



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

SECOND SECTION

CASE OF ERKOL v. TURKEY

(Application no. 50172/06)

JUDGMENT

STRASBOURG

19 April 2011

FINAL

19/07/2011

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

In the case of Erkol v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

David Thór Björgvinsson,

Dragoljub Popović,

András Sajó,

Işıl Karakaş,

Guido Raimondi, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 29 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 50172/06) 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 Engin Erkol (“the applicant”), on 7 December 2006.

2. The applicant was represented by Mr Nedim Şenol Çelik, a lawyer practising in Trabzon. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that despite the suspension of criminal proceedings against him, wording employed subsequently by a number of domestic courts had breached his right to the presumption of innocence within the meaning of Article 6 § 2 of the Convention.

4. On 27 May 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

5. The applicant was born in 1968 and lives in Trabzon.

6. The facts, as presented by the applicant and as they appear from the documents submitted by the parties, are as follows.

7. The applicant used to work as the driver of a security van for Akbank, a private bank in Turkey (hereinafter “the bank”). On 16 July 1998, on their return from one of the branches of the bank, the applicant and his two colleagues in the same van realised that a sum of money (approximately 10,000 euros (EUR)) was missing.

A. Criminal proceedings against the applicant

8. On 21 July 1998 the bank made an official complaint to the Trabzon prosecutor against the applicant and his two colleagues. On the same day the applicant was arrested and questioned by police. The applicant denied the accusations against him, and told the police officers that when they had visited the branch he had stayed in the van and that his colleague had gone in to collect the money. On his return to the van his colleague had put the bag containing the money in the back of the van. On their return to the bank's headquarters in Trabzon he and his colleagues had realised that the sum of 20,000 Turkish liras (TRL) was missing. They had then gone back to the branch and looked for the money, without success.

9. On 3 September 1998 the Trabzon prosecutor filed an indictment formally charging the applicant and his two colleagues with the offence of breach of trust.

10. On 22 December 2000, while the criminal proceedings against the applicant and his colleagues were in progress, Law no. 4616 entered into force. Law no. 4616 provides for the suspension of criminal cases in respect of certain offences committed before 23 April 1999.

11. On 22 December 2003 the Seventh Chamber of the Istanbul Assize Court considered the following:

“...[the applicant] has committed the offence of breach of trust. Nevertheless, the offence was committed before 23 April 1999 and it thus falls within the ambit of Law no. 4616. It is accordingly decided not to convict [the applicant] but to suspend the proceedings in accordance with Law no. 4616”.

12. On 13 February 2004 the applicant appealed against the Assize Court decision, arguing that if the proceedings had not been suspended his innocence would have been proved.

13. On 8 June 2006 the Court of Cassation decided that the Istanbul Assize Court decision was not appealable, because it was not a decision containing a definitive conclusion. It considered, however, that the applicant's appeal could be examined as an “objection” and forwarded it to the Court of Cassation's prosecutor for the necessary action to be taken.

14. On 25 August 2006 the Eighth Chamber of the Istanbul Assize Court examined the objection and rejected it. This decision was communicated to the applicant on 13 October 2006.

B. Civil proceedings brought by the bank against the applicant

15. On 24 August 1998 the applicant's contract of employment was terminated by the bank.

16. On 30 August 1998 lawyers representing the bank lodged a claim with the Trabzon Labour Court for the return of the missing money from the applicant and his two colleagues.

17. On 17 June 2004 the Trabzon Labour Court ordered the applicant and his two colleagues to repay the bank the missing money, with the "highest rates of interest applicable". In its decision the Trabzon Labour Court considered the following:

"The case concerns the compensation of the plaintiff bank's damages caused by the respondents who worked for the plaintiff bank and who, instead of bringing [a sum of] money they had collected from one of the bank's branches back to their branch of the bank, embezzled it...According to the Istanbul Assize Court's decision of 22 December 2003, the respondents committed the offence of breach of trust. Nevertheless, the offence was committed before 23 April 1999 and it thus fell within the ambit of Law no. 4616. It was accordingly decided not to convict the respondents but to suspend the proceedings in accordance with Law no. 4616..."

18. The applicant appealed against the decision and drew the Court of Cassation's attention to the fact that he had not been convicted of any offence by the Istanbul Assize Court, which in fact had decided to suspend the proceedings. The Court of Cassation quashed the decision in so far as it concerned the applicable rate of interest.

19. On 14 July 2004 the bank brought proceedings to enforce the decision, with a view to recovering the money.

20. On 19 July 2005 the Trabzon Labour Court decided, in line with the Court of Cassation decision, that a lower rate of interest should apply. An appeal lodged against this decision by the applicant was rejected by the Court of Cassation on 26 September 2005.

