



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

SECOND SECTION

CASE OF İZZET ÇELİK v. TURKEY

(Application no. 15185/05)

JUDGMENT

STRASBOURG

23 January 2018

FINAL

23/04/2018

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

In the case of İzzet Çelik v. Turkey,

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

Robert Spano, *President*,

Julia Laffranque,

Ledi Bianku,

Işıl Karakaş,

Paul Lemmens,

Valeriu Griţco,

Jon Fridrik Kjølbro, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having deliberated in private on 19 December 2017,

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

PROCEDURE

1. The case originated in an application (no. 15185/05) 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 İzzet Çelik (“the applicant”), on 7 October 2003.

2. The applicant was represented by Mr M. Filorinalı and Ms F. Köstak, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 12 December 2012 the application was communicated to the Government.

4. On 7 October 2016 the Vice-President of the Second Section invited the Government to submit further observations, if they so wished, following the judgment in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, ECHR 2016).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Kırıkkale.

6. On 25 September 1998 the applicant was arrested by police officers and taken into custody on suspicion of being a member of an illegal organisation.

7. On 30 September 1998 police officers at the Istanbul Security Headquarters took a statement from the applicant in the absence of a lawyer, as a result of the restriction stemming from Law no. 3842. He confessed that he was a member of the organisation in question and gave information about certain activities in which he had participated.

8. On 2 October 1998 a statement was taken from the applicant by the Istanbul public prosecutor. He confirmed the statement he had made to the police.

9. On the same day, the applicant was questioned by the investigating judge in the absence of a lawyer. He confirmed the statement he had made to the public prosecutor, but withdrew the one he had made to the police. The applicant alleged that he had given the statements under duress. The investigating judge ordered the applicant's pre-trial detention.

10. On 7 October 1998 the public prosecutor filed an indictment with the Istanbul State Security Court, charging the applicant under Article 125 of the former Turkish Criminal Code with being involved in separatist activities against the Republic of Turkey. The criminal proceedings commenced before the Istanbul State Security Court, the bench of which included a military judge.

11. On 12 October 1998 the Istanbul State Security Court held a preparatory hearing and decided that the first hearing would take place on 16 December 1998.

12. On 16 December 1998 the other co-accused, namely G.T., Z.A. and D.P.N.J., gave evidence in person. They did not give any statement in relation to the applicant.

13. On 8 March 1999 the trial court, noting the absence of the accused, decided to adjourn the hearing.

14. At the hearing held on 2 June 1999, the applicant gave evidence in person and stated that he had been forced to sign his previous statements. The applicant retracted those statements while maintaining that he had not been involved in any of the offences attributed to him. At the same hearing, the other co-accused, namely A.B. and B.G. also gave evidence in person. They did not make any statements in respect of the applicant.

15. While the criminal proceedings against the applicant were pending, on 18 June 1999 the Constitution was amended and the military judge sitting on the bench of the Istanbul State Security Court was replaced by a civilian judge. Between 18 June 1999 and 2 September 2002, the trial court consisting of three civilian judges held fourteen hearings on the merits.

16. On 4 August 1999, the State Security Court, composed of three civilian judges, heard evidence from A.S., Ş.K., H.K., S.K., N.Ç., T.G., Ö.Ö. as witnesses, from M.N. as accused and from K.Ö. as a complainant. Two of them made incriminatory statements in relation to the applicant. When asked his comments concerning those statements, the applicant

rejected them, maintaining that he had had no connection with the accusations.

17. On 25 April 2001 the public prosecutor read out his observations on the merits (*esas hakkında mütalaa*) and requested that the applicant be convicted and sentenced under Article 125 of the former Criminal Code. At the same hearing, the applicant's lawyer requested time to submit the applicant's defence submissions.

18. On 29 August 2001 the applicant's lawyer made his defence submissions in relation to the merits of the case.

19. On 27 March 2002 the applicant's lawyer reiterated his previous defence submissions.

20. On 19 June 2002 the applicant's lawyer, again reiterated his previous defence submissions. At the same hearing, the applicant stated that he had agreed to his lawyer's submissions.

21. On 2 September 2002 the applicant and his lawyer presented their closing arguments. On the same day the Istanbul State Security Court convicted the applicant and sentenced him to thirty years' imprisonment, pursuant to Article 125 of the former Criminal Code. The first-instance court based its decision on several items of evidence, such as the applicant's statements to the police, the public prosecutor and the investigating judge, documents relating to the organisation which had been found and seized in the course of police operations, and the statements of some co-defendants.

22. On 7 April 2003 the Court of Cassation upheld the judgment. On 29 May 2003 that decision was deposited with the registry of the Istanbul State Security Court.

II. RELEVANT DOMESTIC LAW

23. A description of the relevant domestic law may be found in *Salduz v. Turkey* ([GC] no. 36391/02, §§ 27-31, ECHR 2008), and *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26 26 March 2013).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

24. The Government maintained that the application had been introduced outside the six-month time-limit. In this connection, they stated that although the decision of the Court of Cassation had been pronounced on 16 April 2003, the application had been sent to the Court on 7 December 2004, more than six months later.

