court considers that the consistency of the applicants' submissions, the seriousness of their allegations, their ages at the time of the events and the medical reports issued by the Turkish Medical Association, the Istanbul University and the 4th Section of the Forensic Medicine Institute together raise a reasonable suspicion that the applicants could have been the subject of ill-treatment, as alleged. Consequently, the Court should ascertain which part of the medical evidence submitted by the parties should be taken into consideration in order to determine the merits of the applicants' allegations of ill-treatment. In this respect, the Court must consider the applicants' forensic examinations at the end of their detention in police custody with a view to establishing whether those examinations could have produced reliable medical evidence.

79. The Court reiterates that the medical examination of persons in police custody, together with the right of access to a lawyer and the right to inform a third party of the detention, constitutes one of the most essential safeguards against ill-treatment (see *Türkan v. Turkey*, no. 33086/04, § 42, 18 September 2008; *Algür v. Turkey*, no. 32574/96, § 44, 22 October 2002). Moreover, evidence obtained during forensic examinations plays a crucial role during investigations conducted against detainees and in cases where the latter raise allegations of ill-treatment. Therefore, in the Court's view, the system of medical examination of persons in police custody is an integral part of the judicial system. Against this background, the Court's

first task is to determine whether, in the circumstances of the present case, the national authorities ensured the effective functioning of the system of medical examination of persons in police custody.

80. The Court has already reaffirmed the European Committee for the Prevention of Torture's ("CPT") standards on the medical examination of persons in police custody and the guidelines set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Istanbul Protocol"**,** **(**submitted to the United Nations High Commissioner for Human Rights, 9 August 1999). The Court has held that all health professionals owe a fundamental duty of care to the people they are asked to examine or treat. They should not compromise their professional independence by contractual or other considerations but should provide impartial evidence, including making clear in their reports any evidence of ill-treatment (see *Osman Karademir v. Turkey*, no. 30009/03, § 54, 22 July 2008). The Court has further referred to the CPT's standard that all medical examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, every detained person should be examined on his or her own and the results of that examination, as well as relevant statements by the detainee and the doctor's conclusions, should be formally recorded by the doctor (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X; *Mehmet Eren v. Turkey*, no. 32347/02, § 40, 14 October 2008). Moreover, an opinion by medical experts on a possible relationship between physical findings and ill-treatment was found to be a requirement by the Court (see *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 29, 20 July 2004).

81. The Court notes that, according to Article 10 of the Directive on Apprehension, Arrest and Taking of Statements dated 1 October 1998 ("1998 Directive"), in force at the material time, the medical examination of persons in police custody was compulsory under Turkish law. Article 10 (5) stipulated that a copy of the medical report issued in respect of a detainee should be kept at the health institute and another copy should be sent to the detention centre. A third copy should be given to the detainee when he is released from custody and a fourth copy should be included in the investigation file. The sixth paragraph of the same provision stipulated that the doctor and the detainee should be left alone during the examination, "in cases where there is no restriction with regard to the investigation and to security considerations" (see, for the text of Article 10 of the 1998 Directive, Annexes to the Interim Report of the Turkish Government in response to the Report of the CPT on its visit to Turkey from 5 to 17 October 1997, CPT/Inf (99) 3).

82. The Court observes that these provisions of Article 10 were repeatedly criticised by the CPT between 1999 and 2003 (see the following Reports of the CPT: CPT/Inf (2000) 17 § 19; CPT/Inf (2001) 25 §§ 64-66;

CPT/Inf (2002) 8 § 42; CPT/Inf (2003) 8 § 41) as they undermined confidence in and the effectiveness of the system of forensic examinations.

83. In this connection, the Court welcomes the revised Directive which came into force on 1 June 2005 following the CPT's observations and recommendations. The new Directive provides that medical examinations must take place in the absence of law enforcement officials unless the doctor requests their presence in a particular case. It also repealed the requirement to send a copy of the medical report to the detention centre (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 7 to 14 December 2005, CPT/Inf (2006) 30, § 25).

