



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

FOURTH SECTION

CASE OF ÖNER AND OTHERS v. TURKEY

(Application no. 64684/01)

JUDGMENT

STRASBOURG

25 October 2005

FINAL

25/01/2006

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 Öner and Others v. Turkey,

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

Mr J. CASADEVALL, *President*,

Mr R. TÜRMEK,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr K. TRAJA,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 64684/01) 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 nineteen Turkish nationals, Mrs Gülseren Öner, Mr Abuzer Aslan, Mr Hacı Pamuk, Mr Hüseyin Duran, Mr İsmail Turap, Mrs Fatma Doymaz, Mrs Nazife Bilgiç, Mrs Sakine Doymaz, Mr İsmail Minkara, Mr Muhammet Emin Toprak, Mr Bedir Çetin, Mr Hüseyin Aslan, Mrs Fatma Dolaş, Mrs Arzu Doymaz, Mr Ramazan Sertkaya, Mr Hasan Gül, Mr Rıza Kılınç, Mrs Sakine Sürgülü and Mr Şükrü Karadağ, on 13 November 2000.

2. The applicants were represented by represented before the Court by Mr Y. Alataş, 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 1 June 2004 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the applicants' right to a fair trial by an independent and impartial tribunal, not being informed promptly and in sufficient detail of the nature and cause of accusation against them and the non-communication of the public prosecutor's indictment prior to the hearing. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

4. The applicant and the Government each filed observations on the admissibility and merits (Rule 59 § 1).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, who were born in 1964, 1941, 1963, 1958, 1963, 1978, 1977, 1977, 1964, 1960, 1949, 1978, 1973, 1979, 1970, 1961, 1966, 1968 and 1961 respectively, live in Adıyaman.

7. Nine of the applicants, namely Bedir Çetin, Hüseyin Duran, İsmail Minkara, Hacı Pamuk, Abuzer Aslan, Şükrü Karadağ, Rıza Kılınç, Ramazan Sertkaya and Muhammet Emin Toprak, were the regional administrators of the HADEP (*Halkın Demokrasi Partisi- People's Democracy Party*) in the province of Adıyaman.

8. The rest of the applicants are the relatives of prisoners who were convicted of being members of an illegal organisation, namely the PKK at the time of occurrence of the below mentioned events.

9. Following the capture of Abdullah Öcalan in Italy, prisoners who were convicted of being members of the PKK went on a hunger strike in several prisons. Some of these prisoners set themselves on fire in protest at the arrest.

10. On 16 December 1998, eleven of the applicants, namely Gülseren Öner, Hüseyin Duran, İsmail Turap, Fatma Doymaz, Nazife Bilgiç, Sakine Doymaz, Hüseyin Aslan, Fatma Dolaş, Arzu Doymaz, Hasan Gül and Sakine Sürgülü gathered in the Adıyaman regional office of HADEP and started a collective hunger strike in protest at the arrest of Abdullah Öcalan.

11. On 19 December 1998 the Adıyaman Public Prosecutor issued a search warrant in respect of the Adıyaman regional office of HADEP. On the same day the police conducted a search of the Adıyaman regional office of HADEP. According to the arrest report of the same date, the police arrested forty-five people including the applicants, who were present in the office when the search was taking place except Hüseyin Duran.

12. The arrest report, that was signed by the arrested persons including the applicants, revealed that publications of a separatist nature and flags of the PKK were found in the regional office of HADEP.

13. On 21 November 1998 the applicants Bedir Çetin, Muhammet Emin Toprak, İsmail Minkara and Hüseyin Aslan were tried before the Adıyaman Civil Court for participating in and organising meetings with the aim of

disseminating separatist propaganda. The court ordered that the applicants be released pending trial on the same day.

14. On 31 December 1998 the Public Prosecutor filed a bill of indictment with the Malatya State Security Court accusing the applicants of aiding the members of a terrorist organisation and requested that they be convicted under Article 169 of the Criminal Code and Section 5 of the Prevention of Terrorism Act.

15. On 6 May 1999 the Malatya State Security Court, considering as evidence the publications of separatist nature and flags of the PKK which had been found in the office, convicted the applicants of aiding a terrorist organisation pursuant to Article 169 of the Criminal Code and sentenced each of them to three years and nine months' imprisonment.

16. On 12 April 2000 the applicants appealed against this decision. On 15 May 2000 the Court of Cassation, in a public hearing, upheld the decision of the State Security Court.

II. RELEVANT DOMESTIC LAW

17. 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

18. The applicants complained 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 Malatya State Security Court. They further maintained that they were not informed promptly and in sufficient detail of the nature and cause of the accusation against them and that the public prosecutor's indictment was not communicated to them prior to the court hearing. In respect of their complaints, they invoked Article 6 §§ 1, 3 (a) and (b) of the Convention, which in so far as relevant reads as follows:

"1. In the determination of ... any criminal charge against her, 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:

(a) to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him;

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

A. Admissibility

19. 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.

B. Merits

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

20. 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 Malatya State Security Court. They referred to the constitutional amendment of 1999 whereby it is provided that the military judges could no longer sit on such courts.

21. 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).

22. 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 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 Malatya 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’ fear as to the State Security Court’s lack of independence and impartiality can be regarded as objectively justified (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1573, § 72 *in fine*).

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

2. *As to the fairness of the proceedings before the Malatya State Security Court*

24. 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 complaints under Article 6 §§ 1 and 3 (a) and (b) of the Convention (*İncal*, cited above, § 74, and *Çıraklar*, cited above, § 45).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. 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

26. The applicants requested from the Court an award in the amount of 20,000 euros (EUR) for each of them in respect of non-pecuniary damage.

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

28. The Court 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 *İncal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, § 45).

29. The Court considers that where an individual, as in the instant case, has been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Öcalan v. Turkey* [GC], no. 46221/99 § 210, 12 May 2005).

B. Costs and expenses

30. The applicants claimed a total amount of EUR 50,000 with respect to the reimbursement of any costs and expenses in connection with the proceedings before the Court. They did not produce any supporting documents in this respect; however, they claimed that their representative had applied the scale recommended by the Istanbul Bar for applications to the Court.

31. The Government contested the claim.

32. 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).

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, *Vural v. Turkey*, no. 56007/00, § 45, 21 December 2004), the Court awards the applicants EUR 1,500 for the costs and expenses claimed.

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 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 Malatya State Security Court;
3. *Holds* that it is not necessary to consider the applicants' complaints under Article 6 §§ 1, 3 (a) and (b) 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 in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand and five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable, such sum to be converted into Turkish liras at the rate applicable at the date of payment and to be paid into the bank account in Turkey indicated by the applicants;
 - (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 25 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President