



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

THIRD SECTION

**CASE OF MEHMET BÜLENT YILMAZ AND ŞAHİN YILMAZ
v. TURKEY**

(Application no. 42552/98)

JUDGMENT

STRASBOURG

7 October 2004

FINAL

07/01/2005

*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 Mehmet Bülent Yılmaz and Şahin Yılmaz v. Turkey,

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

Mr G. RESS, *President*,

Mr L. CAFLISCH,

Mr R. TÜRMEŒ,

Mr B. ZUPANČIČ,

Mrs H.S. GREVE,

Mr K. TRAJA,

Mrs A. GYULUMYAN, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 16 September 2004,

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

PROCEDURE

1. The case originated in an application (no. 42552/98) 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 Turkish nationals, Mr Mehmet Bülent Yılmaz and Mr Şahin Yılmaz (“the applicants”), on 20 May 1998.

2. The applicants, who had been granted legal aid, were represented by Mr H.Ç. Akbulut, a lawyer practising in İzmir. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. On 21 March 2002 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1975 and 1970 respectively.

5. On 19 and 20 August 1995 respectively the applicants were taken into custody by police officers from the Anti-Terrorism Department of the Aydın Security Directorate on suspicion of their membership to an illegal organisation, namely the DHKP/C.

6. In their police statements the applicants accepted the accusations against them.

7. On 22 August 1995 the applicants were brought before the investigating judge at the Aydın Magistrate's Court, where they repeated the statements they had made to the police. The investigating judge ordered that they be placed in detention on remand.

8. In an indictment dated 6 September 1995, the public prosecutor at the Izmir State Security Court initiated criminal proceedings against the applicants. He charged the first applicant with being member of an armed gang under Article 168 § 2 of the Criminal Code and the second applicant with aiding and abetting an armed gang under Article 169 of the Criminal Code.

9. During the hearings before the Izmir State Security Court, the applicants denied the statements they had made to the police and the investigating judge.

10. On 25 March 1997 the Izmir State Security Court, composed of two civilian judges and a military judge, convicted the applicants as charged and sentenced the first applicant to three years and nine months' imprisonment and the second applicant to twelve years and six months' imprisonment. Neither the applicants nor their lawyers were present in this last hearing.

11. The applicants appealed. On 12 November 1997 the Court of Cassation dismissed the applicants' appeal, upholding the Izmir State Security Court's reasoning and assessment of evidence. The decision, which was pronounced in the absence of the applicants and their lawyers, was deposited with the Registry of the Izmir State Security Court on 21 November 1997.

II. RELEVANT DOMESTIC LAW

12. A full description of the domestic law may be found in *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

13. The applicants complained in the first place that they had not received a fair trial by an independent and impartial tribunal due to the presence of a military judge on the bench of the Izmir State Security Court. They further alleged that the national courts had convicted them on the basis of the statements that they had made to the police and to the investigating

judge. The applicants finally maintained that they had been deprived of their right to defend themselves by a lawyer. In this connection, they invoked Article 6 of the Convention, which in so far as relevant reads as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing...”

A. Admissibility

14. The Government argued under Article 35 of the Convention that the applicants’ complaint in respect of the independence and impartiality of the Izmir State Security Court must be rejected for failure to comply with the six-month rule. In this respect, they maintained that as the applicants were complaining of the lack of independence and impartiality of the State Security Court, they should have lodged their application with the Court within six months of the date on which that court rendered its judgment, namely 25 March 1997.

15. The Court reiterates that it has already examined similar preliminary objections of the Government in respect of the non-compliance with the six-month rule in the past and has rejected them (see *Özdemir v. Turkey*, no. 59659/00, § 29, 6 February 2003, and *Doğan and Keser v. Turkey*, nos. 50193/99 and 50197/99, § 17, 24 June 2004). The Court finds no particular circumstances in the instance case which would require it to depart from its findings in the above-mentioned cases.

16. Accordingly, the Court rejects the Government’s preliminary objection.

17. In the light of its established case law (see amongst many authorities, *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII), and in view of the materials submitted to it, the Court considers that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. The Court therefore concludes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

B. Merits

1. As to the independence and impartiality of the Izmir State Security Court

18. 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 to find that the applicants could have any legitimate doubts about the independence of the Izmir State Security Court. The Government further referred to the constitutional amendment of 1999 whereby military judges could no longer sit on state security courts.

19. 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*, cited above, §§ 35-36).

20. The Court sees no reason to reach a different conclusion in this case. It is understandable that the applicants who were prosecuted in a State Security Court for being a member of an illegal organisation and for aiding and abetting an armed gang respectively 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, they could legitimately fear that the Izmir 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 applicants' 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*).

21. In the light of the foregoing the Court finds that there has been a violation of Article 6 § 1 of the Convention in this respect.

2. As to the remainder of the complaints submitted under Article 6

22. Having regard to its finding that the applicants' right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that it is unnecessary to examine the applicants' remaining complaints under Article 6 § 3 of the Convention (see *Çiraklar*, cited above, § 45).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicants requested the Court to award 4,000 euros (EUR) to the first applicant and EUR 5,000 to the second applicant in respect of non-pecuniary damage.

25. The Government requested the refusal of the applicants' claims.

26. 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 applicants in this respect (see *Incal*, cited above, p. 1575, § 82, and *Çiraklar v. Turkey*, cited above, § 45).

27. 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).

B. Costs and expenses

28. The applicants also claimed EUR 5,000 for the costs and expenses

29. The Government did not make any comments on this point.

30. 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).

31. Making its own estimate based on the information available, and having regard to the criteria laid down in its case-law (see, among other authorities, *Özdemir*, cited above, § 49, and *Aksaç v. Turkey*, no. 41956/98, § 31, 15 July 2004), the Court awards the applicants in respect of costs and expenses EUR 3,000, less EUR 685 received by way of legal aid from the Council of Europe.

C. Default interest

32. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the Izmir State Security Court;
3. *Holds* that there is no need to examine the remaining complaints submitted 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 sustained by the applicants;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), less EUR 685 received by way of legal aid from the Council of Europe, in respect of costs and expenses to be converted into Turkish Liras at the rate applicable at the date of the settlement and free of any 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 amount 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President