84. Nevertheless, the Court finds no reason to diverge from the view expressed by the CPT, since it also considers that Article 10 (5) and (6) of the 1998 Directive, when in force, were capable of diminishing the very essence of the safeguard that the medical examinations constituted against ill-treatment.

85. Turning to the particular circumstances of the present case, the Court observes that the nurse who had been present during Fatma Deniz Polattaş's rectal examination on 6 April 1999 told the assize court that there had been a prison guard in the examination room (see paragraph 41 above). However, this was denied by the doctor who had conducted the examination (see paragraph 33 above). The Court further observes that four other doctors who had examined the applicants also denied the allegation that there had been police officers in the examination rooms. Although the Court is unable to verify these allegations in respect of all examinations, it notes that on at least one occasion, on 12 March 1999, the applicants were examined at the same time in the same room while police officers could hear the conversations between them and the doctor and could see the examination room if they wished (see paragraph 37 above), in clear breach of the aforementioned CPT standards (see paragraph 80 above).

86. The Court further notes that pursuant to the Ministry of Health Circulars of 1995, at the relevant time doctors designated to perform forensic tasks were requested to use standard medical forms which contained distinct sections for the detainee's statements, the doctor's findings and the doctor's conclusions (see, for a copy of the standard forensic medical form, CPT/Inf (99) 3, cited above). They were to forward copies of medical reports to the police and the public prosecutor in sealed envelopes (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 5 to 17 October 1997, CPT/Inf (99) 2, § 39). Moreover, the Prime Minister's Circular of 3 December 1997 expressly stipulated that forensic reports issued in respect of persons in police custody should comply with the standard forensic medical form (see ibid., § 35).

87. The Court observes that the doctors who conducted the applicants' medical examinations during their police custody failed to use the standard forensic medical forms despite the aforementioned, clear ministerial

instructions. What is more, the doctors only wrote down that they did not observe any sign of physical violence on the applicants' bodies (see paragraphs 6, 11 and 13 above). One of the doctors, B.I.K., stated before the assize court that Fatma Deniz Polattaş had been disturbed as she had not wished to have physical contact, but failed to note this observation on the applicant's psychological state in her report (see paragraph 33 above). Moreover, none of the doctors recorded the detainees' statements and their conclusions. The Court is particularly struck by the fact that the doctors merely recorded their findings on the letters which had been sent to them by the police headquarters requesting the medical examination of the applicants and other arrestees (see paragraphs 6, 7, 11 and 13 above).

88. Lastly, the Court observes that the applicants were subjected to virginity tests at the start of their detention in police custody (see paragraphs 7 and 9 above). However, the Court notes that the Government have not shown that these examinations were based on and were in compliance with any statutory or other legal requirement. They just submitted that the examinations were carried out following the applicants' complaints of sexual violence and that the latter had consented to the tests. In the latter connection, no evidence of any written consent was submitted by the Government. In assessing the validity of the purported consent, the Court cannot overlook the fact that the first applicant was only sixteen years old at the material time. Nevertheless, even assuming that the applicants' consent was valid, the Court considers that there could be no medical or legal necessity justifying such an intrusive examination on that occasion as the applicants had yet not complained of sexual assault when the tests were conducted. The tests in themselves may therefore have constituted discriminatory and degrading treatment (see, *mutatis mutandis*, *Juhnke v. Turkey*, no. 52515/99, § 81, 13 May 2008).

89. Having regard to the above, the Court finds that the applicants' medical examinations between 6 and 12 March 1999, as well as the examination of 6 April 1999, fell short of the aforementioned CPT standards and the principles enunciated in the Istanbul Protocol. It concludes that in the present case the national authorities failed to ensure the effective functioning of the system of medical examinations of persons in police custody. Therefore, these examinations could not produce reliable evidence. Consequently, the Court attaches no weight to the findings of the reports of 6, 8, 9 and 12 March and 6 April 1999.

