



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

SECOND SECTION

CASE OF GÜRKAN v. TURKEY

(Application no. 1154/04)

JUDGMENT

STRASBOURG

29 March 2011

FINAL

15/09/2011

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

In the case of Gürkan 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 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 1154/04) 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 a Turkish national, Mr Mustafa Gürkan (“the applicant”), on 3 October 2003. The Turkish Government (“the Government”) were represented by their Agent.

2. On 16 February 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

3. The applicant was born in 1961 and lives in Kars.

4. On 2 March 1998 the applicant, a civil engineer at the Directorate of the Esenboğa Airport, was appointed to the Directorate of the Şanlıurfa Airport.

5. On 20 March 1998 the applicant brought a case before the Ankara Administrative Court against the General Directorate of National Airports (*Devlet Hava Meydanları İşletmesi Genel Müdürlüğü*) (“the General Directorate”) to challenge his transfer to the Şanlıurfa Airport. He claimed that his transfer had a purely punitive motive, aimed at penalising him for

having uncovered certain irregular conduct at the General Directorate. He also requested the suspension of his transfer pending the outcome of the court's final decision.

6. On 27 March 1998 the applicant lodged a criminal complaint with the Ankara Public Prosecutor against his employers in respect of the aforementioned irregularities. On 30 November 1998 the public prosecutor issued a decision not to prosecute.

7. On 29 April 1998 the Ankara Administrative Court rejected the applicant's request for suspension of his transfer. On 22 May 1998 the applicant objected to that decision. On 3 June 1998 the Ankara District Administrative Court dismissed the applicant's objection.

8. On 15 July 1998 the applicant requested the Ankara Administrative Court to hold an oral hearing.

9. On 11 November 1998 the Ankara Administrative Court dismissed the applicant's case, without holding a hearing. It ruled that the applicant's appointment to the Şanlıurfa Airport had been effected in view of the needs of the General Directorate and that the administration had thus acted within its legal discretion and in accordance with the relevant laws.

10. On 22 December 1998 the applicant appealed against the judgment of the administrative court and requested the suspension of the transfer. He also requested the Supreme Administrative Court to hold an oral hearing.

11. On 7 April 1999 the Supreme Administrative Court dismissed the request for suspension.

12. On 21 May 1999 the applicant once again requested the suspension of the administrative act. His request was dismissed by the Supreme Administrative Court on 9 July 1999.

13. On 30 October 2002 the Supreme Administrative Court issued an interim decision requesting certain information and documents from the respondent administration, including the applicant's classified appraisal records (*gizli sicil raporları*) and a description of his duties at the new place of assignment. It appears that the administration submitted the requested information and documents to the Supreme Administrative Court on 13 December 2002. However, neither the interim decision nor the responses of the administration were communicated to the applicant.

14. On 30 January 2003 the Supreme Administrative Court upheld the Ankara Administrative Court's judgment of 11 November 1998 by a majority decision, without holding a hearing. The dissenting judge opined that the replies provided by the General Directorate to the questions put to it in the interim decision indicated that the applicant's transfer had been based on subjective grounds and not on any public need as alleged. Upon service of the Supreme Administrative Court's decision, the applicant found out about the interim decision of 30 October 2002 and the administration's submissions in reply, including his appraisal grades which had apparently

fallen following the various actions he had brought against the administration.

15. On 30 April 2003 the applicant requested the rectification of the Supreme Administrative Court's decision, complaining, *inter alia*, of the non-communication of the interim decision of 30 October 2002 and the General Directorate's replies thereto, which had prevented him from responding to its arguments. In the same letter, the applicant also attempted to challenge the accuracy of the information provided by the General Directorate.

16. On 15 September 2004 the Supreme Administrative Court dismissed the applicant's rectification request, holding that none of the reasons put forth by the applicant for rectification fell within the exhaustive list of permissible grounds for rectification indicated in Section 54 (1) of Administrative Procedure Act (Law no. 2577).

II. RELEVANT DOMESTIC LAW

17. According to Section 16 (1) and (2) of the Administrative Procedure Act, after a claimant lodges a case with the administrative court, his or her submissions are transmitted to the defendant party. The initial written pleadings of the defendant in response are communicated to the claimant, who submits his or her replies thereto. The claimant's replies are then sent to the defendant, who is invited to submit his or her final pleadings, to which the claimant cannot reply.

18. According to Section 17 (1) of the Administrative Procedure Act, an oral hearing will be held in administrative proceedings involving, *inter alia*, an action for annulment of an administrative act (*iptal davası*), upon request of either one of the parties.

