



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

SECOND SECTION

CASE OF MEHMET ŞERIF ÖNER v. TURKEY

(Application no. 50356/08)

JUDGMENT

STRASBOURG

13 September 2011

DÉFINITIF

13/12/2011

Cet arrêt est devenu définitif en vertu de l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

In the case of Mehmet Şerif Öner 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 Stanley Naismith, *Section Registrar*,

Having deliberated in private on 23 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 50356/08) 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 Mehmet Şerif Öner (“the applicant”), on 11 September 2008.

2. The applicant was represented by Ms T. Aslan, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

3. On 2 February 2010 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the lack of legal assistance to the applicant during his police custody and the impartiality of the president of the trial court which convicted the applicant to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**A. Background to the case**

4. On 21 December 1993 the Public Prosecutor at the İzmir Security Court filed an indictment against four accused persons (H.N., N.S., M.Ş.Ç., A.K.) charging them under Article 125 of the former Criminal Code with carrying out activities with the aim of bringing about the secession of part of the national territory. During their interrogation by the police and the public

prosecutor, all of the accused persons stated that they had acted upon the instructions of Mr Mehmet Şerif Öner¹. Subsequently, during the trial before the Izmir State Security Court, they denied the charges against them and retracted their previous statements. On 24 February 1998 the Izmir State Security Court found the accused guilty as charged and sentenced them to life imprisonment. In the judgment the court, presided by Judge G.D.C., found it established that the accused had acted upon the instructions of Mr Mehmet Şerif Öner, whose code name was “*Kahraman*” and who was active in the Izmir region for the illegal organisation the PKK (Workers’ Party of Kurdistan). This judgment became final on 29 July 1998.

B. Criminal proceedings against the applicant

5. On 13 May 2002 the applicant was taken into custody in Batman on suspicion of membership of the PKK. When arrested, he was in possession of a fake identity card.

6. On 16 May 2002 the applicant was transferred to the Anti-Terrorism Branch of the Izmir Security Directorate. The same day, he was interrogated by the police in the absence of a lawyer. The applicant denied all the charges against him. He stated that he was using a fake identity card because he had escaped from prison in 1992.

7. During his police custody, the applicant took part in an identification parade. The complainants, Mr M.Ç., Mr N.Ş. and Mr F.B., identified him as the person who had been involved in the respective armed robberies that had taken place in 1993.

8. On 17 May 2002 the applicant was further interrogated before the public prosecutor and the investigating judge respectively, still in the absence of a lawyer. During the questionings, the applicant denied his involvement in the PKK. He explained that in the past he had been involved in an armed robbery and had been sentenced to twenty years’ prison. He stated that after his escape from prison, he started using fake identity cards. When his questioning was over, the investigating judge remanded the applicant in custody.

9. On 5 June 2002 the Public Prosecutor at the Izmir State Security Court filed an indictment with that court, accusing the applicant of engaging in illegal activities with the aim of bringing about the secession of part of the national territory, an offence under Article 125 of the former Criminal Code.

10. During the hearing held on 3 September 2002 the applicant’s lawyer requested the President of the Court, Judge G.D.C., to withdraw from the case, stating that he had also sat as a member of the court which had

¹ The applicant in the present case.

delivered the judgment of 24 February 1998, in which the applicant was referred to as a member of the PKK. His request was rejected.

11. On 15 July 2003 the Izmir State Security Court found the applicant guilty as charged and sentenced him to life imprisonment under Article 125 of the former Criminal Code. In its judgment, the court found it established that the applicant had participated in the armed robberies as alleged and taken part in the activities carried out for the purpose of bringing about the secession of part of the national territory. In delivering its decision, the first instance court relied on the police statements of the four accused persons who had been convicted by the Izmir State Security Court on 24 February 1998 and the identification parade records in which the intervening parties had identified the applicant as the person who had been involved in the respective armed robberies.

12. On 24 February 2004 the Court of Cassation quashed the judgment of the first instance court on the ground that the intervening parties who were eye-witnesses to the armed robberies should be summoned to the court to confront the applicant to eliminate any doubt.

13. The case resumed before the Izmir State Security Court. In accordance with the decision of the Court of Cassation, the first instance court summoned three intervening parties to give evidence. Before the court, Mr Z.Ö. and Mr N.Ş. stated that as a long time had passed since 1993, they were no longer able to recognise the applicant. Mr M.Ç. however identified the applicant as the person who had stolen his car. As regards the remaining intervening parties, who could not be summoned to the Izmir State Security Court, rogatory courts heard evidence from them. In their statements, Mr F.A., Mr H.A. and Mr Z.A. explained that due to the long time that had elapsed they were not able to recognise the applicant.

