



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

SECOND SECTION

CASE OF YILMAZ v. TURKEY

(Application no. 36607/06)

JUDGMENT

STRASBOURG

4 June 2019

FINAL

04/09/2019

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

In the case of Yılmaz v. Turkey,

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

Robert Spano, *President*,

Işıl Karakaş,

Julia Laffranque,

Egidijus Kūris,

Marko Bošnjak,

Arnfinn Bårdsen,

Darian Pavli, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 4 June 2019,

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

PROCEDURE

1. The case originated in an application (no. 36607/06) 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 Abdullah Yılmaz (“the applicant”), on 3 August 2006.

2. The applicant was represented by Mr V. Ata, a lawyer practising in Eskişehir. The Turkish Government (“the Government”) was represented by its agent.

3. On 19 January 2010 the complaints concerning Article 6 § 1 (length of proceedings, alleged unfairness of the proceedings in breach of the principles of equality of arms and adversarial proceedings, and conflicting court decisions) and Article 8 of the Convention (right to respect for private life) were communicated to the Government and the remainder of the application was declared inadmissible.

4. Neither the applicant nor the Government submitted observations on the merits.

THE FACTS

5. The applicant was born in 1965 and lives in Eskişehir.

6. At the material time he was a religious culture teacher and had passed a competitive examination organised by the Ministry of Education (“the Ministry”) giving access to teaching posts abroad.

7. On completion of the competitive examination, a document dated 4 August 2000 marked “secret” was drawn up. The document contained the following passages:

“Abdullah Yılmaz

...

- was taken into police custody on 19.06.1987 for damaging a bust of Atatürk in Kayseri [and was] then released on 22.06.1987 by the trial court;
- practices separation [between men and women] ('haremlik-selamlık') in his household;
- [his] wife, A.Y., conforms to the Islamic dress code in everyday life, but wears a wig in the school in which she works..."

The document also states the following:

"This document is intended for information only and cannot be used in evidence in court. [If the said information] is to be used ... the facts mentioned ... must be documented by the bodies and institutions in question, and the origin [of the information] must not be disclosed."

8. On 21 August 2000 a Ministry assessment board drew up a list of fourteen teachers who had passed the competitive examination for access to posts abroad but who, consequently upon assessment of their situation pursuant to Article 15 of the Security and Archives Directive ("the Directive"), were refused access to such posts. The applicant's name appeared on that list.

9. On 1 November 2000 the applicant sent the competent administrative authorities a request for information inviting them to explain why, given that he had come second in the competitive examination, he had not yet been given a post abroad. He pointed out that the person who had come third in the examination had already been appointed to such a post.

10. On 17 November 2000 the Ministry wrote to the provincial education authorities to inform them that the assessment of the applicant's situation in the light of the criteria to be met by candidates in the competitive competition for an appointment abroad, as laid down in Article 5 of Section A of Circular 938 (2000/11) of 4 February 2000 ("the Circular") had precluded the applicant's appointment.

11. That information was transmitted to the applicant.

12. On 5 January 2001 the applicant lodged with the Eskişehir Administrative Court an application to stay the execution of and set aside the decision to refuse the appointment ("the impugned decision") as groundless. He also claimed damages in respect of the non-pecuniary damage which he had suffered. In support of his appeal he argued, in particular, that the assessment board had given a decision which had relied on no practical grounds, and that therefore it had used its powers under Article 5 of Section A of the Circular in an arbitrary manner.

13. On 9 February 2001 the Ministry submitted pleadings in reply based on the criteria set out in Article 5 of Section A of the Circular, including "absence of impediment to discharge of functions (to be determined by the Ministry assessment board in the light of the findings of the staff security inquiry and archive search)", as well as Articles 8, 12 and 15 of the Directive. It asked that the information concerning the applicant had been assessed by a board composed in conformity with Article 15 of the

Directive and, in order to justify the impugned decision, referred to the public-interest principle and the needs and specific features of the educational and teaching services.

14. On 27 February 2001 the administrative court dismissed the application for a stay of execution lodged by the applicant.

