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

SECOND SECTION

CASE OF KEPENEKLİOĞLU AND CANPOLAT v. TURKEY

(Application no. 35363/02)

JUDGMENT

STRASBOURG

6 September 2005

FINAL

06/12/2005

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 Kepeneklioğlu and Canpolat v. Turkey

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

Mr J.-P. COSTA, *President*,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
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. 35363/02) 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 two Turkish nationals, Adem Kepeneklioğlu and Mehmet Hakan Canpolat, on 7 August 2002.

2. The applicants were represented by Y. Hoş, a lawyer practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 8 July 2004 the Court declared the application partly inadmissible and decided to communicate the complaints concerning a lack of a fair trial by an impartial and independent tribunal within a reasonable time, a failure to observe the presumption of innocence, a lack of adequate facilities for the preparation of the defence, and a lack of legal assistance during detention. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

4. Both the applicants and the Government submitted their observations outside the time limit. They have therefore not been admitted to the case file.

5. 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

6. The applicants, Mr Adem Kepeneklioğlu and Mr Mehmet Hakan Canpolat, are Turkish nationals, who were born in 1954 and 1964 respectively. When they lodged their application with the Court they were imprisoned in Turkey.

7. On 29 and 30 June 1992 the applicants were taken into custody in Istanbul by police officers from the Istanbul Anti-Terrorist Branch. On 13 July 1992 they were detained on remand.

8. On 27 July 1992 the Public Prosecutor at the Istanbul State Security Court filed a bill of indictment accusing the applicants of, *inter alia*, organised murder and armed burglary, as well as being members of an illegal terrorist organization.

9. On 25 November 1992 the Istanbul State Security Court commenced the trial against the applicants and three other accused and prolonged the applicants' detention.

10. On 3 April 1998 the Istanbul State Security Court convicted the applicants under Article 146 of the Criminal Code and sentenced them to death.

11. On 10 March 1999 the Court of Cassation quashed the judgment.

12. On 12 June 2001 the Istanbul State Security Court convicted them of the same crimes.

13. On 4 February 2002, upon the applicants' appeal, the Court of Cassation upheld the judgment of the State Security Court.

II. RELEVANT DOMESTIC LAW

14. A full description of the domestic law may be found in the judgments of *Demirel v. Turkey* (no. 39324/98, §§ 47-49, 28 April 2003) and *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002).

THE LAW

15. The applicants complained that they were not tried by an independent and impartial tribunal within a “reasonable time.” They asserted that, since they were detained during the trial, their right to the presumption of innocence was breached. They further asserted that their consultations with their lawyer were subjected to very strict regulations which hindered the preparation of their defence. They claimed that they

were not allowed to consult a lawyer during their police custody, before the public prosecutor or the first time they appeared before the trial court. They finally claimed that they could not put questions to the main prosecution witnesses. With respect to their complaints, the applicants invoked Article 6 §§ 1, 2, and 3 (b), (c) and (d) of the Convention, which in so far as relevant read as follows:

> “1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time 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.”
>
> 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; ...”
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

I. ADMISSIBILITY

16. The Court considers that these complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

II. ALLEGED VIOLATIONS OF ARTICLE 6

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

17. The applicants alleged that they had been denied a fair hearing on account of the presence of a military judge on the bench of the Istanbul State Security Court which tried and convicted them.

18. The Government did not submit their observations within the specified time-limit.

19. The Court notes that it has previously examined similar applications concerning the composition of the State Security Courts and has found violations of Article 6 § 1 (see, among others, *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

20. The Court sees no reason to reach a different conclusion in the instant case. It is reasonable that the applicants, who were 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, they could legitimately fear that the Istanbul 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 of Judgments and Decisions* 1998-IV, p. 1573, § 72 *in fine).*

21. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

B. As regards the fairness of the proceedings

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 applicant's other complaints under Article 6 §§ 2 and 3 (b), (c) and (d) (see *Incal*, cited above, § 74, and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 45).

C. As regards the length of proceedings

23. The applicants complained that the criminal proceedings against them were not concluded within a reasonable time.

24. The Court observes that these proceedings began on 29 June 1992, with the applicants' arrest, and ended on 4 February 2002. They thus lasted more than nine years and seven months.

25. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising similar issues to the one in the present application (see, for example, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Ertürk v. Turkey*, no. 15259/02, 12 April 2005).

26. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant

case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

27. There has accordingly been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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."

29. On 8 July 2004 the applicants were requested to submit their claims for just satisfaction. They did not submit any such claims within the specified time-limit. Accordingly, the Court considers that there is no call to award them any sum on that account.

30. 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).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of 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 Istanbul State Security Court;

3. *Holds* that it is not necessary to consider the applicants' other complaints under Article 6 § 2 and Article 6 § 3 (b) (c) and (d) of the Convention;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings.

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 Section Registrar

J.-P. COSTA
President