CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF KEZER AND OTHERS v. TURKEY

(Application no. 58058/00)

JUDGMENT

STRASBOURG

24 January 2006

DÉFINITIF

24/04/2006

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 Kezer and Others v. Turkey,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr R. TÜRMEN,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 5 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 58058/00) 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 five Turkish nationals, Mr Yahya Kezer, Mr Nedim Öndeş, Mr Arap Doğan, Mr Ferhan Özçelik and Mr Selhan Tekin ("the applicants"), on 11 April 2000.

2. The applicants were represented by Mr M. İşeri, a lawyer practising in İzmir. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 5 October 2004 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicants' right to a fair hearing by an independent and impartial tribunal 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). The case was assigned to the newly composed Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1960, 1969, 1951, 1961 and 1964 respectively and live in İzmir.

6. On 2 June 1995 Nedim Öndeş, Arap Doğan, Ferhan Özçelik and Selhan Tekin were arrested and taken into custody by the Anti-Terror branch of the İzmir Security Directorate on suspicion of aiding and abetting an illegal organisation. On 6 June 1995 Yahya Kezer was arrested and taken into custody by the same police officers on the same grounds.

7. On 14 June 1995 the applicants were brought before the İzmir State Security Court. The court ordered their remand in custody.

8. On 10 July 1995 the public prosecutor at the İzmir State Security Court filed a bill of indictment accusing Yahya Keser and Nedim Öndeş of membership of an illegal organisation and the other applicants of aiding and abetting an illegal organisation. He requested that Yahya Keser and Nedim Öndeş be convicted and sentenced under Article 168 §2 of Criminal Code and Article 5 of Law no. 3713. In respect of the other applicants, the public prosecutor requested that they be convicted and sentenced under Article 169 of Criminal Code and Article 5 of Law no. 3713.

9. On 22 July 1997 the İzmir State Security Court convicted the applicants as charged and sentenced Yahya Keser to fifteen years, Nedim Öndeş to fourteen years and seventeen months, Arap Doğan to two years and eleven months and Ferhan Özçelik and Selhan Tekin to three years and nine months' imprisonment.

10. On 7 July 1998 the Court of Cassation quashed the judgment of the İzmir State Security Court for non-compliance with procedural rules.

11. On 3 December 1998 the İzmir State Security Court convicted the applicants as charged and sentenced Yahya Keser to fifteen years' imprisonment, Nedim Öndeş to fourteen years' and seventeen months' imprisonment and the other applicants to three years' and nine months' imprisonment.

12. On 18 October 1999 the Court of Cassation held a hearing and upheld the judgment of the İzmir State Security Court. On 18 November 1999 the judgment of the Court of Cassation was deposited with the registry of the İzmir State Security Court.

II. THE RELEVANT DOMESTIC LAW

13. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Özel v. Turkey* (no. 42739/98,

§§ 20-21, 7 November 2002) and *Gençel v. Turkey* (no. 53431/99, §§ 11-12, 23 October 2003).

14. By Law no. 5190 of 16 June 2004, published in the Official journal on 30 June 2004, the State Security Courts have been abolished.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicants complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the İzmir State Security Court which tried and convicted them. They alleged that they had been convicted solely on the basis of their statements taken under duress in police custody. They maintained that they were denied the assistance of a lawyer during the initial stages of the criminal proceedings. They submitted that the written opinion of the principal public prosecutor at the Court of Cassation was never served on them, thus depriving them of the opportunity to put forward their counter-arguments. Finally, they complained that Turkish law does not give the possibility to cross-examine witnesses, thereby, depriving them of their right to confront the witnesses. They relied on 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:
>
> (a) to be informed promptly, in a language which 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;
>
> ...
>
> (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..."

A. Admissibility

1. Non-exhaustion of domestic remedies

16. The Government argued under Article 35 of the Convention that the applicants' complaint in respect of the independence and impartiality of the İzmir State Security Court must be rejected for non-exhaustion of domestic remedies. They maintained that the applicants have not invoked this complaint before the domestic courts.