C. Civil proceedings brought by the applicant against the bank

21. On 22 September 1998 the applicant and his two colleagues brought a case against the bank before the Trabzon Labour Court, claiming compensation for their dismissal.

22. On 21 September 2004 the Trabzon Labour Court rejected the applicant's claim for compensation for his dismissal. It considered the following:

"The case concerns the compensation claim for the dismissal of the plaintiffs who worked for the respondent bank and who, instead of bringing [a sum of] money they had collected from one of the bank's branches back to their branch of the bank, embezzled it...According to the Istanbul Assize Court's decision of 22 December 2003, the respondents committed the offence of breach of trust but that the proceedings were suspended in accordance with Law no. 4616..."

23. The applicant appealed against the decision, submitting that the criminal proceedings against him had been suspended by the Istanbul Assize Court. He further argued that the proper course of action for the Labour Court would have been to collect its own evidence, hear witnesses and reach its conclusion on the basis of that evidence. The applicant argued that conclusions reached by criminal courts were not binding on civil courts. If a definitive conclusion was reached by a criminal court, the civil court examining the same matter could adopt that criminal court's conclusion if it so wished. Nevertheless, in the present case, waiting for a period of six years without taking any action and then adopting the criminal court's decision as if it contained a definitive finding of guilt was not compatible with the procedure or the applicable legislation.

24. On 26 May 2005 the Court of Cassation quashed the Labour Court decision of 21 September 2004. It held that the Istanbul Assize Court decision had suspended the proceedings and not convicted the applicant. The Labour Court had erred in rejecting the applicant's claim without hearing any of the witnesses proposed by him or obtaining expert reports or even examining the Istanbul Assize Court's case file.

25. On 13 October 2005 the Trabzon Labour Court repeated its decision of 21 September 2004. The Labour Court held the following:

“The plaintiffs caused financial loss to the bank by embezzling the money and knew that their employment had been terminated because of that. Any expectation on the part of the plaintiffs of receiving compensation for their dismissal would therefore damage confidence in the judiciary and, for that reason, our court will not be adhering to the Court of Cassation decision of 26 May 2005”.

26. On 24 May 2006 an appeal lodged by the applicant against the Labour Court decision was rejected by the Court of Cassation, which considered that the Labour Court decision was in accordance with its decision of 26 May 2005. This decision was communicated to the applicant on 1 August 2006.

II. RELEVANT DOMESTIC LAW

27. Law No. 4616, in so far as relevant, provides as follows:

“4. In respect of offences committed before 23 April 1999 which are punishable by a maximum prison sentence of ten years:

- where no criminal investigation has been commenced or no indictment has been filed, institution of prosecution shall be suspended;
- where the criminal prosecution has reached the final stages but no definitive finding on the merits has been adopted or where a definitive finding on the merits has not yet become final, adoption of a definitive finding on the merits shall be suspended.

If the person concerned is detained on remand, he or she shall be released. Documents and evidence concerning such offences shall be kept until the statute of limitations has been reached.

In cases where an offence of the same kind or an offence which is punishable by a more severe prison sentence has been committed before the statute of limitations has been reached, a new prosecution shall be brought in respect of the previous offence which was the subject matter of the suspension or the suspended proceedings shall be resumed. If no offences of the same kind or an offence which is punishable by a more severe prison sentence has been committed before the statute of limitations has been reached, no public prosecutions may be brought against those who benefited from the suspension and the suspended proceedings shall be permanently terminated.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

28. Relying on Article 6 of the Convention, the applicant complained that, notwithstanding the suspension of the criminal proceedings, the Istanbul Assize Court had stated in its decision that he was guilty. Furthermore, the evidence adduced by him in the course of the proceedings before the Trabzon Labour Court had not been taken into account by that court, and his witnesses had not been heard. Under the same Article the applicant also complained that the Trabzon Labour Court had relied on the decision to suspend the criminal proceedings as if it was a decision to convict him.

29. The Court considers it appropriate to examine these complaints solely from the standpoint of Article 6 § 2 of the Convention, which provides as follows:

“...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

...”

A. Admissibility

30. The Court notes that this complaint 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

31. The applicant maintained that the wording used by both the Istanbul Assize Court and the Trabzon Labour Court in its two decisions had violated his right to the presumption of innocence.

32. In their observations the Government summarised the proceedings and submitted that “in view of those facts the Government are of the opinion that the applicant's complaints must be rejected”. The Government did not deal with the specific question posed by the Court at the time of giving notice of the application to them, and did not elaborate on the applicant's complaint in any other way.