19. According to Section 17 (3) of the Administrative Procedure Act, a request for an oral hearing can be made by the parties only at certain stages of the administrative proceedings, that is at the time of bringing the case by the claimant, or as part of the subsequent written pleadings and replies submitted to the court by the parties (see paragraph 17 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained under Article 6 § 1 of the Convention that the length of the administrative proceedings in question had been incompatible with the "reasonable time" requirement, that the Supreme

Administrative Court's interim decision of 30 October 2002 and the administration's responses thereto had not been communicated to him, in breach of the principle of equality of arms, and that he had been denied a fair trial on account of the lack of an oral hearing before the Ankara Administrative Court and the Supreme Administrative Court despite his explicit requests.

A. Admissibility

21. The Government asked the Court to dismiss these complaints for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained that the applicant had not raised any of these complaints before the domestic courts.

22. As far as the complaint regarding the length of proceedings is concerned, the Court reiterates that it has already examined and rejected similar objections of the Government alleging failure to exhaust domestic remedies (see *Karakullukçu v. Turkey*, no. 49275/99, §§ 27-28, 22 November 2005). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned application. It therefore rejects the Government's objection in relation to this complaint.

23. As regards the complaint concerning the non-communication of the Supreme Administrative Court's interim decision and the documents submitted by the administration in response, the Court notes that the applicant did raise the substance of this complaint before the Supreme Administrative Court (see paragraph 15 above). It therefore rejects the Government's objection under this head.

24. Lastly, as for the complaint concerning the absence of an oral hearing, the Court notes that the applicant had expressly requested an oral hearing before both instances (see paragraphs 8 and 10). Inherent in this request was the applicant's conviction that the administration of justice would be better served by affording him a right to explain, on his own behalf or through his representative, his personal situation. It is therefore fair to hold that the lack of an oral hearing at both stages had, in the applicant's opinion, prejudiced his right to a fair hearing, although he did not expressly formulate his complaint in these terms before the domestic courts. In the light of the foregoing, and bearing in mind that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV), the Court considers that the Government's objection under this head should be dismissed.

25. The Court further notes that this part of the application is not manifestly ill-founded, within the meaning of Article 35 § 3 of the

Convention, and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Length of administrative proceedings

26. The Government contended that the length of the proceedings could not be considered to be unreasonable in view of the total number of decisions delivered by the administrative courts, including various decisions on the applicant's suspension requests and an interim decision. They argued in this regard that the applicant had contributed to the prolongation of the proceedings by making full use of the procedural measures available to him, such as requesting the suspension of his appointment numerous times and resorting to the extraordinary remedy of rectification. They also maintained that there was no delay in the proceedings that could be attributed to the authorities.

27. The Court notes that the proceedings in question commenced on 20 March 1998, when the applicant brought the case before the Ankara Administrative Court, and ended on 15 September 2004, when the Supreme Administrative Court rejected his rectification request. They therefore lasted six years and six months before two levels of jurisdiction.

28. The Court further notes that it has frequently found violations of Article 6 § 1 of the Convention in applications raising issues similar to the one before it (see, for instance, *Şenol Uluslararası Nakliyat, İhracat ve Ticaret Limited Şirketi v. Turkey*, no. 75834/01, §§ 23-28, 20 May 2008). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present circumstances. The Court particularly notes that, whilst the numerous requests made by the applicant for the suspension of his appointment might have slightly prolonged the proceedings, the applicant's conduct may in no way justify their entire length. In any event, the applicant cannot be blamed for making full use of the remedies available to him under domestic law (see, amongst other authorities, *Girardi v. Austria*, no. 50064/99, § 56, 11 December 2003). The Court further observes that the case was before the Supreme Administrative Court alone for five years and ten months pending the appeal and rectification procedures. This delay, which remains unjustified, contributed substantially to the overall length of the proceedings.

29. Having regard to its case-law on the subject, the Court therefore considers that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

30. There has accordingly been a breach of Article 6 § 1 of the Convention.

2. Non-communication of the Supreme Administrative Court's interim decision and the responses of the administration

31. The Government argued that the principle of equality of arms had not been prejudiced in the instant case on account of the non-communication of the documents in question as both the applicant and his lawyer had had access to the case file throughout the proceedings.

32. The Court reiterates that the principle of equality of arms requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (*A.B. v. Slovakia*, no. 41784/98, §§ 55 and 56, 4 March 2003).