17. The Court reiterates that it has already examined and rejected 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.

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

2. Six-months

19. The Government argued under Article 35 of the Convention that the applicants had failed to comply with the six months rule. In this regard, they claimed firstly that the application had been lodged with the court outside the six-month time limit. They further submitted that the complaints pertaining to the independence and impartiality of the İzmir State Security Court and the lack of access to a lawyer during the initial stages of the criminal proceedings should have been lodged with the Court within six months of the date on which the State Security Court rendered its judgment and the date on which the applicants' detention period ended, respectively.

20. The Court observes, firstly, that in the instant case the judgment of the State Security Court was upheld by the Court of Cassation on 18 October 1999 and deposited with the registry of the İzmir State Security Court on 18 November 1999. The Court observes that the application was lodged with the Court on 11 April 2000. The application was therefore introduced in time.

21. As to the Government's remaining preliminary objections, the Court reiterates that it has already examined and rejected them in similar cases (see, in particular *Özdemir v. Turkey*, no. 59659/00, § 29, 6 February 2003, and *Yavuzaslan v. Turkey*, no. 53586/99, § 16, 22 April 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.

22. In view of the above, the Court rejects the Government's preliminary objections.

23. 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 applicants' 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.

B. Merits

1. Independence and impartiality of the State Security Court

24. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir*, cited above, §§ 35-36).

25. As to the instant case, the Court considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion. It considers it understandable that the applicants – prosecuted in a State Security Court for offences relating to "national security" – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account they could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Consequently, the applicants' doubts about that court's independence and impartiality may be regarded as objectively justified (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1568, § 72 *in fine*).

26. In conclusion, the Court considers that the State Security Court which tried and convicted the applicants was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Accordingly, there has been a violation of this provision.

2. Fairness of the proceedings

27. Having regard to its finding of a violation of applicants' right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the other complaints under Article 6 of the Convention relating to the fairness of the proceedings before the domestic courts (see, among other authorities, *İncal,* cited above, § 74, and *Ükünç and Güneş v. Turkey*, no. 42775/98, § 26, 18 December 2003).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. The applicants complained in their observations dated 24 March 2005 that since the civilian judges sitting on the bench of the State Security Court and the Court of Cassation were attached to the Supreme Council of Judges and Public Prosecutors they lacked independence and impartiality. They relied on Article 6 of the Convention.

29. The Court observes that, in the instant case, the final domestic decision was given on 18 October 1999 when the Court of Cassation upheld the judgment of the first-instance court. This decision was deposited with the registry of the State Security Court on 18 November 1999, whereas this complaint was introduced to the Court on 24 March 2005.

30. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicants claimed, in total, 70,000 euros (EUR) in respect of non-pecuniary damage.

33. The Government contested the amount requested by the applicants.

34. 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 *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, § 49).

35. 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 (see *Gençel*, cited above, § 27).

B. Costs and expenses

36. The applicants claimed 2,360 new Turkish liras (YTL) (approximately EUR 1,338) for representation fees and EUR 3,000 for the

costs and expenses incurred before the Court. In respect of representation fees, the applicants referred to the Turkish Bar Association's recommended minimum fees list for 2004.

37. The Government maintained that only actually incurred expenses can be reimbursed. In this connection, they submitted that all costs and expenses must be documented by the applicant or his representative.

38. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the global sum of EUR 1,000.

C. Default interest

39. 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 applicants' complaint pertaining to the independence and impartiality of the State Security Court and the Court of Cassation on account of the attachment of the civilian judges to the Supreme Council of Judges and Public Prosecutors inadmissible and 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 İzmir State Security Court;

3. *Holds* that it is not necessary to consider the applicants' other complaints under Article 6 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 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 1,000 (one thousand euros) in respect of costs and expenses, to be converted into new Turkish liras at

the rate applicable at the date of the settlement and free of any taxes or charges 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 24 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President