



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

FIRST SECTION

CASE OF SÜLEYMAN YILDIRIM v. TURKEY a

(Application no. 40518/98)

JUDGMENT

STRASBOURG

29 July 2004

FINAL

29/10/2004

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 Süleyman Yıldırım v. Turkey,

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

Mr C.L. ROZAKIS, *President*,

Mr P. LORENZEN,

Mr R. TÜRMESEN,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mrs S. BOTOCHAROVA,

Mr A. KOVLER, *judges*,

and Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 10 April 2003 and 8 July 2004,

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

PROCEDURE

1. The case originated in an application (no. 40518/98) 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 a Turkish national, Mr Süleyman Yıldırım (“the applicant”), on 19 November 1997.

2. The applicant, who had been granted legal aid, was represented by Mr M. Vefa, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. The applicant alleged under Article 5 § 3 of the Convention that he was not brought promptly before a judge. He further alleged under Article 6 of the Convention that he had been denied a fair hearing on account of the presence of a military judge on the bench of the Diyarbakır State Security Court which tried and convicted him.

4. The application was 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 application was allocated to the Second 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.

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

7. By a decision of 10 April 2003, the Court declared the application admissible.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1968 and is currently detained in Batman “E” Type Prison.

10. The facts of the case, as submitted by the parties, may be summarised as follows.

11. On 2 September 1997 the applicant was arrested in Istanbul on suspicion of membership of an illegal organisation, namely the PKK. 4,000 German Marks and 2,600 US Dollars in cash were found in his possession. During his questioning at the Istanbul Police Headquarters, the applicant stated that he had joined the PKK in 1992 and that the money found in his possession at the time of his arrest had been given to him by the PKK to obtain a false passport. He also added that he had been trained in Syria and that he had carried out activities on behalf of the PKK in Germany, the Netherlands and France.

12. On 3 September 1997 the applicant’s detention period was extended for two days with the permission of the public prosecutor at the Istanbul State Security Court.

13. On 6 September 1997 the applicant was handed over to the Siirt Police Headquarters in whose jurisdiction the applicant had allegedly committed a number of offences. On the same day the Siirt public prosecutor authorised the applicant’s detention for a further two days.

14. On 7 September 1997 a statement was taken from the applicant by the Siirt Police. The applicant reiterated the confessions he had made in his statement at the Istanbul Police Headquarters.

15. The applicant was subsequently handed over to the Batman Police in whose jurisdiction he had allegedly carried out certain illegal activities. On his arrival in Batman the applicant was given a medical examination by a doctor. No signs of ill-treatment were observed on his body according to the medical report drawn up on 7 September 1997.

16. On 8 September 1997, at the request of the Batman public prosecutor and without the applicant being brought before him, a judge at the Batman Magistrates’ Court in Criminal Matters authorised the applicant’s detention until 12 September 1997.

17. On 11 September 1997 a statement was taken from the applicant by the Batman Police. The applicant gave a detailed account of his involvement within the PKK and of the activities he had carried out on behalf of that organisation. He further described the structure of the PKK in detail.

18. On 12 September 1997 the applicant gave a statement before the Batman public prosecutor. He maintained that his police statements were correct and that he had nothing to add to them.

19. On the same day the applicant was taken before the Batman Magistrates' Court in Criminal Matters and subsequently remanded in detention.

20. On 2 October 1997 the public prosecutor filed an indictment with the Diyarbakır State Security Court against the applicant and requested the court to sentence him pursuant to Article 168 § 2 of the Criminal Code and Article 5 of the Prevention of Terrorism Act.

21. In the proceedings before the Diyarbakır State Security Court, which was composed of three judges including a military judge, the applicant mainly repeated the statements he had made to the police.

22. In a supplementary indictment submitted to the trial court on 30 May 2000, the prosecutor accused the applicant of carrying out activities aimed at breaking up the unity of the State and removing part of the national territory from the State's control. He requested the court to sentence the applicant in accordance with Article 125 of the Criminal Code.

23. On 2 November 2000 the Diyarbakır State Security Court found the applicant guilty as charged and sentenced him to the death penalty under Article 125 of the Criminal Code. Taking into account the applicant's good conduct during the trial, the death penalty was commuted to a life sentence.

24. The applicant's appeal against the judgment was rejected by the Court of Cassation on 22 May 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. A full description of the relevant domestic law may be found in *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002) and *Nuray Şen v. Turkey* (no. 41478/98, §§ 13-16, 17 June 2003).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

26. The applicant maintained under Article 5 § 3 of the Convention that he had been detained for ten days without being brought before a judge.