14. In the meantime, by Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, the State Security Courts were abolished. The case against the applicant was accordingly transferred to the Izmir Assize Court. Subsequently, on 12 October 2004 the new Criminal Code (no. 5237) was published in the Official Gazette.

15. On 10 November 2005 the Izmir Assize Court once again found the applicant guilty as charged and sentenced him to aggravated life imprisonment under Article 302 of the new Criminal Code. Among other evidence, the court based itself on the fact that the applicant had been identified by the intervening parties during his police custody.

16. On 9 May 2006 the Court of Cassation quashed the judgment of the first instance court on procedural grounds, holding that as Article 302 of the new Criminal Code provided a heavier sentence for the offence committed by the applicant, the provisions of the former criminal code should have been applied in his case.

17. The case was once again remitted to the Izmir Assize Court, which decided on 29 December 2006 to sentence the applicant to life

imprisonment under Article 125 of the former Criminal Code. On 11 March 2008 the Court of Cassation upheld this judgment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

18. The applicant alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody. In this respect, he relied on Article 6 § 3 (c) of the Convention. The applicant further complained under Article 6 § 1 of the Convention that the president of the first-instance court which tried and convicted him could not be considered as impartial since he had also been a member of the court which had convicted the other co-accused in 1998 and had a preconceived idea that the applicant was a member of the PKK.

19. The Government contested the allegations. In particular, they stated that the restriction imposed on the applicant's access to a lawyer during his police custody had not infringed his right to a fair trial under Article 6 of the Convention.

20. The Court considers that the remaining part of this 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.

21. As regards the complaint concerning access to a lawyer during police custody, the Court reiterates the basic principles laid down in the *Salduz* judgment (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 50-55, 27 November 2008). It notes that the present case is similar to the *Salduz* case since at the time when the applicant was taken into police custody, namely in May 2002, the applicant's right of access to a lawyer was restricted pursuant to Section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. In this connection, the Court observes that although the applicant did not have access to a lawyer during his police custody, he repeatedly denied the charges against him during his interrogation by the police, the public prosecutor and the investigating judge respectively. Consequently, he did not make any self-incriminating statements. However, the Court finds it important to recall once again that the investigation stage is of crucial importance in criminal proceedings as the evidence obtained at this stage determines the framework in which the offence charged will be considered (see, *Salduz*, cited above, § 54, and *Dayanan v. Turkey*, no. 7377/03, § 32, 13 October 2009). In this regard, the Court observes that when the applicant

was in police custody, he took part in an identification parade and was identified by the intervening parties as the person who had taken part in the respective armed robberies which had occurred in 1993. The Court further notes that in convicting the applicant the trial court relied heavily on the result of this identification parade. Thus, the applicant was undoubtedly affected by the restrictions on his access to a lawyer during the preliminary investigation. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the applicant's custody period.

22. Having regard to the foregoing and bearing in mind that the restriction imposed on the applicant was systematic according to the domestic legislation in force at the time, the Court finds no particular circumstances which would require it to depart from its findings in the aforementioned *Salduz* judgment. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

23. Having regard to its finding of a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention above, the Court considers that it is unnecessary to examine the further complaint raised by the applicant regarding the impartiality of the president of the trial court that convicted him.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

24. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage and EUR 30,000 in respect of non-pecuniary damage.

25. The Government contested these claims.

26. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. In respect of non-pecuniary damage, ruling on an equitable basis, it awards the applicant EUR 1,800.

27. The Court further considers that the most appropriate form of redress would be the re-trial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see *Salduz*, cited above, § 72).

28. Referring to the Izmir Bar Association's scale of fees, the applicant's representative also claimed EUR 3,500 covering 198 hours' of legal work, spent in the domestic proceedings and the presentation of this case before the Court. She also claimed EUR 650 for costs and expenses, without submitting any invoice.

29. The Government contested the claims.

30. 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 were reasonable

as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 to the applicant under this head.

31. Finally, 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while in police custody;
3. *Holds* that it is not necessary to consider the applicant's remaining complaint raised under Article 6 § 1 of the Convention;
4. *Holds*
 - (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, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 1,800 (one thousand eight hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses.
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President