



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

SECOND SECTION

CASE OF KABA v. TURKEY

(Application no. 1236/05)

JUDGMENT

STRASBOURG

1 March 2011

FINAL

01/06/2011

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

In the case of Kaba v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Ireneu Cabral Barreto,

David Thór Björgvinsson,

Giorgio Malinverni,

András Sajó,

Işıl Karakaş, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 8 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 1236/05) 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 three Turkish nationals, Ms Havva Kaba, Miss Edanur Kaba and Miss Elif Kaba (“the applicants”), on 30 November 2004.

2. The applicants were represented by Mr A. Tizik, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 15 September 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1978, 2001 and 1997 respectively and live in Istanbul. The first applicant is the wife and the second and third applicants are the children of Mr Yusuf Kaba, who was an officer in the Turkish Navy and died of cancer in 2003. According to the applicants, Mr Kaba's exposure to asbestos at Hasköy Dock had caused his cancer. They were also concerned about the allegedly inadequate treatment he received at the GATA military hospital.

5. Following Mr Kaba's death, on 22 August 2003 the applicants initiated compensation proceedings in the Military Supreme Administrative Court against the Ministry of Defence. They requested a total of 650,000,000,000 Turkish liras (TRL) (approximately 400,000 euros (EUR) at the time) in both pecuniary and non-pecuniary damages. In their application, the applicants complained that Mr Kaba's death was the result of the asbestos levels at Hasköy Dock and stated that he had not received adequate medical treatment at the GATA military hospital. In their submissions the applicants relied on the medical records of the applicant, a report on the asbestos levels at Hasköy Dock and an expert report. The applicants also requested legal aid for the court fees. In their legal-aid claim they submitted documents attesting to their poor financial situation. The official documents attested that the applicants had no income.

6. On 19 November 2003 the Military Supreme Administrative Court, without giving any reason, decided that the applicants did not qualify for legal aid. The applicants were notified that they had to pay TRL 8,758,870,000 (approximately EUR 5,000) in court fees within one month for the proceedings to be continued, and that failure to do so would result in the discontinuation of the proceedings. In January 2004 the applicants again requested legal aid to pay the court fees. On 21 January 2004 the Military Supreme Administrative Court refused to grant the applicants legal aid, once again without giving reasons. The applicants were requested to pay the fees due within one month in order to be able to continue the proceedings. They were warned that failure to do so would result in the discontinuation of the proceedings.

7. On 22 April 2004 the applicants requested a rectification of the decision dated 21 January 2004. Subsequently, on 26 April 2004 the applicants' lawyer also lodged a request with the Military Supreme Administrative Court and requested clarification (*tavzih*) of the decision dated 21 January 2004. In his request the applicants' lawyer referred to the relevant statements of means provided by the domestic authorities. He further stated that while lodging the case he had submitted the relevant medical records concerning Mr Yusuf Kaba, a report on the asbestos levels at Hasköy Dock and an expert report, and that this evidence should be sufficient to prove that they had a well-founded case.

8. On 12 May 2004 the Military Supreme Administrative Court examined both requests and decided that, as the decision dated 21 January 2004 was not a final decision on the merits of the case, a rectification or a clarification request was not possible under domestic law. The court also decided to discontinue the compensation proceedings because the applicants had not paid the necessary court fees. This decision was served on the applicants on 4 June 2004.

II. RELEVANT DOMESTIC LAW AND PRACTICE

9. Article 56 of Law no. 1602 on Military Supreme Administrative Courts provides that when a Military Supreme Administrative Court determines a legal aid request it should apply the relevant provisions of the Code of Civil Procedure (CCP).

10. Article 465 of the CCP states that a request for legal aid may only be granted if the claimant submits evidence in support of his/her case.

11. According to Article 468 of the CCP, in order to determine whether or not the person applying for legal aid has sufficient means, he/she shall be required to submit a statement of his or her means, another certificate indicating whether or not the individual owns any property and an attestation regarding how much, if any, tax he/she had paid. These certificates should be obtained from the appropriate domestic authorities.

12. Article 469 of the CCP provides that decisions regarding legal aid are binding.

13. In November 2003, the minimum wage in force was TRL 306,000,000 (approximately EUR 153) a month.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

14. The applicants complained that the refusal to grant them legal aid in connection with their compensation case had infringed their right to a fair hearing guaranteed by Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

15. The Government contested that argument.

A. Admissibility

16. The Court notes that 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

17. The applicants argued that by refusing their legal aid request the Military Supreme Administrative Court had breached their right of access to

court. In their view, they had submitted sufficient evidence attesting to their poor financial situation and to establish that they had a well-founded case.

18. The Government stated that in domestic law there were two types of court fees. The first type was a fixed amount established by the Ministry of Finance at the end of each year, and it was published in the Official Gazette. The second type was calculated on the basis of the value of the litigation and varied in each case. The Government further pointed out that court fees were required in order to ensure the proper administration of justice and prevent vexatious applications. In their observations the Government did not dispute that in the present case the applicants had submitted a statement of means. According to their submissions, the refusal of the legal aid request was not because of the financial situation of the applicants. They maintained that the applicants had not qualified for legal aid, as they had not provided evidence to indicate that they had a well-founded case. In this respect, the Government stated that when lodging their compensation case with the Military Supreme Administrative Court the applicants had failed to submit relevant medical and expert reports to substantiate their arguments. The Government further argued that in the instant case the court fee had been calculated in the light of the amount of compensation requested by the applicants and that there was no appearance of a violation of the applicants' right of access to a court.

19. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 59, ECHR 2005-II).

20. The right of access to court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. Article 6 § 1 leaves to the State a free choice of the means to be used towards this end but, while the Contracting States enjoy a certain margin of appreciation in that respect, the ultimate decision as to the observance of the Convention's requirements rests with the Court (see *Kreuz v. Poland*, no. 28249/95, § 53, ECHR 2001-VI, and *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 33, 17 July 2007). The institution of a legal aid scheme constitutes one of those means. It may therefore be acceptable to impose conditions on the grant of legal aid on the basis, *inter alia*, of the financial situation of the litigant or his or her prospects of success in the proceedings (see *Steel and Morris*, cited above, §§ 60-62, and *Wieczorek v. Poland*, no. 18176/05, § 37, 8 December 2009). The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant

in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

21. In the present case, the Court must therefore determine whether the requirement to pay the court fees imposed on the applicants constituted a restriction in breach of their right of access to court.

22. The Court observes that the first applicant is the wife and the remaining two applicants are the children of Mr Yusuf Kaba, who died of cancer in 2003, and who was an officer in the Turkish navy. It is clear from the certificates delivered by the domestic authorities that the applicants have no income and are in a poor financial situation. This is not disputed by the Government. Believing that the cancer had been caused by Mr Kaba's exposure to asbestos at Hasköy Dock, the applicants initiated compensation proceedings against the Ministry of Defence before the Military Supreme Administrative Court. When lodging their case, they provided a statement of means and requested legal aid to pay the relevant court fees, which amounted to TRL 8,758,870,000 (approximately EUR 5,000 at the time). The legal aid request was rejected because the Military Supreme Administrative Court, without examining the merits of the case, decided that the applicants did not have a well-founded case.

23. At this point, the Court first notes that according to Turkish administrative law, which is also applicable to the Military Supreme Administrative Court, it is not possible to modify a first claim at a later stage (see *Okçu v. Turkey*, no. 39515/03, § 30-32, 21 July 2009) and the domestic courts are bound by the requested amount when determining the compensation. As a result, the Court considers that the Government's contention that the court fees would have been lower had the applicants requested a lower amount cannot be sustained.

24. Secondly, the court fees that the applicant was required to pay amounted to TRL 8,758,870,000 while the monthly minimum wage was TRL 306,000,000 at the time. The Court observes that it has already examined similar grievances in the past and has found a violation of Article 6 § 1 of the Convention on the ground, *inter alia*, that the legal aid system in Turkey fails to offer individuals substantial guarantees to protect them from arbitrariness (see, in particular, *Bakan v. Turkey*, no. 50939/99, §§ 74-78, 12 June 2007; *Mehmet and Suna Yiğit*, cited above, §§ 31-39 and *Eyüp Kaya v. Turkey*, no. 17582/04, §§ 22-26, 23 September 2008). It has also examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned cases. In this respect, the Court would once again recall that pursuant to Article 469 of the CCP, decisions regarding legal aid are binding and are delivered on the basis of the case file, without hearing the applicants (*Bakan*, cited above, § 76). The Court further observes that the refusal of the applicants' legal aid request deprived them of the possibility of submitting their case before a tribunal. Finally, it also notes that, for the reasons explained above (see paragraph 22) the compensation case lodged following the death of Mr Kaba, was significant for the applicants' personal situation and welfare.

25. In view of the foregoing, the Court concludes that in the instant case there has been a disproportionate restriction on the applicants' right of access to a court. There has accordingly been a violation of Article 6 § 1 in that respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. 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

27. The applicants claimed a total of EUR 150,000 in respect of pecuniary damage and EUR 300,000 in respect of non-pecuniary damage.

28. The Government, considering the requested amounts excessive, contested these claims.

29. As regards pecuniary damage, the Court notes that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. Accordingly, it considers that no award can be made to the applicants under this head.

30. As regards non-pecuniary damage, deciding on an equitable basis, the Court awards the applicants a total of EUR 3,000 under this head.

31. The Court further reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicants, as far as possible, are put in the position in which they would have been had this provision not been disregarded (see *Mehmet and Suna Yiğit*, cited above, § 47). The Court finds that this principle applies in the present case as well. Consequently, it considers that the most appropriate form of redress would be to quash or otherwise set aside the Military Supreme Administrative Court's decision dated 12 May 2004 (paragraph 8 above) and restart the proceedings, in accordance with the requirements of Article 6 § 1 of the Convention, should the applicants so request.

B. Costs and expenses

32. The applicants claimed EUR 200,000 for costs and expenses incurred before the Court, without submitting any documents.

33. The Government contested the claim.

34. In respect of costs and expenses, 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, the

applicants have not substantiated their contention that they actually incurred the costs claimed. Accordingly, no award shall be made under this head.

C. Default interest

35. 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 UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay, within three months of the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, a total of EUR 3,000 (three thousand euros) to the applicants in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement and free of any taxes or charges that may be payable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 1 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President

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

S.H.N.
F.T.

CONCURRING OPINION OF JUDGES MALINVERNI
AND SAJÓ

For the reasons expressed in our Concurring Opinion in the case of *Lalas v. Lithuania* (no. 13109/04), delivered on the same date as the present judgment, we would have liked the reasoning set out in paragraph 31 of the judgment to have been included in the operative provisions as well. Furthermore, our opinion applies to all similar cases in the future.