



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

SECOND SECTION

CASE OF YÜKSEKTEPE v. TURKEY

(Application no. 62227/00)

JUDGMENT

STRASBOURG

24 October 2006

FINAL

26/03/2007

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 Yüksektepe v. Turkey,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr R. TÜRMEK,

Mr M. UGREKHIDZE,

Mrs E. FURA-SANDSTRÖM,

Ms D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 62227/00) 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 a Turkish national, Mr Yılmaz Yüksektepe (“the applicant”), on 14 October 1999.

2. The applicant was represented by Mr C. Toraman, 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 April 2005 the Court decided to communicate the application 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1958 and lives in Germany.

5. The applicant was a civil engineer and a partner in a company. He was also acting as an automobile commissioner in his spare time.

6. In the course of an operation carried out against the activities of an illegal organisation, namely the İslami Hareket Örgütü (the *Islamic Movement Organisation*), the applicant was arrested and taken into custody together with Mr A.A. while they were leaving the applicant’s house on

28 November 1995. It appears from the arrest protocol that the police officers were following Mr A.A. who was suspected of being a member of that organisation.

7. On the same day, the applicant's house was searched. According to the search and seizure protocol drafted by the police officers and signed by the applicant and his wife, the police did not find anything illegal or incriminating.

8. Between 28 November and 11 December 1995, the applicant was interrogated and confronted with a number of suspects. The applicant claims that he was beaten and given electric shocks during this time.

9. On 11 December 1995 the applicant was examined by a doctor at the Bursa Forensic Medical Department who did not find any signs of ill-treatment on the applicant's body. The report mentioned that the applicant complained of a bruise on his left eye and of having been given electric shocks.

10. On the same day, the applicant was brought before the prosecutor when he denied the accusations against him and claimed to have given his statements in custody under duress. He was then brought before a judge at the Istanbul State Security Court who ordered his detention on remand.

11. On 27 December 1995 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant, along with two other suspects, accusing him of providing the Islamic Movement Organisation with financial support by forging licences and plates for stolen cars and, subsequently, selling them. The prosecutor requested that the applicant be convicted and sentenced for membership of an illegal organisation under Article 168 § 2 of the Criminal Code.

12. On an unspecified date the criminal proceedings against the applicant and two other accused commenced before the Istanbul State Security Court.

13. During the proceedings the applicant refuted the accusations against him. In particular, he challenged the authenticity of the documents in the case file claiming that some of them had been replaced. In support of his argument, he claimed, *inter alia*, that the search and seizure protocol was torn and that therefore the police had drafted a new one and made him sign under his wife's name. In his final observations on the merits, the applicant also stated that he had been forced to sign his statements in police custody.

14. On 9 September 1996 the applicant was released pending trial.

15. On 13 February 1998 the Istanbul State Security Court convicted the applicant of aiding and abetting an illegal organisation, under Article 169 of the Criminal Code, and sentenced him to five years' imprisonment. In its decision, the court noted, *inter alia*, that there was no evidence that the applicant had taken part in any armed or unarmed activity of the organisation in order to be considered a member of that organisation. However, the court was not convinced that the applicant did not know that,

through his constant financial relationship with Mr A.A., he had been helping the organisation.

16. On 22 April 1998 the applicant appealed against this judgment. In his appellate petition, the applicant submitted, in particular, that the police documents relied upon by the prosecution did not reflect the truth. In this regard, he stated that the documents drafted by the police in Bursa were torn and replaced by the police in Istanbul. The applicant further claimed that he was coerced into signing the documents drafted by the police. Finally he pointed out that the police had not found a single book concerning political Islam in his house.

17. On 15 April 1999 the Court of Cassation upheld the judgment of the first-instance court in so far as it concerned the applicant and quashed the remainder of the judgment.

18. The Government informed the Court that on 9 February 2001 the Istanbul State Security Court decided to defer the sentence of the applicant pursuant to Law no. 4616 on Conditional Release, Deferral of Procedure and Punishments.

II. THE RELEVANT DOMESTIC LAW

19. 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).

