



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

THIRD SECTION

CASE OF ALFATLI AND OTHERS v. TURKEY
(as regards the applicant Mahmut Memduh Uyan)
(Application no. 32984/96)

JUDGMENT

30 October 2003

STRASBOURG

FINAL

24/03/2004

*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 Alfath and Others v. Turkey (*as regards the applicant Mahmut Memduh Uyan*),

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEŖEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,

and Mr M. VILLIGER, *Deputy Section Registrar*,

Having deliberated in private on 9 October 2003,

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

PROCEDURE

1. The case originated in an application (no. 32984/96) 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 sixteen Turkish nationals, Mr Ali Alfathlı, Mr Haşım Aydınca, Mr Nusrat Safa Akyürek, Mr Ahmet Asena, Mr Mahmut Memduh Uyan, Mr İbrahim Levent Saçılanateş, Mr Mehmet Kaplandur, Mr Nevzat Cömert, Mr Özgür Şahin, Mr Bülent Forta, Mr Hüseyin Cihan, Mr Hasan Yorulmaz, Mr Ahmet Kirami Kılınç, Mr Mehmet Engin Höke, Mr Mustafa Aslan and Mr Sedat Göçmen (“the applicants”), on 7, 8, 12, 18, 24 and 25 June 1996.

2. The applicants all complained that the criminal proceedings brought against them were not determined within a reasonable time as required by Article 6 § 1 of the Convention.

3. The applicants Haşım Aydınca, Nusrat Safa Akyürek, Ahmet Asena, Mahmut Memduh Uyan, İbrahim Levent Saçılanateş, Hüseyin Cihan, Hasan Yorulmaz, Ahmet Kirami Kılınç, Mehmet Engin Höke, Mustafa Aslan and Sedat Göçmen submitted under Article 6 § 1 of the Convention that their right to a fair hearing was breached as they were tried by the Martial Law Court which lacked independence and impartiality.

4. The applicants all alleged under Article 6 § 1 of the Convention that their right to a fair hearing was breached since the courts convicted them on the basis of the statements they had made to the police under duress.

5. The applicant Sedat Göçmen further alleged under Article 6 § 3 (b) of the Convention that he was deprived of his right to have adequate time and facilities for the preparation of his defence.

6. The applicants Haşim Aydınçak, Nusrat Safa Akyürek, Ahmet Asena, Mahmut Memduh Uyan, İbrahim Levent Saçılanateş, Bülent Forta, Hüseyin Cihan, Hasan Yorulmaz, Ahmet Kirami Kılınç, Mehmet Engin Höke, Mustafa Aslan and Sedat Göçmen complained that they had been subjected to various forms of ill-treatment during their pre-trial detention. They did not invoke any Articles of the Convention and did not specify the treatment they had allegedly suffered during their pre-trial detention.

7. The case was transferred to the Court on 1 November 1998 by virtue of Article 5 § 2 of Protocol No. 11 to the Convention.

8. On 23 November 1999 the Court communicated to the Government the applicants' complaint under Article 6 § 1 of the Convention concerning the length of the criminal proceedings and the complaint under Article 6 § 1 of the Convention introduced by Haşim Aydınçak, Nusrat Safa Akyürek, Ahmet Asena, Mahmut Memduh Uyan, İbrahim Levent Saçılanateş, Hüseyin Cihan, Hasan Yorulmaz, Ahmet Kirami Kılınç, Mehmet Engin Höke, Mustafa Aslan and Sedat Göçmen concerning their right to a fair hearing by an independent and impartial tribunal. The Court also communicated to the Government Sedat Göçmen's complaint concerning the lack of time and facilities for the preparation of his defence. The Court rejected the remainder of the complaints.

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

10. By a decision of 27 June 2002 the Court declared the application partly admissible, retaining the applicants' complaint concerning the alleged breach of their right to a hearing within a reasonable time and the complaint introduced by Mahmut Memduh Uyan, İbrahim Levent Saçılanateş, Hüseyin Cihan, Hasan Yorulmaz, Ahmet Kirami Kılınç, Mehmet Engin Höke and Mustafa Aslan concerning their right to a fair hearing by an independent and impartial tribunal.

