



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

SECOND SECTION

CASE OF BEKİR YILDIZ v. TURKEY

(Application no. 49156/99)

JUDGMENT

STRASBOURG

6 September 2005

FINAL

15/02/2006

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 Bekir Yıldız v. Turkey,

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

Mr J.-P. COSTA, *President*,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Ms D. JOČIENĚ,

Mr D. POPOVIĆ, *judges*,

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

Having deliberated in private on 5 July 2005,

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

PROCEDURE

1. The case originated in an application (no. 49156/99) 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 a Turkish national, Mr Bekir Yıldız (“the applicant”), on 26 March 1999.

2. The applicant was represented by Mr Çiçek, a lawyer practising in Ankara. In the instant case, the Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 27 April 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.

4. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Ankara.

6. The applicant was the mayor of the Sincan District in Ankara at the time of the events. In January 1997, the Culture and Education Department

of the Sincan District Council, which was in charge of organising public activities and events during religious and national days, prepared a thirty-day programme for the month of Ramadan. The draft programme was submitted to the applicant for his approval. Upon his authorisation, the organising committee started the necessary preparations.

7. One of the events, which had been foreseen for 31 January 1997, was called the “Jerusalem Night”. The aim of this event was to protest against the genocide and oppression of Muslims in Israel and Palestine. The Ambassador to Iran and a journalist called Nureddin Şirin were invited to the event as speakers. Furthermore, a five-minute play was written for that evening. The play took the form of a conversation between a father and his son about life in Palestine and the struggle of the Palestinian people.

8. The event was announced months in advance and representatives of several embassies as well as important personalities living in the district were invited. The meeting hall was decorated with posters of martyrs who had given their lives for the liberation of Jerusalem. The applicant made the opening speech.

9. On 6 February 1997 the applicant was taken into police custody. He was accused of disseminating propaganda in support of an armed illegal organisation, namely the Hezbollah, and of provoking hatred and hostility on the basis of a distinction between races and regions.

10. In his statement taken at the police station, the applicant stated that the “Jerusalem Night” was organised as part of a thirty-day programme during the month of Ramadan and it was an activity of the Sincan District Council. He explained that the posters portrayed Muslim leaders who had given their lives for the liberation of Jerusalem. The applicant denied having connections with any illegal organisation.

11. On 13 February 1997 the applicant was brought before the public prosecutor. During his questioning, he repeated the statements he had made at the police station. He pointed out that his speech did not contain any elements that would provoke hatred amongst those who did not wear headscarves.

12. On the same day the applicant was brought before the investigating judge attached to the Ankara State Security Court. In his statement taken by the investigating judge, the applicant explained that he supported the secular system and did not approve of the regime in Iran. He stated that he had no connections with any terrorist organisation. He was subsequently placed in detention on remand.

13. In an indictment dated 7 March 1997, the public prosecutor attached to the Ankara State Security Court initiated criminal proceedings against the applicant. It was alleged that he had disseminated propaganda in support of an armed, illegal organisation and that his actions had amounted to incitement to hatred and hostility on the basis of distinctions between races and regions. The prosecution called for the applicant to be sentenced

pursuant to Articles 169 and 312 of the Criminal Code and Article 5 of the Prevention of Terrorism Act.

14. Before the Ankara State Security Court, which was composed of three judges including a military judge, the applicant contested the charges against him. He argued that the “Jerusalem night” was part of the social activities of the Sincan District Council and that he did not intend to incite people to hatred and enmity. He had emphasised the importance of unity and solidarity during his speech. He stated that he was joking when he said that the Shariah would be forcibly injected into secularists.

15. On 2 July 1997 the applicant was released from detention on remand pending trial.

16. Before delivering its judgment, the Ankara State Security Court firstly established the status of Hezbollah in Turkey. In this respect, it relied on a report prepared by the National Intelligence Organisation (MIT), dated 30 April 1997, which referred to the structure and goals of Hezbollah. The court further based itself on another report prepared by the General Directorate of Security, dated 24 October 1996. In this report, it was stated that Hezbollah had been involved in many terrorist attacks throughout Turkey. Finally, the court examined a report from a book called “the Eurasia File” (*Avrasya Dosyası*), which was published by the International Relations and Strategic Studies Centre. In the light of all the evidence before it, the court rejected the applicant's assertions that Hezbollah was not active in Turkey and that it was solely a national movement which operated in Palestine.

