



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

SECOND SECTION

CASE OF BAYTAR v. TURKEY

(Application no. 45440/04)

JUDGMENT

STRASBOURG

14 October 2014

FINAL

14/01/2015

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

In the case of Baytar v. Turkey,

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

Guido Raimondi, *President*,

Işıl Karakaş,

András Sajó,

Nebojša Vučinić,

Egidijus Kūris,

Robert Spano,

Jon Fridrik Kjølbro, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 9 September 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 45440/04) 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, Ms Gülüstan Baytar (“the applicant”), on 17 September 2004.

2. The applicant was represented by Mr M. Timur, a lawyer practising in Van. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that there had been a violation of her right to the assistance of an interpreter.

4. Notice of the application was given to the Government on 24 November 2009.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Van.

A. First set of criminal proceedings against the applicant

6. On 30 April 2001 the applicant went to Muş prison during visiting hours to see her brother, who was being held there in connection with a case related to the PKK, an illegal armed organisation.

7. The staff responsible for body searches found on the applicant “close to the left side of her abdomen”, a piece of paper that had been folded several times and wrapped in tape. It was an unsigned letter dated 24 April 2001, written by a member of the PKK and addressed to another member.

8. The applicant was taken into police custody on the same day and questioned in Turkish by the gendarmes the following day. During the interview she stated that she had picked up the object in question in Van at the bus stop where she was waiting for the bus to Muş. She had thought that the object might have some value and had intended to remove the wrapping once she was alone.

9. On 1 May 2001 she gave a statement to the same effect before the public prosecutor and then before the District Court. As she was illiterate, she signed the statements with her fingerprint.

10. She was remanded in custody after being examined and was released on 5 July 2001.

11. On 27 September 2001 the State Security Court of Van acquitted the applicant, considering her version of events to be credible.

B. Second set of criminal proceedings against the applicant

12. On 17 December 2001 the applicant visited her brother again in Muş prison during a religious festival. After the visit she was taken into police custody.

13. The police report drawn up that same day stated that the staff responsible for body searches had discovered, hidden in the lining of the applicant’s dress, a sixteen-page document consisting of rolled-up onionskin paper protected by adhesive tape. According to the report, the document contained, in particular, information about the PKK’s strategy and its activities in prisons, about the conduct to be adopted *vis-à-vis* the prison authorities and about prison staff.

14. She was questioned in Turkish by two gendarmes on 18 December 2001. The report stated that she had been reminded of her right to the assistance of a lawyer but had waived that right. As to the facts, she had stated that she had seen a wrapped object in the prison waiting room and had picked it up out of mere curiosity, placing it in her bra. She added that, during the search, the prison officers had discovered the object and had unwrapped it. She had noticed pieces of paper covered in writing. During her visit to her brother she had told him about the incident but he had not

said anything about it. The gendarmes had then arrested her as she was leaving the prison.

15. In response to a question about her personal status, she replied that she was married to G.I. on the basis of a religious marriage, not a civil one, and that they had had five children together. Her husband had another partner with whom he had had six children.

16. When asked whether she worked for the PKK, she replied in the negative. She added that, on the first occasion, she had picked up the object thinking it might contain gold and that it was with the same thought in mind that she had taken the paper in the waiting room.

17. In response to a question about ten pieces of gold discovered on her during the search, she stated that half of them belonged to her daughter and the other half were hers.

18. After she had been questioned, the public prosecutor called for her to be remanded in custody. As a result she was brought before the District Court judge.

19. Finding that she did not speak Turkish with sufficient fluency, the judge asked a member of the applicant's family who was waiting in the corridor outside the courtroom to act as interpreter. The relative accepted.

20. The applicant stated once again that she had found the document in question in the waiting room. Immediately afterwards, she claimed that this statement, and the one previously taken by the gendarmes, concerned events that had occurred seven months earlier; that no document had been discovered on her person when she last visited the prison; that she had thought the gendarmes were questioning her about earlier events; and that, not being able to read or write, she had signed the police report with her fingerprint without knowing what it said. When she was informed of the report's content she disputed its veracity.