15. On 13 April 2001 the applicant filed a memorial on the merits arguing that Article 8 of the Directive restricted the obligation to carry out a security inquiry to persons finally appointed to a post abroad, and that he therefore should not have been subjected to such an inquiry. He also pointed out that he had been working as a teacher for many years without the least problem, that he had come second in the competitive examination and that he had never engaged in blameworthy conduct – as witness his lack of a police record. He explained that his arrest in 1987, when he had been a student, had been the result of a misunderstanding and that the case had been dropped at the time. In that regard, he submitted that any security enquiry reaching a negative finding solely on that account would have been unlawful. He added that his conduct of his private life had no effect on the efficiency of his work. Furthermore, the authorities in question should have supported its allegations with proper evidence and explained how they considered that his private life constituted an obstacle to his professional duties. He considered that that was not the case.

16. On 13 September 2001 the administrative court dismissed the applicant's action to set aside the impugned decision. In so doing it had regard to the provisions of Article 5 of Section A of the Circular and Articles 2 and 15 of the Directive, ruling as follows:

“... ”

Under the terms of Article 5 of Section A of the 04.02.2000 Circular ... ‘the absence of an impediment to discharging duties abroad (according to the findings of the staff security enquiry and archive search) must be established by the Ministry's assessment board’;

Article 2 of the Directive ... provides: ‘The present Directive ... sets out the principles and procedures relating to the security enquiries and archive searches to which all staff [wishing] to be permanently appointed abroad are subject ...’

Article 15 headed ‘assessment’ provides as follows: ‘... an assessment board shall be set up... if the information obtained as a result of the security enquiry and archive search is unfavourable’

....”

The court also noted that the applicant had passed the impugned competitive examination and had attended a retraining seminar organised in that context, but that the assessment board which had been set up following the security enquiry and archive search had decided that he could not be appointed to a post abroad. In the light of those circumstances, the evidence on file, the importance and the specific requirements of the posts abroad, the

administrative court found that the impugned decision fell within the discretionary powers of the authority in question.

17. On 2 October 2001 the applicant lodged an appeal on points of law with the Council of State.

18. On 23 January 2002 the Council of State dismissed the application for a stay of execution of the administrative court's decision.

19. On 13 May 2005 the Council of State dismissed the applicant's appeal on points of law on the grounds that the decision at first instance had been given in accordance with the relevant legal and procedural rules. That judgment indicated that the reporting judge had issued an opinion in favour of confirming the first-instance decision. The Attorney General, for his part, held that the impugned refusal to make an appointment had been based solely on the findings of the security enquiry conducted by the intelligence services, which could not, by their very nature, be used in evidence. He added that "... the allegations had been the subject of a discontinuance decision given in 1987". Moreover, no pleas had been advanced capable of justifying the impugned refusal to make an appointment, apart from information stemming from an intelligence-gathering exercise. He considered that the decision had been unlawful, that it should be set aside and that the applicant's appeal should be allowed.

20. On 5 July 2005 the applicant lodged an application for rectification of that judgment. In his pleadings, he submitted, in particular, that the impugned administrative decision had not been based on objective criteria and was arbitrary. He added that the Attorney General had noted those facts in his opinion.

21. By judgment of 19 December 2005, notified on 7 February 2006, the Council of State dismissed the applicant's appeal. That judgment stated that the reporting judge had issued an opinion in favour of dismissing the appeal. The Attorney General, on the other hand, held that the fact of using information stemming from intelligence-gathering was contrary to the rule-of-law principle, inasmuch as it had been obtained by an unidentified institution and, moreover, had not been confirmed by any other legally valid information or document. He therefore sought the annulment of the first-instance decision, on the further grounds that in the light of the relevant case-law that decision had been contrary to the equality principle.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant submitted that the length of the proceedings before the national authorities had been incompatible with the "reasonable length" requirement. He also considered the failure to communicate the opinions of the reporting judge and the Attorney General to the Council of State as a

breach of the equality of arms and the adversarial principles, and thus complained that the proceedings had been unfair on that account. Lastly, he complained of conflicting court decisions, and presented in support of that allegation two administrative court rulings in favour of teachers who had applied for posts abroad and had allegedly been turned down on the basis of the findings of security enquiries.

He relied on Article 6 of the Convention, the relevant parts of which provide:

Article 6 § 1

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by a ... tribunal ...”

23. The Government did not express a view.

A. Applicability of Article 6 of the Convention

24. In the light of the principles set out in its case-law (see, among other authorities, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 40-64, ECHR 2007-II, and *Emel Boyraz v. Turkey*, no. 61960/08, § 62, 2 December 2014), the Court considers that Article 6 of the Convention is applicable in the present case.