90. The Court will now proceed to examine the reports of the Adana Forensic Medicine Institute, the Turkish Medical Association, the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University (in its 2nd, 4th and 6th Sections of Expertise) and the Plenary Assembly of the Forensic Medicine Institute, as well as the bone scintigraphy test of 25 September 2000.

91. The Court observes at the outset that doctors from the Turkish Medical Association opined that the applicants' complaints matched their allegations of ill-treatment. However, as the Government pointed out, their reports were not drafted following a direct medical examination of the applicants. Accordingly, the Court considers that these reports cannot be taken into account as evidence to prove or disprove that the applicants were subjected to ill-treatment. It reaches the same conclusion regarding the reports of the Plenary Assembly of the Forensic Medicine Institute.

92. As to the reports issued by 2nd, 4th and 6th Sections of Expertise of the Adana Forensic Medicine Institute and the bone scintigraphy test, the Court observes that these reports were issued following medical examinations of the applicants. However, they were carried out eight months to five years after the applicant's detention in police custody (see paragraphs 25, 58, 59 61 and 62 above). The Court considers that, with the passage of time, any physical scar of ill-treatment would either disappear or it would become impossible to determine the date on which the injury had been sustained. This is born out by the report of the 6th Section of Expertise which considered that the veracity of the second applicant's allegations of anal rape could not be assessed, since the rectal examination of 6 April 1999 had been conducted too long after the alleged sexual assault (see paragraph 62 above). Similarly, the 2nd Section of Expertise considered that the date on which the applicant's tooth had been broken could not be determined. Consequently, the Court cannot take these reports into account as evidence to prove or disprove the applicants' allegations.

93. It remains to be ascertained what weight is to be attached to the reports of the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University of 23 October 2000 and of the 4th Section of Expertise of the Forensic Medicine Institute.

94. The Court observes that the reports of 23 October 2000 were drafted following very detailed medical examinations of the applicants conducted over three months. The reports included the applicants' statements regarding the traumatic experiences which they had allegedly suffered, the doctors' observations and their conclusions. The doctors considered that the applicants were suffering from post-traumatic stress disorders due to traumatic experiences some one and half years prior to the examinations, i.e. their ill-treatment in police custody. Furthermore, following this diagnosis, the applicants underwent psychotherapy. Fatma Deniz Polattaş also underwent drug therapy. The psychological findings of the reports of 23 October 2000 were further supported by the reports of the 4th Section of Expertise of the Forensic Medicine Institute. The 4th Section noted that the applicants were not suffering from any psychological disorder at the time of their examinations in 2002 and 2004. However, it took into consideration that the applicants had undergone psychotherapy, and the second applicant

drug therapy. It concluded that the applicants had recovered as a result of that medical treatment.

95. In the light of the above considerations, the Court finds the reports of 23 October 2000, 5 March 2003 and 25 August 2004 to be conclusive evidence in the applicants' favour. In this connection, the Court observes that the Government did not challenge the accuracy of these medical reports. Nor did they provide a plausible explanation for the psychological findings contained in the report of 23 October 2000.

96. Therefore, taking into consideration the circumstances of the case as a whole, in particular the virginity tests carried out without any medical or legal necessity at the start of the applicants' detention in custody (see paragraph 88 above) and the post-traumatic stress disorders from which both applicants subsequently suffered, as well as the serious depressive disorder experienced by Fatma Deniz Polattaş, the Court is persuaded that the applicants were subjected to severe ill-treatment during their detention in police custody when they had only been sixteen and nineteen years of age (see *Akkoç*, cited above, § 116).

97. Nevertheless, the Court is unable to establish the complete picture of the severity of the applicants' ill-treatment due to the failure of the national authorities to ensure the effectiveness and reliability of the applicants' earlier medical examinations. In the Court's view, it should have been possible to detect the ill-treatment which had such long-term psychological effects on the applicants during their medical examination on leaving police custody.

