



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

THIRD SECTION

CASE OF DURMAZ AND OTHERS v. TURKEY

(Applications nos. 46506/99, 46569/99, 46570/99 and 46939/99)

JUDGMENT

STRASBOURG

14 October 2004

FINAL

14/01/2005

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 Durmaz and Others v. Turkey,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEŖEN,
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 23 September 2004,

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

PROCEDURE

1. The case originated in four applications (nos. 46506/99, 46569/99, 46570/99 and 46939/99) 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 four Turkish nationals, Mr Kerem Durmaz, Mr Ulaş Işık, Mr Taci Sabri Unutmaz and Mr Hasan Sezal (“the applicants”), on 8 December 1998.

2. The applicants were represented by Ms S. Ceylan, a lawyer practising in Ankara. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. On 4 September 2001 the Court decided to join the applications, declared them partly inadmissible and decided to communicate the complaints concerning the applicants’ right to a fair hearing by an independent and impartial tribunal to the Government. On 7 November 2002 the Court further decided, under Article 29 § 3 of the Convention, to examine the merits of the applications at the same time as their admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicants were born in 1980, 1977, 1979 and 1979 respectively.

5. On 27 and 28 April 1998 respectively the applicants were taken into police custody by police officers from the Anti-Terrorism Department of the Ankara Security Directorate.

6. On 7 May 1996 the applicants were brought before the public prosecutor at the Ankara State Security Court and subsequently before the investigating judge. After taking their statements, the investigating judge ordered that the applicants be placed in detention on remand.

7. In an indictment dated 23 May 1996, the public prosecutor at the Ankara State Security Court initiated criminal proceedings against the applicants and accused them of being members of an illegal armed organisation, namely the TIKP (the Revolutionary Communists' Union of Turkey). The applicants were further accused of carrying out activities on behalf of the TIKB, such as taking part in demonstrations on 1 May and 8 March (Women's Day) during which they had chanted slogans and distributed TIKB leaflets. The public prosecutor asked the court to convict the applicants pursuant to Article 168 § 2 of the Criminal Code.

8. On 9 October 1996 the Ankara State Security Court, composed of two civilian judges and a military judge, held that there was insufficient evidence to conclude that the applicants were members of the TIKP, but found them guilty under Article 169 of the Criminal Code for aiding and abetting an illegal organisation. The first, second and third applicants were sentenced to two years and six months' imprisonment, while the second applicant was sentenced to three years and nine months' imprisonment.

9. The applicants appealed. The chief public prosecutor at the Court of Cassation submitted his opinion on the merits of the appeal on 24 December 1997. This opinion was not served on the applicants, but read out during the hearing which took place on 18 March 1998.

10. On 20 May 1998 the Court of Cassation, upholding the Ankara State Security Court's reasoning and assessment of evidence, dismissed the applicants' request for appeal. The decision was pronounced on 10 June 1998.

11. The applicants' request for rectification was further rejected on 30 June 1998.

II. THE 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 Ankara State Security Court. The applicants further maintained that the principle of equality of arms had been violated since they had not been notified of the public prosecutor's observations at the appeal stage. In this connection, they invoked Article 6 of the Convention, which in so far as relevant reads as follows:

“1. In the determination 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:

...

(b) to have adequate time and facilities for the preparation of his defence; ...”

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 Ankara 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 Ankara 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 9 October 1996.

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 cases raise 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 applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established.

B. Merits

1. As to the independence and impartiality of the Ankara 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 Ankara 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 aiding and abetting an armed gang 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 Ankara 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. The Government maintained that the written opinion of the Chief Public Prosecutor had been submitted to the Court of Cassation on 24 December 1997 and it was read out to the applicants' representative during the hearing which had been held on 18 March 1998. The Government argued that between these dates, the applicants' representative

had three months in which to find out about the submissions made by the Chief Public Prosecutor and to submit additional grounds of appeal. The Government further referred to the legislative amendment of 2003, which regulated the *ex officio* notification of the written opinion of the Chief Public Prosecutor at the Court of Cassation.

23. 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 complaint under Article 6 § 3 of the Convention (see *Çıraklar*, cited above, § 45).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

24. 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

25. Each of the applicants claimed 50,000 euros (EUR) in respect of pecuniary damage and EUR 100,000 for non-pecuniary damage.

26. The Government contested the applicants' requests. They maintained that the sums claimed were excessive and unjustified.

27. 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 applicants' claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them.

28. 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 *Çıraklar*, cited above, § 45).

29. 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

30. Without requesting a specific amount, the applicants asked to be reimbursed for the costs and expenses incurred during the proceedings before the Court.

31. The Government submitted that the claim in respect of costs and expenses had not been duly documented.

32. 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).

33. 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 considers it reasonable to award the applicants EUR 3,000 in respect of costs and expenses.

C. Default interest

34. 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 applications 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 Ankara State Security Court;
3. *Holds* that there is no need to examine the remaining complaint 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) 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 charge that may be payable;

(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 14 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President