



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

FOURTH SECTION

CASE OF KİPER v. TURKEY

(Application no. 44785/98)

JUDGMENT

STRASBOURG

23 May 2006

FINAL

23/08/2006

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 Kiper v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. TÜRMEŒ,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ, *judges*,

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

Having deliberated in private on 4 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 44785/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Nihat Kiper ("the applicant"), on 17 September 1998.

2. The applicant, who had been granted legal aid, was represented by Mr M. Vefa, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Convention institutions.

3. The applicant complained, in particular, that he was denied a fair hearing within a reasonable time by an independent and impartial tribunal. He invoked Articles 6, 9, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 10 October 2000 the Court decided to communicate the application to the Government. In a letter of 27 November 2002, the Court informed the parties that, in accordance with Article 29 §§ 1 and 3 of the Convention, it would decide on both the admissibility and merits of the application.

7. 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).

8. The applicant and the Government each filed observations on the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1970 and was serving his prison sentence at Adiyaman prison at the time of the lodging of the application.

10. On 19 March 1993 the applicant was arrested and taken into custody. On 30 March 1993 he was brought before the Siverek Magistrates' Court. The latter ordered his remand in custody.

11. On 21 May 1993 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment accusing the applicant of hiding members of the PKK and guns and explosives as well as organising meetings in his house. He requested that the applicant be convicted and sentenced under Article 168 § 2 of the Criminal Code and Article 5 of Law no. 3713.

12. On an unspecified date, the criminal proceedings against the applicant and 60 co-accused commenced before the 3rd Section of the Diyarbakır State Security Court.

13. On 29 December 1993 the 1st Section of the Diyarbakır State Security Court decided to join the criminal proceedings of 44 other accused to that of the applicant.

14. Between 29 December 1993 and 28 December 1994 the first-instance court held hearings at regular intervals.

15. On 28 December 1994 the public prosecutor submitted his observations on the merits of the case. The accused were given time to prepare their defence submissions on the merits.

16. Between 28 December 1994 and 30 October 1996 the first-instance court held hearings at regular intervals. During this time, at each hearing until 13 December 1996, several of the co-accused requested the court to apply in their favour Law no. 341 concerning the provisions to be applied to offenders accused of certain categories of crimes, as amended by Law no. 4085. Under this law, an accused who confesses his guilt and who assists the security forces in identifying other offenders can be given a lesser sentence. As a result, during this period, the court undertook various procedural decisions with a view to obtaining the additional defence

submissions of those co-accused who wanted to benefit from Law no. 341 by way of rogatory letters and also requested information from the Ministry of Interior as to whether these co-accused could be deemed to benefit from the application of this law.

17. In the hearing held on 5 August 1996, the applicant's representative requested the court to rule on the merits of the case as soon as possible. He pointed out that the public prosecutor had already submitted his observations on the merits on 28 December 1994.

18. In a hearing held on 25 September 1996 the court requested the public prosecutor to submit his observations on the merits as regards the co-accused who had requested to benefit from Law no. 341.

19. On 30 October 1996 the public prosecutor submitted his additional observations on the merits of the case in so far as it concerned those co-accused who had requested to benefit from Law no. 341. In respect of the other co-accused, including the applicant, the public prosecutor referred to his initial observations of 28 December 1994.

20. In the next two hearings held on 28 November 1996 and 30 January 1997 the court heard the defence submissions of some of the co-accused.

21. At the end of each hearing, the court considered and refused the release of the applicant pending trial, either *ex officio* or at applicant's request.

22. On 27 March 1997 the Diyarbakır Security Court convicted the applicant as charged and sentenced him to twelve years and six months' imprisonment. He was also barred from public service for life. In its decision the court held, *inter alia*, that despite the fact that the applicant submitted that he had aided the organisation out of fear, it was established that the applicant had entered into a permanent hierarchical and organic relationship with the organisation. In this regard, the court referred to the statements taken from other co-accused as well as other evidence, namely the guns and other materials found. It further noted that the applicant had shouted "*Biji Serok Apo, Biji PKK and Biji ERNK¹*" together with other co-accused while the judgment was read out in court.

23. On 17 June 1998 the Court of Cassation upheld the judgment of the first instance court in respect of the applicant.

II. THE RELEVANT DOMESTIC LAW

24. 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).

1. Long live president Apo, long live PKK and long live ERNK, in Kurdish.

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

26. Articles 2 and 4 of the Criminal Code on Procedure provide that courts may join or sever cases at any stage of the proceedings either on the request of the parties or of their own motion.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Diyarbakır State Security Court which tried and convicted him. He further submitted that he had been deprived of his right to the assistance of a lawyer during his police custody. Finally, he claimed that the length of the criminal proceedings brought against him was excessive. The applicant relied on Article 6 of the Convention, which in so far as relevant reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...within a reasonable time by an independent and impartial tribunal established by law.”

3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing ...”

A. Admissibility

28. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Independence and impartiality of the State Security Court

29. 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 v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

30. 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 applicant – 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 he 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 applicant’s doubts about that court’s independence and impartiality may be regarded as objectively justified (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1568, § 72, *in fine*).

31. In conclusion, the Court considers that the State Security Court which tried and convicted the applicant 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

32. Having regard to its finding of a violation of the applicant’s right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the other complaint 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 *Üküncü and Güneş v. Turkey*, no. 42775/98, § 26, 18 December 2003).

3. Length of the criminal proceedings

33. There was no dispute over the period to be taken into consideration. It was common ground between the parties that the period to be taken into consideration began on 19 March 1993, when the applicant was arrested and taken into police custody and ended on 17 June 1998, when the Court of Cassation upheld the judgment of the Diyarbakır State Security Court in respect of the applicant. The Court sees no reason to decide otherwise. The period under consideration thus lasted five years and three months before two instances.