20. 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 3 OF THE CONVENTION

21. The applicant complained that he had been subjected to torture while held in police custody, in breach of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

22. The Government maintained under Article 35 § 1 of the Convention that this part of the application must be rejected for non-exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule. In this regard, they maintained that the applicant had failed to lodge an official complaint with the public prosecutor. They further submitted that the applicant should have lodged his application within six months following the date on which he informed the public prosecutor about the alleged ill-treatment, i.e. on 11 December 1995.

23. The applicant refuted the arguments of the Government. In particular, he alleged that, since the domestic remedies were not effective, he did not need to exhaust them.

24. The Court considers it unnecessary to determine whether the applicant has exhausted domestic remedies or complied with the six months' rule within the meaning of Article 35 of the Convention since this part of the application is inadmissible for the following reasons:

25. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence (see, in particular, *Tanrikulu and Others v. Turkey* (dec.), no. 45907/99, 22 October 2002).

26. The Court notes that the medical report established at the end of the applicant's stay in custody does not contain any indication that he was ill-treated by the police. On this point, the Court reiterates that any ill-treatment inflicted in the way alleged by the applicant would have left marks on his body, in particular, beatings and electric shocks, which would have been observed by the doctor who examined him at the end of his detention in police custody, some twelve days later, before he was formally detained on remand (see, in particular, *Tanrikulu and Others v. Turkey* (dec.), nos. 29918/96, 29919/96 and 30169/96, 24 February 2005). The Court is aware of the lack of details in this report. Nevertheless, it notes that there is no material in the case file which could call into question the findings in the report or add probative weight to the applicant's allegations. In particular, it notes that the applicant did not object to its contents in the course of the domestic proceedings and that there is no indication in the case file that the applicant requested or was refused permission to see another doctor at the end of the custody period.

27. In view of the above, the Court is of the opinion that the applicant has not laid the basis of an arguable claim that he was subjected to ill-treatment whilst in police custody. It follows that this part of the application is unsubstantiated and must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

28. The applicant complained that there was no reasonable suspicion for his arrest and detention. By a letter dated 7 July 2000, the applicant

complained that he had been held in police custody for twelve days without being brought before a judge or other officer authorised by law to exercise judicial power. The applicant relied on Article 5 of the Convention which, in so far as relevant, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.”

29. The Government argued under Article 35 § 1 of the Convention that the applicant's complaints under this head should be rejected for failure to comply with the six-month rule. They maintained that he should have lodged his application with the Court within six months of the date on which his police custody ended.

30. The applicant refuted this argument.

31. The Court reiterates that, according to the established case-law of the Convention organs, where there is no domestic remedy available, the six-month period runs from the date of the act alleged to constitute a violation of the Convention; however, where it concerns a continuing situation, the period of six months runs from the end of the situation concerned (see, among other authorities, *Ege v. Turkey* (dec.), no. 47117/99, 10 February 2004).

32. The Court notes that the applicant's detention in police custody ended when he was detained on remand on 11 December 1995, whereas these complaints were lodged with the Court on 14 October 1999 and 7 July 2000 respectively, i.e. more than six months later. In these circumstances, the Court accepts the Government's objection that the applicant has failed to comply with the six-month rule. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 6 AND 7 OF THE CONVENTION

33. The applicant first complained that he 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 İstanbul State Security Court which tried and convicted him. Secondly, he submitted that he was convicted on the basis of false statements taken under duress and documents

drafted by the police. Thirdly, he alleges that he should not have been tried by a State Security Court and that the rules of procedure before these courts are different from the standard rules of criminal procedure. The applicant relied on Articles 6 and 7 of the Convention.

34. 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 and public hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

35. As regards the applicant's third, general grievance in respect of the State Security Courts, the Court reiterates that it has already examined and rejected similar complaints (see, amongst other authorities, *Ükünç and Güneş v. Turkey* (dec.), no. 42775/98, 5 December 2000 and, *mutadis mutandis*, *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003). The Court finds no particular circumstances, in the instant case, which would require it to depart from its findings in such cases. It follows that 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.

36. As to the applicant's complaints that he 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 İstanbul State Security Court which tried and convicted him and that he was convicted on the basis of false statements taken under duress and documents drafted by the police, the Court considers, 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, that these 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

37. 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).