17. On 15 October 1997 the Ankara State Security Court concluded that the applicant had aided and abetted a terrorist organisation, by making propaganda for it and by inciting persons to hatred and enmity by discriminating against class, religion and region. It found the applicant guilty as charged and sentenced him to four years and seven months' imprisonment. The court further disbarred the applicant from public service for three years.

18. The applicant appealed to the Court of Cassation. In his submissions to the Court of Cassation, the applicant defended himself against the charge of incitement to hatred and enmity, contrary to Article 312 of the Criminal Code, and argued that he had called for unity and solidarity in his speech.

19. On 21 September 1998 the Court of Cassation dismissed the applicant's appeal, upholding the Ankara State Security Court's assessment of evidence and its reasons for rejecting the applicant's defence.

II. THE RELEVANT DOMESTIC LAW

20. 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

21. The applicant complained 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 Ankara State Security Court. In this connection, he invoked Article 6 of the Convention.

A. Admissibility

22. The Government argued under Article 35 of the Convention that the applicant's 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.

23. The Court reiterates that it has already examined similar preliminary objections of the Government in respect of 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 instant case which would require it to depart from its findings in the above-mentioned cases.

24. Accordingly, the Court rejects the Government's preliminary objection.

25. 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 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.

B. Merits

26. The Government submitted that after the constitutional amendment of 1999 military judges could no longer sit on such courts. They also stated that the State Security Courts had been abolished as of June 2004 by Law No. 5190.

27. 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).

28. 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 disseminating propaganda in support of an armed, 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 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 applicant's fear 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*).

29. 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.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

30. The applicant submitted under Article 10 of the Convention that his conviction following his speech had constituted an unjustified interference with his freedom of expression.

31. The Government raised a preliminary objection on the ground of non-exhaustion of domestic remedies. They contended that the applicant had failed to raise his complaint before the national courts.

32. The Court reiterates that under the terms of Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This condition is not met by the mere fact that an applicant has submitted his case to the various competent courts. It is also necessary for the complaint brought before the Court to have been raised, at least in substance, during the proceedings in question (see, among others, *Çakar v. Turkey*, no. 42741/98, § 30, 23 October 2003, and *Karakaya v. Turkey* (dec.), no. 62619/00, 4 May 2004).

33. In the instant case, the Court observes that at no time did the applicant rely on or raise any arguments in respect of his right to freedom of expression. The Court notes that throughout the criminal proceedings, the applicant only denied the allegations against him, claiming that he had had no intention to incite people to hatred and enmity, and put forward arguments which were based solely on domestic law and did not raise the matter of freedom of expression.

34. Even assuming that the national courts were able, or even obliged, to examine the case of their own motion under the Convention, this could not dispense the applicant from relying on the Convention in those courts or

from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be, to the Court (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A no. 40, p. 19 § 39, *Ahmet Sadık v. Greece*, judgment of 15 November 1996, *Reports* 1996-V, § 33, and *Aydar v. Turkey* (dec.), no. 32207/96, 1 July 2003).

35. In view of the above considerations, the Court holds that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant requested the Court to award him 158,932 euros (EUR) in respect of pecuniary damage and EUR 150,000 in respect of non-pecuniary damage.

The Government submitted that these claims were excessive and unacceptable.

38. 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. The Court cannot therefore allow the applicant's claims in this respect.

39. 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*, cited above, § 45).

40. 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

41. The applicant also claimed EUR 3,000 for costs and expenses incurred before the domestic courts and the Court, without producing any supporting documents.

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

43. 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).

44. 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

45. 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 complaint concerning the independence and impartiality of the Ankara State Security Court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage sustained by the applicant;
4. *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) free of any tax that may chargeable in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement;

(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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President