21. On 18 December 2001, after the hearing, the applicant was remanded in custody and criminal proceedings were brought against her before the State Security Court of Van for membership of an illegal armed organisation and, in the alternative, for aiding and abetting such an organisation.

22. At the various hearings before that court the applicant was assisted by a lawyer and an interpreter.

23. In the course of the proceedings, the defence disputed the prison officers' version of events. Counsel argued that no document had been found on the applicant, adding that, according to her, a document had certainly been found on a female visitor during the search carried out on entering the premises and that person had nevertheless been authorised to visit on the grounds that it was a public holiday. The prison officers had failed to arrest her when she left the prison on account of the large number of visitors that day. Having realised that the visitor in question had evaded their control, the officers had decided to arrest the applicant instead, because

they knew that a similar accusation had already been made against her. In addition, the defence stated that in her statement to the gendarmes the applicant had said that the impugned object had been found in her bra, whereas the record of the incident indicated that it had been found in the lining of her dress.

24. On 12 May 2002 two female prison officers were interviewed on the basis of a warrant. The first, C.A., stated that she had personally found the impugned document in the lining of the applicant's dress during the body search. The second, F.A., confirmed this version and stated that she had been called immediately by her colleague after the discovery.

25. Testimony was also taken from a number of defence witnesses. Two women who were visiting the prison on the day of the incident stated that they did not know if the applicant had been searched on entering the prison. Another testified that she had entered the prison at the same time as the applicant but not had seen her being searched. One of the applicant's brothers testified that he had arrived at the prison with her but that they had become separated during the body search before coming together again to visit their brother. In their conversation with the latter, the applicant had never mentioned any incident during her body search.

26. On 29 May 2002 the applicant was given a prison sentence of three years and nine months for aiding and abetting an illegal armed organisation. In its reasoning, the State Security Court observed that, in the first case, the applicant had claimed to have found the impugned document at a bus stop in Van, and that, in the second, she had stated during the investigation that she had found the document in the prison waiting room. It noted that the applicant had reiterated this statement to a district judge before claiming that she had been talking about the first case and that no document had in fact been found on her during the body search of 17 December 2001. The court took the view that there were some serious inconsistencies in the applicant's explanations. It noted that if she had really believed that the questioning by the gendarmes and the district judge concerned the events of 30 April 2001 she should logically have stated that she had found the impugned document not in the waiting room of Muş prison but in Van. It concluded that the version of events given by the applicant and the defence witnesses was not credible, and it accepted the testimony of the two prison officers, which confirmed the findings in the relevant police report. The court thus found the applicant guilty as charged.

27. On 7 October 2002 the Court of Cassation quashed that judgment on a procedural ground.

28. On 18 April 2003 the State Security Court convicted the applicant again and handed down the same sentence. Moreover, taking into account the time she had already served, it ordered her release.

29. That judgment was quashed on 19 January 2004 on an appeal on points of law by the applicant. The Court of Cassation took the view that the

offence with which she was charged had been incomplete and had remained at the attempt stage. It dismissed the applicant's other grounds of appeal on points of law, including the question of the absence of an interpreter in police custody.

30. On 3 May 2004 the State Security Court sentenced the applicant to one year and three months' imprisonment for attempting to aid and abet an illegal armed organisation. It adopted the same reasoning as that of its previous judgments.

31. On 6 June 2005 the Court of Cassation referred the case back to the first-instance court stating that, in accordance with Law no. 5252, setting out the rules and procedures for the application of the new Criminal Code which had recently entered into force, the case had to be re-examined in the light of that new code to determine whether the applicant could be granted the benefit of a more lenient provision.

32. On 19 September 2005 the Van Assize Court (formerly the State Security Court) convicted the applicant once again, adopting the same reasoning as that of its previous judgments, and specifying that the provisions of the former code were more lenient.

33. The applicant appealed on points of law against that judgment, submitting in particular that she had not been assisted by an interpreter while in police custody.

34. Her appeal was dismissed on 31 October 2006.

II. RELEVANT DOMESTIC LAW

35. The Code of Criminal Procedure in force at the relevant time did not contain any provision prohibiting access to an interpreter in police custody.