B. Admissibility

1. As regards the failure to communicate the reporting judge’s opinion to the Council of State

25. The Court reiterates that it has already determined a similar issue in the framework of the case of *Meral v. Turkey* (no. 33446/02, §§ 40-43, 27 November 2007), where it found that there had been no violation of Article 6 § 1 of the Convention on that count. It considers that none of the circumstances of the present case warrant departing from that finding. Consequently, it holds that that complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

2. As regards the failure to communicate the Attorney General’s opinion to the Council of State

26. The Court reiterates that it has already considered a similar issue in *Kılıç and Others v. Turkey* ((dec.), no. 33162/10, §§ 19-32, 3 December 2013). In the latter case it found that the applicants had sustained no “major damage” in the exercise of their right to participate appropriately in the impugned proceedings, and it therefore declared their complaint inadmissible under Article 35 § 3 (b) of the Convention.

27. In the instant case, the Court notes that the Attorney General's opinion was favourable to the applicant, and moreover that the latter had referred to that fact in his application for rectification of the judgment (see paragraphs 19-20 above). It can discern no particular reason to depart from its conclusions in the case of *Kılıç and Others* cited above.

28. The Court therefore considers that this complaint must be declared inadmissible pursuant to Article 35 § 3 (b) of the Convention.

3. As regards the allegation of conflicting court decisions

29. In the light of its case-law (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 49-58 and 94-95, 20 October 2011), the Court considers that it does not have sufficient information to conclude that the present case involved a situation of case-law uncertainty capable of infringing the principle of legal certainty. It considers therefore that this complaint is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. As regards the length of proceedings

30. The Court emphasises that the Government submitted no observations in the present case. In the light of its case-law on the compensation remedy 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), the Court considers that since the Government raised no objection regarding such remedy, it should proceed to examine the applicant's complaint concerning the length of proceedings (see *Sodan v. Turkey*, no. 18650/05, §§ 63-65, 2 February 2016).

31. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

32. In the instant case, the Court notes that the impugned proceedings lasted some four years and eleven months before the administrative courts, including three years and seven months before the Council of State, pending its decision on the merits of the dispute. In that connection, it reiterates that the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII, and *Rodoplu v. Turkey*, no. 41665/02, § 31, 23 January 2007).

33. The Court has examined cases raising similar issues to that in the instant case on numerous occasions and has found a violation of Article 6 § 1 of the Convention (see *Frydlender*, cited above, § 46, and *Rodoplu*, cited above, § 32).

34. Having examined all the evidence presented to it, the Court cannot discern any fact or argument capable of persuading the Court to reach a different conclusion as regards the merits of the complaint in question. Having regard to its relevant case-law, it considers that in the present case the length of the impugned proceedings was excessive, in breach of the “reasonable length” requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicant complained of an infringement of his right to respect for his private life. He alleged that the domestic authorities had unduly subjected him and his family to a security enquiry and had refused, relying on information concerning his private life obtained by means of that enquiry, to appoint him to one of the posts to which the fact of passing the competitive examination should have given him access.

He relied on Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Applicability of Article 8 of the Convention

36. The Court first of all notes that the present case concerns an employment-related dispute between an individual and a State. It then reiterates that has on many occasions examined cases raising the issue of the applicability of the concept of “private life”, within the meaning of Article 8 of the Convention, to employment-related complaints.

37. In its recent *Denisov v. Ukraine* judgment ([GC], no. 76639/11, 25 September 2018), the Court drew up an evolutive typology of cases of employment-related disputes which it has dealt with. Acknowledging that such disputes are not *per se* excluded from the scope of “private life”, it determined the criteria for the applicability of Article 8 of the Convention in such situations. It thus established that generally speaking, there are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that

event the Court employs the reason-based approach) or because of the consequences for private life (in that event the Court employs the consequence-based approach) (*ibid.*, § 115).

38. The Court will examine the present case in the light of the approaches defined above. That means determining how a private-life issue can arise in the situation in question, whether from the underlying reasons for the applicant's non-appointment, or from the consequences of the latter for his private life.