33. The Court reiterates that the presumption of innocence is infringed if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty. While the principle of the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair criminal trial which is required by paragraph 1 of that Article, it is not merely a procedural safeguard in criminal proceedings. Its scope is more extensive, and requires that no representative of the State or a public authority should declare a person guilty of an offence before their guilt has been established by a “court” (see *Moulet v. France* (no. 2) (dec.), no. 27521/04, ECHR 2007-X).

34. In the present case the Istanbul Assize Court concluded that the applicant had committed the offence with which he had been charged, but decided “not to convict” him. Observing that the provisions of Law no. 4616 were applicable to the offence with which the applicant had been charged, it decided to suspend the proceedings.

35. The Court observes at the outset that the Istanbul Assize Court's decision is not a decision to convict the applicant. Indeed, in its decision of 26 May 2005 the Court of Cassation also held that the Istanbul Assize Court decision was a decision to suspend the proceedings and not to convict the applicant. Thus, although the Court considers the wording employed by the Trabzon Assize Court, namely that the applicant had “committed the offence”, to be problematic, having regard to the wording employed by the Trabzon Labour Court subsequently it does not deem it necessary to examine whether that wording infringed the applicant's right to the presumption of innocence.

36. The Trabzon Labour Court held in its decisions of 21 September 2004 and 13 October 2005 that the applicant had “committed the offence” in question and “embezzled” the money.

37. The Court has already held that while an acquittal in respect of criminal liability ought to be maintained in subsequent compensation proceedings, it should not preclude the establishment of civil liability to pay

compensation arising out of the same facts on the basis of a less strict burden of proof (see, *mutatis mutandis*, *X v. Austria*, no. 9295/81, Commission decision of 6 October 1992, Decisions and Reports (D.R.) 30, p. 227, and *M.C. v. the United Kingdom*, no. 11882/85, decision of 7 October 1987, D.R. 54, p. 162). In Turkey, as is the case in a significant number of Contracting States (see *Y v. Norway*, no. 56568/00, § 41, ECHR 2003-II (extracts)), an acquittal or suspension of criminal proceedings does not preclude the establishment of civil liability in relation to the same facts.

38. However, if the national decision on compensation contains a statement imputing criminal liability to the plaintiff, this could raise an issue falling within the ambit of Article 6 § 2 of the Convention.

39. In the present case the Court considers that the unequivocal language used by the Trabzon Labour Court, namely that the applicant had “committed the offence”, created a sufficiently clear link between the criminal case and the ensuing compensation proceedings to justify extending the scope of the application of Article 6 § 2 to the latter.

40. Furthermore, the Labour Court did not only state that the applicant had committed the offence with which he had been charged (see paragraph 22 above), but also held that he had “embezzled” the money (see paragraph 25 above), an offence which the applicant had never even been charged with.

41. The Court considers that by the language it used the Labour Court overstepped the bounds of a civil forum and went beyond its task of examining the case before it. Having regard to the wording employed by the Labour Court and the fact that it did not make a fresh assessment of the facts, the Court finds that that court did not only cast doubt on the applicant's innocence of the criminal charge brought against him, but in essence found him guilty of an offence with which he had never been charged.

42. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to the presumption of innocence has been breached.

There has accordingly been a violation of Article 6 § 2 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. Without elaborating in what respect, the applicant alleged a violation of Articles 5 and 13 of the Convention and of Article 2 of Protocol No. 7.

44. In the light of all the material in its possession, the Court finds that these submissions by the applicant do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed EUR 7,360 in respect of pecuniary damage. He submitted that this was the total amount he had so far paid to the bank in accordance with the Trabzon Labour Court decision. In respect of this claim the applicant submitted documents to the Court showing deductions made from his wages.

47. The applicant also claimed that as a result of his unfair dismissal he had incurred a total of EUR 53,261 in pecuniary damage.

48. The applicant also claimed EUR 500,000 in respect of non-pecuniary damage. In support of his claim he argued that both he and his family had suffered serious psychological problems as a result of him having been declared guilty of an offence he had not committed.

49. The Government argued that the applicant had been found guilty by the Istanbul Assize Court but that no sanctions had been imposed on him. He had then found another job. Thus, his claims for pecuniary damage had no basis. The Government also considered that the sum claimed by the applicant in respect of non-pecuniary damage was excessive and would lead to unjust enrichment if awarded.

50. The Court observes that the applicant's claims for pecuniary damage are based on the Trabzon Labour Court decision, the wording of which the Court has found to be incompatible with the applicant's right to the presumption of innocence guaranteed in Article 6 § 2 of the Convention. It considers, however, that it cannot speculate as to what the outcome of the proceedings would have been had the Trabzon Labour Court not disregarded that provision. It therefore considers that no award can be made in respect of the applicant's claims for pecuniary damage.

