



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

SECOND SECTION

CASE OF İRMAK v. TURKEY

(Application no. 20564/10)

JUDGMENT

STRASBOURG

12 January 2016

FINAL

12/04/2016

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

In the case of İrmak v. Turkey,

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

Julia Laffranque, *President*,

Işıl Karakaş,

Nebojša Vučinić,

Valeriu Griţco,

Ksenija Turković,

Jon Fridrik Kjølbro,

Georges Ravarani, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 8 December 2015,

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

PROCEDURE

1. The case originated in an application (no. 20564/10) 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 Nurettin İrmak (“the applicant”), on 24 March 2010.

2. The applicant was represented by Ms A. Pamukçu Yördem, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

3. On 18 December 2012 the application was communicated to the Government.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1977 and is serving a sentence in Diyarbakır prison.

5. On 11 January 1996 the applicant was arrested and taken into police custody on suspicion of being a member of Hizbullah, an illegal organisation. On the same day he was examined by a doctor at the request of the police. The doctor noted, in a police document, that there was no sign of physical violence on the applicant’s body.

6. On 24 January 1996 the applicant's statement was taken by the police. The applicant acknowledged being a member of Hizbullah and gave a detailed account of his activities within that illegal organisation. The applicant did not benefit from the assistance of a lawyer when he made that statement.

7. On 2 February 1996 the applicant was once again examined by a doctor who, in a document issued by the police headquarters to which the applicant's name was added, noted that there was no sign of physical violence on his body.

8. On the same day the applicant was brought before the public prosecutor and, subsequently, a judge, who questioned him and recorded his statements. On both occasions he retracted the statements he had made to the police, claiming that he had signed them under duress. The judge remanded him in custody.

9. On the same day the applicant was placed in detention.

10. On 29 February 1996 the public prosecutor at the Diyarbakır State Security Court filed an indictment with that court, accusing the applicant and several other persons – pursuant to Article 125 of the former Criminal Code, in force at the material time – of carrying out activities with the aim of bringing about the secession of part of the national territory. The public prosecutor alleged that the applicant had taken part in the killing of eight persons and the wounding of four persons by Hizbullah.

11. On 18 April 1996 the Diyarbakır State Security Court held the first hearing on the merits of the case (case no. 1996/113).

12. On 8 May 1996 the applicant made a statement before the court in which he denied the charges brought against him, claiming that he had been coerced by the police into signing the document containing his statement.

13. On 13 June 1996, at the end of the third hearing in the case, the applicant was released pending trial.

14. On 18 June 1999 the Constitution was amended and the military judges on the bench of the state security courts were replaced by civilian judges.

15. On 21 February 2002 – while case no. 1996/113 was still pending before the Diyarbakır State Security Court – the applicant was arrested once again, on suspicion of having been involved in certain armed acts undertaken by Hizbullah. According to the arrest report, which was signed by three police officers and the applicant, the police had had to use force in order to apprehend the applicant, since the latter had attempted to resist arrest and flee.

16. On the same day the applicant was examined by a doctor at the Batman state hospital. The doctor noted, in a police document, that the applicant had signs of physical violence on six areas on his back, bruises on both wrists, two cuts on his left ear and an injury to his right eye.

17. On 24 February 2002 the applicant gave a statement to the police in the absence of a lawyer, explaining in detail the structure of the illegal organisation and his role as a member. According to the police document, he acknowledged, *inter alia*, that he had been involved in a number of killings and abductions committed by Hizbullah.

18. On 25 February 2002 the applicant was once again examined by a doctor at the Batman state hospital. In a document of the police directorate to which the applicant's name was added, the doctor who examined the applicant noted that he had a cut on his left ear.

19. On the same day the applicant was questioned by the Batman Magistrates' Court. During that questioning, the applicant, without any legal assistance, retracted the statement he had made to the police. He alleged that he had been blindfolded while in police custody and coerced into signing that document. The Batman Magistrates' Court remanded the applicant in custody.