38. The Court finds no reason to reach a different conclusion in the instant case. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

2. Fairness of the proceedings

39. 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 separately the remaining complaints under Article 6 of the Convention relating to the fairness of the proceedings before the domestic courts (see, among other authorities, *Incal v. Turkey*, judgment of 9 June 1998, *Reports 1998-IV*, § 74).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant complained that the search conducted in his house was unlawful, in breach of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

41. The Government argued under Article 35 § 1 of the Convention that this part of the application must be rejected for non-exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule. In this regard, they maintained that the applicant had neither raised this complaint during the proceedings nor lodged an official complaint with the public prosecutor. They further submitted that the applicant should have lodged his application within six months following the date on which his house was searched, i.e. on 28 November 1995.

42. The applicant maintained that he had, during the criminal proceedings, complained about the search conducted in his house. He also suggested that there were no effective domestic remedies at the time of the events.

43. The Court reiterates that, under the terms of Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This condition is not met by the mere fact that an applicant has submitted his case to the various competent courts. It is also necessary for the complaint brought before the Court to have been raised, at least in

substance, during the proceedings in question (see, among others, *Çakar v. Turkey*, no. 42741/98, § 30, 23 October 2003).

44. In the instant case, the Court observes that at no time, however, did the applicant allege, rely on or raise any arguments that his house was unlawfully searched in breach of his right to respect for his private and family life. The Court notes that, before the domestic courts, the applicant challenged solely the authenticity of the search and seizure protocol in support of his general argument that certain documents were falsified by the police (see paragraph 13). Accordingly, the Court considers that the applicant has failed to raise his complaints under this head before the domestic instances (see, in particular, *Rüzgar v. Turkey* (dec.), no. 59246/00, 9 November 2004).

45. In these circumstances, the Court accepts the Government's objection that the applicant has failed to exhaust domestic remedies. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention.

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

46. The applicant alleged that the charges brought against him were motivated by his religious beliefs. In this respect, he maintained that he had been subjected to discrimination. The applicant relied on Articles 9 and 14 of the Convention, which provide:

Article 9

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Article 14

“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 refuted the allegations.

48. The Court first observes that at no stage of the domestic proceedings did the applicant allege, rely or raise any arguments that the charges brought

against him were motivated by his religious or political beliefs or that he had been discriminated against on that account. Secondly, there is nothing in the case file disclosing elements of that nature. Charges were brought against him not because of his religious or political beliefs but for his alleged membership of an illegal organisation, pursuant to Article 168 of the Criminal Code. In the subsequent criminal proceedings, on the basis of the evidence, the domestic court found the applicant guilty of aiding and abetting an illegal organisation pursuant to Article 169 of the Criminal Code. It follows that the applicant's claims are wholly unsubstantiated and must be rejected as being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

49. In his observations dated 24 June 2005 the applicant submitted a number of new complaints. In particular, he complained that he was not promptly informed of the reasons for his arrest, that he had been deprived of his right to the assistance of a lawyer during his police custody and that his right to the presumption of innocence had been violated since the police denounced him as a terrorist at a press conference. He invoked Articles 5 § 2 and 6 § 2 of the Convention.

50. The Court finds that these complaints relate to events or decisions which intervened more than six months before being lodged with the Court on 24 June 2005, and it therefore rejects them in accordance with Article 35 §§ 1 and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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, costs and expenses

52. The applicant claimed 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. This sum comprised, in particular, the loss of earnings, costs, expenses and debts incurred in Turkey, and the costs and expenses (travel and telephone) incurred in Germany. This sum also included costs and expenses incurred before the domestic courts.

53. The Government contested the amount.

54. On the question of pecuniary damage, the Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. Moreover, none of the costs and expenses, including those incurred before the domestic courts, are substantiated by appropriate evidence. The Court accordingly dismisses this claim.

55. 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 applicant (see *Incal*, cited above, p. 1575, § 82).

56. However, 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* [GC], no. 46221/99, § 210, *in fine*, ECHR 2005 - ...).

B. Default interest

57. 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 lack of independence and impartiality of the İstanbul State Security Court and the unfairness of the proceedings due to the applicant's conviction, allegedly on the basis of statements taken under duress and falsified documents drafted by the police, 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 lack of independence and impartiality of the Istanbul State Security Court;
3. *Holds* that it is not necessary to consider separately the applicant's other complaints under Article 6 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President