51. On the other hand, the Court considers that the applicant must have suffered a degree of distress as a result of the Trabzon Labour Court's finding, and awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed EUR 431 for costs and expenses incurred before the domestic courts. In respect of this claim the applicant submitted

to the Court a number of documents showing payments made by the applicant in respect of fees for the national courts. He also asked the Court to make an award for the fees of his lawyer and his remaining costs and expenses which, he claimed, he had been unable to substantiate with documentary evidence.

53. The Government contested the applicant's claims.

54. According to the Court's case-law, an applicant is entitled to 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, in support of his claim for the fees of his lawyer, the applicant failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award in respect of the fees of his lawyer.

55. Concerning the claim in respect of the remaining costs and expenses, the Court considers it reasonable to award the applicant the sum of EUR 431.

C. Default interest

56. 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 complaint under Article 6 § 2 of the Convention concerning the applicant's right to the presumption of innocence admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been a violation of Article 6 § 2 of the Convention;
3. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage and EUR 431 (four hundred and thirty one euros) in respect of costs and expenses, plus any tax that may be chargeable, 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 amounts 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions of Judges D. Popović and A. Sajó are annexed to this judgment.

F.T.
F.E.P.

PARTLY DISSENTING OPINION OF JUDGE POPOVIĆ

I voted along with the majority of colleagues in finding a violation of Article 6 § 2 of the Convention in this case. However, I voted against the proposal to award a certain amount of money to the applicant in just satisfaction. The finding of violation suffices in my opinion and in terms of Article 41 of the Convention I do not find it necessary to award a sum of money to remedy the violation of human rights in this particular case.

The Labour Court used an inappropriate language and by doing so it violated the applicant's rights under the Convention. At the same time the Labour Court ordered the applicant to repay the missing money to the bank, which had been the applicant's employer. The Labour Court judgment was confirmed by the Court of Cassation of Turkey. That is why I accept the argument put forward by the respondent Government, as reported in paragraph 49 of the judgment, that awarding a sum of money in just satisfaction to the applicant in this case would in a certain sense lead to an unjust enrichment of the applicant.

DISSENTING OPINION OF JUDGE SAJÓ

Contrary to the judgment, I could not find that the Trabzon Labour Court violated the requirements of the presumption of innocence when it denied by its judgment of 13 October 2005 the applicant's claim to receive compensation for his dismissal. The Trabzon Court referred to an earlier suspension of a criminal procedure by the Istanbul Assize Court. The Istanbul Assize Court's decision stated that the applicant had committed the crime of breach of trust but his case was to be suspended. I do not find that this reference was decisive in the rejection of the applicant's labour law compensation claim. The Trabzon Court, relying on findings of its own – findings which originate in evidence that emerged in the criminal procedure – came to the conclusion that the applicant had embezzled the money in question. This is not a finding of a criminal nature but a description of the act that the applicant had committed; in fact, the applicant was charged with breach of trust in the criminal case. The fact that the applicant as a driver of a security van was unable to bring to the bank the money that he was supposed to deliver had been established on the basis of the examination of documents produced during the criminal investigation, including the statement of one of the accused, namely that he “forgot to return” the sum in question.

The Court of Cassation quashed the original judgment of the Trabzon Court, indicating that the error consisted, *inter alia*, in the lack of examination of the Istanbul Assize Court's case file. After a fresh trial by the Trabzon Court resulting in the judgment of 13 October 2005, the Court of Cassation found that this second judgment of the Trabzon Court satisfied the requirements it had set in its earlier cassation decision.

It is not for this Court to review the appropriateness of the evaluation of facts carried out by the domestic court. Given that the Trabzon Court did not base its judgment on the (non-existing) finding of guilt but on facts established during the procedure, which have an independent probatory force in a civil case which is different from what is required in a criminal court, I see no violation of the presumption of innocence. Reliance on evidence collected in a suspended criminal procedure does not amount to unconditional reliance on a finding of guilt. Evidence gathered in a non-final procedure can be taken into consideration in a dispute over a civil right without attributing guilt to the person whose acts are evaluated in a civil/labour procedure.

Even where there are certain negative consequences attached to a non-acquittal which is due to the fact that the case is suspended and “the definitive finding on the merits has not yet become final” [see para. 27 of the judgment], there is no violation of the presumption of innocence, as the negative consequences do not follow from a non-final finding of guilt and do not amount to a “measure that can be equated with a penalty” (*Lautscher*

v. Netherlands, judgment of 22 February 1996, § 29, Reports 1996-II). Further, there were no formal declarations of the applicant's guilt which could prejudice the assessment of the facts by the competent judicial authority (see in regard to prosecutors, *Daktaras v. Lithuania*, no. 42095/98, ECHR 2000-X; see, *mutatis mutandis*, *Alenet de Ribemont v. France*, judgment of 10 February 1995, § 41, Series A no. 308).