25. In accordance with the Court's established practice at the material time, the date of introduction of an application was the date of the first letter indicating an intention to lodge an application and giving some indication of the nature of the complaint. In the instant case the Court notes that, according to the correspondence in the file, the applicant purportedly sent his first letter on 7 October 2003 by registered post and that the Court never received it. By a fax of 21 June 2004 the applicant requested information about his application. On 23 June 2004, the Court Registry informed him that his application had not been received and requested him to re-send his application form. By a letter dated 3 August 2004 the applicant sent the receipt of the registered letter (which indicates that he received the receipt on 10 October 2003) for his missing application form. On 7 December 2004, he re-sent his full application form dated 7 October 2003. In light of the foregoing, the Court observes that the full application form was re-submitted on 7 December 2004 with the receipt of the registered post which shows that the applicant's application form dated 7 October 2003 was missing even though it was sent by registered post. In the light of the registered post receipt submitted by the applicant, the Court considers the date of introduction of the application to be 7 October 2003 (see *Özbent and Others v. Turkey*, nos. 56395/08 and 58241/08, § 33, 9 June 2015).

26. Furthermore, concerning the calculation of the six-month period starting from the date of the final domestic decision, the Court notes that the judgment of the Court of Cassation was deposited with the registry of the first-instance court on 29 May 2003. The Court reiterates that where an applicant is not automatically entitled to be served 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 – that is to say the latest date by which the applicant or his or her representative would definitively be able to discover the content of the decision (see *Ipek v. Turkey* (dec.), no. 39706/98, 7 November 2000, and *Okul v. Turkey* (dec.), no. 45358/99, 4 September 2003). Accordingly, in the present case the applicant lodged his application with the Court on 7 October 2003 within the six-month time-limit, as required by Article 35 § 1 of the Convention. In view of the above, the Court rejects the Government's preliminary objection.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained that he had been denied a fair trial on account of his trial by the Istanbul Security Court whose composition included a military judge, the denial of access to a lawyer during the preliminary investigation, the use of statements taken under duress to

convict him, the non-communication of the written opinion of the principal public prosecutor at the Court Cassation and the failure of the trial court to hear important witnesses. He further complained that the length of the criminal proceedings had been excessive. Article 6 of the Convention provides, in so far as relevant, as follows:

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

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

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

28. The Government contested those allegations.

A. Independence and impartiality of the Istanbul State Security Court

29. The applicant complained of a violation of his right to a fair trial on account of the involvement of a military judge in part of his trial before the Istanbul State Security Court.

30. The Government maintained that the military judge had only attended the first four hearings, during which the trial court had taken the statements of the applicant and the other co-accused. They further submitted that at the hearing held on 4 August 1999, the entire case file was read out due to the change in the composition of the trial court, namely the removal of the military judge. It was from that moment on that the applicant could make his defence submissions before a court composed of civilian judges. In fact, he was able put forward his defence arguments at the hearings held on 29 August 2001 and 19 June 2002. In addition to that, witnesses whose testimonies were later relied on by the trial court to convict the applicant had also given evidence following the removal of the military judge. As a result, the Government contended that the limited presence of the military judge in the criminal proceedings had not constituted a reasonable ground for the applicant to have concerns about the fairness of the entirety of the proceedings.

31. 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. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

32. The Court has consistently held that certain aspects of the status of military judges sitting as members of State Security Courts rendered their independence from the executive questionable (see *Incal v. Turkey*, 9 June 1998, § 68, Reports of Judgments and Decisions 1998-IV, and *Çiraklar v. Turkey*, 28 October 1998, § 39, Reports 1998-VII). The Court also found in *Öcalan (v. Turkey [GC])*, no. 46221/99, §§ 114-15, ECHR 2005-IV) that when a military judge participated in one or more interlocutory decisions that remained in effect during the criminal proceedings in question, the military judge's replacement by a civilian judge in the course of those proceedings, before the verdict was delivered, failed to dissipate the applicant's reasonably held concern about that trial court's independence and impartiality, unless it was established that the procedure subsequently followed in the State Security Court sufficiently allayed that concern. In this connection, it is necessary to examine the nature of the procedural acts carried out with the participation of the military judge and to verify whether the proceedings on the merits were properly renewed after the military judge had been replaced (see *Ceylan v. Turkey (dec.)*, no. 68953/01, ECHR 2005-X).

