CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF ÇAPLIK v. TURKEY

(Application no. 57019/00)

JUDGMENT

STRASBOURG

15 July 2005

FINAL

15/10/2005

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 Çaplık v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN, *judges*

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 23 June 2005,

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

PROCEDURE

1. The case originated in an application (no. 57019/00) 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 a Turkish national, Mr Hatip Çaplık ("the applicant"), on 23 December 1999.

2. The applicant was represented by Ms Anke Stock, Mr Mark Muller and Mr Tim Otty, lawyers attached to the Kurdish Human Rights Project, a non-governmental organisation based in London. The Turkish Government ("the Government") did not designate an Agent for the purpose of the proceedings before the Court.

3. On 23 June 2004 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 applicant is a Turkish national, who was born in 1961 and he lives in Adana.

5. On 16 November 1994 F.A. and her son, İ.A., filed a complaint with the gendarmes and submitted that they had received a threatening letter from the PKK. The letter which was written on purple paper and sealed with

the symbol of the PKK read: “You have to change your statement concerning our friend or both of you will die.” F.A. and İ.A. stated that they had been summoned to give evidence in connection with an ongoing investigation against certain PKK members. They further maintained that they knew the person who had sent the letter.

6. Accordingly, the gendarme officers initiated an investigation, which led to the arrest of the applicant.

7. On 17 November 1994 the applicant was arrested on suspicion of sending threatening letters on behalf of the PKK. Samples of the applicant's handwriting were taken and sent to the laboratory for examination.

8. The Regional Criminal Police Laboratory compared the handwriting of the applicant to the handwriting on the letter. It concluded that the characteristics of the applicant's handwriting had similarities with the handwriting on the letter.

9. On 18 November 1994 the applicant gave a statement to the gendarmes and denied all the accusations against him. He submitted that he had no connections with the PKK and that he had not written the letter.

10. The same day, he was questioned by the Adana public prosecutor. In his statement to the public prosecutor, he mainly repeated his police statement and denied the charges against him.

11. The applicant was then taken before the Adana Magistrate's Court in Criminal Matters on the same day. He pleaded not guilty before the judge. He denied the allegation that he had carried out activities on behalf of the PKK. He further asserted that his signature which had been used for handwriting analysis had not been taken in accordance with the domestic legislation. After examining the expert report and the applicant's submissions, the court concluded that the sample of the applicant's handwriting which had been used for comparison had not been taken in accordance with the law. It accordingly concluded that there was not sufficient evidence to establish that the applicant had committed the alleged offence and ordered his release.

12. In an indictment dated 26 December 1994, the public prosecutor attached to the Konya State Security Court initiated criminal proceedings against the applicant. He charged him with being a member of an armed gang under Article 168 § 2 of the Criminal Code. He based himself on the report of the Regional Criminal Police Laboratory which had concluded that the applicant's handwriting had similarities with the handwriting on the threatening letter sent to F.A. and İ.A.

13. Before the court, the applicant contested the charges against him. He stated that he had no connection with the PKK and that the allegations were baseless.

14. On 8 June 1995 the court ordered the Forensic Medicine Institute to carry out a handwriting examination.

15. On 17 July 1995 the Forensic Medicine Institute sent a letter to the court and requested further specimens to make an accurate comparison. In this respect, they required the applicant to write down the text of the letter in small letters, and the text on the envelope in capital letters. The Institute further requested the applicant to submit specimens of his handwriting, which he had written in the past.

16. After an examination of the above-mentioned samples, the Institute delivered two reports, dated 22 January 1996 and 22 January 1997. It was established that the characteristics of the applicant's handwriting had similarities with the handwriting on the letter and that the letter was written by the applicant.

17. The Konya State Security Court held twenty-six hearings, the last on the 28th April 1997.

18. On 16 May 1997 the case was transferred to the Adana State Security Court. Between this date and 14 October 1997 the court held seven hearings.

19. In his final observations on the merits, the public prosecutor changed the accusation against the applicant and accused him of aiding an armed gang under Article 169 of the Criminal Code.

20. In his final defence submissions, the applicant denied the allegations under Article 169 of the Criminal Code and stated that he had not written the letter and that he had no connection with the PKK. He further challenged the findings of the experts' reports.

21. On 14 October 1997 the Adana State Security Court, which was composed of three judges including a military judge, found the applicant guilty as charged and sentenced him to three years and nine months' imprisonment pursuant to Article 169 of the Criminal Code. The applicant was further debarred from public service for three years. In its judgment, the court found it established that the applicant had sent a threatening letter on behalf of the PKK to F.A. and İ.A. who were to give statements against certain PKK members in connection with another criminal case. The court based itself on expert reports which had concluded that the letter was written by the applicant.

22. After holding a hearing, on 30 June 1999 the Court of Cassation dismissed the applicant's appeal.

II. THE RELEVANT DOMESTIC LAW

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

Article 311 § 1 (f) of the Criminal Procedure Code, as amended by Law No. 5271 of 4 December 2004 which entered into force on 1 June 2005, regulates the cases where a request for re-trial could be filed following a criminal conviction.

