



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

SECOND SECTION

CASE OF İBRAHİM GÜRKAN v. TURKEY

(Application no. 10987/10)

JUDGMENT

STRASBOURG

3 July 2012

FINAL

03/10/2012

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

In the case of İbrahim Gürkan 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 12 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 10987/10) 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 İbrahim Gürkan (“the applicant”), on 10 February 2010.

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

3. On 18 January 2011 the application was communicated 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

4. At the time of the events the applicant was serving in the Turkish Navy. On 8 July 2008 the military prosecutor filed an indictment against the applicant with the Kasımpaşa Military Criminal Court (*Kuzey Deniz Saha Komutanlığı Askeri Mahkemesi*). He accused the applicant of wilfully disobeying his superior contrary to section 87 of the Military Criminal Code.

5. On 18 February 2009 the Kasımpaşa Military Criminal Court, composed of a military officer with no legal background and two military judges, found the applicant guilty as charged and sentenced him to two months and fifteen days’ imprisonment.

6. On 21 July 2009 the Military Court of Cassation rejected the applicant's appeal. The applicant stated that he learned of this decision on 23 September 2009 when he was summoned to the prosecutor's office. The applicant served his prison sentence between 5 November and 25 December 2009.

II. RELEVANT DOMESTIC LAW

A. The Constitution

7. The relevant provisions of the Constitution provide:

Article 9

"Judicial power shall be exercised by independent courts on behalf of the Turkish Nation."

Article 138

"In the performance of their duties, judges shall be independent; they shall give judgment according to their personal conviction, in accordance with the Constitution, statute and the Law.

No organ, authority, officer or other person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars, or make recommendations or suggestions to them.

..."

Article 139 § 1

"Judges ... shall not be removed from their office or compelled to retire without their consent before the age prescribed by the Constitution."

Article 145 § 4

"The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law..."

B. Law no. 353 on the composition and functioning of Military Courts

Section 2:

"Military courts shall be composed of two military judges and a military officer."

C. The relevant case-law of the Constitutional Court

8. In a decision dated 7 May 2009 and published in the Official Gazette on 7 October 2009, the Constitutional Court examined the independence and impartiality of military courts on account of the presence of a military officer on the bench. The Constitutional Court firstly pointed out that the officer sitting on the bench of the military criminal court was appointed on a case by case basis by his hierarchical superiors and continued to perform his other military duties while also acting as a judge. Noting that the military officer remained in the service of the military authorities, the Constitutional Court found that military courts could not be considered as compatible with the principle of judicial independence guaranteed under Article 9 of the Constitution. As a result, the Constitutional Court decided to repeal section 2(1) of Law no. 353 on the Composition and Functioning of Military Courts. The decision of the Constitutional Court became effective one year after its publication in the official gazette.

THE LAW

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

A. As to the independence and impartiality of the Kasımpaşa Military Criminal Court

9. The applicant maintained that the Kasımpaşa Military Criminal Court which had tried and convicted him was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, which reads:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

1. Admissibility

10. The Government stressed at the outset that during the domestic proceedings, the applicant had failed to contest the independence and impartiality of the military court which had tried and convicted him.

11. The Court considers that the applicant's failure to raise the substance of his objection to that court's independence and impartiality cannot result in the dismissal of his complaint raised under this head. It observes that, having regard to the constitutional status of the Military Court which tried and convicted the applicant, any objection which he might have raised to its independence and impartiality would have been doomed to failure (see, *Yavuz and Others v. Turkey* (dec.), no. 29870/96, 25 May 2000). The Court therefore rejects the Government's preliminary objection.

12. The Court further 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.

2. Merits

13. The Court reiterates that, in order to establish whether a tribunal can be considered “independent”, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

In this latter respect, the Court also reiterates that what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I; *Incal v. Turkey*, judgment of 9 June 1998, § 71, *Reports* 1998-IV; *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

14. There are two aspects to the question of “impartiality”: the tribunal must be subjectively free of personal prejudice or bias, and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Findlay*, cited above, § 73). The Court notes that the present applicant did not suggest that anyone involved in his trial was subjectively biased against him.