39. The applicant submitted that his appointment abroad had been turned down for reasons linked to his and his wife's private life. In that connection it should be remembered that the applicant – who was a religious culture teacher at the time – passed a competitive examination which should have enabled him to be appointed to a post abroad. Having passed the examination, he also attended a seminar geared to adapting his competences (see paragraph 16 above). However, a Ministry assessment board decided that the applicant's situation was such that he could not be appointed to a post abroad. Having regard to the evidence on file and, in particular, the decisions of the administrative courts, the Court observes that the refusal to appoint the applicant was based on the findings of a security enquiry which had disclosed information on the applicant's private life, such as his lifestyle and his wife's mode of attire. Reference was also made to an arrest which had occurred a long time before and which had been the subject of a discontinuance decision.

40. The Court also notes that apart from the information obtained from the security enquiry, the competent administrative authorities provided no employment-related and/or administrative reasons to explain why the applicant could not be appointed to a post abroad (see paragraphs 8 and 10 above). Moreover, the Attorney General with the Council of State twice criticised this failure to give reasons (see paragraphs 19 and 21 above). The Court further notes that the administrative authorities also failed to explain how the information obtained by means of the security enquiry was such as to debar *per se* the applicant from discharging his duties abroad.

41. In the light of all these considerations, the Court agrees with the applicant that the underlying reasons for refusing to appoint him were based solely on the information on his private life. Indeed, the underlying reasons for a measure affecting professional life may be linked to the individual's private life and these reasons themselves may render Article 8 applicable (see *Denisov*, cited above, § 103; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI; *Obst v. Germany*, no. 425/03, §§ 43 et seq., 23 September 2010; and *Özpınar v. Turkey*, no. 20999/04, §§ 47-48, 19 October 2010). The Court therefore holds that Article 8 of the Convention is applicable in the present case.

B. Admissibility

42. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

43. In the instant case the Court considers that the refusal to appoint the applicant amounted to an interference with the exercise of his right to respect for his private life. Such interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more legitimate aims and is “necessary in a democratic society” in order to achieve them.

44. The Court observes that the Government failed to specify the legal basis for the interference, the legitimate aim pursued and the reasons why that interference might be deemed necessary in a democratic society.

45. In that regard, the Court deems it useful to reiterate that with reference to the provisions of a circular and a directive, the national authorities considered that the applicant was debarred from taking up a post abroad (see paragraphs 8, 10 and 13 above). The Ministry of Education mentioned the “public interest” principle and overriding needs in order to justify that decision, albeit without providing any explanations as to the public-interest reasons at issue or the necessities and peculiarities of the education and teaching services which might have explained why a teacher employed by the Ministry could not hold a post abroad (see paragraph 13 above).

46. On reading the assessment board’s decision (see paragraph 8 above), the Court also observes that that board had not given its view on the applicant’s competences or capacities in terms of discharging the duties in question, but confined itself to the findings of the security enquiry. However, those findings had attached primary importance to aspects of the applicant’s and his wife’s private life, especially the fact that she wore an Islamic headscarf (see paragraph 7 above).

47. In that connection the Court reiterates that it has previously held that the aim of protecting civil service neutrality could not justify having regard, in a decision to transfer a civil servant, to the fact that his wife wore an Islamic headscarf, which fell within the ambit of the couple’s private life (see *Sodan*, § 57, cited above). Of course, the Court does not rule out the possibility that under certain circumstances specific civil-service requirements necessitate taking into account the findings of security enquiries. Nevertheless, it is difficult to understand how, in the present case, the applicant’s mode of conduct at home and the fact of his wife wearing a headscarf (see paragraph 7 above) – which matters fall within the ambit of private life – could possibly interfere with public-interest requirements or

the needs of the educational services. It further notes that the applicant's previous arrest had not led to any criminal prosecution, nor had it impeded his access to the teaching profession.

48. In concluding this assessment of the circumstances of the present case, the Court regards it as established that the decision not to appoint the applicant to a post abroad had been motivated by factors falling within the ambit of his private life. Even supposing that this interference was prescribed by law and pursued one of the legitimate aims set out in Article 8 § 2, the Court considers that in any case the interference was not necessary in a democratic society.

49. There has accordingly been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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.”

51. The applicant did not submit a claim for just satisfaction. The Court considers therefore that no award should be made under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible as regards the complaints concerning Article 6 § 1 (on account of the length of proceedings) and Article 8 of the Convention, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 on account of the excessive length of proceedings;
3. *Holds* that there has been a violation of Article 8 of the Convention;

Done in French, and notified in writing on 4 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President