



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

FOURTH SECTION

CASE OF BORAK v. TURKEY

(Application no. 60132/00)

JUDGMENT

STRASBOURG

5 December 2006

FINAL

05/03/2007

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 Borak 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. TÜRMEŒ,

Mr M. PELLONPÄÄ,

Mr S. PAVLOVSCHI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ, *judges*,

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

Having deliberated in private on 14 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 60132/00) 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 İdris Borak (“the applicant”), on 5 April 1999.

2. The applicant was represented by Mrs Z.S. Özdoğan, a lawyer practising in Izmir. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. On 3 November 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint concerning the applicant’s right to a fair hearing before an independent and impartial tribunal and the interference with his right to respect for private life and home on account of the alleged unlawful search of his house. 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 1978 and was serving his prison sentence in the Sakarya Prison at the time of his application to the Court.

5. On 17 July 1997 the applicant was arrested and taken into police custody by the Anti-terror branch of the Izmir Security Directorate on

suspicion of his involvement in an illegal organisation, namely the DHP (*Revolutionary Peoples' Party*).

6. According to the search protocol drafted on 18 July 1997 by police officers and signed by the applicant's father, the police, after obtaining his consent, searched the applicant's parents' flat and did not find any incriminating evidence.

7. According to the search and seizure protocol drafted on the same day by the police officers and signed by the applicant, the police searched the applicant's flat and had found inside a book a paper with coded inscriptions and numbers on it. Following the search the applicant was taken back to the police station. However, three police officers remained in the applicant's flat, until 6.30 p.m., in case other members of the illegal organisation appeared.

8. On 18 July 1997 the applicant's representative requested the public prosecutor at the Izmir State Security Court to give her permission to see the applicant in police custody. On the same day the public prosecutor refused.

9. Also the same day, the applicant was examined by a doctor at the Izmir Forensic Medicine Institute. The applicant complained that he had been beaten. However, the doctor found no physical evidence of ill-treatment.

10. On 21 July 1997 the applicant was brought before the public prosecutor at the Izmir State Security Court. Before the public prosecutor the applicant gave information as to his relations with various people but denied that he had been involved in an illegal organisation and that he had taken part in military training in Greece. He claimed that he did not know anything about the code found during the search. He acknowledged that he knew Mr A.T and Mr U.M who had identified him in the police station. He submitted further that he knew Mr A.E.K., Mr M.K, and Mr G.C. because they were in the same prison as his sister. He admitted that Mr A.T and Mr U.M knew him as Kemal Borak but stated that this was not a code name.

11. On the same day the applicant was brought, together with two other suspects, before the Izmir State Security Court. He refuted the statements he had given to the police and reiterated his statements made to the public prosecutor. The other suspects claimed that they knew the applicant as "Kemal" and acknowledged their statements given to the police and to the public prosecutor. The court ordered the applicant's remand in custody.

12. On 25 July 1997 the public prosecutor at the Izmir State Security Court filed a bill of indictment with that court, accusing the applicant of membership of an illegal organisation, namely the DHP. The public prosecutor requested that the applicant be convicted and sentenced under Article 168 § 2 and Article 5 of Law no. 3713.

13. On an unspecified date the Izmir State Security Court commenced the trial against the applicant and two other co-accused.

14. At a hearing held on 7 October 1997 the applicant stated that he was not a member of the DHP and that he did not accept the content of the statements he had given to the police since they had been extracted under duress and torture. The statements which the applicant had made to the public prosecutor were read out to him. He rectified certain details. He further submitted that he had asked his brother for money but since he did not have an identity document and a bank account, his brother had sent the money to the bank account of Mr R.A. He was asked about Ms S.D, who had sent the money to R.A. He stated that he did not know Ms S.D. personally but that she was a friend of his brother. He maintained that he did not have a code name and that people knew him as “Kemal” because that was his middle name. As to the coded inscriptions, he claimed that the police made him write them in the police station. The search and seizure protocol was read out to him. He denied that the coded inscriptions had been found in his house.

15. At a hearing held on 6 November 1997 the applicant requested that witnesses on his behalf be heard by the court. The court, taking into account the evidence contained in the case file and the fact that the witness Ms S.D. was living in Germany, decided not to hear the latter witness. On the other hand, the court decided to hear the other witnesses. On 27 November 1997 the court heard the applicant’s witnesses.

16. On 23 December 1997 the applicant submitted his final written defence submissions to the court. He claimed that there was no evidence in the case file to support the accusations against him apart from his statements given under duress in police custody. In particular, he alleged that the police had made him write the coded inscriptions while he was in custody.

17. On 23 December 1997 the Izmir State Security Court convicted the applicant as charged and sentenced him to twelve years and six months’ imprisonment. The court held, *inter alia*, that as the applicant’s statements in police custody were consistent with the statements made by Mr I.A., Mr R.K, Mr A.T and Mr U.M., it did not find the applicant’s statements made during the trial convincing. As to the defence witnesses’ statements, the court ruled that, as the witnesses were the applicant’s relatives, their submissions could not be considered reliable. The court further held that since the profile of the applicant did not match that given by two convicted persons who had given evidence it did not take into account the latter’s statements in its assessment.