15. The Court recalls that in the case of *Hakan Önen v. Turkey* ((dec.), no. 32860/96, 10 February 2004), it examined a complaint regarding the independence and impartiality of military criminal courts and dismissed it, finding that sufficient safeguards were in place to guarantee the independence and impartiality of the members of that court.

16. Subsequently, in a decision dated 7 May 2009, the Constitutional Court found that the domestic legislation in force at the time did not provide sufficient safeguards against the risk of outside pressures on the members of the military criminal courts. According to the Constitutional Court’s reasoning, the officer concerned had no legal training, remained subject to military discipline and assessment reports, and was not insulated from army influence by any legal provision. The court therefore concluded that the military criminal courts could not be considered as compatible with the principle of judicial independence guaranteed under Article 9 of the Constitution.

17. In view of the Constitutional Court’s reasoning in annulling section 2(1) of Law no. 353 on the Composition and Functioning of Military Courts, the Court is called on to re-examine the independence and

impartiality of military criminal courts, having regard to the manner of the appointment of its members, their terms of office, the existence of guarantees against outside pressures and whether the military criminal courts presented an appearance of independence.

18. Firstly, regarding the applicant's complaint about the lack of legal qualification of one of the members, the Court reiterates that the participation of lay judges on tribunals is not, as such, contrary to Article 6: the principles established in the case-law concerning independence and impartiality are to be applied to lay judges as to professional judges (see *Langborger v. Sweden*, judgment of 22 June 1989, § 32, Series A no. 155; *Fey v. Austria*, judgment of 24 February 1993, §§ 27, Series A no. 255-A, 28 and 30; and *Holm v. Sweden*, judgment of 25 November 1993, § 30, Series A no. 279-A).

19. The Court does not consider that the lack of legal qualification of the military officer who sat on the bench of the military criminal court hindered his independence or impartiality. Nevertheless, it notes that the military officer remained in the service of the army and was subject to military discipline. These officers were appointed as judges by their hierarchical superiors and did not enjoy the same constitutional safeguards provided to the other two military judges. The Court thus concludes that the Military Criminal Court which tried and convicted the applicant cannot be considered to have been independent and impartial within the meaning of Article 6 of the Convention (see, *a contrario*, *Yavuz and others*, cited above, and *Hakan Önen*, cited above).

20. Consequently, there has been a violation of Article 6 § 1 of the Convention in this respect.

B. As to fairness of the proceedings before the Kasımpaşa Military Criminal Court

21. The applicant further complained about the fairness of the proceedings. In this respect, he argued that his superior, who had filed the complaint against him, was heard as a witness during the trial and that he was also the person who had drafted a negative assessment report on his performance in the navy.

22. An examination by the Court of the material submitted to it does not disclose any appearance of a violation. 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.

II. ARTICLE 41 OF THE CONVENTION

23. The applicant requested 32,500 Euros (EUR) in respect of compensation for pecuniary damage and EUR 50,000 in respect of compensation for non-pecuniary damage. The applicant's representative

further claimed EUR 1,450 for costs and expenses and EUR 10,000 in respect of legal expenses without submitting any documents in support of the claims.

24. The Government did not submit any comments regarding the applicant's just satisfaction claims.

25. As regards pecuniary damage, the Court notes that it cannot speculate as to what the outcome of proceedings compatible with Article 6 of the Convention would have been. Accordingly, it makes no award under this head.

26. Moreover, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

27. Finally, as regards the 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 Court notes that the applicant failed to submit any supporting documents. The Court therefore does not award any sum under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint regarding the independence and impartiality of the Kasımpaşa Military Criminal Court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention regarding the independence and impartiality of the Kasımpaşa Military Criminal Court;
3. *Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Stanley Naismith
Registrar

Françoise Tulkens
President