98. In the light of its preceding considerations (paragraphs 94-96 above), the Court concludes that there has been a breach of Article 3 of the Convention under its substantive limb.

b. As regards the alleged ineffectiveness of the investigation

99. The Court reiterates that Article 3 of the Convention requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005). One of the minimum standards of effectiveness defined by the Court's case-law is that the competent authorities act with exemplary diligence and promptness (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004). A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Batı and Others*, cited above, § 136). The Court further reaffirms that where a State agent has been charged with crimes involving ill-treatment, criminal proceedings and sentencing must not become time-barred (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

100. The Court has found above a breach of Article 3 of the Convention under its substantive limb. An effective investigation was therefore required.

101. In this connection, the Court observes that the applicants lodged complaints on 26 March and 1 June 1999 alleging that they had been subjected to ill-treatment while in police custody. The criminal proceedings brought against the police officers were however declared to be time-barred on 15 November 2006. The Court is struck by the fact that the proceedings in question have not produced any result, on account mainly of the substantial delays throughout the proceedings and, decisively, the application of the statutory limitations in domestic law (see *Abdülsamet Yaman*, cited above, § 59).

102. In the light of the above, the Court concludes that the applicant's allegations of ill-treatment were not the subject of an effective investigation by the domestic authorities as required by Article 3 of the Convention.

103. There has accordingly been a violation of Article 3 under its procedural limb.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

104. Relying on Article 14 of the Convention, the applicants complained that they had been subjected to gynaecological examinations, which constituted discrimination against them on the basis of their sex.

105. Having regard, particularly, to the submissions of the parties, its above considerations (see in particular paragraph 88 above) and the finding of a violation under Article 3 under both its substantive and procedural limbs, the Court considers that there is no need to make a separate ruling under this head (see, for example, *Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *Juhnke*, cited above, § 99).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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

107. The applicants each claimed 50,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 in respect of pecuniary damage.

108. The Government submitted that the amounts claimed were excessive and unjustified.

109. As regards the alleged pecuniary damage sustained, the Court observes that the applicants did not produce any document in support of their claims, which the Court accordingly dismisses.

110. However, the Court has found violations of Article 3 of the Convention under its substantive and procedural limbs. In view of their gravity, the Court considers that the applicants have suffered pain and distress which cannot be compensated solely by such findings. Making its assessment on an equitable basis, the Court awards the applicants EUR 10,000 each in respect of non-pecuniary damage.

B. Costs and expenses

111. The applicants also claimed EUR 5,000 each for the costs and expenses incurred before the Court. The applicants documented those expenses on the basis of the legal fee agreements concluded with their representative, according to which the applicants would pay EUR 5,000 each to the lawyer when the Court decided on their application. Regarding their translation costs, the applicants submitted an invoice disclosing that they had disbursed 354 new Turkish liras (TRY) (approximately EUR 200).

112. The Government submitted that the applicants had failed to substantiate their claims.

113. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession, in particular the fee agreements, and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 5,000 covering their costs before the Court, less the EUR 850 which they received in legal aid from the Council of Europe.

C. Default interest

114. 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. *Declares* unanimously the application admissible;

2. *Holds* by 4 votes to 3 that there has been a violation of Article 3 of the Convention under its substantive limb;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention under its procedural limb;

4. *Holds* unanimously that there is no need to examine separately the complaint under Article 14 of the Convention;

5. *Holds* by 4 votes to 3
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted to the national currency of the respondent Government at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,000 (five thousand euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, less EUR 850 (eight hundred and fifty euros) granted by way of legal aid;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 17 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé	Francoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judges Sajó, Tsotsoria and Karakaş is annexed to this judgment.

F.T.
S.J.D.

PARTLY DISSENTING OPINION OF JUDGES SAJÓ, TSOTSORIA AND KARAKAŞ

With all due respect, we have to dissent as to the finding of a substantive violation in the present case.