20. On 27 February 2002 the applicant lodged an objection with the Batman Criminal Court against the decision of 25 February 2002 remanding him in custody. In his petition, the applicant denied the charges against him and submitted that he had been subjected to ill-treatment while in police custody. In particular, he had been stripped naked, blindfolded, given electric shocks to his genitals, subjected to "Palestinian hanging", threatened with the rape of his wife, and insulted.

21. On 13 March 2002 the public prosecutor at the Diyarbakır State Security Court lodged a new indictment with that court under Article 146 of the then applicable Criminal Code, accusing the applicant of having attempted to undermine the constitutional order by force. According to the bill of indictment, the applicant had, acting within the hierarchy of Hizbullah, given instructions for the killing of three persons and the abduction of two others.

22. On 16 May 2002 the Diyarbakır State Security Court held a hearing in the case initiated by the public prosecutor's indictment dated 13 March 2002 (case no. 2002/81). During the hearing, the applicant made a statement and retracted the statement that he had given to the police and denied the charges against him. He further stated that he had not attempted to flee arrest and stated that the arrest report was untrue. He noted that police officers had been present during his medical examinations; therefore, he had not been able to inform the doctors that he had been ill-treated. At the end of the hearing, at the request of the public prosecutor, the first-instance court decided to join the case to case no. 1996/113.

23. During the thirty-third hearing in case no. 1996/113, on 6 June 2002, the applicant made a statement before the first-instance court and once again stated that the various police documents contained untruths.

24. On 16 January 2004 the applicant filed a request with the Diyarbakır State Security Court to be allowed to benefit from the Reintegration of Offenders into Society Act (“Law no. 4959”).

25. At a hearing held on 8 April 2004, the applicant confirmed the accuracy of his statement to the police and stated that he had been a member of Hizbullah. He maintained, however, that he had never been involved in any armed acts but had only provided intelligence to other members of Hizbullah. He reiterated his request to benefit from Law no. 4959 during eight other hearings and in his petitions dated 8 April and 24 November 2004, 3 March 2005, 13 April 2006, and 22 February 2007 and submitted to the first-instance court, noting that he had no negative comments to make in respect of the police or the other State authorities.

26. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, the State Security Courts were abolished. The case against the applicant was accordingly transferred to the Diyarbakır Assize Court.

27. On 10 June 2008 the Diyarbakır Assize Court delivered its judgment in the case.

28. The Diyarbakır Assize Court acquitted the applicant of (i) all the charges against him brought under the public prosecutor’s indictment of 29 February 1996 (see paragraph 10 above), (ii) the charge of involvement in the killing of one of the three persons noted in the indictment of 13 March 2002, and (iii) the charge of involvement in the alleged abduction of two other persons (see paragraph 21 above). In acquitting the applicant of those charges, the first-instance court noted that there was no evidence against the applicant other than the statements he had made to the police, which had allegedly been taken under duress.

29. On the other hand, the Diyarbakır Assize Court found that the applicant had been a member of Hizbullah and had ordered two other members of Hizbullah to kill two persons in furtherance of Hizbullah’s aims and that his order had been executed by those two members. In its judgment the court relied on (i) the applicant’s statement to the police made on 24 February 2002 (see paragraph 17 above), (ii) the statement that he had made on 8 April 2004 during the trial (see paragraph 25 above), (iii) the statements to the police of the two gunmen who had allegedly carried out the killings upon the instructions of the applicant, and (iv) the statements of those gunmen before the public prosecutors and investigating judges after they had been arrested. The Diyarbakır Assize Court considered that the aforementioned statements by the applicant and the gunmen were consistent with each other and proved that the applicant had instructed the gunmen to kill the two persons mentioned in the bill of indictment. The court accordingly convicted the applicant of attempting to undermine the constitutional order by force under Article 146 of the former Criminal Code and sentenced him to life imprisonment. It further rejected his request to benefit from Law no. 4959, as he had not provided information which could

have contributed to the dissolution of an illegal organisation or brought to light any facts unknown to the authorities.

