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

FIRST SECTION

CASE OF GÜLŞEN AND HALİL YASİN KETENOĞLU v. TURKEY

(*Applications nos. 29360/95 and 29361/95*)

JUDGMENT

STRASBOURG

25 September 2001

FINAL

25/12/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gülşen and Halil Yasin Ketenoğlu v. Turkey,

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

Mrs E. PALM, *President*,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr B. ZUPANČIČ,
Mr T. PANŢÎRU,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 15 June 1999 and on 4 September 2001,

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

PROCEDURE

1. The case originated in applications (nos. 29360/95 and 29361/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mrs Gülşen Ketenoğlu and Mr Halil Yasin Ketenoğlu ("the applicants"), on 15 May 1995.

2. The applicants were represented by Mr Mehmet Aydın, a lawyer practising in Antalya (Turkey). The Turkish Government did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants alleged, in particular, that the criminal proceedings brought against them had not been concluded within a "reasonable time" and that their right to a fair hearing had been breached on account of their conviction by the Ankara Martial Law Court which lacked independence and impartiality.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Feyyaz Gölcüklü to sit as an *ad hoc* judge, in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 11 January 2001, the Chamber decided to join the applications and declared them admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Arrest and detention of the applicants

8. The applicants, a married couple, Halil Yasin and Gülşen Ketenoğlu were arrested by police officers from the Ankara Security Directorate on 7 and 13 November respectively. They were suspected of membership of an illegal organisation, the Dev-Yol (Revolutionary Way).

9. By decisions of 30 January and 6 February 1981 the Ankara Martial Law Court (*sıkıyönetim mahkemesi*) remanded the applicants in custody.

B. Trial in the Ankara Martial Law Court

10. On 26 February 1982 the Military Public Prosecutor filed a bill of indictment with the Martial Law Court against the applicants and 721 other defendants. The public prosecutor accused the applicants of membership of an illegal armed organisation, namely the Dev-Yol, whose object was to undermine the constitutional order and replace it with a Marxist-Leninist regime. He further charged the applicants with having been involved in a number of crimes such as the killing of several individuals, bomb attacks and robberies.

The prosecution sought the death penalty under Article 146 § 1 of the Turkish Criminal Code.

11. By the orders of 11 November and 17 December 1985 the applicants were released pending trial by the Ankara Martial Law Court.

12. In May 1989 the applicants both fled the country and settled in Germany.

13. In a judgment of 19 July 1989 the Martial Law Court, composed of two civilian judges, two military judges and an army officer, found the applicants guilty as charged and sentenced Mrs Ketenoğlu to five years and 6 months' imprisonment and Mr Ketenoğlu to 16 years' imprisonment for offences under Article 168 §§ 1 and 2 of the Criminal Code. The judgment was pronounced in the aplicants' absence.

C. Proceedings on appeal

14. The applicant lodged an appeal with the Military Court of Cassation (*askeri yargıtay*).

15. Following promulgation of the Law of 27 December 1993, which abolished the jurisdiction of the martial law courts, the Court of Cassation (*yargıtay*) acquired jurisdiction over the case and the file was transmitted to it.

16. On 27 December 1995 the Court of Cassation quashed the applicants' conviction. It held, under Article 102 of the Turkish Criminal Code, that the criminal proceedings against Mrs Ketenoğlu should be discontinued since the prosecution was time-barred. The court however considered that Mr Ketenoğlu should have been convicted for offences under Article 146 § 1 of the Turkish Criminal Code. It therefore referred the case to the 6th Chamber of the Ankara Assize Court where the criminal proceedings against Mr Ketenoğlu are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

17. Article 146 § 1 of the Turkish Criminal Code provides:

> "Whosoever shall attempt to alter or amend in whole or in part the Constitution of the Turkish Republic or to effect a coup d'état against the Grand National Assembly formed under the Constitution or to prevent it by force from carrying out its functions shall be liable to the death penalty."

18. Article 168 of the Criminal Code reads:

> "Any person who, with the intention of committing the offences defined in Articles... forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.
>
> The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment."

B. The Martial Law Courts

19. The provisions governing judicial organisation are worded as follows:

1. The Constitution

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, officer or other person may give orders or instructions to courts or judges in the exercise of their judicial powers, nor send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges ... shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution ..."