33. The Court notes in the instant case that on 30 October 2002 the Supreme Administrative Court delivered an interim decision, where it requested the General Directorate to submit certain information and documents in relation to the applicant's allegations. The applicant was not informed of this decision. Subsequently, the General Directorate presented the requested documents to the Supreme Administrative Court, along with its written replies. These submissions, which later formed the basis of the Supreme Administrative Court's decision in the administration's favour, were not communicated to the applicant prior to the delivery of the decision. The applicant only learned of the interim decision and the General Directorate's replies upon the service of the Supreme Administrative Court's decision refusing his appeal. The applicant was therefore denied the opportunity to respond to the information and documents provided to the appellate court by the General Directorate and to challenge their accuracy before that court.

34. The Court notes at the outset that the Government's argument that the case file was open to the parties' examination implies a duty on the applicant and his lawyer to take the initiative and inform themselves periodically on whether any new elements have been included in the case file. In the Court's opinion, this would amount to imposing a disproportionate burden on the applicant and his lawyer (see, *mutatis mutandis*, *Meral v. Turkey*, no. 33446/02, § 36, 27 November 2007). Moreover, this would not necessarily have guaranteed a real opportunity to comment on the defendant party's submissions in the instant case, bearing in mind that the Supreme Administrative Court delivered its decision very shortly after receiving these submissions, that is within one and a half months. The applicant therefore had a very small window of opportunity to become acquainted with the General Directorate's replies and the documents appended thereto and to put forward his counter-arguments before the appellate court.

35. The Court moreover considers that, regardless of whether or not the applicant had a theoretical right of access to the documents in the case file, the onus was on the Supreme Administrative Court to ensure the applicant's proper participation in the proceedings and thus to afford him an

opportunity to comment on the administration's submissions prior to its decision (see, *H.A.L. v. Finland*, no. 38267/97, § 45, 27 January 2004; *Milatová and Others v. the Czech Republic*, no. 61811/00, § 65, ECHR 2005-V). What is at stake is the litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (*Nideröst-Huber v. Switzerland* judgment of 18 February 1997, § 29, *Reports* 1997-I).

36. The Court lastly notes that although the applicant attempted to challenge the administration's submissions in his subsequent rectification request, the limited scope and nature of the rectification procedure did not allow the assessment of the applicant's counter-arguments, which necessitated a reconsideration of the facts and evidence.

37. In the light of the foregoing, the Court finds that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication to the applicant of the Supreme Administrative Court's interim decision and the submission made by the General Directorate upon that court's request.

3. *Lack of an oral hearing*

38. The Government argued that the applicant had failed to request the holding of an oral hearing before the Ankara Administrative Court. They maintained that if he had made such a request, the administrative court would have been bound by Section 17 (1) of the Administrative Procedure Act to hold a hearing on account of the nature of the action, that is an action for annulment of an administrative act (*iptal davası*).

39. The Court notes from the documents submitted by the applicant to the case file, which were also transmitted to the Government at the time of the communication of the application, that the applicant had lodged a request for an oral hearing with the Ankara Administrative Court on 15 July 1998, contrary to the Government's allegations. The Government, however, have failed to indicate in their observations whether the applicant's request for an oral hearing had been dismissed for having been lodged outside the time-frames indicated in Section 17 (3) of the Administrative Procedure Act (see paragraphs 17-19 above). It is similarly not possible to determine the reasons for such refusal from the other documents in the case file, including from the Ankara Administrative Court's decision of 11 November 1998 itself.

40. The Court, however, considers in any event that in the light of its findings under Article 6 § 1 of the Convention above (see paragraph 37), no separate examination of the instant complaint is necessary.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant complained under Article 8 of the Convention that his transfer to Şanlıurfa had adversely affected his private life and under Article 13 that the administration had attempted to interfere with his right to an effective remedy by penalising him with lower appraisal marks for having made use of available domestic remedies.

42. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court does not find that these complaints, which are largely unsubstantiated, disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols (see, for instance, *Fahrettin Aydın v. Turkey*, no. 31695/02, § 31, 29 January 2008).

43. It follows that these complaints should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. The applicant did not submit a claim for pecuniary and non-pecuniary damage. Accordingly, the Court considers that there is no call to award him any sum on that account.

45. However, the applicant submitted a claim for translation expenses incurred before the Court, in the amount of 234.64 Turkish liras (TRY) (equivalent to approximately 110 euros (EUR)).

46. The Government contested this claim.

47. 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 and the above criteria, the Court considers it reasonable to award the full amount claimed by the applicant.

48. 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 complaints under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the administrative proceedings and the non-communication to the applicant of the interim decision of the Supreme Administrative Court and the submissions of the administration in reply;
3. *Holds* that there is no need to examine separately the applicant's complaint under Article 6 § 1 of the Convention regarding the lack of an oral hearing in the administrative proceedings;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 110 (one hundred and ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (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;

Done in English, and notified in writing on 29 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President