30. In its judgment, the Diyarbakır Assize Court also referred to four medical reports drawn up in respect of the applicant, but did not refer to the applicant's allegations of ill-treatment. The court noted that the first two reports, which had been issued in 1996, had not indicated any sign of ill-treatment, whereas the others, drawn up on 21 and 25 February 2002 respectively (before and after the applicant's detention in police custody) referred, respectively, to trauma and cuts on the applicant's body and a cut on his left ear.

31. On 12 June 2008 the applicant's lawyer appealed against the judgment, arguing that the applicant had been convicted on the basis of statements taken under duress.

32. On the same day the applicant made another application to benefit from Law no. 4959 and requested a reduction in his sentence in view of the fact that he had been a minor at the time of the offence.

33. On 8 October 2009 the Court of Cassation dismissed the applicant's requests and upheld the judgment of the first-instance court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

34. The applicant complained under Article 3 of the Convention that he had been subjected to ill-treatment when he had been detained in police custody both in 1996 and in 2002. He further argued that the national authorities had failed to conduct an investigation into his allegations of ill-treatment, despite the medical reports of 21 and 25 February 2002 having recorded injuries on his body.

35. The Government submitted that the applicant had failed to comply with the six-month rule. They argued that given that the domestic authorities had failed to initiate an investigation into the applicant's allegations of ill-treatment, the authorities' failure to fulfil their obligation to investigate must have become apparent to the applicant at the latest by 10 June 2008, the date on which the Diyarbakır Assize Court had rendered its judgment in the case against him. They further argued that the applicant's allegations of ill-treatment between 11 January and 2 February 1996 were not supported by any evidence. They further contended that the injuries noted in the medical report of 21 February 2002 had been the result of the use of proportionate force to effect the applicant's arrest since the applicant had attempted to flee arrest. They stressed that the medical report of 25 February 2002 had not referred to any new injury on the applicant's

person. They considered that the applicant's allegations of ill-treatment while in police custody during his questioning were therefore unsubstantiated. Lastly, the Government submitted that there had been no reasonable cause for the authorities to conduct an investigation into the applicant's unsubstantiated allegations.

36. The applicant replied that he had been ill-treated and tortured in police custody and that despite his continuous efforts, the national authorities had failed to initiate an investigation into his ill-treatment.

37. The Court does not find it necessary to examine the Government's objection regarding the applicant's failure to comply with the six-month time-limit since in its view this part of the application is manifestly ill-founded for the reasons set out below.

38. The Court observes at the outset that the parties submitted four medical reports concerning the applicant's detention in police custody between 11 January and 2 February 1996 and between 21 and 25 February 2002. The reports of 11 January and 2 February 1996 do not refer to any sign of ill-treatment on the applicant's body, whereas the report of 21 February 2002 issued subsequent to the applicant's medical examination at the beginning of his detention in police custody does mention the existence of injuries. The report drawn up on 25 February 2002 – the date on which the applicant's second period of custody ended – only refers to one injury on his ear, which had already existed when the applicant had been taken into police custody (see paragraphs 16 and 18 above). The Government argued that the applicant had sustained the injuries noted in the reports of 21 and 25 February 2002 as a result of the use of proportionate force to effect his arrest. The applicant, on the other hand, neither complained about the force used during his arrest in his application nor challenged the Government's version of the facts in respect of his arrest. Given that the applicant alleged that he had been ill-treated only when he had been detained in police custody for questioning, the Court considers it unnecessary to examine the circumstances in which the applicant's arrest was effected (see *Tonka and Others v. Turkey*, no. 11381/02, § 49, 22 July 2008), and confines itself to the examination of the applicant's allegations of ill-treatment in police custody.

39. In this connection, the Court observes that the medical reports pertaining to the applicant's medical examinations of 11 January 1996, 2 February 1996, 21 February 2002 and 25 February 2002 do not refer to any injuries that would have occurred while the applicant was detained in police custody.

40. Besides, no other material has been submitted to the Court that could add weight to the applicant's allegation that he was ill-treated during his detention in police custody between 11 January and 2 February 1996 and 21 and 25 February 2002. In the absence of evidence in support of the

applicant's allegations, the Court finds that these allegations are not substantiated.