33. In the present case, the Court notes that the military judge was only present at one preliminary hearing and three hearings on the merits. In those three hearings, six of the accused, including the applicant, gave evidence in person and some minor procedural acts were carried out. Moreover, none of the other five accused made any statements, be it incriminatory or not, in respect of the applicant. However, the fact remains that the applicant made his initial defence submissions before a court whose bench included a military judge. The Court is aware that the hearing of an accused by a court is an important procedural step on the merits in a criminal case. Thus, it has to ascertain whether the State Security Court in its new composition properly renewed that procedural act. In this connection, the Court notes that after the removal of the military judge from its bench, the trial court held fourteen more hearings and the case was examined by three civilian judges. Moreover, both the applicant and his lawyer were able to put forward their detailed defence arguments, including the ones against the public prosecutor's opinion on the merits, during those hearings (by contrast *Akgül v. Turkey*, no. 65897/01, § 24, 16 January 2007). Likewise, the witnesses who made incriminating statements in respect of the applicant were also heard by the trial court composed of three civilian judges who ultimately delivered the judgment and the applicant was able to submit his views in respect of those witnesses before the same court (compare and contrast *Çamlar v. Turkey*, no. 28226/04, § 44, 10 November 2015). The above considerations, taken cumulatively, are sufficient to warrant the conclusion that the procedure followed by the State Security Court in its new composition is sufficient to allay the applicant's reasonably held concerns about the trial court's independence and impartiality. Therefore,

the Court finds that, in the particular circumstances of the case, the replacement of the military judge before the end of the proceedings disposed of the applicant's reasonably held concern about the trial court's independence and impartiality (see *Kabasakal and Atar v. Turkey*, nos. 70084/01 and 70085/01, § 34, 19 September 2006)

34. There has accordingly been no violation of Article 6 § 1 of the Convention under this head.

B. Lack of legal assistance available to the applicant during the preliminary investigation

35. The applicant stated that the restriction on his right to legal assistance during the preliminary investigation had breached his right to a fair trial.

36. Referring to the Court's judgment in the case of *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008), the Government submitted that they were aware of the Court's case-law under Article 6 § 3 (c) of the Convention.

37. 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. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

38. The Court notes that the applicant's access to a lawyer was restricted by virtue of Law No. 3842 and was as such a systemic restriction applicable at the time of the applicant's arrest (*Salduz*, cited above, § 56). The Court does not consider it necessary to examine whether the systematic nature of the restriction on the applicant's right of access to a lawyer was, in itself, sufficient to find a violation of Article 6 §§ 1 and 3 (c) of the Convention, as, in any event, the Government have not offered any compelling reasons for the restriction or demonstrated that the absence of legal assistance at the initial stage of the investigation did not irretrievably prejudice the applicant's defence rights (*Salduz*, cited above, § 58; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 274.) In that respect, the Court notes that in convicting him, the first-instance court relied on the applicant's statements to the police. Moreover, it did not examine the admissibility of evidence at the trial. Likewise, the Court of Cassation dealt with this issue in a formalistic manner and failed to remedy this shortcoming (see, *Bayram Koç v. Turkey*, no. 38907/09, 5 September 2017).

39. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

C. Length of criminal proceedings against the applicant

40. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention.

41. 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).

42. 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.

43. The Court notes that in its decision in the case of *Ümmühan Kaplan* 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.

44. 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, 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).

D. Other alleged violations of Article 6 of the Convention

45. The applicant further complained, under Article 6 of the Convention, that the domestic courts had failed to hear witnesses who were purportedly on his side and that at the appeal stage he had not received the written opinions of the public prosecutor at the Court of Cassation.

46. In the light of its findings under Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention, the Court considers that no separate examination of the remaining complaints under Article 6 is necessary (see *Tezcan Uzunhasanoğlu v. Turkey*, no. 35070/97, § 23, 20 April 2004, and *Geçgel and Çelik v. Turkey*, nos. 8747/02 and 34509/03, § 16, 13 October 2009).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

47. The applicant complained under Article 5 of the Convention of the excessive length of his pre-trial detention.

48. The Court notes that this part of the application was introduced outside the six-month time-limit because the applicant's pre-trial detention ended on 2 September 2002 with the judgment of the Istanbul State Security Court whereas the application was lodged with the Court on 7 October 2003. It follows that the applicant's complaint under Article 5 must be declared inadmissible for being introduced outside the six-month time-limit, according to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He further claimed EUR 4,100 for legal fees and EUR 300 for costs and expenses.

50. The Government contested the claims.

51. The Court 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 *Salduz*, cited above, § 72). It further considers that the finding of a violation constitutes sufficient just satisfaction (see *Dvorski v. Croatia* [GC], no. 25703/11, § 117, ECHR 2015) for non-pecuniary damage. It therefore rejects the applicant's claim.

52. As regards costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of these 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 *Salduz*, cited above, § 79; *Gürova v. Turkey*, no. 22088/03, § 21, 6 October 2009; *Bolukoç and Others v. Turkey*, no. 35392/04, § 47, 10 November 2009; and *Şaman v. Turkey*, no. 35292/05, § 45, 5 April 2011), the Court finds it reasonable to award EUR 1,000 under this head.

53. 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 complaints concerning the lack of independence and impartiality of the trial court on account of the presence of a military judge and the right to have access to a lawyer under Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention admissible;
2. *Declares* the complaints concerning the excessive length of the pre-trial detention under Article 5 § 3 and the length of the criminal proceedings under Article 6 § 1 and inadmissible;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the Istanbul State Security Court;
4. *Holds* that there has been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention on account of the lack of legal assistance available to the applicant during the preliminary investigation;
5. *Holds* that there is no need to examine separately either the admissibility or the merits of the applicant's other complaints under Article 6 of the Convention;
6. *Hold*
 - (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, EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President