



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

Communicated on 2 September 2016

FIFTH SECTION

Application no. 4871/16
Abdul HANAN
against Germany
lodged on 13 January 2016

STATEMENT OF FACTS

1. The applicant, Mr Abdul Hanan, is an Afghan national, who was born in Omar Khel and lives in Omar Khel, Afghanistan. He is represented before the Court by Mr W. Kaleck, a lawyer practising in Berlin.

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

A. Background to the case

3. On 20 December 2001 the United Nations Security Council mandated the International Security Assistance Force (ISAF) by Resolution 1386 to support the Afghan Transitional Authority and its successors in the maintenance of security. On 21 December 2001 the German Parliament authorised the deployment of German armed forces as part of ISAF.

4. German Troops were deployed as part of ISAF's Regional Command (RC) North and primarily took over the Provincial Reconstruction Team (PRT) Kunduz. At the relevant time PRT Kunduz was commanded by the German Colonel K., who himself reported to the German Commander of RC North, Brigadier-General V., who at the same time also commanded the entire German armed forces in Afghanistan.

B. The airstrike of 4 September 2009

5. On 3 September 2009 insurgents hijacked two fuel tankers, which later that day became immobilised on a sandbank in the Kunduz River, around 7 kilometres from the base of PRT Kunduz. To mobilise the fuel tankers again, the insurgents enlisted the population of nearby villages to siphon fuel from the lorries. After several hours of search and surveillance of the fuel tankers by airplanes, Colonel K. ordered two United States Air Force airplanes to bomb the still immobilised fuel tankers at 1.49 a.m. on

4 September 2009. The airstrike killed *inter alia* the applicant's two sons Abdul Bayan and Nesarullah, approximately 12 and 8 years old respectively.

C. Investigations into the airstrike

1. On-site investigation

6. In the morning of 4 September 2009, after having been informed about the airstrike, Brigadier-General V. send an investigation team from Masar-i-Sharif to Kunduz to support the PRT Kunduz in the investigation into the airstrike.

7. On 12.34 p.m. on 4 September 2009 a team of the PRT Kunduz reached the site of the airstrike. No soldiers of the team from Masar-i-Sharif participated in the on-site visit. The team came across a strongly altered site, with only few destroyed cars and no corpses.

8. On 4 and 5 September 2009 both investigation teams visited hospitals and villages in the area and interviewed several persons regarding the events of 4 September 2009. Colonel K., as the commander of PRT Kunduz was partially involved in some interviews and was further kept up to date regarding the investigation.

2. Investigation of the German Federal Public Prosecutor General

9. After some preparatory work by the Dresden Public Prosecutor General and the collection and requisition of relevant documents, the Federal Public Prosecutor General (hereinafter: the Prosecutor) initiated an official criminal investigation on 12 March 2010. The investigation was directed against Colonel K. and one First Sergeant, who assisted Colonel K. in the night of the airstrike. From 22 to 25 March 2010 the Prosecutor interrogated the two suspects and interviewed two witnesses, who were present at the command centre of the base in Kunduz during the relevant time. Furthermore, the collected documents and video material from the airplanes were analysed.

10. On 16 April 2010 the criminal investigation was discontinued due to a lack of sufficient grounds for suspicion. The Prosecutor concluded that Colonel K. had had no intent to kill or harm civilians or damage civilian objects, in a degree that would have been disproportionate to the military benefit of the airstrike. Therefore, a criminal liability for offences pursuant to the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*), in particular Section 11 § 1 no. 3, could be eliminated. Furthermore, the Prosecutor held that all possible offences pursuant to the German Criminal Code (*Strafgesetzbuch*), such as murder, were justified by the lawfulness of the attack under international law. A redacted version of the discontinuation decision was published later on.

3. The applicant's involvement in the investigation and appeals against the discontinuation decision

11. On 12 April 2010 the applicant filed a criminal complaint with the Prosecutor regarding the death of his two sons. He also requested access to the case files. By letter of 27 April 2010 the Prosecutor informed the

applicant's representative that the criminal investigation had been discontinued in the meantime and that the applicant's request for access would require a more detailed assessment concerning the applicant's victim status. After further correspondence between the Prosecutor and the applicant's representative regarding the applicant's victim status and an allegation that one of the applicant's son had been an insurgent, the applicant was granted access to the non-confidential parts of the investigation file on 3 September 2010. On 15 October 2010 the redacted version of the discontinuation decision was served on the applicant's representative.

12. On 16 February 2011 the Düsseldorf Court of Appeal dismissed the applicant's motion to compel public charges (*Antrag auf gerichtliche Entscheidung im Klageerzwingungsverfahren*) as inadmissible.

13. On 19 May 2015 the Federal Constitutional Court refused to admit the applicant's constitutional complaint for adjudication (2 BvR 987/11). The court held that the investigation by the Prosecutor constituted an effective investigation, as defined by the case-law of the Federal Constitutional Court and the European Court of Human Rights. It further stated that additional investigatory measures, such as hearing of further witnesses, who had been present during the airstrike, would not have provided any further relevant information, as the investigation was discontinued based on questions of intent. As regards the decision of the Court of Appeal, the Federal Constitutional Court concluded that, even though it had declared the applicant's motion inadmissible, it nevertheless had considered the decision of the Prosecutor in detail.

4. Other investigations

14. The ISAF conducted its own independent investigation. A so-called 'Initial Action Team' conducted an on-site investigation and subsequently recommended in its final report the further assessment of the events by a Joint Investigation Board. The Joint Investigation Board concluded its investigation on 26 October 2009 and published its findings in a second report. Both reports, however, are classified 'NATO-/ISAF-Confidential'.

15. On 16 December 2009 the German Parliament established a commission of enquiry to assess *inter alia* whether the airstrike was in compliance with the mandate given by the parliament to the German armed forces, with the operative planning and with the applicable orders and rules of engagement. On 20 October 2011 the commission concluded its investigation and published its report. Regarding the question of compliance with the applicable orders and rules of engagement, it came to the conclusion that Colonel K. made, when ordering the airstrike, certain procedural mistakes and partially violated the applicable ISAF rules of engagement. Consequently, based on the meanwhile available information, the airstrike could not be considered proportionate and should not have been ordered. However, the commission also stated that Colonel K. acted at the relevant time to the best of his knowledge and to protect 'his' soldiers. Therefore his decision to order the airstrike was comprehensible.

COMPLAINTS

16. The applicant complains under Article 2 of the Convention that the investigation into the airstrike of 4 September 2009 that killed the applicant's two sons was not effective.

17. The applicant further complains under Article 13 of the Convention that he had no effective domestic remedy at his disposal to challenge the decision to discontinue the investigation.

QUESTIONS TO THE PARTIES

1. Having regard to the procedural protection of the right to life (see paragraph 104 of *Salman v. Turkey* [GC], no. 21986/93, ECHR 2000-VII; paragraph 186 *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014), was the investigation in the present case by the domestic authorities in breach of Article 2 of the Convention?

2. In particular:

a) Were the persons responsible for and carrying out the investigation independent from those implicated in the events?

b) Was the investigation conducted with reasonable expedition?

c) Was the applicant, as a next of kin of two of the victims, involved in the investigation to the extent necessary to safeguard his legitimate interests?

3. Having regard to the procedural requirements under Article 2, should the applicant have had at his disposal a judicial remedy to review the decision to discontinue the investigation?

4. Could the Federal Constitutional Court, in the constitutional complaint proceedings, carry out such an effective review?

5. Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 2, as required by Article 13 of the Convention?