41. As regards the applicant's complaint about the lack of an investigation into his allegations of ill-treatment, the Court first reiterates that Article 3 of the Convention requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005).

42. In the present case, the Court notes that the applicant's allegations of ill-treatment in police custody were found to be unsubstantiated. Besides, during the proceedings brought against him the applicant complained only about his alleged ill-treatment during his detention in police custody in 1996 and 2002, confining himself to challenging the admissibility as evidence of his statements to the police. The applicant did not submit any allegation that ill-treatment had occurred during the course of his two separate arrests. Moreover, only on one occasion did he provide details of the ill-treatment to which he had allegedly been subjected – on 27 February 2002 (see paragraph 20 above). Nor did the applicant make any detailed submission before the Court concerning his alleged ill-treatment.

43. In these circumstances, and having regard, in particular, to the lack of any material in the case file supporting the conclusion that the applicant was ill-treated while detained in police custody, the Court finds that the applicant failed to lay before the national authorities the basis of an arguable claim of ill-treatment in police custody which would have engaged the State's obligation to conduct an effective investigation.

44. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

45. The applicant argued that he had been denied a fair hearing, in that he had not benefited from legal assistance during the preliminary investigation stage. He further complained that the Diyarbakır State Security Court had lacked independence and impartiality and that it had relied on evidence given under duress. He also complained about the excessive length of the proceedings and about the fact that he had been unable to benefit from Law no. 4959 pertaining to the reintegration of offenders into society.

The applicant relied on Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which provide:

"1. 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.

...

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...”

A. Use of statements by the applicant to the police obtained without legal assistance

46. The applicant complained that he had been denied legal assistance during the preliminary investigation stage.

47. The Government submitted that the applicant’s statements to the police had not constituted decisive evidence against him but that they were aware of the Court’s case-law concerning any failure to offer legal assistance to those held in police custody.

48. The Court observes that the applicant was acquitted of the charges brought against him in the indictment dated 29 February 1996 (see paragraph 28 above). As a result, he cannot claim to be a victim of an alleged violation of Article 6 on account of the lack of legal assistance provided to him when he was detained in police custody between 11 January and 2 February 1996 (see, for example, *Bodi v. Hungary* (dec.), no. 37216/04, 23 October 2007). It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

49. In so far as the applicant’s complaint under this head concern his criminal conviction of the charges brought against him with the indictment dated 13 March 2002, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

50. The Court further notes that it is not in dispute between the parties that the applicant was denied legal assistance during his detention in police custody in February 2002. It notes that during the time that he was detained the restriction imposed on his right of access to a lawyer was systemic and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 56-63, ECHR 2008). The Court also notes that the applicant’s incriminating statements given in police custody were used as evidence against him (see paragraph 29 above). 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.

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

B. Length of the criminal proceedings against the applicant

52. The Government noted that pursuant to Law no. 6384 a Compensation Commission has been established to deal with applications concerning the length of proceedings and the non-execution of judgments. They maintained that the applicant had not exhausted domestic remedies, as he had not made any application to that Compensation Commission: this ground had also been recognised by the Court in its decision in the case of *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013).

53. The applicant did not respond to the Government's submissions under this head.

54. The Court observes that, as pointed out by the Government, a new domestic remedy has been established in Turkey following the application of the pilot-judgment procedure in the case of *Ümmühan Kaplan v. Turkey* (no. 24240/07, 20 March 2012). Subsequently, in its decision in the case of *Turgut and Others*, cited above, the Court declared a new application inadmissible on the ground that the applicants had failed to exhaust domestic remedies, that is to say the new remedy. In so doing, the Court considered in particular that this new remedy was *a priori* accessible and capable of offering a reasonable prospect of redress for complaints concerning the length of proceedings.

55. The Court notes that in its decision in the case of *Ümmühan Kaplan* (cited above, § 77) it stressed that it could nevertheless pursue the examination of such complaints under the normal procedure in cases which had already been communicated to the Government prior to the entry into force of the new remedy.

