CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF KABASAKAL AND ATAR v. TURKEY

(Applications nos. 70084/01 and 70085/01)

JUDGMENT

STRASBOURG

19 September 2006

FINAL

19/12/2006

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 Kabasakal and Atar 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. TÜRMEN,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. ŠIKUTA, *judges,*

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 29 August 2006,

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

PROCEDURE

1. The case originated in two applications (nos. 70084/01 and 70085/01) 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 two Turkish nationals, Mr Selim Kabasakal and Mr Hasan Atar ("the applicants"), on 13 December 2000.

2. The applicants were represented by Mr H. Erdoğan and Mr L. Kanat, lawyers practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants alleged that they were denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the State Security Court which tried them and the non-communication of the written opinion of the principal public prosecutor at the Court of Cassation.

4. The applications were allocated to the Fourth 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.

5. The Chamber decided to join the proceedings in the applications (Rule 42 § 1).

6. By a decision of 8 March 2005 the Court declared the applications admissible.

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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1979 and 1977 respectively and were serving their prison sentences in Ordu prison at the time of their applications to the Court.

9. On 11 November 1998 the applicants were arrested and taken into custody by police officers at the Anti-terror branch of the Sivas Security Directorate on suspicion of membership of an illegal organisation, namely the TDP[1].

10. On 18 November 1998 they were brought before a judge who ordered their remand in custody.

11. On 31 December 1998 the public prosecutor at the Erzurum State Security Court filed a bill of indictment with the latter charging the applicants under Article 168 § 2 of the Criminal Code with membership of an illegal organisation.

12. The first hearing, held before the Erzurum State Security Court on 12 January 1999, in the applicants' absence, was taken up with procedural matters, such as the measures to be taken for securing the presence of the accused.

13. On 5 February 1999 the court heard the applicants. The first applicant stated that he accepted in part the accusations against him. In this respect he maintained, *inter alia*, that he had wanted to join the armed forces of the TDP and that he was apprehended, together with the co-accused, on his way to the rural area. The second applicant also stated, *inter alia*, that he was apprehended, together with the co-accused, before he had joined the rural cadre of the organisation. He maintained that he was a sympathiser of the organisation and not a member. Both applicants also repudiated the statements they had given to the police, claiming that they had been made under duress.

14. In the next hearing held on 2 March 1999 the applicants stated that they had nothing to say. On 23 March 1999 the court heard a witness and one of the co-accused. The witness stated that he knew only one of the accused and that he had loaned his car to him. The applicants maintained that, in view of the judgment of the European Court on Human Rights concerning State Security Courts, they were boycotting the court and were not going to give any statements.

15. In the next hearing held on 20 April 1999, the first applicant submitted that he was neither a member nor a participant in any activity of

[1] Devrimci Halk Partisi- Revolutionary Peoples' Party.

the organisation in question and that he had been apprehended prior to attending a meeting with members of the organisation.

16. In the hearings held on 18 May 1999 and 15 June 1999 the second applicant stated that he had nothing to say. The first applicant requested the rectification of some of his words contained in the previous minutes of the hearings.

17. In a hearing held on 13 July 1999 the civilian judge who had been appointed to replace the military judge sat as a member of the trial court for the first time. At this hearing and the next one held on 10 August 1999, the court took some procedural decisions and heard several of the co-accused, including the second applicant who maintained that he had nothing to say.

18. In a hearing held on 8 September 1999 the applicants submitted their written submissions in which they challenged, in particular, the veracity of their statements given in police custody.

19. On 5 October 1999 before the court two persons filed petitions to intervene as third-parties in the proceedings. The applicants reiterated their previous submissions.

20. At a hearing held on 12 October 1999 the court accepted the request for the third-party intervention of two persons. On the same day, the public prosecutor read out his observations on the merits. The public prosecutor, relying on the submissions of the applicants, the co-accused and the materials found during the applicants' arrest, requested that the applicants be convicted and sentenced under Article 168 § 2 of the Criminal Code and Article 5 of Law no. 3713. The applicants' request for an extension of time to submit their observations on the merits was granted by the court.

21. At each hearing, the court examined and dismissed the requests of the applicants to be released.

22. On 26 October 1999 the court heard the submissions of the applicants on the merits. The applicants also submitted four pages of written submissions. On the same day the Erzurum State Security Court convicted the applicants as charged and sentenced them to twelve years and six months' imprisonment.

23. On 6 December 1999 the applicants appealed to the Court of Cassation against the judgment of the State Security Court. In their petition the applicants submitted arguments based on domestic law and, in particular, challenged the veracity of their statements to the police.

24. Following a hearing held on 5 June 2000, the Court of Cassation dismissed the applicants' appeal and upheld the judgment of the first-instance court. This decision was pronounced, in the absence of the applicants' representative, on 14 June 2000.

25. On an unspecified date, the applicants were released from prison.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. 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; *Öcalan v. Turkey* [GC], no. 46221/99, §§ -54, ECHR 2005-...; and *Göç v. Turkey* [GC], no. 36590/97, § 34, ECHR 2002-V.

27. On 2 January 2003 Article 316 of the Code of Criminal Procedure Law was amended to provide that the written opinion of the principal public prosecutor at the Court of Cassation be notified to the parties.

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicants complained that they were denied a fair hearing on account of the presence of a military judge on the bench of the Erzurum State Security Court which tried them. They further 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. They relied on Article 6 §§ 1 and 3 (b) of the Convention.