Article 145

"... Martial law courts shall be responsible for dealing with offences under special laws committed by civilians against military personnel and offences committed against military personnel in the course of their duties or on scheduled premises.

The offences and persons falling within the jurisdiction of the martial law courts in time of war or under martial law, the composition of martial law courts and the appointment, where necessary, of judges and prosecutors from the ordinary courts to martial law courts shall be regulated by law.

The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law."

2. The Martial Law Act (Law no. 1402 of 13 May 1971)

Article 11 § 1

"The Ministry of defence shall convene a sufficient number of martial law courts in areas where martial law applies..."

Article 11 § 4

"Judicial advisers, military judges and military prosecutors attached to the martial law courts are appointed, with agreement of the Chief of Staff, from among the candidates nominated by a committee composed of the personnel director and the legal adviser to the Office of the Chief of Staff, the personnel director and the legal adviser to the army corps to which the judge in question belongs and finally the head of the Military Legal Service at the Ministry of Defence."

Article 11 § 6

"The army officers serving on martial law courts are appointed, on the proposal of the Chief of Staff, according to the procedure for appointing military judges..."

3. The Act Governing the Formation and Proceedings of Martial Law Courts (Law no. 353 of 26 October 1963)

Article 4

"The officers serving on the martial law courts and their substitutes shall be appointed, in December, by the commander or the superior of the military establishment within which a martial law court is formed, from among the officers of that establishment. The officers thus appointed are irremovable for one year."

4. The Military Judges Act (Law no. 357 of 26 October 1963)

Article 12

"The suitability of military judges for promotion, priority within the same grade and progress up the career hierarchy is determined on the basis of assessments.

A) There are three types of assessment certificate, which are the assessment certificate for generals, the assessment certificate for officers (sub-lieutenant - colonel) and the professional assessment certificate.

...

B) The superiors in the hierarchy authorised to issue an assessment certificate for officers and to assess officers:

First superior in the hierarchy: the commander or superior of the military establishment to which the judge in question belongs and in which a martial law court is formed.

Second superior in the hierarchy: the commander or the superior immediately above the first superior in the hierarchy.

Third superior in the hierarchy: the commander or the superior immediately above the second superior in the hierarchy..."

Article 29

"The Minister of Defence may apply the following disciplinary sanctions to military judges, after hearing their defence:

- Written warning...;

- Rebuke..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicants complained that they were denied a fair hearing within a reasonable time by an independent and impartial tribunal, in breach of Article 6 § 1 of the Convention which provides, as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal..."

A. The Court's jurisdiction *ratione temporis*

21. The Court observes that a question arises as to its jurisdiction *ratione temporis* in respect of the instant applications in view of the entry into force of Protocol No. 11 to the Convention.

22. The Court notes in this connection that on 1 November 1998, by operation of Protocol No. 11, applications such as the present one pending before the Commission (see paragraph 4 above) which have not been declared admissible fell to be examined by the Court in accordance with the provisions of that Protocol. Given that the object of Article 5 § 2 of the Protocol is to provide for the examination of former Commission cases as part of transitional arrangement, the former Court no longer being in existence, the Court's jurisdiction *ratione temporis* is determined by the date of the respondent State's acceptance of the right of individual petition.

23. Accordingly, the considerations which led the former Court in its Mitap and Müftüoğlu v. Turkey judgment of 25 March 1996 (*Reports of Judgments and Decisions* 1996-II, pp. 410-411, §§ 26-28) to determine its jurisdiction *ratione temporis* in respect of the complaints raised in that case as of 22 January 1990, the date of the respondent State's acceptance of its jurisdiction, cannot be invoked to confine its jurisdiction to facts or events occurring since that date (see Cankoçak v. Turkey, nos. 25182/94 and 26956/95, § 26, ECHR 2001- ...).

The Court notes that this conclusion has not been disputed.

B. Merits of the complaints

1. Length of the proceedings

(a) Period to be taken into consideration

24. The Court notes that the proceedings began on 7 and 13 November 1980, the dates of the arrest of Mrs and Mr Ketenoğlu respectively. They ended on 27 December 1995 in respect of Mrs Ketenoğlu when the Court of Cassation held that the prosecution was time-barred and are still pending in respect of Mr Ketenoğlu. The proceedings therefore lasted almost fifteen years in respect of Mrs Ketenoğlu and have already lasted more than twenty years in respect of Mr Ketenoğlu.