56. However, taking account of the Government's preliminary objection with regard to the applicants' failure to make use of the new domestic remedy established by Law no. 6384 (see paragraph 52 above), the Court reiterates its conclusion in the case of *Turgut and Others*. It therefore concludes that the complaint of the excessive length of the criminal proceedings must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies (see *Rifat Demir v. Turkey*, no. 24267/07, § 35, 4 June 2013; and *Yiğitdoğan v. Turkey* (no. 2), no. 72174/10, § 59, 3 June 2014).

C. Other alleged violations of Article 6 of the Convention

57. The applicant complained that the Diyarbakır State Security Court had lacked independence and impartiality and that it had relied on evidence obtained under duress. He further complained about the fact that he had not been permitted to benefit from Law no. 4959 pertaining to the reintegration of offenders into society.

58. Having regard to the facts of the case and its finding of a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, and referring to paragraph 66 below, the Court considers that there is no need to give a separate ruling on the admissibility or the merits of the applicant's complaints under this head (see, for example, *Recep Kurt v. Turkey*, no. 23164/09, § 70, 22 November 2011; *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 72, ECHR 2012; and *Mustafa Erdoğan and Others v. Turkey*, nos. 346/04 and 39779/04, § 48, 27 May 2014).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

59. The applicant complained under Article 5 §§ 2 and 3 of the Convention that he had not been informed of the reasons for his arrest in 1996 and that the length of his detention in police custody in 1996 and 2002 had been excessive. The applicant further complained under Article 5 §§ 1 and 3, Article 6 § 2 and Article 8 of the Convention that (i) there had been no reasonable suspicion to justify his being remanded in custody, (ii) the length of his detention had been excessive, and (iii) his right to respect for family life had been breached due to the excessive amount of time he had spent in detention.

60. As regards the applicant's complaints under Article 5 §§ 2 and 3 of the Convention regarding his detention in police custody in 1996 and 2002, the Court notes that the applicant's custody periods ended on 2 February 1996 and 25 February 2002 respectively, whereas the application was lodged with the Court on 24 March 2010 – that is to say, more than six months later (see, for example, *Çarkçı v. Turkey (no. 2)*, no. 28451/08, §§ 54-55, 14 October 2014 and the cases cited therein). It follows that these complaints were lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

61. As to the applicant's complaints under Article 5 §§ 1 and 3, Article 6 § 2 and Article 8 of the Convention regarding his detention pending trial, the Court notes that the applicant's detention during judicial proceedings continued until the judgment of the Assize Court of 10 June 2008. Following that date, the applicant was detained "after conviction by a competent court", whereas the application was lodged on 24 March 2010 (see, for example, *Öztürk v. Turkey (dec.)*, no. 54890/09, 7 January 2014). It

follows that these complaints were introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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.”

A. Damage

63. The applicant claimed 50,000 Turkish liras (TRY) (approximately 18,475 euros (EUR)) in respect of non-pecuniary damage and TRY 105,300 (approximately EUR 38,909) in respect of pecuniary damage.

64. The Government considered that the applicant's claims were unsubstantiated and excessive.

65. 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 1,500 in respect of non-pecuniary damage.

66. The Court further considers that the most appropriate form of redress would be a 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).

B. Costs and expenses

67. The applicant also claimed TRY 20,000 (approximately EUR 7,390) in respect of his lawyer's fees and TRY 260.65 (approximately EUR 97) in respect of costs and expenses incurred before the Court.

68. The Government contested these claims.

69. 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 absence of supporting documents, the Court rejects the applicant's claim in respect of his lawyer's fees. On the other hand, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 97 for costs and expenses incurred before the Court.

C. Default interest

70. 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 complaint concerning the lack of legal assistance afforded to the applicant during the preliminary investigation stage in 2002 admissible;
2. *Holds* that there is no need to examine the admissibility or the merits of the other complaints under Article 6 of the Convention concerning the alleged unfairness of the criminal proceedings against the applicant;
3. *Declares* the remainder of the application inadmissible;
4. *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 afforded to the applicant during the preliminary investigation stage;
5. *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;
 - (iii) EUR 97 (ninety-seven 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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Julia Laffranque
President