In this case there are conflicting medical opinions regarding the applicants' state of health. Examinations in the immediate aftermath of the alleged ill-treatment produced no medical evidence of physical abuse. Four months after the contested facts, the Turkish Medical Association, a respectable professional medical association dealing with professional education, fees and professional ethics, with representation on the Turkish Ministry of Health Central Ethics Committee, issued an opinion on those medical examinations without re-examining the applicants. The opinion states that the complaints made by the applicants were consistent with those that genuine victims of violence and rape would have made. Secondly, in accordance with their deontological principles, they criticise the examination procedure applied by the doctors as not being in conformity with the standards of the Ministry of Health. These views concern examinations conducted upon the applicants' discharge from police custody (paragraph 23 of the judgment).

Contrary to the majority's finding, we cannot disregard the results of repeated medical examinations which were conducted shortly after the alleged abuse, as the purported improprieties do not concern the applicants' physical condition. Moreover, the report of the Psychosocial Trauma Centre at the Faculty of Medicine of Istanbul University is based on examinations that took place more than a year after the contested events. More importantly, the finding of the Centre refers to post-traumatic stress disorder. The existence of such disorder does not prove anything about its origins. It may well be that the applicants' psychological problems had to do with the stress of the detention, or the long-term sentences they had been given, or were even related to remorse for the acts for which they had been convicted. The diagnosis itself remains contested in the light of the decision of the highest expert body in the matter, namely the Plenary Assembly of the Forensic Medicine Institute. Given that the medical opinions are conflicting, and that the balance is overwhelmingly tipped against any indirect evidence of ill-treatment, in the absence of *prima faci*e evidence and in view of the negative finding of a domestic court we cannot see here that the State's responsibility is established beyond reasonable doubt, even though the State has a certain burden of proof in the event of sufficiently strong, clear and concordant inferences. There is no *prima facie* sign of sufficiently strong inferences here, be it clear or even unclear. The Court itself is "unable to establish the complete picture" and believes that "it should have been possible to detect the ill-treatment which had such long-term psychological effects" (paragraph 97). Clearly, if it only "should have

been possible" it cannot be said to have happened, especially as the existence of the post-trauma syndrome remains contested. And once again, even if the applicants were in distress, this is not conclusive as to the causes of the distress.

We voted for the finding of a violation of the procedural limb of Article 3 of the Convention because seven years of proceedings, after which they became time-barred, cannot satisfy the requirement of an effective investigation.

Lastly, we would like to mention that we found the application of the virginity test troubling, bordering on degrading treatment. However, the medical examination of persons in police custody constitutes one of the most essential safeguards against ill-treatment (*Türkan v. Turkey*, no 33086/04, § 42). In this connection, we should like to recall that, in a situation where a female detainee complains of a sexual assault or requests a gynaecological examination, the obligation of the authorities to carry out a thorough and effective investigation into the complaint would include the duty to carry out the examination promptly (see, for example, *Aydın v. Turkey*, 25 September 1997, *Reports* 1997-VI, § 107). In its recent judgment in the case of *L.Z. v. Romania* (no. 22383/03, §§ 32-37, 3 February 2009), the Court found a violation of Article 3 of the Convention on the grounds, *inter alia*, that the domestic authorities had not ensured the detailed medical examination of an applicant who had complained of anal rape while in prison.

It is true that a female detainee may not be compelled or subjected to pressure to undergo such an examination against her wishes (see *Y.F. v. Turkey*, no. 24209/94, §§ 41-44, ECHR 2003-IX, and *Juhnke v. Turkey*, no. 52515/99, § 81, 13 May 2008). However, in the instant case, it seems that the applicants had a genuine opportunity to refuse to undergo the examination as, the second time they were asked, they were able to refuse it without difficulty. There is no evidence of their objecting to the first examination. For reasons of legal certainty, we find the requirement of written consent indispensable, and we would welcome an exception to the general rule regarding medical examinations. At least, very young people should not have to undergo such tests as the humiliation is virtually inevitable while the protection against ill-treatment resulting from such tests is limited, given the possibility of alternative forms of sexual abuse.