Accordingly:

> "In cases where the European Court of Human Rights finds it established that the criminal conviction constituted a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols (...) In this case, the re-trial can be requested within one year from the date on which the judgment of the European Court of Human Rights becomes final."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. As regards the independence and impartiality of the Adana State Security Court and the fairness of the proceedings

24. The applicant complained in the first place that he 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 Adana State Security Court, which tried and convicted him. He further alleged that he had been denied a fair hearing before the domestic courts. He asserted that he had been convicted solely on the basis of expert reports, which were not supported by any oral or other documentary evidence. In respect of his complaints, the applicant invoked Article 6 §§ 1 and 2 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.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

1. Admissibility

25. The Government argued under Article 35 of the Convention that the applicant's complaint in respect of the independence and impartiality of the Adana State Security Court must be rejected for non-exhaustion of domestic remedies. They maintained that the applicant had not invoked his complaint before the domestic courts. In this respect, they refer to the case-law of the Court (in particular *Ahmet Sadık v. Greece*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V).

26. The Court reiterates that it has already examined similar preliminary objections of the Government in respect of the non-exhaustion of domestic

remedies (see *Vural v. Turkey*, no. 56007/00, § 22, 21 December 2004, *Çolak v. Turkey (no. 1)*, no. 52898/99, § 24, 15 July 2004, and *Özel*, cited above, § 25). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned cases.

27. Accordingly, the Court rejects the Government's objection.

28. In the light of its established case law (see, amongst many authorities, *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII), and in view of the materials submitted to it, the Court considers that the applicant's complaints 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 this part of 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.

2. Merits

(a) As to the independence and impartiality of the Adana State Security Court

29. 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 applicant could have any legitimate doubts about the independence of the Adana State Security Court. The Government further referred to the constitutional amendment of 1999 whereby military judges could no longer sit on such courts. Finally, they stated that the State Security Courts had been abolished as of 2004.

30. 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).

31. 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 aiding and abetting an illegal organisation 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 Adana 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*).

32. 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.

(b) As to the fairness of the proceedings

33. 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 complaints under Article 6 §§ 1 and 2 of the Convention (*Incal*, cited above, § 74, and *Çıraklar v. Turkey*, cited above, § 45).

B. As regards the length of proceedings

34. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention

35. The Government stated that the length of the proceedings had not exceeded a reasonable time.

36. The Court notes that the proceedings began on 17 November 1994 with the applicant's arrest, and ended on 30 June 1999, with the decision of the Court of Cassation, upholding the applicant's conviction. They therefore lasted approximately four years and seven months, during which time there had been thirty three hearings before the first instance court and an appeal hearing.

37. The Court recalls in the first place that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, amongst many others, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

38. The Court considers that the present case was not particularly complex. As regards the applicant's conduct, there is no indication in the case-file that he contributed noticeably to the length of the proceedings. In so far as the conduct of the judicial authorities is concerned, the Court observes that the case was examined by two levels of jurisdiction. It is true that although the domestic court ordered an experts' report on 8 June 1995, the experts' reports were submitted on 22 January 1996 and on 22 January 1997 respectively. The Court considers that such a delay in the conduct of the hearing could have been minimised. However, the Court recalls that a delay at some stage may be tolerated if the overall duration of the proceedings cannot be deemed excessive (see, for example, *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, p. 16, § 37).

39. The foregoing considerations lead the Court to conclude that the total duration of the proceedings of four years and seven months does not

give rise to any appearance of a violation of the reasonable time requirement of Article 6 § 1.

40. It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 6

41. The applicant alleged that he had been prosecuted due to his Kurdish origin. In this respect, he contended that he had been subjected to discrimination in breach of Article 14 of the Convention in conjunction with Article 6.

42. The Government refuted the allegations.

43. The Court has examined the applicant's allegations in the light of the evidence submitted to it, and considers them unsubstantiated.

44. It follows that this part of the application should be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant requested the Court to award 83,000 euros (EUR) in respect of pecuniary damage and EUR 239,000 in respect of non-pecuniary damage.

47. The Government submitted that these claims were excessive and unacceptable.

48. On the question of pecuniary damage, the Court considers 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 cannot therefore allow them.

49. 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).

50. 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

51. The applicant also claimed 7,168.75 pounds sterling for costs and expenses.

52. The Government contested the claim.

53. The Court may 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).

54. 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, *Vural v. Turkey*, no. 56007/00, § 45, 21 December 2004), the Court awards the applicant EUR 1,000 for the costs and expenses claimed.

C. Default interest

55. 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 complaints concerning the independence and impartiality of the Adana State Security Court and the fairness of the proceedings admissible and the remainder of the application inadmissible;

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 Adana State Security Court;

3. *Holds* that it is not necessary to consider the applicant's other complaints under Article 6 §§ 1 and 2 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

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, EUR 1,000 (one thousand euros) in respect of costs and expenses, such sum to be converted into pounds sterling and to be paid into the bank account in the United Kingdom as indicated by the applicant;

(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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President