36. The Rules concerning the arrest, custody and questioning of suspects, as in force until 1 June 2005, provided in Article 12 (d), subparagraph 6, that the police custody register had to indicate whether an interpreter was present during the interview and, if so, the interpreter's name and signature was required.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION FOR LACK OF ASSISTANCE OF AN INTERPRETER IN POLICE CUSTODY

37. The applicant complained that there had been no interpreter to assist her while she was in police custody and that this had entailed a violation of

her right to a fair trial within the meaning of Article 6 §§ 1 and 3 (e) of the Convention, provisions which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

38. The Government contested that argument.

A. Admissibility

39. The Government argued that the applicant should have submitted her complaint to the Court within six months after the end of her police custody, given that, in their opinion, there was no effective or appropriate remedy by which she could have had her complaint examined.

40. Should the Court not agree with their argument about the lack of a remedy, the Government asked it to declare the complaint inadmissible for failure to exhaust domestic remedies, firstly because the applicant had not raised the complaint during the domestic proceedings and, secondly, because the case was still pending before the domestic courts at the time she lodged her application.

41. As to the argument that the applicant had not complied with the six-month period allegedly running from the end of her police custody, the Court noted that the use of remedies, such as an appeal on points of law, could have enabled the applicant to obtain redress for the defect which, in her submission, had vitiated the proceedings, by obtaining a ruling either that the incriminating statements made during her police custody should be excluded or that she should not be convicted. In that connection, the Court would refer to its settled case-law to the effect that, following an acquittal or the quashing of a conviction, the applicant cannot be considered a “victim” of a violation of the rights guaranteed by Article 6 of the Convention (see *Bouglamé v. Belgium* (dec.), no. 16147/08, 2 March 2010, and the numerous references therein). An appeal on points of law was therefore one of the remedies to be exhausted and the applicant acquired victim status only once her appeal on points of law had been dismissed and her conviction had become final. It was thus on 31 October 2006 that the six-month period began to run and not, as the Government argued, at the end of her time in police custody.

42. As to the assertion that the applicant had not submitted her complaint to the domestic courts, the Court observes that, in her appeals on points of law, she had expressly complained about the use by the Assize

Court of the statement obtained without the assistance of an interpreter while she was in police custody (see paragraphs 29 and 33 above).

43. As to the objection that domestic remedies had not been exhausted, on the grounds that the Court of Cassation had not yet ruled on the applicant's appeal at the time the application was lodged, the Court observes that the conviction has in the meantime become final and that all domestic remedies have been exhausted. It would moreover note that this was already the case on the date when notice of the application was given to the Government.

44. In conclusion, the three objections raised by the Government are unfounded and must be dismissed.

45. Furthermore, finding that no other ground for declaring the complaint inadmissible has been established and that it is not manifestly ill-founded, the Court declares it admissible.

B. Merits

46. The applicant complained that she had not been assisted by an interpreter when questioned by the gendarmes while she was in their custody and argued that the statement taken in those circumstances constituted illegally obtained evidence which should therefore have been excluded by the trial court.

47. The Government argued that the applicant had not shown how the absence of an interpreter during her police custody had impaired her right to a fair trial, as when she had subsequently reiterated her statement to a judge, an interpreter had then been present. The Government further argued that the applicant had been assisted by an interpreter throughout the remainder of the proceedings.

48. Reiterating the finding in its case-law that the requirements of paragraph 3 (e) of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, for example, *Valentini v. Italy* (dec.), no. 45003/98, 18 May 2000, or *Pala v. France* (dec.), no. 33387/04, 30 January 2007).

49. The Court further reiterates that paragraph 3 (e) of Article 6 guarantees the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see *Luedicke, Belkacem and Koç v. Germany*, 28 November 1978, § 48,

Series A no. 29). Furthermore, the interpretation assistance provided should be such as to enable the accused to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events (see *Güngör v. Germany* (dec.), no. 31540/96, 17 May 2001).

50. Furthermore, like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right (see, to that effect, *Diallo v. Sweden* (dec.), no. 13205/07, § 25, 5 January 2010).

51. In the present case, the Court would first observe that it is not in dispute that the applicant's level of knowledge of Turkish rendered necessary the assistance of an interpreter. Both the District Court and the trial court decided that she needed an interpreter. As the Government never submitted argument to the contrary, the Court finds this point established.