11. On 25 September 2002, after an exchange of correspondence, the Registrar suggested to the parties that they should attempt to reach a friendly settlement within the meaning of Article 38 § 1 (b) of the Convention. On 23 and 24 October 2002, 5 November 2002, 4 December 2002; and on 17 December 2002, 7 and 23 January 2003 the applicants and the Government respectively submitted formal declarations accepting a friendly settlement of the case.

12. On 25 October 2002 Mr Mehdi Bektaş, the representative of the applicant Mahmut Memduh Uyan, informed the Court that his client did not wish to reach a friendly settlement in his case.

13. On 11 September 2003 the Court unanimously decided to strike the case out of the list following the friendly settlement agreement reached between the parties in so far as it concerned the applicants Mr Ali Alfatlı, Mr Haşim Aydınçak, Mr Nusrat Safa Akyürek, Mr Ahmet Asena, Mr İbrahim Levent Saçılanateş, Mr Mehmet Kaplandur, Mr Nevzat Cömert, Mr Özgür Şahin, Mr Bülent Forta, Mr Hüseyin Cihan, Mr Hasan Yorulmaz, Mr Ahmet Kirami Kılınç, Mr Mehmet Engin Höke, Mr Mustafa Aslan and Mr Sedat Göçmen. It decided to sever the application, in so far as it concerned the applicant Mr Mahmut Memduh Uyan, and adjourned the examination of the complaints introduced by him.

14. The present judgment examines the merits of the complaints introduced by Mr Mahmut Memduh Uyan on 7 June 1996. Mr Uyan will be referred to as “the applicant”.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

15. On 2 February 1985 the applicant was arrested and placed in police custody. He was accused of membership of an illegal organisation, the Dev-Yol (Revolutionary Way). On 18 March 1985 the Ankara Martial Law Court (*Sıkıyönetim Mahkemesi*) ordered the applicant's detention on remand.

16. On 26 February 1982 the Military Public Prosecutor filed a bill of indictment with the Ankara Martial Law Court setting out charges against seven hundred and twenty-three defendants, including the applicant. The military prosecutor accused the applicant of membership of an organisation whose aim was to undermine the constitutional order and replace it with a Marxist-Leninist regime, contrary to Articles 146 § 1 and 168 § 2 of the Criminal Code.

17. After martial law was lifted, the Ankara Martial Law Court took the name of the Martial Law Court attached to the 4th Army Corps.

18. On 19 July 1989 the Martial Law Court convicted the applicant and sentenced him to death penalty. The applicant appealed against the conviction and the case was referred to the Military Court of Cassation (*Askeri Yargıtay*).

19. Following promulgation of the Law of 26 December 1994, which abolished the jurisdiction of the martial law courts, the Court of Cassation (*Yargıtay*) acquired jurisdiction over the cases and the files were sent to it.

20. On 6 February 1995 the applicant was released pending trial.

21. On 27 December 1995 the Court of Cassation upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. A description of the relevant domestic law and practice can be found in *Şahiner v. Turkey*, judgment of 4 September 2001, *Reports of Judgments and Decisions* 2000-IX.

23. Article 327 of the Code of Criminal Procedure lists the circumstances in which “a person convicted in a judgment that has become final may be granted a retrial”.

It was amended by section 3 of Law no. 4793, which added a sixth set of circumstances in which the proceedings could be reopened:

“where it has been held in a final judgment of the European Court of Human Rights that a decision in criminal proceedings was given in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms or its Protocols. In such cases, an application to reopen the proceedings may be lodged within one year of the date on which the judgment of the European Court of Human Rights became final.”

Law no. 4793 came into force on 3 February 2003. By provisional section 1 of the Law, section 3 is applicable in only two sets of circumstances: where the Court has delivered a judgment that became final before the Law came into force, and where the Court delivers a final judgment on an application lodged after the Law came into force.

THE LAW

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

1. Length of the proceedings

24. The applicant complained about the length of the criminal proceedings against him. He alleged a violation 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 ... hearing within a reasonable time by [a] ... tribunal...”

25. The Government rejected the allegation. They argued that the case was complex on account of the nature of the charges the applicant faced and the need to organise a large-scale trial involving 723 defendants, including the applicant. The participation of all these defendants in Dev-Yol activities had to be established. They averred that these factors explained the length of

the proceedings and that no negligence or delay could be imputed to the judicial authorities.