However, the Court can consider the period of almost eight years and eleven months in respect of Mrs Ketenoğlu and approximately fourteen years in respect of Mr Ketenoğlu that elapsed after 28 January 1987, the date of deposit of Turkey's declaration recognising the right of individual petition (see paragraph 22 above). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (see, as the most recent authority, the above-mentioned Cankoçak judgment, § 25). On the critical date the proceedings against the applicants had already lasted six years and two months.

(b) Reasonableness of the length of proceedings

25. The reasonableness of the length of the impugned period is to be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities (see, among many other authorities, the above-mentioned Mitap and Müftüoğlu judgment, p. 411, § 32).

26. The Government underlined the complexity of the case and the nature of the charges the applicants faced. They pointed out that the applicants were accused of serious crimes and were convicted of murder and bombing offences. The courts had to deal with a trial involving 723 defendants, including the applicants. The authorities needed time to establish the scope and activities of the terrorist network of which the applicants were alleged to be a member. The Martial Law Court followed an expedited procedure and made every necessary effort to speed up the trial. It held more than five hundred hearings, at a rate of three per week. The public prosecutor had to study two thousand pages of written submissions in order to prepare his indictment. The file comprised approximately one thousand loose-leaf binders and the summary of the judgment ran to no fewer than two hundred and sixty-four pages. With reference to the minutes of the 6th Chamber of the Ankara Assize Court, the Government pointed out that the

hearings were postponed by reason of Mr Ketenoğlu's failure to appear before the court as he lived abroad. The Assize Court was therefore unable to deliver a judgment since it could not hear Mr Ketenoğlu.

In sum, the Government contended that these factors explained the length of the proceedings against the applicants and that no negligence or delay was imputable to the judicial authorities.

27. The applicants submitted in reply that they had been kept in detention on remand for three years and that the courts were unable to deliver a final judgment in their case. In their view, the complexity of the case and the large number of defendants cannot justify the delay in the proceedings which lasted fifteen to twenty years. They asserted in this connection that during the impugned period they were placed in an ambiguous situation as a result of which they could not continue their education and that Mrs Ketenoğlu was not allowed to work as a teacher while Mr Ketenoğlu had to leave his country.

28. The Court acknowledges the Government's submission that the case was a complex one owing to the large number of defendants, the seriousness of the charges and the courts' difficulties in handling a large-scale trial. However, as the case cannot be explained in terms of the complexity of the issues involved, the Court will examine it in the light of the conduct of the applicants and the national authorities (see paragraph 25 above).

29. In this regard, it is to be noted that the respondent Government have not made any criticism of the Mrs Ketenoğlu's behaviour at any stage of the trial. Their only criticism was about Mr Ketenoğlu's failure to attend the hearings before the Ankara Assize Court which allegedly contributed to the delay in the proceedings. The Court reiterates that the length of the proceedings can only be explained by the failure of the domestic courts to deal with the case diligently (see the Cankoçak judgment cited above, § 32).

30. It observes in this connection that the Martial Law Court reached a verdict in almost seven years and four months. It took the Military Court of Cassation, to which the applicants appealed against their conviction, more than four years to rule on the appeal. Furthermore, the Court of Cassation gave judgment on 27 December 1995, approximately two years after it had been seized of the case. Although the appellate court terminated the criminal proceedings against Mrs Ketenoğlu, the conviction of Mr Ketenoğlu was quashed, and the case is still pending before the first instance court.

31. The Court does not dispute the Government's assertion that the delay in the delivery of a final judgment on the applicants' case was caused to a large extent by the complexity of the case. It observes that the legislative changes resulting from transfer of the jurisdiction over the case from the military courts to civil ones was also a contributing factor to the delay at issue. The Court further accepts that the respondent State cannot be held responsible for the time that elapsed subsequent to the Court of Cassation's decision of 27 December 1995 since Mr Ketenoğlu fled Turkey and never

appeared before the Ankara Assize Court. However, the Court cannot regard as "reasonable" a total duration which at 27 December 1995 was already fifteen years, out of which eight years and eleven months fell within its jurisdiction *ratione temporis*.

