



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

SECOND SECTION

CASE OF HASKO v. TURKEY

(Application no. 20578/05)

JUDGMENT

STRASBOURG

17 January 2012

FINAL

17/04/2012

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

In the case of Hasko v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Isabelle Berro-Lefèvre,

András Sajó,

Işıl Karakaş,

Guido Raimondi, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 20578/05) 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 a Turkish national, Mr Dündar Hasko (“the applicant”), on 7 June 2005.

2. The applicant was represented by Ms H.S. Özyavuz, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that the length of the criminal proceedings against him had been incompatible with Article 6 § 1 of the Convention and that his right to adversarial proceedings had been breached by the non-communication of the Principal Public Prosecutor’s opinion to him.

4. On 10 February 2010 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 1930 and lives in Istanbul.

6. In 1991 the inspection board of a State-owned bank (*Türkiye Vakıflar Bankası Teftiş Kurulu* – “the Board”) issued a report claiming, *inter alia*, that the applicant, who was a lawyer, had withdrawn substantial amounts of expropriation compensation on behalf of several persons by submitting false powers of attorney. In 1993, on the basis of the Board’s report, the bank requested the institution of criminal proceedings against the applicant.

7. On 26 September 1993 the Beyoğlu Public Prosecutor filed an indictment against the applicant for knowingly using false powers of attorney.

8. On 21 March 1994 the Istanbul Assize Court acquitted the applicant, stating that the powers of attorney had been issued by a notary and conveyed to the applicant by third parties and that there was insufficient evidence to prove that the applicant knew these documents to be false. On 8 December 1994 the Court of Cassation quashed the judgment of the first-instance court, stating that the court had failed to examine certain major witnesses.

9. After examining these witnesses, on 20 March 1996 the Istanbul Assize Court once again acquitted the applicant. The statements of one of the civil parties, N.K., were taken in the absence of the applicant. Nevertheless, her statements were read during the hearing of 26 June 1995 and the applicant had the opportunity to submit his arguments against them.

10. On 13 May 1997 the Court of Cassation quashed the judgment of the first-instance court, this time stating that the court had failed to evaluate the authenticity of the signatures on the powers of attorney.

11. On 23 January 2001, taking into account expert reports on the authenticity of the signatures, the Istanbul Assize Court again acquitted the applicant. However, this judgment was quashed by the Court of Cassation on 8 October 2002. The higher court stated that the first-instance court had erred in its judgment and that the applicant should have been sentenced.

12. On 17 July 2003, following six hearings, two of which were conducted with the attendance of N.K., the Istanbul Assize Court found the applicant guilty as charged and sentenced him to four years and eight months’ imprisonment. The court mainly relied on the expert reports and indicated that the witness statements were not adequate to clarify whether the applicant had used the false powers of attorney knowingly.

13. During the appeal proceedings, the Principal Public Prosecutor at the Court of Cassation submitted his written observations to that court. However, those observations were not forwarded to either the applicant or his lawyer. On 22 December 2004 the Court of Cassation upheld the judgment of the Istanbul Assize Court.

14. Subsequently, the applicant requested the suspension of the execution of his sentence on account of his age and poor state of health, submitting several doctors’ reports which stated that he was suffering from

cerebrovascular and vertebral insufficiency as well as hypertension. On 16 February 2005 the Istanbul Assize Court refused his request.

15. Following the entry into force of the new Criminal Code (Law no. 5237) in 2005, the Istanbul Assize Court re-examined the applicant's sentence on 13 February 2006 and reduced it to three years and nine months' imprisonment. The applicant did not appeal against that decision.

16. In July 2010, an additional arrest warrant was issued against the applicant.

II. RELEVANT DOMESTIC LAW

17. The relevant domestic law and practice in force at the material time are outlined in the *Göç v. Turkey* judgment ([GC], no. 36590/97, § 34, ECHR 2002-V).