(a) Period to be taken into consideration

26. The Court notes that the proceedings began on 2 February 1985, the date of the applicant's arrest, and ended on 27 December 1995 when the Court of Cassation upheld the applicant's conviction. They therefore lasted almost eleven years.

27. The Court's jurisdiction *ratione temporis* only permits it to consider the period of just over eight years and eleven months that elapsed after 28 January 1987, the date of deposit of Turkey's declaration recognising the right of individual petition to the European Commission of Human Rights (see *Cankocak v. Turkey*, nos. 25182/94 and 26956/95, §§ 25-26, 20 February 2001). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (*ibid.*, § 25). On that critical date the proceedings had already lasted almost two years.

(b) Reasonableness of the length of proceedings

28. The Court considers that both at first instance and in the appeal proceedings there were substantial delays. It can accept that the case mounted against the applicant and the large number of other defendants was complex. That being said, it cannot but note that the proceedings have lasted almost eleven years of which almost nine years are within the scope of the Court's consideration. This is an excessively long period that cannot be justified with reference to considerations of complexity. In the Court's opinion the length of the proceedings can only be explained by the failure of the domestic courts to deal with the case diligently (see the above-mentioned *Cankocak* judgment, § 32).

29. Having regard to all the evidence before it and to its case-law on the subject (see the above-mentioned *Cankocak* judgment, § 33 and also the above-mentioned *Şahiner* judgment), the Court holds that the length of the proceedings in issue did not satisfy the "reasonable time" requirement.

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

2. Independence and impartiality of the Martial Law Court

(a) The parties' submissions

31. The applicant submitted, under Article 6 § 1 of the Convention, that his right to a fair hearing by an independent and impartial tribunal was breached as he was tried and convicted by the Martial Law Court composed of two military judges, two civilian judges and an army officer. The army

officer who has no legal training is accountable to the commander of the state of martial law. The two military judges on the bench are servicemen who belong to the army and take orders from the executive. They are subject to military discipline and assessment reports are compiled on them by the army for that purpose. 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 ... by an independent and impartial tribunal established by law.”

32. The respondent Government submitted in reply that the two military judges and the two civilian judges 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 is to ensure the proper functioning of the hearing and he has no other judicial power.

33. The Government further submitted that the procedure for the appointment and the assessment of the military judges sitting on the Martial Law Courts and the safeguards they enjoy in the performance of their judicial duties perfectly satisfy the criteria laid down by the Court's case-law on the subject.

(b) The Court's assessment

34. The Court reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

35. The Court recalls that the existence of “impartiality”, for the purposes of Article 6 § 1, must be determined according to a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge in a given case, and also according to an objective test, that is, ascertaining whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect (see, among many other authorities, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 356, § 31, and *Thomann v. Switzerland*, judgment of 10 June 1996, *Reports* 1996-III, p. 815, § 30). It was not contested before the Court that only the second of these tests was relevant in the instant case.

36. In this case it appears difficult to dissociate the question of impartiality from that of independence, as the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations. The Court will accordingly consider both issues together (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32).

37. The Court notes that Article 145 of the Constitution and Law no. 1402 of 13 May 1971 govern the legal framework and functioning of martial-law courts (see paragraph 17 above). These courts are composed of two civilian judges, two military judges and an army officer.

The Court observes in this connection that the independence and impartiality of the two civilian judges are not in dispute between the parties. It will therefore confine itself to examining the position of the military judges and the army officer sitting as members of martial-law courts.

38. The Court notes that the two military judges serving on these courts were selected by a committee composed of the personal 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 belonged and finally the head of the Military Legal Service at the Ministry of Defence. The military judges thus chosen were appointed with the approval of the Chief of Staff and by a decree signed by the Minister of Defence, the Prime Minister and the President of the Republic.

The army officer, a senior colonel in the instant case, was appointed on the proposal of the Chief of Staff and in accordance with the rules governing the appointment of military judges. This officer was removable after the expiry of one year after his appointment.