32. The Court recalls in this respect that, as it has repeatedly held, Article 6 § 1 imposes on the Contracting States the duty to organise their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see, among other authorities, *Pelissier and Sassi v. France* [GC], p. 301, § 74, no. 25444/94, ECHR 1999-II). Therefore, the delay in the criminal proceedings against the applicants must be attributed to the national authorities. For these reasons the Court concludes that the length of the criminal proceedings failed to meet the "reasonable time" requirement.

33. There has accordingly been a breach of Article 6 § 1 of the Convention.

2. Independence and impartiality of the Martial Law Court

(a) Arguments of the participants

(i) The applicants

34. According to the applicants, the Martial Law Court which tried them could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention in that its five members included two military judges and an army officer. The two military judges on the bench were servicemen who belonged to the army and took orders from the executive. They were subject to military discipline and the army compiled assessment reports on them for that purpose. The army officer who had no legal training was accountable to the commander of the state of martial law.

(ii) The Government

35. The Government submitted that the applicants cannot claim to be a victim of a violation in respect of this matter since their conviction by the Martial Law Court was quashed by the Court of Cassation. They maintained that the criminal proceedings against Mrs Ketenoğlu were discontinued and that Mr Ketenoğlu is now being tried by a court which does not include a military judge. The Government argued, in the alternative, that at the relevant time the two military judges and their two civilian counterparts sitting on the Martial Law Court enjoyed the guarantees of judicial independence and immunity laid down in the Constitution. The sole task of the army officer on the bench was to ensure the proper functioning of the hearing and he had no other judicial power. In the Government's view, the

procedure for the appointment and the assessment of the military judges sitting on the Martial Law Courts and the safeguards they enjoyed in the performance of their judicial duties at the time perfectly satisfied the criteria laid down by the Court's case-law on the subject. They therefore requested the Court to hold that there has been no violation of the applicants' right to a fair hearing by an "independent and impartial tribunal".

(b) The Court's assessment

36. The Court observes that the criminal proceedings against Mrs Ketenoğlu was terminated on 27 December 1995 on the ground that the statutory time-limit under Article 102 of the Turkish Criminal Code had expired. It further notes that the Court of Cassation quashed the conviction of Mr Ketenoğlu by the Martial Law Court and referred the case to the 6th Chamber of the Ankara Assize Court, which does not include a military judge and whose independence and impartiality was not challenged by the applicant.

37. Against this background, the Court is of the opinion that any defects which may have existed at the time of the applicants' trial by the Martial Law Court must be considered to have been rectified by the decision of the Court of Cassation due to the quashing of the conviction, and thus they can no longer claim to be a victim of the alleged violation (see application no. 8083/77, X v. the United Kingdom, DR 19, p. 223).

38. In conclusion, the Court cannot find that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. Mrs Gülşen Ketenoğlu and Mr Halil Yasin Ketenoğlu claimed the sums of 1,100,000 and 1,202,540 French francs (FRF), respectively, by way of compensation for pecuniary and non-pecuniary damage. They referred in this connection to the unjustified length of the criminal proceedings and to their claims, *inter alia*, that they were arbitrarily detained in prison for three years, that they could not continue their profession and that they finally had to leave their country.

41. The Government did not make any comments on the applicants' claims.

42. The Court considers that the applicants must have suffered a certain amount of distress, having regard to the total length of the proceedings against them. Deciding on an equitable basis, it awards them each the sum of FRF 100,000.

B. Costs and expenses

43. The applicants each claimed the sum of FRF 45,000 at the material for their lawyer's fees and expenses.

44. The Government did not make any observations under this head of claim either.

45. Deciding on an equitable basis and having regard to the criteria laid down by its case-law (see, among other authorities, the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, p. 20, § 49), the Court considers it reasonable to award the applicants FRF 15,000 by way of reimbursement of their costs and expenses.

C. Default interest

46. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4,26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the applicants' trial by the Martial Law Court;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:

   (i) to each applicant 100,000 (one hundred thousand) French francs in respect of non-pecuniary damage;

   (ii) for costs and expenses 15,000 (fifteen thousand) French francs, together with any tax that may be chargeable, to the applicants;

(b) that simple interest at an annual rate of 4,26% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 25 September 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President