



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

SECOND SECTION

CASE OF ALKAN v. TURKEY

(Application no. 17725/07)

JUDGMENT

STRASBOURG

7 February 2012

FINAL

07/05/2012

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

In the case of Alkan v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 17 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 17725/07) 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 Necmettin Alkan (“the applicant”), on 11 April 2007.

2. The applicant was represented by Ms L. Alkan, his mother. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that his right of access to court had been breached by the domestic court’s refusal to grant him legal aid.

4. On 25 May 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 1979 and lives in Kars.

6. On 13 December 2002, after having completed his military service, the applicant was placed under the guardianship of his father, S.A., by a decision of the Sarıkamış Magistrates’ Court as he was mentally ill and needed constant supervision.

7. The applicant submitted several requests to the gendarmerie command claiming compensation for his illness which, according to him, began during his military service as a result of the treatment there. His requests were rejected on the basis of a medical report from the Gülhane Military Medical Academy, which indicated that such a condition could not have been caused merely by military service and that many other factors could have been involved in its development.

8. Subsequently, under the guardianship of S.A., the applicant initiated compensation proceedings before the Supreme Military Administrative Court, claiming that his illness had been caused by the ill-treatment to which he had been subjected in the army. He argued that his enrolment for military service after having passed several medical tests was proof that he had been healthy before. The applicant requested a total of 200,000 Turkish liras (TRY) (approximately 100,000 euros (EUR) at the time) in respect of both pecuniary and non-pecuniary damage, submitting the medical records from several hospitals in support of his claims. He also requested legal aid for the court fees, presenting a certificate from the office of the headman (*muhtar*) attesting to his father's poverty. The certificate stated that neither S.A. nor anyone else from his household was employed. It also indicated that he was ill, had no social security and depended on support from his neighbours.

9. By two decisions of 19 July and 1 November 2006 respectively, the Supreme Military Administrative Court rejected the applicant's legal aid request, stating that pursuant to the Code of Civil Procedure, a legal aid request must be supported by proof that the case is well-founded and that the plaintiff does not have the means to pay the required court fees. It concluded that the requirements had not been met in the applicant's case.

10. On 6 November 2006 the court informed the applicant that he was to pay a total of TRY 2,719 (approximately EUR 1,400 at the time) in court fees within thirty days for the proceedings to be continued.

11. On 10 January 2007 the Supreme Military Administrative Court decided to discontinue the compensation proceedings because the applicant had not paid the necessary court fees.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

13. 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 or her case.

14. Article 468 of the CCP provides that in order to determine whether or not the person applying for legal aid has sufficient means, he or 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 or she has paid. These certificates should be obtained from the appropriate domestic authorities.

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

16. In January 2007 the minimum wage in force was TRY 562 (approximately EUR 300 at the time) a month.

THE LAW

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

17. The applicant complained, in substance, that he had been denied access to court on account of the domestic court's refusal to grant him legal aid. The applicant invoked Article 6 § 1 of the Convention, which, in so far as relevant, provides:

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

18. The Government contested that argument.

A. Admissibility

19. The Government argued that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention in that he had not appealed against the first-instance court's judgment dated 10 January 2007.

20. The Court reiterates that it has already examined and dismissed the Government's preliminary objection in similar cases, holding that the applicants could not be expected to lodge successful appeals against the judgments discontinuing their cases as decisions regarding legal aid are final under Article 469 of the CCP (see *Cığırhun Öner v. Turkey*, no. 33612/03, § 29, 20 May 2008; *Serin v. Turkey*, no. 18404/04, § 24, 18 November 2008; and *Sabri Aslan and Others v. Turkey*, no. 37952/04, § 22, 15 December 2009). It finds no particular circumstances in the instant case requiring it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's preliminary objection.

21. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

22. 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. They 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 contended that decisions regarding legal aid were given by the judges on the basis of the case files and that there was no obligation for them to grant it under the domestic law. They argued that in the instant case the applicant had failed to submit the documents attesting to his poverty. In this connection, they stated that the applicant had been represented by a lawyer during the domestic proceedings and had thus been able to seek legal assistance as regards the documents that would have supported his legal aid request. The Government concluded therefore that the domestic court's refusal to grant legal aid had not impaired the essence of the applicant's right of access to court.

23. 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).

24. 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 granting 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.

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

26. The Court notes that the court fees that the applicant was required to pay were calculated on the basis of the value of the litigation and amounted to TRY 2,719 while the monthly minimum wage was TRY 562 at the time. Contrary to the Government's allegation, the applicant submitted a certificate issued by the office of the headman before the domestic court (see paragraph 8 above). It is clear from that certificate that the applicant's father has no income and that he is in a poor financial situation. Although the certificate was issued for the applicant's father, the Court notes that it also attested to the applicant's poverty as the latter had been under the guardianship of his father and lodged the case through him. Nevertheless, the applicant's legal aid request was rejected by the Supreme Military Administrative Court, which did not indicate a specific reason in its decision but merely referred to the relevant legislation.

27. 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 *Bakan v. Turkey*, no. 50939/99, §§ 74-78, 12 June 2007; *Mehmet and Suna Yiğit*, cited above, §§ 31-39; *Eyüp Kaya v. Turkey*, no. 17582/04, §§ 22-26, 23 September 2008; and *Kaba v. Turkey*, no. 1236/05, §§ 19-25, 1 March 2011). The Court 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, it would once again reiterate 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 (see *Bakan*, cited above, § 76). The Court further holds that the refusal of the applicant's legal aid request deprived him of the possibility of submitting his case before a tribunal.

28. In view of the foregoing, the Court concludes that in the instant case there has been a disproportionate restriction of the applicant's right of access to court.

29. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

30. The applicant complained of a violation of his right to an effective remedy in that he could not have his case heard before the domestic courts. He relied on Article 13 of the Convention.

31. The Government contested that argument.

32. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

33. Having regard to the finding relating to Article 6 § 1 of the Convention (see paragraph 29 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 13.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. The applicant claimed 150,000 Turkish liras (TRY), approximately 70,000 euros (EUR), in respect of pecuniary damage and TRY 100,000 (approximately EUR 47,000) in respect of non-pecuniary damage. He also requested EUR 150 for the costs and expenses incurred before the Court.

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

36. 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 applicant under this head.

37. As for non-pecuniary damage, deciding on an equitable basis, the Court awards the applicant EUR 3,000.

38. 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 applicant has not provided any proof that he actually incurred the costs claimed. Accordingly, no award shall be made under this head.

39. The Court further reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he 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 Supreme Military Administrative Court's decision dated 10 January 2007 (see paragraph 11 above) and restart the proceedings, in conformity with the requirements of Article 6 § 1 of the Convention, should the applicant so request.

40. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine separately the applicant's complaint under Article 13 of the Convention;
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 3,000 (three thousand euros) in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President