18. On 2 January 2003 Article 316 of the Code of Criminal Procedure was amended to provide that the written opinion of the Principal Public Prosecutor at the Court of Cassation must be notified to the parties.

THE LAW

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

19. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had been incompatible with the "reasonable time" requirement. He further maintained under the same provision that the principle of equality of arms had not been respected during the criminal proceedings against him as the written opinion submitted by the Principal Public Prosecutor to the Court of Cassation had not been communicated to him, depriving him of the opportunity to submit his counter-arguments.

20. The Government contested that argument.

A. Admissibility

21. The Government argued that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They maintained firstly that the applicant had not appealed against the first-instance court's judgment mitigating his sentence. Secondly, they stated that he had failed to lodge a new request for the suspension of the execution of his sentence following the entry into force of the recent Code on the

Execution of Criminal Penalties (*Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*).

22. The applicant disputed the Government's arguments. He submitted that the decision dated 13 February 2006 merely concerned the re-evaluation of his case in the light of the new Criminal Code. In this respect, he maintained that he had not been informed that a re-evaluation would take place and that the court had decided to reduce his sentence on the basis of the case file, without holding a hearing.

23. The Court reiterates that the obligation to exhaust domestic remedies requires only that an applicant make normal use of effective and sufficient remedies, that is those capable of remedying the situation at issue and affording redress for the breaches alleged (see *Karakullukçu v. Turkey*, no. 49275/99, § 27, 22 November 2005). It notes that the re-evaluation conducted by the court subsequent to the entry into force of the new Criminal Code was of a procedural nature, aiming to apply the more favourable provisions of that Code. Accordingly, that procedure did not have an overall effect on the fairness of the criminal proceedings against the applicant. As for the Government's argument concerning the applicant's failure to make an additional request for suspension of the execution of his sentence, the Court considers that the preliminary objection concerns the complaint raised under Article 3 of the Convention and that in any case the applicant had recourse to that remedy once following the decision of the Court of Cassation. The Court therefore concludes that the Government's preliminary objections cannot be upheld.

24. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. As to the complaint concerning the excessive length of proceedings

25. The applicant complained that the criminal proceedings against him had not been concluded within a reasonable time.

26. The Government stated that the length of the impugned proceedings had been compatible with Article 6 § 1 of the Convention, taking account of the complexity of the case, the applicant's conduct and that of the competent authorities. They further maintained that the Istanbul Assize Court had delivered five judgments during the course of the proceedings and that there had been no period during which the judicial authorities had been inactive.

27. The Court notes that in the instant case the criminal proceedings began on 26 September 1993, when the public prosecutor filed an

indictment against the applicant, and ended on 22 December 2004 with the decision of the Court of Cassation. They thus lasted for a period of eleven years and two months at two levels of jurisdiction.

28. The Court observes that it has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, among others, *Er v. Turkey*, no. 21377/04, § 23, 27 October 2009; *Şahap Doğan v. Turkey*, no. 29361/07, § 39, 27 May 2010; and *Fırat Can v. Turkey*, no. 6644/08, § 74, 24 May 2011; see also, *mutatis mutandis*, *Frydlender v. France* [GC], no. 30979/96, §§ 42-46, ECHR 2000-VII, and *Daneshpayeh v. Turkey*, no. 21086/04, §§ 26-29, 16 July 2009). The Court notes in the present case that the Court of Cassation quashed the judgment of the first-instance court as many as three times. It reiterates that the repeated quashing and remittal of lower court decisions for re-examination are usually ordered as a result of errors committed by the latter, which, within one set of proceedings, discloses a deficiency in the operation of the legal system (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003, and *Falimonov v. Russia*, no. 11549/02, § 58, 25 March 2008).

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

30. There has accordingly been a violation of Article 6 § 1 of the Convention in respect of the excessive length of the criminal proceedings.

2. As to the non-communication of the Principal Public Prosecutor’s opinion

31. The applicant contended that the domestic courts had violated his right to adversarial proceedings in that the written opinion of the Principal Public Prosecutor concerning his appeal request had not been communicated to him.