30. The Court considers that these complaints should be examined from the standpoint of Article 6 § 1 alone, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Independence and impartiality of the Erzurum State Security Court

31. The Government maintained that, by Law no. 4388 of 18 June 1999, amendments were made to remove military judges from the bench of the State Security Courts with a view to complying with the requirements of the Convention. In this connection they pointed out that, in the present case, the military judge sitting on the bench of the Erzurum State Security Court had already been replaced by a civilian judge before the applicants' lawyer had put forward their submissions on the merits of the case and that the applicants were convicted by a State Security Court which was composed of three civilian judges.

32. The applicants refuted the Government's arguments. They maintained, in particular, that the Erzurum State Security Court did not repeat the acts in which the military judge had participated when the latter was replaced by a civilian judge.

33. The Court has consistently held that certain aspects of the status of military judges sitting as members of the State Security Courts rendered their independence from the executive questionable (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68; and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 39). The Court also found in *Öcalan v. Turkey* (cited above, §§ 114-115) that when a military judge participated in one or more interlocutory decisions that continued to remain in effect in the criminal proceedings concerned, the military judge's replacement by a civilian judge in the course of those proceedings before the verdict was delivered, failed to dissipate the applicant's reasonably held concern about that trial court's independence and impartiality, unless it was established that the procedure subsequently followed in the state security court sufficiently alleyed that concern.

34. In the instant case, the Court notes that before his replacement on 13 July 1999, the military judge was present at one preliminary hearing and six hearings on the merits. At these hearings, the domestic court heard the accused, including the applicants, on several occasions as well as a witness, whose testimony did not have any bearing on the applicants' case. It also took some minor procedural acts. However, no interlocutory decisions of importance, in particular for the rights of the defence of the applicants, were taken by the domestic court during these hearings. In this connection, the Court notes that after the military judge was replaced by a civilian judge, the domestic court held five more hearings on the merits during which it accepted a third-party intervention and again heard the accused, including the applicants, a number of times. Furthermore, the final submissions of both the public prosecutor and the applicants were read out before the court, composed of three civilian judges. Therefore, taking into account, in particular, the respective importance of the procedural acts which took place before and after the replacement of the military judge, the Court considers that none of the acts in which the military judge participated in the instant case necessitated immediate renewal after his replacement (see, *mutatis mutandis*, *Ceylan v. Turkey*, (dec.), no. 68953/01, ECHR 2005-...).

35. In view of the overall proceedings, the Court finds that, in the particular circumstances of the case, the replacement of the military judge before the end of the proceedings disposed of the applicants' reasonably held concern about the trial court's independence and impartiality (see *mutatis mutandis*, *Yılmaz v. Turkey* ((dec.), no. 62230/00, 20 September 2005).

36. There has accordingly been no violation of Article 6 § 1 of the Convention under this head.

B. Fairness of the proceedings

37. The Government maintained that the written opinion of the principal public prosecutor does not have a binding nature and that it is generally in a form of a one-page document in which it is briefly stated whether the judgment of the first instance court should be upheld or quashed. They pointed out that since all documents before the Court of Cassation can be examined by the parties pursuant to Article 99 of the Law of Court of Cassation, the applicants could have found out about the written opinion of the principal public prosecutor via telephone, fax or in person. Finally, they submitted that the written opinion of the principal public prosecutor was read out during the hearing.

38. The applicants disputed the Government's arguments. In particular, they claimed that they did not have sufficient time to prepare their defence since they learned of the contents of the written opinion of the principal public prosecutor for the first time during the hearing held before the Court of Cassation.

39. The Court notes that it has already examined the same grievance in the past and has found a violation of Article 6 § 1 of the Convention (see, in particular, *Göç*, cited above, § 58; *Abdullah Aydın v. Turkey (no. 2)*, no. 63739/00, § 30, 10 November 2005; and *Ayçoban and Others v. Turkey*, nos. 42208/02, 43491/02 and 43495/02, 22 December 2005).

40. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned cases.

41. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the non-communication of the written opinion of the principal public prosecutor at the Court of Cassation.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicants claimed, in total, 30,000 euros (EUR) for pecuniary and EUR 20,000 for non-pecuniary damage.

44. The Government did not express an opinion.

45. As regards the alleged pecuniary damage sustained by the applicants, the Court notes that they failed to produce any receipt or documents in support of their claim. The Court accordingly dismisses it.

46. The Court further considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicants (see, *mutatis mutandis*, *Parsil v. Turkey*, no. 39465/98, § 38, 26 April 2005; and *Ayçoban and Others*, cited above, § 32).

B. Costs and expenses

47. The applicants claimed, in total, EUR 10,000 for legal fees and EUR 1,000 for costs and expenses incurred both before the domestic courts and before the Court. They relied on the Ankara Bar Association's recommended minimum fees list. However, they did not submit any receipt or documents in support of their claims.

48. The Government did not express an opinion.

49. 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 for the proceedings before the Court.

C. Default interest

50. 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. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the presence of the military judge on the bench of the State Security Court during a part of the proceedings against the applicants;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the non-communication to the applicants of the principal public prosecutor's observations before the Court of Cassation;

3. *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 1,000 (one thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the date of settlement, plus any tax that may be chargeable;
(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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 September 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President