52. The Court further notes that, while the applicant enjoyed the assistance of an interpreter when she was examined by the judge responsible for deciding whether she should be remanded in custody, this had not been the case during her questioning by the gendarmes, when she had stated that she had found the impugned document in the prison waiting room, thus admitting that a document had indeed been found in her possession.

53. The Court has already had occasion to emphasise the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained at this stage may be decisive for the subsequent proceedings (see, to that effect, *Salduz v. Turkey* [GC], no. 36391/02, § 63, ECHR 2008). It should be pointed out that an individual held in police custody enjoys a certain number of rights, such as the right to remain silent or to be assisted by a lawyer. The decision to exercise or waive such rights can only be taken if the individual concerned clearly understands the charges, so that he or she can consider what is at stake in the proceedings and assess the advisability of such a waiver.

54. The Court takes the view that, as the applicant was not able to have the questions put to her translated and was not made aware as precisely as possible of the charges against her, she was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. Accordingly, it is questionable whether the choices made by the applicant without the assistance of an interpreter were totally informed.

55. The Court finds that this initial defect thus had repercussions for other rights which, while distinct from the right alleged to have been breached, were closely related thereto and undermined the fairness of the proceedings as a whole.

56. While it is true that the applicant enjoyed the assistance of an interpreter when she was brought before a judge following her police

custody, the Court is of the opinion that this fact was not such as to cure the defect which had vitiated the proceedings at their initial stage.

57. Furthermore, the Court observes that the judge apparently failed to verify the skills of that interpreter, who was simply a member of the applicant's family waiting in the corridor (see, *mutatis mutandis*, *Cuscani v. the United Kingdom*, no. 32771/96, § 38, 24 September 2002, and paragraph 19 above).

58. Moreover, the Court notes that the impugned statement was not excluded by the trial court. Even though the conviction was based on a number of factors, it is nevertheless established that the statements obtained by the gendarmes without the assistance of an interpreter were also relied upon when the applicant was found guilty.

59. In conclusion, having regard to its consequences for the fairness of the proceedings as a whole, the failure to provide the applicant with an interpreter while she was in police custody entailed a violation of Article 6 § 3 (e) of the Convention taken together with Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS

60. Relying on Article 5 of the Convention, the applicant complained about the length of her detention on remand and alleged that she did not have a remedy by which to obtain an examination of its lawfulness, with the possibility of then being released.

61. In addition, relying on Article 6 of the Convention, the applicant argued that the use by the judges, in the reasoning given for her conviction, of the statement she had given to the gendarmes, constituted a breach of her right to be presumed innocent.

62. Under Article 14 of the Convention, she also contended that she had been the victim of a violation of Convention rights on account of her ethnic origin.

63. Lastly, she argued that she did not have a domestic remedy, within the meaning of Article 13 of the Convention, by which to submit her complaints.

64. Having regard to all the evidence in its possession, and in so far as it has jurisdiction to examine these allegations, the Court finds no appearance of a breach of the provisions of the Convention.

65. Accordingly, it declares these complaints inadmissible.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

67. The applicant claimed 20,000 euros (EUR) in respect of the non-pecuniary damage she alleged to have sustained.

68. She also claimed EUR 2,500 for the costs and expenses she had incurred before the domestic courts, EUR 5,075 for the cost of her representation before the Court, and EUR 298 for the translation expenses in support of which she submitted invoices.

69. The Government disputed those claims, which they found excessive, and asked the Court to reject them.

70. The Court finds that it is appropriate to award the applicant EUR 1,500 in respect of non-pecuniary damage.

71. The Court takes the view that, in circumstances such as those of the present case, a re-trial or the reopening of the proceedings, at the request of the person concerned, represents in principle an appropriate means of redress for the violation in question (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

72. 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, and having regard to the documents in its possession and its case-law, the Court finds it reasonable to award the applicant EUR 1,300 in respect of all costs and expenses.

73. 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 in respect of the complaint concerning the absence of an interpreter in police custody, and the remainder inadmissible;
2. *Holds* that there has been a violation of Article 6 § 3 (e) of the Convention taken together with Article 6 § 1;
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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 1,300 (one thousand three hundred 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 14 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President