32. The Government maintained that the applicant’s lawyer should have asked to examine the case file, which included the Principal Public Prosecutor’s opinion when it arrived at the registry of the Court of Cassation. They further submitted that the Code of Criminal Procedure foresees that the opinion would be served on the defendant party.

33. The Court notes that it has already examined similar grievances in the past and found a violation of Article 6 § 1 of the Convention (see, among others, *Göç*, cited above, § 58; *Hakan Duman v. Turkey*, no. 28439/03, §§ 54-56, 23 March 2010; and *Çamyar and Berktaş v. Turkey*, no. 41959/02, §§ 52-54, 15 February 2011). In the *Göç* judgment (cited above) the Court held that, having regard to the nature of the Principal

Public Prosecutor's submissions and to the fact that the applicant had not been given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings.

34. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned case. Moreover, there is nothing in the case file to prove that the opinion of the Principal Public Prosecutor was served on the applicant in compliance with the Code of Criminal Procedure (contrast *Ayhan Işık v. Turkey*, no. 33102/04, § 38, 30 March 2010).

35. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention as regards the non-communication of the Principal Public Prosecutor's written opinion to the applicant.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. Relying on Article 3 of the Convention, the applicant argued that he would be subjected to inhuman and degrading treatment if his sentence were executed. In support of this complaint, he submitted that he was eighty years old and suffered from several diseases which required him to live under constant medical supervision.

37. The Government contested that argument. They maintained that the applicant lacked victim status as he has not yet served his sentence.

38. The Court observes that if ill-treatment is to fall within the scope of Article 3, it must attain a minimum level of severity. The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

39. In the instant case, the applicant relies on his age and his state of health. The Court notes that advanced age is not a bar to pre-trial detention or a prison sentence in any of the Council of Europe's member States. However, age in conjunction with other factors, such as state of health, may be taken into account either when sentence is passed or while the sentence is being served (see *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI) (for instance, when a sentence is suspended or imprisonment is replaced by house arrest).

40. While none of the provisions of the Convention expressly prohibits imprisonment beyond a certain age, the Court has already had occasion to note that, under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3. Nonetheless, regard is to be had to the particular circumstances of each specific case (see *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001; *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001; and *Papon*, cited above).

41. The Court notes that in the present case the applicant has not started serving his sentence despite an additional arrest warrant having been issued against him in July 2010. Nor has he requested the suspension of the execution of his sentence during the six years that have passed following his initial request, in order to substantiate his argument that the authorities have disregarded his deteriorating health condition.

42. The Court concludes therefore that the complaint is manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. The applicant complained under Article 6 §§ 1 and 2 of the Convention that both the Assize Court and the Court of Cassation had failed to deliver reasoned judgments. Relying upon Article 6 § 3 of the Convention, he also argued that he had not been given sufficient time to prepare his defence and that he had not had the opportunity to examine witnesses. Finally, invoking Article 8 of the Convention, he repeated the complaint he had made under Article 3.

44. An examination by the Court of the material submitted to it does not disclose any appearance of a violation of these provisions. It follows that this part of the application is manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. The applicant claimed 40,000 euros (EUR) in respect of pecuniary damage and another EUR 40,000 for non-pecuniary damage. He also requested EUR 10,000 for costs and expenses incurred before the Court.

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

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 7,200 in respect of non-pecuniary damage.

48. As regards costs and expenses, the Court reiterates that 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 (see *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). In the present case, the applicant has not substantiated that he has actually incurred the costs claimed. In particular, he failed to submit documentary evidence, such as bills, receipts, a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award under this head.

49. The Court considers it appropriate that the default interest rate 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 concerning the length of the criminal proceedings and the non-communication of the Principal Public Prosecutor's written opinion admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings and the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation;
3. *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 7,200 (seven thousand two hundred euros) in respect of non-pecuniary damage, 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President