18. On 23 September 1998 the applicant appealed against the judgment of the Izmir State Security Court. In his appeal petition, the applicant reiterated his previous submissions. He further argued that the court had relied on unlawfully obtained evidence and that there was no evidence to support the allegation that he was a member of an illegal organisation. The applicant also attached the written witness statement of Ms S.D to his petition. According to the written statement of Ms S.D., she was a friend of

the applicant's brother and since he had been busy she had made all the necessary transactions and sent the money to the bank account given to her.

19. On 28 September 1998 the Court of Cassation held a hearing and upheld the judgment of the İzmir State Security Court. The court pronounced its decision on 30 September 1998 in the absence of the applicant and his representative. The applicant's representative claims that she learned of the decision of the Court of Cassation on 12 October 1998 when she went to that court on other business.

20. On 26 October 1998 the decision of the Court of Cassation was deposited with the registry of the first-instance court.

21. The applicant's representative informed the Court that the applicant had been released from prison after having served his sentence.

II. THE RELEVANT DOMESTIC LAW

22. 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).

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. 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 sitting on the bench of the İzmir State Security Court which tried and convicted him. He submitted that his statements in police custody which had been extracted under torture were admitted in evidence and that he had been denied the assistance of a lawyer at the initial stages of the proceedings. He argued that the court did not take into account his objections to the admissibility of the document and the findings of the unlawful search. He claimed that the unlawfully obtained evidence and other documents prepared by the police and the prosecution had been prejudicial to his defence rights. He claimed that the court did not hear Ms S.D. and despite the fact that her testimony was admitted to the case file at the appeal stage, the Court of Cassation did not take it into account. The applicant maintained that the court did not give any reasons as to why it had not taken into account the testimony of his witnesses. He complained that

the testimony of two convicted persons had been included in the case file. Finally, he argued that his defence rights had been infringed as he was detained in a prison far from Izmir, thus making it difficult for his representative to see him. The applicant relied on Article 6 §§ 1, 2 and 3 of the Convention, which in so far as relevant provides:

“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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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

...

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

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

A. Admissibility

25. The Government maintained under Article 35 § 1 of the Convention that the applicant had failed to comply with the six-month rule. In this regard, they submitted that the applicant should have lodged his application with the Court within six months following the date of the pronouncement of the Court of Cassation’s judgment.

26. The applicant denied the Government’s arguments.

27. The Court reiterates that where an applicant is entitled to be served *ex officio* with a written copy of the final domestic decision the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment. Where, as in the present case, the domestic law does not provide for service, it considers it appropriate to take the date on which the final domestic decision was deposited with the registry of the first-instance court as the starting-point, the latest date on which the applicant was definitively able to find out about the content of the final decision (see, among others, *Esmer v. Turkey* (dec.), no. 57888/00, 30 June 2005). The Court also reiterates that the six-month period runs from the date on which the applicant’s lawyer became aware of the decision completing the exhaustion of the domestic remedies, notwithstanding the fact that the applicant only became aware of the decision later (see, in particular, *Bölükbaş and Others v. Turkey* (dec.), no. 37793/97, 12 October 1999).

28. The Court observes that the applicant's lawyer obtained a copy of the decision of the Court of Cassation on 12 October 1998. It further notes that the Court of Cassation's decision had been deposited with the registry of the Court of Cassation on 26 October 1998. The application was lodged with the Court on 5 April 1999, i.e. within six months. It therefore rejects the Government's objection under this head.

29. In the light of its established case-law (see, among many other authorities, *Çiraklar 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 applicant's 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 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

30. 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).

31. 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

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 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, p. 1568, § 74).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that the search conducted in his house was unlawful and 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.”

34. 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. They maintained that the applicant had neither raised this complaint during the proceedings nor lodged an official complaint with the public prosecutor.

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

36. 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 other authorities, *Çakar v. Turkey*, no. 42741/98, § 30, 23 October 2003).

37. In the instant case, the Court observes that at no time, did the applicant allege, rely on or raise any arguments that his house had been 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 admission in evidence of the paper allegedly found during the search in support of his general argument that he had not been involved in any illegal organisation. Accordingly, the Court considers that the applicant has failed to raise the substance of his complaints under this head before the domestic instances (see, in particular, *Rüzgar v. Turkey* (dec.), no. 59246/00, 9 November 2004).

38. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed, in total, 36,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

41. The Government contested the amount.

42. 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. The Court therefore makes no award in respect of pecuniary damage.

43. The Court further 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, § 82).

B. Costs and expenses

44. The applicant also claimed EUR 4,000 for the costs and expenses incurred before the Court.

45. The Government contested the amount.

46. 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 sum of EUR 1,000.

C. Default interest

47. 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

1. *Declares* the complaints concerning the applicant's right to a fair trial by an independent and impartial tribunal 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 Izmir State Security Court;
3. *Holds* that it is not necessary to consider 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. *Holds*
 - (a) that the respondent State is to pay the applicant, 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) 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President