



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

SECOND SECTION

CASE OF HİKMET YILMAZ v. TURKEY

(Application no. 11022/05)

JUDGMENT

STRASBOURG

4 June 2013

FINAL

04/09/2013

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

In the case of Hikmet Yılmaz v. Turkey,

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

Guido Raimondi, *President*,

Danutė Jočienė,

Peer Lorenzen,

Dragoljub Popović,

Işıl Karakaş,

Nebojša Vučinić,

Paulo Pinto de Albuquerque, *judges*,

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

Having deliberated in private on 7 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 11022/05) 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 Hikmet Yılmaz (“the applicant”), on 28 February 2005.

2. The applicant was represented by Mr R Jaspers, a lawyer practising in Antwerp. The Turkish Government (“the Government”) were represented by their Agent.

3. On 20 September 2011 the application was declared partly inadmissible and the complaints concerning the lack of legal assistance to the applicant during his police custody and his right to a fair trial were 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. The applicant was born in 1962 and lives in Belgium.

5. On 26 June 2002 the applicant was arrested at the Istanbul Atatürk Airport on suspicion of membership of the PKK (the Kurdistan Workers’ Party), an illegal organisation.

6. On 27 June 2002 the applicant was interrogated at the Anti-Terrorism Branch of the Istanbul Security Directorate, in the absence of a lawyer. According to a form explaining arrested persons’ rights which the applicant

signed, he was informed of the charges against him and of his right to remain silent. In his statement, the applicant admitted his involvement in the PKK. He explained that he had moved to Italy for financial reasons and that while he was in Milan he had met with a certain A.T., who had helped him in finding a job and obtaining a residence permit. The applicant stated that while he was living in Milan, he had distributed leaflets on behalf of the PKK and organised information meetings about the illegal organisation.

7. On 28 June 2002 the applicant was questioned by the public prosecutor at the Istanbul State Security Court in the absence of a lawyer and he repeated the statement he had made to the police. Later on the same day, the applicant was further questioned by the investigating judge at the Istanbul State Security Court, still in the absence of a lawyer. The applicant admitted to his activities in the illegal organisation and largely repeated his statement to the police. At the end of the questioning, the judge ordered his pre-trial detention. The applicant was then allowed to have access to a lawyer.

8. On 3 July 2002 the public prosecutor at the Istanbul State Security Court filed an indictment with that court, accusing the applicant of membership of the PKK, an offence under Article 168 § 2 of the former Criminal Code (Law no. 765) and Section 5 of the Prevention of Terrorism Act (Law no. 3713).

9. In his defence submissions, the applicant denied the charges against him and argued that his police statement had been taken under duress. He also stated that he had still been under the influence of the pressure exerted on him by the police during his questioning by the public prosecutor and the investigating judge respectively. The applicant further called a witness to attest to his innocence.

10. On 13 November 2002 the Istanbul State Security Court ordered the applicant's release from pre-trial detention.

11. On 5 November 2003 the Istanbul State Security Court found the applicant guilty as charged and sentenced him to twelve years and six months' imprisonment. In convicting the applicant, the court took into consideration the self-incriminating statements he had made before the police, the public prosecutor and the investigating judge respectively. The court further relied on a classified information note submitted by the Ministry of the Interior regarding the applicant's activities within the PKK. It also took into account the police statement of another accused, namely A.T., who had been convicted of being a member of the PKK in 2001 by the Diyarbakır State Security Court. In this statement, A.T. had given a detailed account of the applicant's activities in the PKK.

12. The applicant appealed. In his appeal petition, he denied being involved in the activities of the PKK and claimed that he was innocent.

13. On 8 July 2004 the Court of Cassation, after holding a hearing, upheld the judgment of the first-instance court. The decision, which was

pronounced on 14 July 2004, was deposited with the registry of the first-instance court on 31 August 2004.