34. The Government maintained that, in the circumstances of the present case, the length of criminal proceedings could not be considered unreasonably long. In this respect, they referred to the number of the co-accused and the time spent gathering evidence. The Government pointed out that the final judgment of the first-instance court consisted of ninety-eight pages.

35. The applicant disputed the Government’s arguments. He submitted, in particular, that the public prosecutor had already submitted his observations on the merits in 1994 and that no new evidence concerning

him was introduced after that date. The applicant maintained that the sole reason for the prolongation of the proceedings was political because the court wished his co-accused to become “confessors”. He argued that the court could have severed the cases in order to speed up the proceedings.

36. The Court reiterates 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, among many others, *Sekin and Others v. Turkey*, no. 26518, § 35, 22 January 2004, and *Kranz v. Poland*, no. 6214/02, § 33, 17 February 2004).

37. The Court considers that, even though the case involved a certain degree of complexity since it involved the prosecution of ninety-five accused, it cannot be said that this in itself justified the total length of the proceedings.

38. As regards the conduct of the applicant, the Court observes that it does not appear that he contributed to the prolongation of the proceedings. The Government have not argued to the contrary.

39. As to the conduct of the domestic authorities, the Court observes that there was a significant period of delay which was attributable to the authorities. In this respect, it notes that the factual circumstances of the case against the applicant and the co-accused were elucidated as early as 28 December 1994 when the public prosecutor submitted his observations on the merits. Regardless of this fact, the proceedings continued for approximately two years and two months. Admittedly, the Court notes that the proceedings were prolonged due to a number of co-accused who wanted to benefit from Law no. 341 and, as a result, the court had to undertake various procedural decisions to secure their additional submissions (see paragraph 16). However, it appears from the case-file that the additional submissions of these co-accused did not serve any purpose in clarifying other facts of the criminal case before it, since in respect of the co-accused, including the applicant, who did not request the application of Law no. 341, the public prosecutor, on 30 October 1996, relied on his previous observations on the merits (see paragraph 19). In fact, it appears from the case-file that no evidence was admitted into the case-file in respect of the applicant after 28 December 1994. The Government did not offer any explanation for this state of affairs.

40. The Court notes that, throughout the proceedings, the applicant was kept in custody – a fact which required particular diligence on the part of the courts dealing with the case to administer justice expeditiously (see *Kalashnikov v. Russia*, no. 47095/99, § 132, ECHR 2002-VI). Recalling that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts

can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time (see *Arvelakis v. Greece*, no. 41354/98, § 26, 12 April 2001), the Court considers that the domestic court could have applied stricter measures to speed up the proceedings. In particular, it could have decided to sever the proceedings in respect of those co-accused who wanted to benefit from Law no. 341 from the remaining co-accused pursuant to Articles 2 and 4 of the Code on Criminal Procedure. It therefore finds that, in the absence of any explanation from the Government, the proceedings in the instant case were unnecessarily prolonged as the national court failed to act with the necessary diligence in conducting the proceedings against the applicant.

41. In view of the above, the Court considers that the length of the proceedings cannot be considered to have complied with the reasonable time requirement laid down under Article 6 § 1.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

43. The applicant complained that he had been denied an effective remedy in respect of his grievances within the meaning of Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

44. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible. The Court further notes that the applicant failed to develop with reasons his complaint under this head. Accordingly, it finds it unnecessary to examine this complaint separately (see *Tekin and Baltaş v. Turkey*, nos. 42554/98 and 42581/98, § 42, 7 February 2006).

III. ALLEGED VIOLATION OF ARTICLES 9 AND 14 OF THE CONVENTION

45. The applicant alleged that he was discriminated against on account of his Kurdish ethnic origin and his political opinions. He relied on Articles 9 and 14 of the Convention.

46. The Court considers that this complaint should be examined from the standpoint of Article 14 alone, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

47. The Government contested that argument.

48. The Court has examined the applicant's allegation. However, it finds no evidence in the case file to support it, or which might disclose any appearance of a violation of this provision. Consequently, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed, in total, 39,772 euros (EUR) in respect of pecuniary damages. This sum included the loss of earnings incurred as a result of his imprisonment and the loss of future earnings as a result of the ban on him exercising a public function. In support of his claims the applicant submitted a report prepared by an accountant. He further claimed EUR 60,000 in respect of non-pecuniary damage.

51. The Government contested the claims considering them speculative.

52. 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. Moreover, the Court finds the applicant's claims unsubstantiated. The Court cannot therefore allow them.

53. However, it accepts that the applicant must have suffered non-pecuniary damage, such as distress and frustration, on account of the duration of the proceedings, which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the circumstances of the case and having regard to its case law, the Court awards the applicant EUR 2,000 under this head.

54. The Court further 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*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005 - ...).

B. Costs and expenses

55. The applicant, who received EUR 630 in legal aid from the Council of Europe in connection with the presentation of his case, also claimed, in total, EUR 6,758 for the costs and expenses incurred both before the domestic courts and before the Court. The applicant did not submit any receipt or invoice in support of his claims. He relied on the Diyarbakır Bar Association's recommended minimum fees list.

56. The Government maintained that the applicant's claims were unsubstantiated.

57. 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000 less EUR 630 received by way of legal aid from the Council of Europe for the proceedings before the Court.

C. Default interest

58. 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 Diyarbakır State Security Court, the fairness and the length of the proceedings and the lack of an effective remedy 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 Diyarbakır State Security Court;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
4. *Holds* that that it is not necessary to consider the applicant's other complaint under Articles 6 and 13 of the Convention;

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, the following amounts to be converted into new Turkish liras at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) EUR 370 (three hundred and seventy euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 23 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President