39. As regards the existence of safeguards to protect the members of the martial-law court against outside pressures, the Court notes that military judges undergo the same professional training as their civilian counterparts, which gives them the status of career members of the Military Legal Service. Furthermore, military judges enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a martial-law court they sit as individuals. According to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-72, § 67, and *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, p. 3073, § 39).

40. However, other aspects of their status call into question their independence and impartiality. Firstly, the military judges are servicemen who still belong to the army, which in turn takes orders from the executive. Secondly, as the applicant rightly pointed out, they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion (see *Mitap and Müftüoğlu*, cited above, opinion of the Commission, p. 424, § 104). Lastly, decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army.

As regards the officer serving on the martial-law court, the Court observes that he was subordinate in the hierarchy to the martial-law commander and/or the commander of the army corps concerned. He was not in any way independent of these authorities.

41. The Court notes that martial-law courts were set up to deal with offences aimed at undermining the constitutional order and its democratic regime. They enjoyed emergency powers and were required to function in a period of martial law, during which the armed forces were given the task of overseeing the “internal security” of the country and the regional military commander used police powers to repress acts of violence in his area.

42. However, it is not the Court's task to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial (see, among other authorities, *Incal*, cited above, p. 1572, § 70).

43. In the Court's opinion, even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 48). In deciding whether in a given case there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Incal*, cited above, pp. 1572-73, § 71).

44. The Court considers in this connection that where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, *Sramek v. Austria*, judgment of 22 October 1984, Series A no. 84, p. 20, § 42). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see *Incal*, cited above, p. 1573, § 72).

45. In the light of the foregoing, the Court considers that the applicant - tried in a martial-law court on charges of attempting to undermine the constitutional order of the State - could have legitimate reason to fear being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court makes no difference in this respect (see *Langborger*, cited above, p. 16, § 36).

46. In conclusion, the applicant's fears as to the martial-law court's lack of independence and impartiality can be regarded as objectively justified.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed an amount between 20,000 and 30,000 Euros (EUR) by way of compensation in respect of his pecuniary and non-pecuniary damages.

49. The Government submitted that the applicant had not provided any evidence in support of his pecuniary damages and invited the Court not to accede to the applicant's claims. Should the Court deem it necessary to award the applicant compensation, the Government invited the Court to award him an equitable amount of pecuniary damage without allowing the compensation procedure to be exploited by way of introducing claims lacking any evidence or document.

As regards the non-pecuniary damages, the Government submitted that the amounts claimed by the applicant were excessive and therefore unacceptable. They submitted that in view of the lack of evidence to substantiate the allegations of the applicant, only symbolic amount would be equitable with respect to non-pecuniary damages.

50. The Court considers that the finding of a violation in respect of the trial by a tribunal which lacked independence and impartiality constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, p. 3074, § 45).

It reiterates that it can award reparation only in respect of its finding that there has been a violation of the Convention as regards the unreasonable length of the criminal proceedings and make its calculation accordingly (see *Cankoçak*, cited above, § 37).

51. The Court considers that the applicant must have suffered a certain amount of distress, having regard to the total length of the proceedings against him. Deciding on an equitable basis, it awards him the sum of EUR 11,000.

52. Where the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal.

B. Costs and expenses

53. The applicant did not submit any receipts or invoices indicating the costs and expenses and left it to the Court to assess the amount in respect of his expenses under this heading.

54. The Government submitted that only actually incurred expenses can be reimbursed. In this connection they submitted that all costs and expenses must be documented by the applicant or his representative. Rough figures or rough lists cannot be considered as relevant and necessary documents to prove the expenditure. They pointed out that no receipts or documents were produced by the applicant's representative to indicate the costs and expenses.

55. Deciding on an equitable basis and having regard to the criteria laid down in its case-law (see, among other authorities, *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 20, § 49 and the above-mentioned *Şahiner* judgment, § 55), the Court considers it reasonable to award the applicant EUR 2,000 by way of reimbursement of his costs and expenses.

C. Default interest

56. The Court considers it appropriate that the default interest 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. *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 a violation of Article 6 § 1 of the Convention on account of the applicant's trial by the martial-law court, which lacked independence and impartiality;

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) EUR 11,000 (eleven thousand euros) in respect of non-pecuniary damage;

(ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 October 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER
Deputy Registrar

Georg RESS
President