II. RELEVANT DOMESTIC LAW

14. A description of the relevant domestic law may be found in *Salduz v. Turkey* ([GC] no. 36391/02, §§ 27-31, 27 November 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. 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. He also maintained that his conviction had been based on a classified document, submitted by the Ministry of Interior. Finally, under Article 6 § 3 (d), the applicant argued that he had not been given an opportunity to cross-examine one of the co-accused persons, who had given an incriminating statement against him.

A. Admissibility

16. The Government maintained in the first place that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention, since at no stage of the domestic proceedings did he rely on the fact that he had been deprived of his right to legal assistance during police custody. In the alternative, they stated that this part of the application was introduced outside the six months time-limit. In this respect, they stated that although the decision of the Court of Cassation had been pronounced on 14 July 2004, the application was introduced with the Court on 28 February 2005, more than six months later.

17. As to the Government's plea of non-exhaustion, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Halil Kaya v. Turkey*, no. 22922/03, § 14, 22 September 2009). The Court finds no particular circumstances in the instant case which would require it to depart from its findings concerning the above-mentioned application.

18. As to the objection concerning the failure of the applicant to comply with the six months time-limit, the Court notes that the decision of the Court of Cassation was deposited with the Registry of the first-instance court on 31 August 2004. The Court reiterates that where an applicant is not entitled to be served *ex officio* with a written copy of the final domestic decision and

if she or he was represented by a lawyer during the domestic proceedings, as in the present case, the date on which the final domestic decision was deposited with the registry of the first-instance court should be taken as the starting-point under Article 35 § 1 of the Convention, being the latest date by which the applicant or his or her representative was definitively able to find out about the content of the final decision (see *İpek v. Turkey* (dec.), no. 39706/98, 7 November 2000, *Okul v. Turkey* (dec.), no. 45358/99, 4 September 2003). Accordingly, in the present case the applicant lodged his application to the Court within the six months time-limit, as required by Article 35 § 1 of the Convention. In conclusion, this objection cannot be upheld either.

19. The Court further notes that the remainder of the application 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

20. The applicant stated that the restriction on his right to legal assistance during his police custody had breached his right to a fair trial.

21. 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.

22. The Court observes that at the material time, the restriction imposed on the applicant's right to legal assistance was systemic and applied to anyone held in custody in connection with an offence falling under the jurisdiction of the State Security Courts (see *Salduz*, cited above, §§ 56-63). The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Salduz* judgment.

23. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

24. Having regard to its finding above and referring to paragraph 28 below, the Court, without taking a position on the remaining complaints raised by the applicant regarding the fairness of the proceedings, considers that it is unnecessary to examine them (see *Geçgel and Çelik v. Turkey*, nos. 8747/02 and 34509/03, § 16, 13 October 2009, *Tezcan Uzunhasanoğlu v. Turkey*, no. 35070/97, § 23, 20 April 2004).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. The applicant claimed 8,000 euros (EUR) in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage. He further claimed EUR 6,500 for legal fees and EUR 266.20 for costs and expenses.

26. The Government contested the claims.

27. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court considers that the applicant must have suffered some non-pecuniary damage and therefore, taking into account the circumstances of the present case, and ruling on an equitable basis, it awards him EUR 1,500 in respect of non-pecuniary damage.

28. The Court further considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 of the Convention, should he so request (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

29. 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. Taking into account the awards made in comparable cases (see *Şaman v. Turkey*, no. 35292/05, § 45, 5 April 2011; *Bolukoç and Others v. Turkey*, no. 35392/04, § 47, 10 November 2009; *Gürova v. Turkey*, no. 22088/03, § 21, 6 October 2009; and *Salduz*, cited above, § 79), the Court finds it reasonable to award EUR 1,000 under this head.

30. 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 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 available to the applicant while in police custody;
3. *Holds* that there is no need to examine the remaining complaints raised under Article 6 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:
 - (i) EUR 1,500 (one thousand five 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 4 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Acting Registrar

Guido Raimondi
President