27. The Government submitted that the applicant's detention was in accordance with the Turkish law at the relevant time.

28. The Court recalls that Article 5, in general, aims to protect the individual against arbitrary interference by the State with his right to liberty. Article 5 § 3 is intended to avoid arbitrariness and to secure the rule of law by requiring a judicial control of interferences by the executive with the individual's liberty (see *Sakık and Others v. Turkey*, judgment of 26 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2623, § 44).

29. To be in accordance with Article 5 § 3, judicial control must be prompt. Promptness has to be assessed in each case according to its special features (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, pp. 24-25, §§ 51-52). However, the scope of flexibility in interpreting and applying the notion of promptness is very limited (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

30. The Court has accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others*, cited above, p. 33, § 61, *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 58, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2282, § 78, and *Demir and Others v. Turkey*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2653, § 41). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Court, whenever they choose to assert that terrorism is involved (see *Murray*, cited above, p. 27, § 58).

31. In the present case, the applicant was held in police custody for ten days from 2 September until 12 September 1997. The Court recalls that in the *Brogan and Others* case it held that detention in police custody which had lasted four days and six hours without any judicial control fell outside the strict constraints as to the time laid down by Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism (see *Brogan and Others*, cited above, p. 33, § 62).

32. While bearing in mind the justification relied on by the Government, the Court cannot accept that it was necessary to detain the applicant in the instant case for ten days without bringing him before a judge.

33. The Court concludes therefore that there has been a violation of Article 5 § 3.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

34. The applicant submitted that he had been tried and convicted by the Diyarbakır State Security Court, which was neither independent nor

impartial. He further complained that he had been deprived of his right to a lawyer in police custody. In this respect, he invoked Article 6 §§1 and 3 (c) of the Convention.

35. The Government maintained that the state security courts had been established by law to deal with threats to the security and integrity of the State. They submitted that in the instant case there was no basis on which to find that the applicant could have any legitimate doubts about the independence of the Diyarbakır State Security Court. The Government further referred to the constitutional amendment of 1999 whereby military judges could no longer sit on state security courts.

36. The Court notes that it has examined similar cases in the past and has concluded that there was a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

37. The Court sees no reason to reach a different conclusion in this case. It is understandable that the applicant who was prosecuted in a State Security Court for carrying out illegal activities aimed at breaking up the unity of the State should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal Service. On that account, he could legitimately fear that the Diyarbakır State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1573, § 72 *in fine*).

38. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

39. Having regard to its finding that the applicant's right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that it is unnecessary to examine the applicant's remaining complaint under Article 6 § 3 (c) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 50,000 euros (EUR) for pecuniary damage and EUR 25,000 for non-pecuniary damage.

42. The Government did not address these claims.

43. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. Moreover, the applicant's claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court therefore cannot allow them.

44. In respect of non-pecuniary damage concerning Article 5, the Court recalls its finding above (see paragraph 33) and considers that the applicant should be awarded compensation for non-pecuniary damage since he must have suffered distress, fear and anxiety by being kept in police custody for ten days without any judicial intervention. Deciding on an equitable basis, as required by Article 41, the Court awards him the sum of EUR 3,500 in this respect.

45. The Court further considers that the finding of a violation of Article 6 constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant in this respect (see *Incal*, cited above, p. 1575, § 82, and *Çiraklar v. Turkey*, judgment of 28 October 1998, Reports 1998-VII, p. 3074, § 45).

46. Where the Court finds that an applicant has been convicted by a tribunal which is 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 (*Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). Accordingly, it rejects the applicant's remaining claims for non-pecuniary damage in respect of Article 6.

B. Costs and expenses

47. The applicant claimed a total of EUR 2,491.25 for costs and expenses incurred in the proceedings before the domestic authorities and before the Strasbourg institutions

48. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002).

49. Making its own estimate based on the information available, the Court awards the applicant in respect of costs and expenses EUR 1,500 less EUR 660 received by way of legal aid from the Council of Europe.

C. Default interest

50. 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 5 § 3 of the Convention;
2. *Holds* that there has been a violation of Article 6 of the Convention as regards the complaint relating to the independence and impartiality of the Diyarbakır State Security Court;
3. *Holds* that it is not necessary to consider the applicant's complaint under Article 6 § 3 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage in respect of Article 6 of the Convention;
5. *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 at the date of the settlement and exempt from all taxes and duties:
 - (i) EUR 3,500 (three thousand five hundred euros) in respect of non-pecuniary damage concerning his police custody;
 - (ii) EUR 840 (eight hundred and forty euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President